



THE CANADIAN  
BAR ASSOCIATION  
British Columbia Branch

April 18, 2018

**By Email:** [AG.Minister@gov.bc.ca](mailto:AG.Minister@gov.bc.ca)

Hon. David Eby QC  
Attorney General  
PO Box 9044, Stn Prov Govt  
Victoria, BC V8W 9E2

Dear Attorney General:

***Re: Insurance Corporation of British Columbia  
Proposal for Caps on Compensation***

We are writing with respect to the government's announcement that it intends to introduce legislation imposing a system of caps on damage awards in motor vehicle accident cases. The CBABC is disappointed that this government has chosen to follow a path that has not worked in other provinces and that serves to punish victims of negligence, rather than being an innovative leader in finding ways to return ICBC to the profitable position that it was previously in. We will not repeat what has been said in our earlier correspondence, but it is our hope that this government will work to find a way to protect British Columbians by reducing the number of collisions on our roads, improving the safety of our roads and vehicles, and maintaining a system of full and fair compensation for all who are injured due to the fault of another.

The CBA in 1974 adopted a resolution that "the right of an individual to recover general damages from the wrong-doer in motor vehicle cases and to have such right adjudicated in the courts is one of the most vital hallmarks of the Canadian system of justice". No fault or cap types of compensation schemes result in a bureaucratization of justice with rights prescribed by legislation which, in most circumstances, reduce the level of compensation available for innocent accident victims. The CBA also views the implementation of no fault or cap types of compensation schemes as not being in the public interest. Among other concerns, they 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. The CBABC continues to view any limitation of the rights of an individual to recover damages in motor vehicle accident cases to be contrary to the principles of the Canadian justice system and continues to oppose any such changes.

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We encourage the government to explore other potential avenues to address the financial problems at ICBC and to abandon the announced implementation of caps, which is short-sighted and will not serve to address the long term financial problems of the Corporation. In particular:

- ICBC's financial problems can be addressed through measures that serve to decrease the incidence of motor vehicle accidents and that put the financial burden for bad driving where it belongs, on at-fault drivers.
- A key component to ICBC's long term financial health and ultimately, its survival, is the implementation of measures that require ICBC to be run like a business rather than an arm of government. Utilizing policy dollars for functions outside of traditional insurance will necessarily result in financial shortfalls for ICBC. This needs to be addressed by either funding these functions through government financing or, at the very least, by returning any revenue generated by these functions to ICBC. [For example, the funds collected by ICBC's driver licensing offices that flow through to government without recognition of the costs of operating a network of such offices.]

A key component of running ICBC as a business is transparency. The ever-shifting numbers that are being reported on ICBC's losses are concerning and reflect either mismanagement or a lack of transparency. The losses that are being reported at ICBC are losses that in any other business would have resulted in significant questions being asked and quite likely a change in management. The CBABC encourages the government to ensure that those tough questions are being asked. We understand the current government is taking the position that the previous government was aware these losses were being projected and that this problem falls at their feet. It is not that simple.

Much has been said about the legal costs associated with adjudicating ICBC claims. "Legal costs" have been defined to include the costs of:

- ICBC's legal teams defending claims;
- expert reports obtained in the defence of claims, including through independent medical examinations requested by ICBC;
- a portion of the plaintiff's legal fees; and
- expert reports obtained by the plaintiff in support of claims.

The CBABC encourages the government to look at those numbers with a critical eye, assessing legal costs the way that they would be assessed in any business. If ICBC's legal costs exceed what is reasonable in an insurance company then changes need to be made within ICBC to bring those costs down. Tough questions that must be asked include: Is ICBC adjudicating claims in a way that leads to higher legal costs? Is ICBC

making the right decisions in cases that it takes to trial in terms of true costs savings? ICBC management needs to be held accountable for the decisions that are being made and the claims handling that is being conducted. A key indicator of that is a comparison of settlement offers versus trial results and the amount of legal fees paid.

Although the CBABC is opposed to caps, it is our position that regardless of whether this government proceeds with limiting the rights of British Columbians, a system must be put in place to make ICBC accountable for the decisions it is making and for the legal costs that it is incurring. Lawyers handling these types of cases, whether they are on the plaintiff side or the defence side, know that ICBC cases are handled differently than any other type of personal injury cases involving a private insurer. Is it this different handling of cases that is resulting in increased legal costs and, if yes, what measures can be put in place to deal with this?

We note as well that the cost of medical legal reports is often the largest component of legal costs in a given ICBC legal matter. We encourage the government to analyze these expert costs and to find ways to process claims, including through the litigation process, with more reasonable expert disbursements being incurred.

