SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION

(BRITISH COLUMBIA BRANCH) ("CBABC") to the MINISTRY OF ATTORNEY GENERAL OF BRITISH COLUMBIA

Respecting

Attorney General Statutes (Vehicle Insurance) Amendment Act, 2020

(Bill 11)

And

***Evidence Amendment Act, 2020* (Bill 9)**

Issued by:

CBABC Automobile Insurance Working Group

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PREFACE

The Canadian Bar Association ("CBA") is the largest professional association for lawyers in Canada. We have been championing Canadian lawyers and Canadian law since 1896. We are the face, the voice, and the future of this country's leading legal minds. The CBA has a national office in Ottawa and branches in every province and territory. Membership is voluntary in all but New Brunswick, where participation is mandatory through an agreement with the Law Society. Our members stand at the forefront of Canada's legal profession.

Nationally, the Canadian Bar Association ("CBA") represents approximately 36,000 members. The CBABC has over 7,000 members. Our members practice law in many different areas. The CBABC has established 76 different sections to provide a forum for lawyers who practice in similar areas to participate in continuing legal education, research, and law reform. The CBABC also establishes committees and working groups from time to time, as need arises.

The within submissions summarize the response of the CBABC Automobile Insurance Working Group ("AIWG") to the proposed changes respecting the handling of motor vehicle accident claims in British Columbia. The CBABC AIWG is comprised of lawyers who represent both those injured in motor vehicle accidents (plaintiffs) and those who are defending those claims (i.e., the insurer and the insured defendants). The AIWG investigates and makes recommendations regarding automobile insurance, insurance law, and personal injury law to the CBABC Board.

It is the position of the CBA that the right of an individual to recover damages from the wrongdoer in motor vehicle cases – and to have that right adjudicated in the courts – is one of the most vital hallmarks of the Canadian system of justice. The method of compensating British Columbians injured in automobile collisions and the resultant impact on the British Columbia justice system are matters of special interest to CBABC. We believe it is in the public interest to work cooperatively with government to achieve durable solutions to the financial situation of the Insurance Corporation of British Columbia ("ICBC").

The within submission provides the CBABC AIWG position on the *Attorney General Statutes (Vehicle Insurance) Amendment Act, 2020* (Bill 11) and the *Evidence Amendment Act, 2020* (Bill 9). We advance a number of concerns respecting the approach to reform represented in Bills 11 and 9, and offer responsible, viable solutions to achieving the sought outcomes of the legislation without further limiting the rights and access to justice of British Columbians.

The following members of the AIWG participated in the drafting of the within submission:

- Roger Watts, Chair;
- Jennifer Brun, Board Liaison;
- James Legh; and
- Marlisa Martin.

EXECUTIVE SUMMARY

This submission provides the CBABC AIWG's position on the *Attorney General Statutes (Vehicle Insurance) Amendment Act, 2020* (Bill 11) and the *Evidence Amendment Act, 2020* (Bill 9). We advance a number of concerns respecting the approach to reform represented in Bills 11 and 9, and offer responsible, viable alternate solutions to achieving the sought outcomes of the legislation without further limiting the rights and access to justice of British Columbians.

It is the position of the CBA that the right of an individual to recover damages from the wrongdoer in motor vehicle cases – and to have that right adjudicated in the courts – is one of the most vital hallmarks of the Canadian system of justice. The method of compensating British Columbians injured in automobile collisions and the resultant impact on the British Columbia justice system are matters of special interest to CBABC. We believe it is in the public interest to work cooperatively with government to achieve durable solutions to the financial situation of the ICBC.

BILL 11 CREATES A NO-FAULT AUTOMOBILE INSURANCE SYSTEM

Bill 11 proposes to amend the *Insurance (Vehicle) Act* to provide for a no-fault automobile insurance system in BC. The reform envisioned by Bill 11 means that injured British Columbians will no longer have the right to compensation for damages based on an assessment of their unique circumstances and the impact of the motor vehicle accident on their life.

The CBABC opposes no-fault insurance, as it will reduce the rights of injured victims. It is the CBABC's position that any system of no-fault insurance results in discriminatory consequences and a dearth of accountability for at-fault drivers, with no demonstrable trade-off benefit in terms of cost savings over the long run.

Despite a multitude of variations in the insurance systems implemented across Canada, there is no conclusive evidence that no-fault reforms have resulted in a dramatic or sustained reduction in insurance costs over time. Similarly, there is no firm support for the conclusion that the proposed changes to the existing BC insurance system will result in long-term control of such costs, or that the automobile insurance system in British Columbia needs to be substantially overhauled.

At the same time, the appeal process proposed under no-fault is wholly unsatisfactory. It provides no assurances that substantive decisions, made internally by ICBC personnel and reviewed by the Civil Resolution Tribunal ("CRT"), may be reviewed or (where necessary) changed by an independent arbiter. Only the most egregious

oversights will proceed to the point of judicial review, held to inordinately high standards of deference, and will do so slowly.

The BC government's emphasis on speedy resolution through the CRT fails to account for the importance of ensuring that injuries have reached maximum medical recovery prior to any final decision being made respecting appropriate compensation. The suggested time savings of proceeding before the CRT rather than the BC Supreme Court is thus illusory.

The CBABC recommends that government reject no-fault and remain committed to a system that allows for the determination of loss suffered by persons injured in automobile collisions on an individual basis, by an objective and independent judiciary. It remains clear that the only entity that can be trusted to ensure fairness in any dispute between an individual citizen and a public institution is an independent and accessible judiciary. The available evidence demonstrates the need to focus primarily on accident prevention, and to implement proactive traffic safety initiatives, rather than radically reform the insurance system. Such measures will result in a significant reduction in motor vehicle accidents on British Columbia roads, while also producing an increase in ICBC revenue via enforcement. Both of these benefits will, in turn, serve to reduce insurance costs in the province.

The CBABC also recommends the government take the following steps in furtherance of improving operational efficiency, accountability, and transparency within ICBC:

a) Proceeding with a transparent and independent operational review of ICBC, in order to identify opportunities for business reform; and
b) Establishing an independent rate-setting agency to fix and monitor premiums, with a view to ensuring premium adjustments are made on a timely basis and in accordance with sound insurance and actuarial principles.

The CBABC believes that the challenges the provincial government faces with ICBC represent an opportunity for British Columbia to take a leadership role in Canada in road safety initiatives and preservation of a system that is just, fair, and does not penalize victims. It is our position that any system of no-fault results in discriminatory consequences and a dearth of accountability for at-fault drivers.

We have made a number of meaningful suggestions for reform that will improve the present system without taking away the rights of innocent victims.

Further, in small and rural jurisdictions, law firms will be unable to maintain a feasible general practice without the income of motor vehicle accident work to make ends meet. It is important to note that this income is paid by clients and not by ICBC. It does not affect premiums. This is of particular concern on the heels of the COVID-19 crisis, where unemployment is already at a devastating low.

The implementation of a no-fault compensation scheme is not in the public interest. No-fault will eliminate the right of innocent accident victims to seek redress before an

independent judiciary and, at the same time, relieve parties of responsibility for their negligent or willfully tortious conduct. Any limitation of the rights of an individual to recover damages in motor vehicle accident cases is contrary to the principles of the Canadian justice system. The case for fundamental change including statutory abrogation of the rights of injured British Columbians to full and fair compensation because of uncontrollable costs has not been established.

BILL 9 LIMITS EXPERTS AND DISBURSEMENTS IN COURT

Bill 9 proposes to amend the *Evidence Act* to: (1) limit the number of experts and expert reports (2) restrict the amount recoverable from the unsuccessful party for the cost of each expert report to $3,000, and (3) limit total recoverable disbursements to 5% of the settlement or judgment amount.

The CBABC supports a presumptive limit on the number of experts to be used at trial, but only if such a limit is made subject to variation upon agreement of the parties or at the discretion of the Court, in keeping with the principle of proportionality.

The CBABC opposes an arbitrary $3,000 cap on recoverable experts' fees, as such fees often substantially exceed $3,000 and are outside the control of the parties. The CBABC instead recommends addressing the rising cost of expert fees by directly engaging with stakeholders (including the legal and medical professions) regarding permissible amounts to be charged, then enacting a schedule of fees limiting the amount experts can charge, subject to the discretion of the Court.

The CBABC opposes the proposed 5% cap on what a successful litigant can recover for disbursements incurred to prosecute or defend their case. The Court already maintains extensive assessment procedures for determining the necessity and reasonableness of such expenses. An arbitrary cap on all disbursements is unwarranted and should be discarded in its entirety.

The proposed limits on recovery of expert fees and overall disbursements disproportionately limits access to justice for our most marginalized members of society. At the same time, Bill 9 also causes a disproportionate benefit to a sole party: ICBC. ICBC is in a conflict of interest as a result of Bill 9. Bill 9 needs to be more fairly balanced to not just penalize injured people. The constitutionality of the proposed amendments is called into question.

A more equitable solution to the problem of increased legal costs is to engage in consultations with the medical and legal professions, to arrive at reasonable limits on the amount medical experts can charge for medical-legal assessments and testimony.

BACKGROUND

The fundamental problems with ICBC, as currently structured, are:

- Rising numbers of claims;
- Failure to maintain capital reserves, which were depleted in the past as a result of:
    - basic rates being directed below the level needed to cover costs,
    - transfers of capital to government, and
    - a greater emergence of large and complex claims;

  and
- Increased costs of dealing with these claims, including but not limited to: compensation paid to victims; legal costs (including legal fees, expert fees, and other disbursements); and auto body repair costs.

In 2017, ICBC conducted a re-evaluation of its reserves for outstanding claims and concluded that its rate structure did not provide adequate revenue to cover the cost of the outstanding and ongoing anticipated new claims. In order to avoid a general rate increase, government has been considering and implementing ways to restructure ICBC and the insurance product it provides. In addition, government has been reflecting upon the ways in which our laws provide compensation for victims of motor vehicle accidents and the means by which those rights might be limited to achieve a costs savings.

Prior to the *Insurance (Vehicle) Amendment Act, 2018* (Bill 20) being enacted and coming into force on May 17, 2018, in British Columbia, compensation of people injured in automobile collisions was premised upon the principle that those who were injured due to the negligence of others were entitled to be fully compensated for the actual losses sustained.

Presently, with the imposition of the "minor injury" cap, if a person's injury meets the definition of "minor", the amount of their general damages (i.e., a payment received to compensate an injured victim for pain and suffering, emotional distress and inconvenience of being in a crash, and the inability to perform certain activities) is capped at $5,500. The limit of $5,500 applies to pain and suffering payouts for minor injuries from a crash that happened between April 1, 2019, and March 31, 2020. For a crash after April 1, 2020, a limit of $5,627 will apply.

B.C's minor injury definition includes:

- Sprains;
- Strains;
- General aches and pains;
- Cuts;
- Bruises;
- Road rash;
- Persistent pain;

- Minor whiplash;
- Temporomandibular joint disorder or TMJ (pain in your jaw joint and in the jaw muscles);
- Mild concussions; and
- Short-term mental health conditions.

The victim's injury may have been determined to be minor after the crash, but if the injury turns out to impact their life for more than 12 months – for example, they are still not able to go to work or school, have to modify work hours or duties, or are unable to care for themselves – it will no longer be considered minor and will not be subject to the payment limit. In the case of concussions or mental health conditions, the limit on pain and suffering will not apply if there is significant impairment beyond 16 weeks.

What this means for British Columbians injured in a motor vehicle accident between April 1, 2019, and March 31, 2020, is that their compensation will no longer be full. Rather, compensation will be arbitrarily capped at the amount prescribed by regulation. There is an ongoing constitutional challenge to the *Insurance (Vehicle) Amendment Act*'s minor injury cap working its way through the BC Supreme Court. It is yet to be seen whether the Court will deem the legislation unconstitutional and of no force and effect. In the meantime, our province is left with uncertainty.

In almost all cases, the necessary funds for victim compensation come from ICBC's insurance program, which has two main parts:

- Liability insurance, by which ICBC pays on behalf of at-fault drivers compensation for damages suffered by those injured in motor vehicle accidents based on common law principles of tort law; and

- A system of accident benefits provided to all drivers, including at-fault drivers, which are commonly referred to as "No-Fault Benefits" or "Accident Benefits".[1] Payments are made based on a schedule of specified benefits that are available to anyone injured in a motor vehicle collision who is eligible, regardless of fault.

Individuals injured in a motor vehicle accident are able to access Accident Benefits immediately upon incurring an injury as a result of a motor vehicle collision, without the need for any assessment of fault. Innocent victims (those not at fault) are able to receive this funding and treatment while still maintaining their entitlement to a further assessment of damages in court should they so choose. However, to the extent their costs of care are covered by Accident Benefits, there is no need to claim them in those further court proceedings.

The tort system aims to place an innocently injured plaintiff in the original position he or she would have been in absent the defendant's negligent or willfully tortious actions. Compensation will include any costs of care not already covered by Accident Benefits, as well as loss of income and income earning capacity, costs of future care, and

[1] Accident Benefits are provided under Part VII of the *Insurance (Vehicle) Regulation*, B.C. Reg. 156/2000, made pursuant to the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

compensation for pain and suffering. British Columbia courts presently recognize the importance of considering the individual situation of the plaintiff when awarding damages, with decades of jurisprudence aimed at determining what compensation is fair and just for a particular individual in their unique circumstances.

The principal feature of the present system is that those who are injured as a result of the carelessness of others are, to the extent that money can provide adequate compensation, compensated for their injuries (again, with the exception of the post-April 1, 2019, “minor injury” cap); while those who injure themselves through their own neglect are provided with only basic coverage available through the Accident Benefits.

The BC government asserts that the present system needs to be further reformed because it fears that the escalating costs of automobile insurance will not be sustainable. In light, however, of BC Budget 2020 demonstrating that ICBC is profitable following the implementation of the *Insurance (Vehicle) Amendment Act* and the *Civil Resolution Tribunal Amendment Act* reforms – even before government proceeds with its proposed no-fault regime – the CBABC queries why government still intends to implement a no-fault insurance plan. In the submission of the CBABC, it is not needed, will restrict the rights of British Columbians, and will disproportionately affect the most marginalized members of our society.

ATTORNEY GENERAL STATUTES (VEHICLE INSURANCE) AMENDMENT ACT, 2020 (BILL 11)

INTRODUCTION OF CRITICAL ISSUES

In February 2020, the BC government released its Intentions Paper, which proposes a no-fault auto insurance system in BC. On March 4, 2020, the Attorney General introduced the Attorney General Statutes (Vehicle Insurance) Amendment Act, 2020 (Bill 11) before the Legislative Assembly of BC. Bill 11 proposes to amend the *Insurance (Vehicle) Act* to provide for many of the no-fault matters listed in the government's Intention Paper. On March 23, 2020, the Legislative Assembly of BC adjourned until further notice because of the COVID-19 emergency. At the date of adjournment, Bill 11 was at First Reading and not enacted.

The reform envisioned by Bill 11 will completely do away with the first part of ICBC's current insurance program delineated above. In other words, injured British Columbians will no longer have the right to compensation for damages based on an assessment of their unique circumstances and the impact of the motor vehicle accident on their life, following common law principles of tort law. To be clear, British Columbians will not have the ability to sue for recovery of damages in Court. [2] We will simply be left with only the second main part of ICBC's current insurance program: prescribed payments

[2] Note that individuals who commit a criminal offence in the course of causing an accident can be sued for additional benefits, and may be responsible for partial payment of premiums. Entities who have host liability, manufacturers' liability or other forms of secondary liability can also be sued.

based on a schedule of specified benefits that are available to anyone injured in a motor vehicle collision regardless of whether the collision was their fault or not.

Our current tort system ensures an injured plaintiff is “made whole” again. In other words, the settlement or judgment amount is awarded to put the injured party back into the position they would have been in had the accident not occurred.

The proposed model provides access to medical care and wage loss benefits, and is said to save drivers approximately 20% on their automobile insurance. However, that espoused savings comes at a great cost.

Let’s take an example of where a driver runs a red light and collides with your vehicle, causing you significant injury and impairment to your leisure, recreation, and occupational capacity. You are no longer able to work. Under the current tort-based model, you will be fully compensated for your pain and suffering, past loss of income, future loss of income and income-earning capacity, future care costs, out of pocket expenses, and the disbursements incurred to bring forward your claim. The compensation will consider your unique circumstances and the impact of those injuries on your life. Under the BC government’s proposed “enhanced care model”, both you and the person who ran the red light, if they were also injured, will have access to the exact same benefits under the proposed plan. There will be no compensation for your pain and suffering. Further, rather than ensuring you are fully compensated for your limitations and inability to work, an insurance adjuster will determine whether you are

eligible for certain benefits. If you are found to be eligible for wage-loss payments, those will be capped at a maximum of $1,200 per week (the weekly net income based on maximum gross annual income of up to $93,400). If you were earning more than that at the time of the accident, you will not be compensated for that additional loss. The advertised 20% savings on your annual insurance premium no longer looks appealing.

Further, the BC government's proposed no-fault insurance scheme will empower ICBC adjusters to assess claims and determine a claimant's entitlement to certain prescribed benefits and compensation under that schedule. ICBC adjusters will have an expanded mandate, and the discretion to assess claims and determine entitlements. Bill 11 proposes that ICBC, through its adjusters and other representatives, be required to:

- Assist claimants with making a claim; and

- Endeavour to ensure claimants are informed of, and receive, the benefits to which they are entitled.

But what if the adjuster decides you are not entitled to benefits that you feel you should be receiving based on your personal circumstances? Despite these proposed safeguards, the discretionary nature of the decisions being made by adjusters in the new scheme is cause for concern. In order to address this concern, the BC government has stated there will be a multi-level appeal mechanism in place to review adjusters' decisions. In its proposed form, it is largely the same as ICBC's current dispute

mechanism[3], and appears to require that claimants pursue two levels of internal appeal within ICBC before they have access to independent review of a decision by the CRT.