This government has focused on what it sees as escalating claims as the root of the problem at ICBC. The CBABC does not agree with that analysis and encourages the government to truly determine what factors are causing the financial problems at ICBC. ICBC is a company that has managed its finances in a way that, if the latest set of projections turns out to be accurate, will have resulted in a loss exceeding \$1 billion in one year. There are many reasons for that loss and those reasons will continue to exist whether or not limitations are implemented on the right of recovery of British Columbians, unless they are addressed. The CBABC encourages the government to look at those root causes and address them before acting to statutorily abrogate the rights of British Columbians.

ICBC for many years was extremely profitable, resulting in government taking funds out of ICBC that never should have been taken out. The shift from very profitable to very unprofitable has many reasons beyond an increased number of collisions. ICBC will not be moved to a profitable or self-sustaining model without addressing these reasons. There are many things that can be done to change ICBC's financial situation without limiting the rights of British Columbians and the CBABC is disappointed to see government moving to a model of limiting the rights of innocent victims to recovery, rather than addressing the root causes behind the financial problems at ICBC.

In addition, from what disclosure there has been, the government's plan of implementation is just as troubling and will compound the problems of bringing in a cap. The proposed cap targets soft tissue injury. Through the extensive experience of our

members in personal injury cases, both for plaintiffs and defendants, it is apparent that a victim suffering from soft tissue injury may suffer much more significant symptoms and consequences than victims suffering from other injuries that would not be capped in their claims. There is no reason to arbitrarily single out victims with soft tissue injury and label their claims as “minor”. If this definition of “minor” is allowed to proceed, these individuals will be initially victimized by at-fault drivers and will be subsequently victimized by the government.

The proposed plan suggests individuals suffering soft tissue injury who continue to have serious impairment or a significant inability to care for themselves **beyond one year** would no longer be considered to have a minor injury. The implication is that individuals suffering significant impairment but who are able to return to work or become able to care for themselves within one year of the collision are labeled to be suffering from “minor” injuries. This is misleading and disrespectful of what these individuals have to endure. This will also fail to encourage injured parties to return to work as they are able, as it may appear to be in their best interest to remain off of work for over one year post-collision.

Another troubling part of the plan is to designate the Civil Resolution Tribunal (“CRT”) as the body authorized to adjudicate whether claims fit into the “minor” claim designation. The rationale given is that the CRT will be able to “provide fair, fast resolution, without the involvement of a lawyer.” We have several concerns with the involvement of the CRT in such matters; in particular:

- Section 20 of the CRT Act prohibits the involvement of a lawyer in tribunal hearings except in certain limited circumstances. The CBABC has pressed for the repeal of section 20 on multiple occasions. Its impact in motor vehicle claims will be to pit individuals without experience in legal matters against experienced adjusters and other senior staff of ICBC, a sophisticated litigant with vast resources at its disposal. This is an intolerable power imbalance that the CBABC cannot support.
- Section 9 of the Act prohibits the CRT from hearing proceedings in which the government is a member. That is because tribunal members are civil servants, appointed by Cabinet, with limited tenure (as little as 2 years) and remuneration set by Cabinet. Their independence from government is limited. The inherent conflict in having the tribunal decide proceedings involving a Crown agency closely connected to government is of concern.
- The CRT has no expertise in motor vehicle matters and the large volume of cases likely to result from the proposed new jurisdiction may make speedy resolution impossible. In any event, in most personal injury matters there is a necessary delay waiting for medical symptoms to be resolved before any trial

should occur. I note that trial dates for short motor vehicle accident trials are currently available in less than five months in many court registries – it is the nature of the injury and not the availability of court time that prevents speedy resolution of such cases.

The CBABC welcomes the opportunity to work with this government to find ways to preserve British Columbians' rights to full compensation following injury, to decrease the number of accidents on British Columbia roads, and to decrease the costs associated with claims. The CBABC will not support any system that limits full recovery and will be vocal in its opposition to any move by government toward that end.

A system of caps will not solve the financial problems of ICBC. A system of caps is unfair to British Columbians and is a failed model in other provinces. We encourage the government to be a leader in the country on this difficult issue and to find ways – without encroaching upon the rights of British Columbians – to return ICBC to its once profitable position.

If given an opportunity, the CBABC is committed to providing assistance to reach these objectives. Given the vast experience of our members in representing plaintiffs and defendants in personal injury claims, and the knowledge that our members have in this area, we welcome further dialogue and a meaningful role in dealing with these issues.

We welcome the opportunity to discuss this with you further at your convenience, and look forward to hearing from you.

Yours truly,



Bill Veenstra  
President  
Canadian Bar Association, BC Branch