The appeal process for government's proposed no-fault insurance scheme requires claimants to enter a multi-tier maze if they wish to challenge the decision of an ICBC adjuster. The BC government has stated that ICBC's approach to appeals will focus on "fairness", which is intuitively appealing; however, this type of assessment is not very exacting and generally focuses on the procedural manner in which a decision is made rather than the substance of the decision. The effect of this focus is that there is a lower chance decisions will be overturned. Moving beyond ICBC and its new Fairness Office, the CRT will likely deploy a deferential standard of review to ICBC's decisions, which again results in a lower chance that decisions will be overturned. Finally, on judicial review, the standard of review in most situations will be patent unreasonableness, which is the most deferential standard of review available.

Overall, this type of appeal structure emphasizes the importance of decisions made in the first instance, in this case by ICBC adjusters. A claimant will not be able to engage a lawyer to assist in any meaningful way until they proceed through ICBC's internal processes, including the new Fairness Office, and decide to appeal ICBC's decision to the CRT. Provided the legislation remains unchanged under the new scheme, from that point forward they can be represented by counsel, but the role of counsel at the appeal stage is limited. The initial decision will have been made by an ICBC adjuster on the

[3] See https://www.icbc.com/about-icbc/contact-us/Pages/Raising-your-complaints.aspx.

available medical evidence, and it appears likely that the CRT will be limited to reviewing those decisions rather than re-considering the issues de novo. The same goes for judicial review of CRT decisions by the BC Supreme Court. Taken together, this change represents a clear attempt to remove lawyers from the Accident Benefit system. In the proposed system, only egregious oversights will proceed to the point of judicial review, and even then will only do so slowly. The expanded jurisdiction proposed for the CRT raises explicit concerns over the inherent operations of that tribunal.

CONCERNS RESPECTING THE EXPANDED JURISDICTION OF THE CIVIL RESOLUTION TRIBUNAL

The CRT is a primarily online, administrative tribunal in British Columbia that is a relatively new organization with limited experience in personal injury matters. The CRT first received jurisdiction to hear personal injury claims under $5,000 in June 2017. Then, following the enactment of the *Civil Resolutions Tribunal Amendment Act, 2018* (Bill 22) on May 17, 2018, the CRT suddenly had statutory jurisdiction to determine disputes respecting entitlement to Accident Benefits, whether a motor vehicle accident claimant has suffered a “minor injury”, as well as to decide liability and quantum issues for motor vehicle claims under $50,000. In comparison, the Canadian judicial system, which has evolved over hundreds of years of practice and binding precedent, has extensive experience in assessing fair compensation for those injured in motor vehicle accidents. In granting this expanded jurisdiction to the CRT, government emphasized the time savings that the CRT will offer to injured British Columbians in reaching a final resolution of their claim.

Our existing civil system of justice in British Columbia resolves disputes fairly and in a timely fashion once maximum medical recovery of the plaintiff's injuries has been achieved. The BC government's emphasis on speedy resolution through the CRT fails to account for the importance of ensuring that injuries have reached maximum medical recovery prior to any final decision being made respecting appropriate compensation. The suggested time savings of proceeding before the CRT rather than the BC Supreme Court is thus illusory.

When originally constituted, s. 9 of the *Civil Resolution Tribunal Act* prohibited the CRT from hearing proceedings in which the government was a party. That is because Tribunal members are civil servants, appointed by Cabinet, with limited tenure of two to five years and remuneration set by Cabinet. Their independence from government is limited. The *Civil Resolution Tribunal Amendment Act* repealed s. 9 and replaced it with provisions clearly giving the CRT jurisdiction over ICBC claims. The inherent conflict in having the CRT decide proceedings involving a Crown agency closely connected to government is thus of the utmost concern. That conflict was not resolved by the *Civil Resolution Tribunal Amendment Act* – rather, the conflict was embraced as part of the strategy to reduce ICBC costs.

It is noteworthy that the same Ministry to which the CRT reports, and which appoints CRT tribunal members, is responsible for ICBC and accountable to the public for ICBC's financial performance. In light of the evidence that the government is working hard to

reduce the amount ICBC spends on claims, the conflict of having civil servants of the CRT making decisions on monetary compensation to victims of motor vehicle accidents is arguably stronger than ever.

Further, it is noteworthy that the current monetary threshold of $50,000 is substantially greater than the CRT's original monetary jurisdiction, which was a mere $5,000 for small claims personal injury matters. In contrast, Provincial Court judges in our province – who maintain their tenure to age 75 and operate as judicial officers independent of government – only have monetary jurisdiction for decision making up to $35,000. Query whether it is reasonable and prudent to grant monetary jurisdiction of $50,000 to arguably conflicted government employees with term appointments that may be as little as two years.

On May 6, 2020, legal counsel at the CRT confirmed for the CBABC via email that the CRT has not made any final decisions following a hearing for a claim brought under s. 133(1)(b) of the *Civil Resolution Tribunal Act* for a substantive determination of a "minor injury" designation. She confirmed the CRT has issued one consent resolution order relating to a minor injury determination since being granted that jurisdiction. Further, as of that date, the CRT had not made any decisions under s. 133(1)(c) respecting a motor vehicle accident liability ruling. However, she states there are CRT decisions that relate to liability in motor vehicle accidents that have been made under the CRT's small claims jurisdiction under $5,000. Similarly, the CRT has not made any final decisions under s.

133(1)(a) respecting rehabilitation entitlement determinations. CRT legal counsel confirmed there have been two preliminary decisions respecting accident benefit claims. Section 133 of the *Civil Resolution Tribunal Act* declares that the CRT has exclusive jurisdiction in respect of entitlement to benefits paid or payable under the *Insurance (Vehicle) Act* and whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act*. Further, that same section deems the CRT to have specialized expertise in respect of claims for liability and damages, including personal injury and loss or damage to property related to the accident, under $50,000. What the past year of this exclusive jurisdiction and complete lack of substantive determinations demonstrates, is that this body continues to lack specialized expertise in these matters despite the legislated deeming provision.

Thus, in light of the clear conflict of interest, lack of independence, and arguable specialized expertise, it remains clear that the only entity that can be trusted to ensure fairness in any dispute between an individual citizen and a public institution is an independent and accessible judiciary.

UNINTENDED CONSEQUENCE OF NO-FAULT: LIMITING ACCESS TO JUSTICE IN SMALL AND RURAL COMMUNITIES

According to the March 6, 2020, oral report of Mr. Don Avison, QC, CEO of the Law Society of British Columbia, to the Benchers' meeting, there are approximately 1700 plaintiff lawyers who have a motor vehicle accident personal injury practice in BC. Of those, roughly 650 plaintiff lawyers have motor vehicle accident work as more than 50% of their practice. On the defence side, over 760 lawyers report motor vehicle accident work being a significant portion of their practice. That is approximately 2500 lawyers who have a significant motor vehicle accident practice across our province.

According to the same report, there are 900 law firms in BC that report motor vehicle accident work is a significant part of their practice. Of those 900 firms, 160 report over 90% of the firm's work is motor vehicle accident work and 300 report that over 50% of the firm's work is motor vehicle accident work. A move to no-fault will see many of these firms close permanently.

The closing of law firms across our province is not only detrimental to the lawyers affected, these firms employ significant numbers of support staff and articling students who will also be unemployed as a result. On the heels of the COVID-19 crisis, this no doubt unintended consequence of the BC government's no-fault proposal will be even more devastating. This is of particular concern in small and rural jurisdictions, where lawyers will undoubtedly be unable to maintain a feasible general practice without the income of motor vehicle accident work to make ends meet. It is important to note that this income is paid by clients and not by ICBC. It does not affect premiums.

The result is that the proposed changes in Bill 11 will further limit access to justice in small and rural communities, something the province cannot afford to let happen.

A CASE FOR THE STATUTORY ABROGATION OF THE RIGHTS OF BRITISH COLUMBIANS IS NOT ESTABLISHED

From a public policy perspective, no-fault or “care-based” types of compensation schemes result in a bureaucratization of justice with rights prescribed by legislation that, in most circumstances, reduce the level of compensation available for innocent accident victims.

The implementation of a no-fault compensation scheme is not in the public interest. Among other concerns, it will eliminate the right of innocent accident victims to seek redress before an independent judiciary and, at the same time, relieve parties of responsibility for their negligent or willfully tortious conduct. Any limitation of the rights of an individual to recover damages in motor vehicle accident cases is contrary to the principles of the Canadian justice system.

The case for fundamental change including statutory abrogation of the rights of injured British Columbians to full and fair compensation because of uncontrollable costs has not been established. What has been established, however, is that the number of accidents occurring each year has been steadily increasing. The solution to the issue of rising collisions, however, is to look at and deal head-on with the causes of those increases.

There are many areas of our present automobile insurance compensation system that warrant considered review and reform. However, those reforms should result in a costs savings to automobile insurance while preserving the core components of the current system valued by British Columbians. The present government proposals are not the correct solutions to the problem. They will not achieve the purpose for which they are espoused and they will result in considerable inequity and injustice among the public, and unintended consequences limiting overall access to justice for British Columbians.

The evidence from other jurisdictions that have gone before British Columbia in moving to no-fault or “care-based” insurance models does not support government’s conclusion that the proposed changes will achieve sustained cost savings at all (see Appendix I).

Reforms to automobile insurance as contemplated in Bill 11 have been attempted across our nation with little success. Jurisdictions in Canada have instituted various forms of modified no-fault insurance schemes and caps on tort losses. Although direct comparisons are limited, there is no significant difference in the cost of insurance to the consumer between those jurisdictions that have some system of no-fault insurance and those that do not.

For example, when insurance reforms were introduced in Ontario, it was hoped that they would reduce the cost of insurance. This was unsuccessful and although there have been repeated attempts to modify both the insurance product and restrictions on

tort liability to achieve those savings, these have also been unsuccessful to date. Ontario has gone through several versions of no-fault insurance schemes without any apparent success in containing or reducing the cost of insurance. The repeated changes there have created uncertainty and unfairness among innocent victims of automobile collisions and have, in turn, diminished the integrity of the civil justice system.

In short, what we have learned from other jurisdictions is that insurance premiums have not declined after the introduction of no-fault based insurance schemes. The result has been a bureaucratization of justice with rights prescribed by legislation that, in most circumstances, reduces the level of pecuniary compensation and either eliminates or significantly reduces compensation for non-pecuniary damages for innocent accident victims. The BC government's proposal completely eliminates compensation for victim's pain and suffering, which was incurred through no fault of their own. The policy and social values promoted by our present tort system – such as encouraging people to adhere to a higher standard of care by holding them accountable for their negligence or willfully tortious conduct – are compromised by the provincial government's proposed "care-based model", which benefits at-fault drivers by providing them with increased Accident Benefits, relative to the current model.

The reality in other provinces has been that implementation of limits on compensation has resulted in decreased accountability for unsafe driving and imposition of the cost of unsafe driving onto the victim. There is also conflicting evidence as to whether or not

the costs to policy holders have decreased as a result. The CBABC encourages the provincial government to lead on this issue rather than to follow.

Rather than imposing limitations on the rights to compensation by British Columbians as proposed, the CBABC encourages the provincial government to implement changes that will:

1. Preserve the rights of British Columbians;
2. Reduce the incidence of motor vehicle collisions and resulting injuries in BC; and
3. Improve the rate of recovery of British Columbians following injury.

Changing the existing automobile insurance system as proposed will not result in long-term control of insurance costs. The only way to modify cost trends on a long-term basis is to change driver behaviour through sweeping traffic initiatives, including but not limited to stricter enforcement of all traffic safety laws, more severe penalties for errant drivers, tougher licensing standards, and distracted driving and photo radar programs that work.

The CBABC has had the opportunity to review the July 10, 2017, Ernst & Young LLP report entitled, ICBC: Affordable and effective auto insurance – A new road forward for British Columbia (the "E&Y Report"). The CBABC agrees with and embraces many of the principles in the E&Y Report; however, there are other principles within that report that the CBABC does not support. It is the position of the CBABC that the E&Y Report

does not provide conclusive evidence that automobile insurance in BC needs to be substantially overhauled. What the E&Y Report clearly demonstrates – and what the CBABC supports – is the need for BC to focus on accident prevention and to implement traffic safety initiatives. It is only through the implementation of such preventative initiatives that the trends in the cost of insurance will be reduced.

The CBABC advocates that the focus of change should be on improving road safety as the best means of controlling automobile insurance costs. This also cements the direct relationship between the cost of insurance and automobile collisions in the public consciousness. British Columbia has historically been a leader in linking automobile insurance and road safety. ICBC, unlike other provincial insurers, is a partner in encouraging safe driving practices in British Columbia. However, the cost of doing so has been placed on the shoulders of policy holders. Allowing ICBC to retain a portion of the revenue from its road safety measures – rather than siphoning the revenue stream into the provincial government's general revenue – is a solution the CBABC supports, as it will undoubtedly contribute to return ICBC to a position of financial stability.

The CBABC is aware of the steps taken to implement safety programs since our 2018 position paper on Bills 20 and 22[4], including:

a) Activating red-light cameras 24 hours a day, seven days a week, up from the previous six hours per day;
b) Launching a Collision Reduction Program to identify and rapidly retrofit infrastructure, regulations and signage at dangerous roads and intersections;
c) Moving forward with pilot projects to evaluate distracted driving reduction technology;
d) Designating distracted driving as a high-risk driving behaviour under the ICBC Driver Risk Premium program;
e) Launching two pilot projects to explore how technology can help combat distracted driving; and
f) Upgrading existing red-light cameras to facilitate automated speed enforcement at high risk intersections.

These reforms are certainly welcome, but there is much more to do.

In September 2018, the CBABC released its updated Agenda for Justice (the "A4J"). The A4J outlines justice and legislative recommendations and reforms within BC's

[4] See CBABC 2018 Bill 20 Position Paper and CBABC 2018 Bill 22 Position Paper.

justice system and identifies a path toward their improvement.[5] The minor injury caps from Bill 20 and the expansion of the CRT from Bill 22 were added to the A4J. The CBABC strongly urges government leaders and decision-makers to include our A4J recommendations in their policy platforms.

CONCLUSIONS AND RECOMMENDATIONS RESPECTING BILL 11

To summarize, the CBABC opposes no-fault and believes no-fault insurance will reduce the rights of injured victims and limit access to justice in British Columbia.[6] This is particularly so in light of BC Budget 2020 demonstrating that ICBC is profitable following the implementation of the *Insurance (Vehicle) Amendment Act* and *the Civil Resolution Tribunal Amendment Act* reforms – even before government proceeds with its proposed no-fault regime. The CBABC queries why government still intends to implement a no-fault insurance plan in light of ICBC's profitability. A no-fault insurance system is not needed, will restrict the rights of British Columbians, and will disproportionately affect the most marginalized members of our society.

[5] See https://www.cbabc.org/Our-Work/Advocacy/Agenda-for-Justice-2017 and https://www.cbabc.org/Our-Work/Advocacy/Agenda-for-Justice-2018-Update.

[6] See Canadian Bar Association, BC Branch responds to BC Government's No-Fault Insurance Plan (February 6, 2020).

Regarding Bill 11, the CBABC recommends the following:

1. The CBABC opposes no-fault, and believes no-fault will reduce the rights of injured victims. It is the CBABC's position that any system of no-fault insurance results in discriminatory consequences and a dearth of accountability for at-fault drivers, with no demonstrable trade-off benefit in terms of cost savings over the long run.

2. Despite a multitude of variations in the insurance systems implemented across Canada, there is no conclusive evidence that no-fault reforms have resulted in a dramatic or sustained reduction in insurance costs over time. Similarly, there is no firm support for the conclusion that the proposed changes to the existing BC insurance system will result in long-term control of such costs, or in turn, that the automobile insurance system in British Columbia needs to be substantially overhauled.

3. At the same time, the appeal process proposed under no-fault is wholly unsatisfactory, and provides no assurances that substantive decisions, made internally by ICBC personnel, may be reviewed or (where necessary) changed by an independent arbiter. Only the most egregious oversights will proceed to the point of judicial review, subject to inordinately high standards of deference upon review, and will do so slowly.

4. Rather than imposing limitations on the rights to compensation by British Columbians as proposed under Bill 11, the CBABC recommends the implementation of changes that will preserve the rights of British Columbians; reduce the incidence of accidents and injuries in British Columbia; and improve the rate of recovery of British Columbians following injury.

5. The CBABC therefore recommends that government reject no-fault and remain committed to a system that allows for the independent determination of loss suffered by persons injured in automobile collisions on an individual basis. Absent any objective proof that the reform experiences of other provinces have resulted in substantial reductions in insurance costs, it remains clear that the only entity that can be trusted to ensure fairness in any dispute between an individual citizen and a public institution is an independent and accessible judiciary.

6. The CBABC maintains the view that these challenges present an opportunity for British Columbia to take a leadership role in Canada, both in implementation of road safety initiatives and in preservation of a system that is just, fair, and does not penalize victims. The available evidence demonstrates the need to focus primarily on accident prevention, and to implement proactive traffic safety initiatives, rather than radically reform the insurance system. Such measures will, in the CBABC's view, result in a significant reduction in motor vehicle accidents on British Columbia roads, while also producing an increase in ICBC revenue via

enforcement. Both of these benefits will, in turn, serve to reduce insurance costs in the province.

7. To that end, the CBABC recommends that government take the following further steps:
   a) Penalization of negligent or reckless drivers, consistent with the notion that individuals will be held accountable for their errors, that victims will be entitled to recover their losses to the extent that they are not individually responsible for them, and that all motorists should be encouraged to be responsible and careful drivers;
   b) Similar penalization of drivers with records of dangerous driving behaviours such as impaired driving, excessive speeding and distracted driving, via payment of higher insurance premiums, as a deterrent to risk-prone behaviour;
   c) Implementation of higher premiums for operators of luxury or performance vehicles, and according subsidies or discounts of premiums for those who operate safer or more economical vehicles;
   d) Enactment of measures to incentivize motorists and vehicle manufacturers to employ accident-avoiding technology, such as back-up cameras and blind-spot warning sensors, in order to decrease the likelihood of crashes; and
   e) Development of ways in which the legal profession can publicly endorse and promote safety programs and other initiatives to limit distracted and intoxicated driving.

8. The CBABC also recommends that the government take the following steps in furtherance of improving operational efficiency, accountability and transparency within ICBC:

    a) Proceeding with a transparent and independent operational review of ICBC, in order to identify opportunities for business reform; and
    b) Establishing an independent rate-setting agency to fix and monitor premiums, with a view to ensuring premium adjustments are made on a timely basis and in accordance with sound insurance and actuarial principles.

The CBABC believes that the challenges the provincial government faces with ICBC represent an opportunity for British Columbia to take a leadership role in Canada in road safety initiatives and preservation of a system that is just and fair, and that does not penalize victims. It is our position that any system of no-fault results in discriminatory consequences and a dearth of accountability for at-fault drivers.

In addressing the financial situation of ICBC, the provincial government should instead focus on:

a) Maintaining the principle of full recovery for victims of negligence – a principle that is fair and prudent;

b) Implementing measures that will decrease the incidence of accident and accident-related injury in our province;

c) Enabling injured motorists to obtain treatment in a timelier manner; and

d) Being a leader in developing a system of premium assessment that motivates reasonable and prudent behaviours, penalizes risky and unsafe behaviours, and has those who choose to drive luxury vehicles paying more to insure them.

We encourage the government to explore other potential avenues to address the financial problems at ICBC. From a public policy perspective, it is preferable to control costs by reducing the number and severity of accidents rather than by cutting the compensation available to innocent accident victims. Reducing accidents will reach the root of the problem and will also eliminate the pain and disability that accompany traffic injuries. Reducing the cost of automobile insurance by limiting compensation puts an unfair burden on innocent accident victims, rather than placing that burden on the people who cause the accidents or on society for failing to make driving safer.

The CBABC remains committed to a system that allows for the independent determination of the actual loss suffered by persons injured in automobile collisions on an individual basis. The only entity that can be trusted to ensure fairness in any dispute between an individual citizen and a public institution is an independent and accessible judicial system. We believe that we have made a number of meaningful suggestions for

reform that will improve the present system without taking away the rights of innocent victims.

The CBABC welcomes the opportunity to work with this government to find ways to preserve British Columbians' rights to compensation following injury through our tort system, to decrease the number of accidents on British Columbia roads, and to decrease the costs associated with claims.

EVIDENCE AMENDMENT ACT, 2020 (BILL 9)

INTRODUCTION OF CRITICAL ISSUES

On February 25, 2020, the Attorney General introduced the Evidence Amendment Act, 2020 (Bill 9) in the Spring Session of the Legislative Assembly of BC. Bill 9 proposes to amend the Evidence Act to: (1) limit the number of experts and expert reports used in motor vehicle injury litigation to one report if overall damages recovered in settlement or judgment are less than $100,000 and to three reports if overall damages are equal to or exceed $100,000, (2) restrict the amount recoverable from the unsuccessful party for the cost of each expert report to $3,000, and (3) limit total recoverable disbursements to 5% of the settlement or judgment amount.

On March 23, 2020, the Legislative Assembly of BC adjourned itself until further notice because of the COVID-19 emergency. At the date of adjournment, Bill 9 was at Second Reading and not enacted.

The CBABC position respecting Bill 9 is as follows:

1. The CBABC supports a presumptive limit on the number of experts to be used at trial, but only if such a limit is made subject to variation upon agreement of the parties or at the discretion of the Court, in keeping with the principle of proportionality.

2. The CBABC opposes an arbitrary $3,000 cap on recoverable experts' fees, as such fees often substantially exceed $3,000. The CBABC instead recommends addressing the rising cost of expert fees by directly engaging with stakeholders regarding permissible amounts to be charged, and by enacting a schedule of fees limiting the amount experts can charge, subject to the discretion of the Court.

3. The CBABC opposes the proposed 5% cap on what a litigant can recover for disbursements incurred to prosecute or defend their case. The cost of gathering evidence to present in Court is usually far more than 5% of the damages in question. Additionally, the Court already maintains extensive assessment procedures for determining the necessity and reasonableness of such expenses. An arbitrary cap on all disbursements is unwarranted and should be discarded in its entirety.

The proposed limits on recovery of expert fees and overall disbursements disproportionately limit access to justice for our most marginalized members of society.

POSITION ON $3,000 CAP ON EXPERT FEES

The fees that experts charge are outside the control of injured parties and their counsel.

Regarding medical experts, the Preamble C.2 to the BCMA Revised Fees for Uninsured

Services, effective April 1, 2019, states:

> The Non-MSP Insured Fees have been set by the Doctors of BC Tariff Committee in conjunction with Section representatives and in accordance with general policy established by the Board of Directors. Under the arrangement with the MSC, MSP fees have been approved by the MSC.
>
> The recommended values for services when not paid for by the MSP, WorkSafeBC or ICBC are listed under “Non-MSP Insured Fee”. The charges for these uninsured services, including A-lettered items, are not to be construed as maximum or minimum charges but only as a general guide for services of average complexity, by which the individual physician dealing with the patient can set a proper and responsible value on the individual services provided:
>
> a. You are in no way obligated, ethically or otherwise, to follow these Non-MSP Insured Fees and you may charge either a higher or lower fee according to your own judgement.
>
> b. No special sanction of any kind is employed nor will be employed by the Association to enforce these Non-MSP Insured Fees, and you are free to exercise your discretion and judgement with respect to any charge made for any service rendered that is not payable by the MSP, WorkSafeBC or ICBC or otherwise specified in the Preamble.
>
> The recommended fee for a medicolegal report is:
>
> A00073 A Medico-Legal Opinion will usually include the information contained in the medico-legal report and will differ from it primarily in the field of expert opinion. This may be opinion as to the course of events when these cannot be known for sure. It can include opinion as to long-term consequences and possible complications in the further development of the condition. All the known facts will probably be mentioned, but in addition there will be the extensive exercise of expert knowledge and judgement with respect to those facts with a detailed prognosis ..... 1832.00.

The $3,000 proposed limit is higher than the BCMA Uninsured Services Fees and as such, at first blush appears reasonable. However, as stated in the preamble to that document, experts are not bound by the recommended fee and can charge whatever they deem appropriate. Not having a constraint on what can be charged for medical legal reports leaves all parties vulnerable to being billed excessive fees.

The cost of reports has increased considerably in the past 10 years. Anecdotally, 10 years ago the cost of an average specialist report was in the range of $2,500 to $4,000. Back then, a $5,000 expert report was considered expensive. Currently, that $5,000 expert report is considered average (or even cheap). In the past decade, we have seen the market for independent medical examinations in the litigation context flooded with medical-legal assessment companies that provide doctors with examination rooms, logistical and administrative support, and marketing. These for-profit companies often source specialists from out of province and have significantly contributed to the overall rise in legal costs.

The CBABC agrees the increase in expert fees and reports is extremely problematic. The challenge for parties is that they are at the whim of these experts and these medical-legal assessment companies operating as a “middle-person” between the expert and counsel. Parties have no choice but to pay these costs. There is no bargaining power. The experts are in high demand and there are often waitlists of years for certain assessments.

If the BC government does not limit what these experts are able to charge, but limits what successful parties can recover, it means that the shortfall will come out of the plaintiff's settlement or judgment. If this occurs, plaintiffs will be unable to fully investigate and prosecute their injury claims and access to justice will be limited.

Regarding non-medical reports, in motor vehicle injury claims engineers and economists are often required to prove an element of the case. There are no guidelines recommending what these experts should charge. Typically, both engineers and economists charge hourly so the fees associated with their reports are proportional to the complexity of the case. However, this is still problematic in light of the proposed amendments in Bill 9 as the complexity of the case is not always proportionate to the damages.

Limiting the recoverable amount of an expert report to $3,000 may leave a plaintiff in a situation where they are successful in their claim but are ultimately out of pocket. The more complex the case, the more of a risk this will be as typically more complex issues require a greater degree of expert evidence to prove aspects of a case. Counsel may be more reluctant to take on such complex matters that will be intrinsically more risky from a cost-benefit analysis in light of the proposed amendments, which further limits access to justice for our most marginalized members of society.

The BC government should be supported in addressing the rising cost of expert fees by directly engaging with medical and legal stakeholders. Having an arbitrary cap of $3,000

ignores differences in medical expertise levels. It is a fact that a general physician's expertise is significantly less than that of a neurologist's, and the time taken to do a neurologist assessment and report will be significantly less than a neuropsychology assessment and report, or a comprehensive functional capacity evaluation and cost of future care assessment often covering two days of testing.

Rather than having a proposed tariff that is not mandatory, the CBABC recommends having a tariff with mandatory maximums to ensure that experts (and the middle-person assessment companies) do not overcharge for the services they are providing. Such rates must also recognize the need to ensure that parties are able to obtain reports and experts do not become unwilling to undertake the work if they are not fairly compensated.

POSITION ON 5% CAP ON OVERALL RECOVERY OF DISBURSEMENTS

Currently, a reasonable framework to limit the recovery of disbursements in personal injury litigation is in effect. Pursuant to R. 14-1 of the Supreme Court Civil Rules, litigants are only able to recover a "reasonable" amount for disbursements that have been "necessarily or properly incurred" in the conduct of the proceeding.

A "necessary" disbursement is one that is essential to conducting litigation; a "proper" one is one that is not necessary but is reasonable, see *McKenzie v. Drake*, 2003 BCSC 138.[7] Other relevant legal principles are as follows:

[7] See https://www.bccourts.ca/jdb-txt/sc/03/01/2003bcsc0138.htm.

- The consideration of whether a disbursement was necessarily or properly incurred is case-and circumstance-specific and must take into account proportionality;
- The time for assessing whether a disbursement was necessarily or properly incurred is when the disbursement was incurred not with the benefit of hindsight; and
- The role of an assessing officer is not to second-guess a competent counsel doing a competent job solely because other counsel might have handled the matter differently.

Disbursements include but are not limited to expenses such as court filing/trial fees, photocopying/scanning/ facsimile fees, expert testimony and expert report fees, witness fees (including transportation and accommodation costs when required), postage, couriers, examination for discovery fees, mediation fees, record production fees, transcript fees, and court reporter fees. Bill 9 radically plans to change the law of British Columbia.

Bill 9 retroactively, and in the future, limits the recovery of disbursements by litigants (excluding fees payable to the Crown such as filing fees, court fees, and jury fees), which were properly incurred in full compliance with the existing Supreme Court Civil Rules. It is the position of the CBABC that there should be no prescribed reduction or limit to the recovery of disbursements that are necessarily and properly incurred.

The proposed 5% disbursements cap will significantly limit access to justice for the following reasons.

First, plaintiffs have the legal onus to prove their cases on the issues of liability and damages. When disbursements are incurred, plaintiffs will not have a full sense of what the quantum of their cases may be. However, they must investigate liability, causation of injuries, and the overall impact of those injuries on their life. In order to explore these issues, plaintiffs must incur costs without the benefit of hindsight. For example, it may be that an expert retained to opine on the issue of causation says that an injury (for example, a disc herniation) was not caused by the accident in question. If that is the result, the quantum of the case will be decreased by that opinion; however, that disbursement was still reasonably incurred. The current approach to recovery of disbursements recognizes this challenge. The determination of whether the disbursement was reasonably incurred is assessed in relation to the time the disbursement was incurred. It is not an assessment conducted with the benefit of hindsight.

Second, the value of a case is not directly proportional to the amount of disbursements incurred or investigation required. For example, if a doctor and a teacher suffer the same injuries and both are deemed 50% disabled – the doctor's case will have a significantly higher value than the teacher's case due to the earnings differential between doctors and teachers. However, the two cases will require the same expert disbursements to be incurred. Further, there are many cases that are not necessarily of

high value but are quite complex, and thus require significant incurring of disbursements to obtain the necessary evidence to prosecute the claim. For example, if someone has a complex pre-existing medical history, the disbursements will likely be disproportionately high because there will be complex issues of causation requiring multiple experts and review of voluminous medical and employment records, often including extensive disability files.

Third, having a prescribed limit on recovery is disproportionately prejudicial to British Columbians who live outside of main urban centers. These injured parties will need to travel to attend discoveries, medical legal assessments, mediations, and trial. These travel costs are disbursements that are incurred, which will count towards the 5% limit. Is it just and fair that someone injured in Barriere, British Columbia, for example, should recover less than someone injured in Vancouver?

Fourth, having a prescribed limit on recovery is disproportionately prejudicial to plaintiffs. The presumed motivation of the BC government to implement this arbitrary cap on disbursements is to reduce what ICBC has to pay to injured citizens. No other insurer, nor class of defendant, has been known to make these demands. It is clear that the cost of the reduced recovery of proper and necessary disbursement incurred, will be paid by injured parties out of any settlement or judgment they obtain, victimising them yet again. Setting a percentage of recovery on disbursements is of fundamental benefit only to defendants and to insurers, when they exist. The only benefit of the proposed amendments will be to insurance companies. The fact of the matter is that the portion of

any insurance premiums allocated to personal injury losses, when compared to property damage, is miniscule. Careful reflection suggests there is simply no need to change the law in this area.

It is universally accepted that successful litigants should be able to recover reasonable disbursements incurred in prosecuting or defending a claim. Such a position is seen as fair, in a just society. The reasonableness of any disbursement cannot usually be determined at the beginning of a claim and may only be resolved after resolution. Further, the BC government is intending to proceed to a no-fault system in May 2021, making the proposed *Evidence Amendment Act* changes relevant to a relatively small cohort of motor vehicle accident claims, further limiting the relevance and application of such significant and prejudicial changes.

In addition to the obvious result that victims will bear losses that are better borne by those who cause injury (or their insurers), there are other practical problems caused by these proposed changes in the litigation process as well. For example, defendants are refusing to participate in mediations unless the plaintiff agrees to pay the costs if the case does not settle. Of course, if the case does not settle the plaintiff's disbursements are then further increased and the likelihood of recovery is decreased. Thus, this change is working against the early resolution of claims by agreement between parties, which should be promoted. Further, plaintiffs are refusing to obtain document production requested by the defendants, at the expense of the plaintiff. Rather, they are demanding pre-payment of those amounts or refusing to obtain production altogether. This, in turn,

increases the overall cost of the litigation and the burden on the court system, due to an increase in the necessity for court production applications. Clearly, the unintended outcomes of these proposed changes are already being seen in practice in the legal profession and are counterproductive to government's intended outcome.

Respecting the retroactive nature of the amendments, government is proposing that the changes not be entirely retroactive in that any regulations "shall not limit the disbursements payable to a party for amounts that the party necessarily or properly incurred before February 6, 2020, for reports from experts in respect of personal injury damages". However, this does not include other disbursements incurred outside of expert report fees. Further, the retroactivity provision does not go far enough to resolve the injustice to plaintiffs levied by these amendments, as no notice to the profession was provided of these changes. Many Independent Medical Examinations ("IMEs") were arranged or had proceeded prior to February 6, 2020, for which no report or invoice had yet been generated by that date. The proposed cap will unfairly catch these disbursements.

For illustrative purposes, please consider the two following real-life examples:

- In the first example, the plaintiff was involved in a motor vehicle collision with the defendant that caused damage to the vehicles and injured the plaintiff. The plaintiff sued and, prior to trial, in 2017 counsel negotiated a settlement of the claim with ICBC. The negotiated settlement was $36,000 composed of $30,000

damages and $6,000 costs. Legal fees and tax payable were $8,254. The plaintiff repaid to the plaintiff's lawyer $6,715 for the disbursements that the lawyer pre-paid for the plaintiff. The plaintiff also repaid to the lawyer $4,465 for loans to cover medical and rehabilitation expenses. In the end, the plaintiff was compensated $16,566. If the 5% proposed disbursement limit was in place at that time, then the plaintiff's recovery would be a gross amount of $31,500 resulting in a net recovery of $12,066. This represents a 27% reduction in compensation to the plaintiff.

- In the second example, the plaintiff suffered from post-concussion syndrome and was unable to work for a couple of years. He had recently been able to manage a return to part-time employment in a less demanding position than his pre-accident occupation. In 2020, legal counsel negotiated settlement of the claim at mediation. The plaintiff's Bill of Costs was $10,100 in tariff fees and $51,937.46 in disbursements for a total of $62,037.46. The Bill of Costs was settled at mediation for $60,000. The plaintiff's disbursements of $51,937.46 included nominal Court fees and $42,000 in expert fees and costs for 11 medical and economic experts. The total settlement from mediation was $610,000. From that total, $184,000 was payable for legal fees and taxes. The plaintiff repaid his lawyer $51,937 for the disbursements that the lawyer pre-paid for the plaintiff. The plaintiff also repaid to his lawyer $45,000 for loans to cover medical and rehabilitation expenses. In the end, the plaintiff was compensated $329,063. If the 5% disbursement limit had been in place as proposed at that time, then the

plaintiff's recovery would have been $577,500 ($550,000 damages plus $27,500 costs and disbursements). This is about 10% less to the plaintiff, as a result of the proposed disbursement limit.

CONCLUSIONS AND RECOMMENDATIONS RESPECTING BILL 9

On balance, the limit on expert reports subject to agreement by the parties or discretion of the courts is workable and achieves a balancing of interests between access to justice and proportionality. The expert report cost and overall disbursement caps, however, compromise access to justice and must be rejected. The expert limit alone should reduce legal costs considerably.

Further, with respect, Bill 9's cost-cutting measures are aimed at the wrong targets. Much has been said about the "legal costs" associated with adjudicating ICBC claims. In analyzing legal costs, it is important to give separate consideration to the various component parts. Legal costs of motor vehicle actions include costs associated with:

- Expert reports obtained in the defence of claims, including through independent medical examinations requested by ICBC;
- Expert reports obtained by claimants in order to persuade ICBC (or the Court) of the need for compensation;
- ICBC's legal teams defending claims;
- A portion of the plaintiff's legal fees; and
- Other disbursements required to properly prosecute and defend the claim.

The rise in costs is largely based on the increased fees charged by the medical profession. Bill 9 does not limit the amount an expert can charge or the amount a party can incur, it only limits the amount that is recoverable.

Bill 9 causes a disproportionately prejudicial impact to injured parties and, in so doing, reduces access to justice. The CBABC strives to increase access to justice for the poor and middle class in Canada, and the impact of an arbitrary, one-size-fits-all limit on recovery of disbursements will most certainly have the opposite effect.

Bill 9 also causes a disproportionate benefit to a sole party. In addition to the disproportionate negative effects on injured citizens, the proposed amendments will disproportionately benefit ICBC. A limit on how much plaintiffs can recover will have an indirect impact on the ability to retain doctors to conduct independent medical assessments. If these doctors get fewer assessments, they may charge more competitive rates. However, if the defendant (through their insurer) is willing to pay full price despite the proposed limit on recovery, then only the plaintiffs will suffer. The injured victim risks having the ultimate compensation for their injuries further eroded by the unrecoverable capped disbursements; while the sophisticated, institutional litigant with vast resources does not have the same limitations. Bill 9 serves to emphasize the unfair playing field that results from the imbalance of power.

The disproportionate benefit to one entity, and that entity being the same entity responsible for enacting the legislation, further speaks to the conflict of interest and unfairness of this legislation. Bill 9 is enacted for the sole benefit of ICBC by the party that is responsible for ICBC. If the purpose is to limit litigation expenses, which is appropriate, Bill 9 needs to be more fairly balanced to not just penalize injured people. The constitutionality of the proposed amendments is called into question.

A more equitable solution to the problem of increased legal costs is to engage in consultations with the medical and legal professions, to arrive at reasonable limits on the amount medical experts can charge for medical-legal assessments and testimony.

CONCLUSION

The CBABC AIWG would be pleased to discuss our submissions further with the Attorney General, either in writing or meeting by virtual means in order to provide any clarification or additional information that may be of assistance to the Ministry.

Communications in this regard can be directed to:

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APPENDIX I

NO-FAULT AUTOMOBILE INSURANCE SYSTEMS ACROSS CANADA

This section summarizes variations in Canada of no-fault automobile insurance systems outside of British Columbia. Manitoba and Quebec are currently Canada's only pure no-fault automobile insurance regimes. The remaining provinces besides BC are hybrid systems, incorporating different aspects of tort and no-fault regimes. In 2017, the BC government commissioned a report from Ernst & Young to examine the state of auto insurance in BC, and to make recommendations for future changes. The report, Affordable and effective auto insurance – A new road forward for British Columbia, was released in July of 2017. Within the report was contained a comprehensive review of the various systems across Canada, as well as a chart comparing the key aspects of the various systems from province to province.

Alberta

The current system in Alberta, like several across Canada, is a hybrid between tort and no-fault systems. Insurance is offered privately, via approximately 75 accredited insurance companies, for minimum compulsory coverage of $200,000. Medical costs are covered for an amount up to $50,000. Claims for property damage are capped at $10,000. This system has remained largely the same since 2004.

Further changes, however, may be afoot in Alberta. Since the end of 2019, the Alberta government have been seeking feedback from citizens for a new "sustainable" system,

which will “reduce costs for consumers,” according to the Alberta government’s website. To that end, the government is currently holding public consultations about the future of auto insurance in that province. This came after the government ended an annual 5% cap on insurance premiums put in place by the previous NDP government in 2017, ushering in premium hikes throughout 2019.

Recently, it was revealed that since last November, the Alberta government has been in possession of a study that calls for removal of the right to sue for pain and suffering. [8] The report was compiled by Ontario actuary firm J.S. Cheng & Partners Inc. and insurance consulting firm Cameron & Associates Insurance Consultants Ltd., in consultation with representatives from the Alberta treasury board and finance department. The document was reportedly put together as part of a claims and costs study requested in 2018 under the former NDP government, and is understood to contain recommendations mirroring some aspects of the Ontario regime. It recommends a “no-fault” system, removing the right to sue over pain and suffering and replacing it with a benefits schedule for injuries from an accident.

The crux of the problem in Alberta, according to the study, is that people with what it calls “top four” injuries (namely: psychological injuries such as PTSD; concussions; TMJ injuries; and whiplash-associated disorder with chronic pain lasting longer than six

[8] See K. Leavitt, “Leaked Alberta car-insurance study recommends ban on pain-and-suffering lawsuits” , The Star, March 17, 2020: https://www.thestar.com/news/canada/2020/03/17/leaked-alberta-auto-insurance-study-recommends-bizarre-measures-like-no-more-suing-over-pain-and-suffering.html.

months) are “more likely to be represented by a lawyer” and that the percentage of claims from people with one or more of the injuries “has steadily increased from 16 per cent in 2010 to 30 per cent in 2016.” Furthermore, the study says that in 2017, pain and suffering took up 57 per cent of money that goes toward bodily injuries that make up claims costs. The resulting recommendation is that the system “be modified to make it easier for a claimant to make a claim without the time consuming and costly legal process.”

Similarly, the Insurance Brokers’ Association of Alberta has also recommended a no-fault system in a white paper released March 9 of this year.[9] The white paper, The Framework: Fixing the Alberta Auto System, listed four primary concerns overall with the Alberta auto product: that increasing costs will result in a financially inaccessible system if no changes are made; ensuring those who are injured receive comprehensive medical treatment — instead of just cash — to either recover or have “the best quality of life where recovery is not possible”; charging drivers a price that equals their risk exposure; and giving consumers the option to choose whether they want to sue for injuries. The paper’s recommendations reportedly include calling for a basic no-fault system, with the option for consumers to “buy up” to tort access.[10]

[9] See A. Malik, “Is Alberta next for no-fault insurance?”, *Canadian Underwriter,* March 10, 2020: https://www.canadianunderwriter.ca/brokers/is-alberta-next-for-no-fault-insurance-1004175241/.

[10] See Malik, “What a ‘made-in-Alberta’ no-fault insurance regime would look like, Canadian Underwriter, March 13, 2020: https://www.canadianunderwriter.ca/brokers/what-a-made-in-alberta-no-fault-auto-insurance-regime-would-look-like-1004175395/.

At present, the Alberta government has made no official statement on either document, saying only that public consultations on the issue remain ongoing via its Auto Advisory Committee. However, concerns are now being raised by members of Alberta's legal community that the questions being asked of the public in the course of those consultations reveal an intention to move toward no-fault.[11]

Saskatchewan

Saskatchewan has a hybrid automobile insurance regime, although it largely operates as a no-fault system.[12] Saskatchewan Government Insurance (SGI) is the monopoly insurer, owned by the government.[13] Coverage includes:

- Mandatory $200,000 in third-party liability coverage;
- Medical payments to a maximum of $7,074,623 per person
- Funeral benefits;
- Death benefits;
- Disability income benefits; and
- Impairment benefits.[14]

[11] See S. Thomas, "Lawyers concerned no-fault insurance coming, province claims decision hasn't been made", CTV News, March 4, 2020: https://calgary.ctvnews.ca/lawyers-concerned-no-fault-insurance-coming-province-claims-decision-hasn-t-been-made-1.4838969.

[12] See http://www.ibc.ca/sk/auto/auto-insurance/mandatory-coverage/.

[13] See https://www.sgi.sk.ca/.

[14] See https://www.sgi.sk.ca/no-fault-injury-coverage-manual.

Since January 1, 2003, drivers can select a tort option to have the right to sue for "pain and suffering" and financial loss in excess of the no-fault benefits set by statute. There is a $5,000 deductible. In reality, however, very few drivers in the province (less than 1%) select the tort option.

Manitoba

In 1994, Manitoba became the second jurisdiction in Canada to enact a no-fault automobile insurance model. The Manitoba Public Insurance Corporation (MPI) is the monopoly that manages the no-fault system.[15]

In Manitoba's no-fault system, there is no right for parties to sue for damages or for pain and suffering. MPI pays medical and rehabilitation expenses, income replacement, and permanent impairment amounts according to guidelines. There is no option for Manitoba residents to opt out of the system, unlike Saskatchewan. As a result, Manitoba is considered to have a pure no-fault system.

MPI's mission is to provide exceptional coverage and service, affordable rates, and safer roads.[16] MPI covers residents of Manitoba, anywhere in Canada or the United States, even without a resident having a driver's licence.

Manitobans are not paid for being hurt in a motor vehicle accident but are being paid for impairment. MPI pays for medical treatment and provides support to make claimants get

[15] See https://www.mpi.mb.ca.

[16] See Annual Report 2018, page 4, https://www.mpi.mb.ca/Documents/2018-Annual-Report.pdf.

back to the state they were in before the accident. Doctors and chiropractors are subject to a tariff and MPI pays them according to the tariff for their treatments and medical reports for claimants.

Another key aspect of Manitoba's no-fault system is the legal duty for MPI to assist claimants.

There is no maximum accident benefit amount in Manitoba, unlike BC's current proposal that sets a maximum accident benefit amount for BC residents at $7.5 million.

Manitoba has a two-stage appeal process if claimants do not agree with a decision made by a case manager with respect to their no fault benefits. The MPI appeal process is free for claimants. MPI's Internal Review Office holds meetings to discuss the dispute and obtain any further information the claimant wishes to submit. Internal Review Officers are employees of Manitoba Public Insurance and are in a separate division from Claims. Claimants can have lawyers attend these meetings but lawyers are not commonly involved. These meetings are not typically adversarial.

Claimants can further appeal to the Automobile Injury Compensation Appeal Commission (AICAC).[17] The AICAC's decision is final, except in limited circumstances

[17] See https://www.gov.mb.ca/cp/auto/index.html.

set by statute for appeal to the Manitoba Court of Appeal.[18] Claimants are given free advice and assistance from the Claimant Advisors Office. The assigned Claimant Advisor will represent the claimant before the Appeal Commission. Claimants can hire their own lawyers to represent them before the AICAC and the Manitoba Court of Appeal.

Oversight on MPI's operations is done by the MPI Board and the Public Utilities Board that sets rates and provides direction to MPI. If a claimant has a complaint about how they have been treated by their case manager they may complain to the case manager's manager and the customer relations office. If a claimant has a complaint about MPI's policies and how those policies may be treating the customer unfairly they may contact Manitoba Public Insurance's Fair Practices Office. This Office is part of MPI and reviews MPI's service delivery and policies for overall fairness.

Oversight is also provided by the independent Manitoba Ombudsman.[19] Residents can complain about MPI to the Ombudsman. To date, the Ombudsman has published 4 decisions involving MPI.[20]

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[18] To date, from 2020 to 1999, there are 65 decisions of the Manitoba Court of Appeal where MPI is a party (search on www.canlii.org on May 22, 2020).

[19] See https://www.ombudsman.mb.ca.

[20] See Case 2017-0280 (https://www.ombudsman.mb.ca/uploads/document/files/case-2017-0280-en.pdf), Case 2013-0350 (https://www.ombudsman.mb.ca/uploads/document/files/case-2013-0350-en.pdf), Case 2012-0392 (https://www.ombudsman.mb.ca/uploads/document/files/case-2012-0392-web-version-en.pdf), Case 2010-0332 https://www.ombudsman.mb.ca/uploads/document/files/case2010-0332-en.pdf.

Ontario

Ontario maintains a hybrid system, which (like Alberta) requires drivers to purchase mandatory insurance from private insurers.[21] Coverage includes:

- Mandatory $200,000 in third-party liability coverage;
- Medical payments from $3,500 for a minor injury to a maximum $1 million per person for catastrophic injury;
- Funeral benefits;
- Death benefits;
- Disability income benefits; and
- Impairment benefits.[22]

Parties can sue in Court for pain and suffering for a catastrophic functional impairment, like spinal cord damage or loss of a limb, provided that the injuries in question meet a certain threshold of severity.[23]

As noted in the CBABC's May 2018 position paper on Bills 20 and 22, the cost reductions that had been hoped for with Ontario's insurance reforms did not materialize, and subsequent efforts to rectify that state of affairs have been largely unsuccessful. For example, in June 2016, the Ontario government introduced changes to the

[21] See http://www.ibc.ca/on/auto/auto-insurance/mandatory-coverage/.

[22] See http://www.fsco.gov.on.ca/en/auto/brochures/Pages/brochure_autoins.aspx.

[23] See s. 3.1 of the Statutory Accident Benefits Schedule (O. Reg. 34/10) under the *Insurance Act,* R.S.O. 1990, c. I.8, https://www.ontario.ca/laws/regulation/100034#BK4.

automobile insurance system that resulted in new lower standard benefits. The changes were aimed at giving more choice to consumers and to stabilize rates. Following that, in April 2017, Ontario's adviser on automobile insurance, David Marshall, released his report Fair Benefits Fairly Delivered: A Review of the Auto Insurance System in Ontario, outlining a five-part action plan including an independent regulator to regulate the insurance industry independent of government.[24]

Thus, Ontario has gone through several versions of no-fault insurance schemes without any apparent success in containing or reducing the cost of insurance. The repeated changes there have created uncertainty and unfairness among innocent victims of automobile collisions and have, in turn, diminished the integrity of the civil justice system.

Québec

Québec's no-fault system requires drivers to purchase mandatory insurance from the Société de l'assurance automobile du Québec (SAAQ)[25] for bodily injury claims, and from private insurers for liability and vehicle damage issues.[26] Coverage includes:

- Mandatory $50,000 in third-party liability coverage;
- Medical payments, no limits to payments;
- Funeral benefits;

[24] See https://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html.

[25] See https://saaq.gouv.qc.ca/en/.

[26] See http://www.ibc.ca/qc/auto/auto-insurance/mandatory-coverage/.

- Death benefits;
- Disability income benefits; and
- Impairment benefits.[27]

In Québec, mandatory coverage is obtained through both the SAAQ (for accident benefits) and private companies (who provide the liability portion). The public insurance portion is included in driver's license fees. Accordingly, insurance rates in Québec tend to be low when compared to other areas of Canada. However, in contrast to the minimum requirement of $200,000 of TPL coverage seen virtually everywhere else, Québec requires only $50,000 in minimum TPL coverage. The Québec system is also a pure no-fault regime in terms of bodily injury compensation. An at-fault driver in Quebec cannot be sued for either non-pecuniary damages or losses in excess of provincial no-fault coverage. While Ontario has some no-fault provisions (particularly surrounding medical and rehabilitation treatment not covered by provincial health care), an at-fault driver remains subject to tort action.

Maritimes

The auto insurance regimes in the Maritime provinces are relatively similar, comprised of hybrid systems that rely on private insurers. Minimum third-party liability limits are generally $200,000 (with the exception of Nova Scotia at $500,000). Non-pecuniary losses for "minor injuries" are currently capped at approximately $7,000 to $9,000 depending on jurisdiction (save for Newfoundland and Labrador, which has no cap).

[27] See https://saaq.gouv.qc.ca/fileadmin/documents/publications/automobile-insurance-policy-quebec.pdf and http://www.ibc.ca/qc/auto/auto-insurance/mandatory-coverage/.

Summary

One central consideration is a comparison of insurance premiums between various systems. Such premiums obviously depend on a number of different variables and risk factors that are specific from region to region (such as local accident and fatality rates), but a broad comparison is nonetheless a helpful starting point when looking at the various systems in use.

The annual 2019 premiums for a single 21-year-old male student, claim- and conviction-free, driving a 2013 Toyota Corolla 4DR, for selected cities, ordered from least expensive premium is as follows:[28]

City	Premium
Saskatoon, SK	$1,284
Winnipeg, MB	$1,899
Moncton, NB	$3,882
Vancouver, BC	$4,516
Charlottetown, PEI	$4,915
Halifax, NS	$6,124
Toronto, ON	$6,463
Red Deer, AB	$7,234

Similarly, key considerations in comparing provincial systems are also canvassed in the 2017 E&Y report, and include:

[28] See Ministry of the Attorney General in British Columbia, Canadian Automobile Insurance Rate Comparisons (February 2020), page 5, https://bit.ly/2VKV32L.

- Comparison of coverage limits. For example, the Manitoba regime has no limits for medical coverage whatsoever under its pure no-fault system;
- Options for consumers as to the types of insurance and resolution schemes available, such as Saskatchewan's available (albeit little-used) tort option;
- Caps / restrictions on certain benefits such as non-pecuniary damages, and definitions of "minor injuries" triggering such caps; and
- Mechanisms for effective and independent resolution of disputes as to coverage and benefits.

That said, it has also been noted previously that the various attempted insurance reforms from province to province have had little success in reducing insurance rates over time in any given area.[29] Contrary to hopes or expectations, insurance premiums have generally not declined after the introduction of no-fault based insurance schemes. Rather, the principal result has simply been a bureaucratization of justice with rights prescribed by legislation that, in most circumstances, reduces the level of pecuniary compensation and either eliminates or significantly reduces compensation for non-pecuniary damages for innocent accident victims. The policy and social values promoted by a tort system – such as encouraging people to adhere to a higher standard of care by holding them accountable for their negligence or willfully tortious conduct – are ultimately compromised by the use of a "care-based model", which benefits at-fault drivers by providing them with increased Accident Benefits.

[29] See CBABC Bill 20 Position Paper at pp. 6-8.

CONCLUSIONS

The conclusions to be drawn from comparing other provincial regimes, closely align with those set out in the CBABC's 2018 Bill 20 position paper:

- Despite a multitude of variations in the insurance systems implemented across Canada, there is no conclusive evidence that any such reforms have resulted in a dramatic or sustained reduction in insurance costs over time; and
- Similarly, there is no firm support for the conclusion that the proposed changes to the existing BC insurance system will result in long-term control of such costs.

This is consistent with the conclusion that the E&Y Report does not provide conclusive evidence that automobile insurance in the Province of British Columbia needs to be substantially overhauled.

Rather, what the E&Y Report clearly demonstrates is the need for BC to focus instead on accident prevention and to implement traffic safety initiatives, including (but not limited to) stricter enforcement of all traffic safety laws, more severe penalties for errant drivers, tougher licensing standards, and effective distracted driving / photo radar programs. It is only through the implementation of such preventative initiatives that the trends in the cost of insurance will be reduced.