Submission Regarding *Insurance (Vehicle) Amendment Act* & *Regulations* and BCSC Rules of Court for Non-Minor MVAs

TRIAL LAWYERS ASSOCIATION *of* BC

Prepared by: Trial Lawyers Association of BC
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1.0 EXECUTIVE SUMMARY

TLABC continues to oppose any minor injury caps on pain and suffering in BC. Prior to the introduction of this amendment into legislation, TLABC authored papers that questioned the inflated negative financial picture of ICBC and provided a comprehensive analysis and comparison of insurance schemes across Canada. TLABC's position remains that minor injury caps are not the answer to ICBC's financial problems. Alternatively, minor injury caps ought to have been a last resort, and other cost-saving alternatives should have been attempted first.

In the 2018 throne speech, the NDP government said that, "*By making different choices that put people first, government can transform lives and create a better future for everyone*." With the implementation of Bills 20 and 22, the government put the economic interests of ICBC before the rights of victims of negligence. The new legal scheme taking effect April 1, 2019 introduces significant constraints on the legal rights of British Columbians and sweeping changes to this province's auto insurance scheme. In the forthcoming regulatory process, however, government has the opportunity to recognize and narrow the harmful impacts of the new law on our communities. Much of the new law is open-ended, leaving consequential legal, procedural and administrative matters to be enacted by regulation and, therefore, bereft of debate in the legislature or any public scrutiny. The NDP government has promised transparency, but the manner in which the regulations are being drafted, requiring stakeholders like doctors and therapists to execute non-disclosure agreements, is opaque and undemocratic. TLABC hopes that in the interest of transparency and fairness, government will listen to stakeholders and especially victims' rights groups and strike a more reasonable balance between ICBC revenues and the civil liberties of British Columbians.

It is in this spirit of fairness, and at the invitation of the Attorney General, that TLABC provides this paper, the purpose of which is three-fold:

1. To highlight legal and practical concerns about the legislation and forthcoming regulations;

2. To provide analysis and commentary on the *Insurance (Vehicle) Amendment Act*, including suggestions that the coming regulations narrow the scope of the amendments to more fairly balance the competing financial interest of ICBC and the rights of individuals in this province; and finally,

3. To caution against making any substantive changes to the *Rules of Court* for "non-minor" claims in BC Supreme Court, so that the impact of the new system on ICBC's finances and the legal rights of British Columbians can be more fairly assessed in the fullness of time.

Part 7 of Bill 20 - the *Insurance (Vehicle) Amendment Act* - addresses the definition of "minor injury" and the execution of the reforms. Other amendments of significance to injury victims include sections 28.1, 45.1, 82.2, 83 and 84, 105 and 106.

As currently legislated, the reforms victimize innocent people who are injured as a result of the fault of bad drivers, and not just by imposing caps on pain and suffering or by casting the definition of minor injury so broadly that it eclipses similar such definitions in other provinces. Rather, upon careful review, the new legislation further victimizes British Columbians as laid out below, by:

1. Co-opting the care providers of victims to work for ICBC instead of victims, including:
   a) imposing increased reporting by health care practitioners to ICBC (eroding the right to privacy of victims);
   b) imposing a new requirement on care providers to place the victim into a cookie-cutter "diagnostic and treatment protocol," designed by ICBC outside of public view that, if not followed by the victim, results in the victim being punished by being classified as a "minor injury"; and,
   c) setting amounts payable by ICBC to care providers that places them in a position where they are beholden to ICBC for setting the amount of their fees, thus creating a conflict of interest where the care providers have an incentive to keep ICBC happy, instead of their patients.

2. Eliminating the right of victims to recover the <u>actual cost</u> of health care treatments, instead limiting recovery to the price fixed by ICBC.

3. Eliminating the right of victims to seek compensation on behalf of third party extended health and disability insurers, but failing to protect victims from repayment claims from those third party insurers, which could further erode the compensation recovered by victims.

RECOMMENDATIONS

1. **TRANSPARENT CONSULTATION.** The NDP government should publicly consult with all stakeholders to the new auto insurance tort and coverage schemes and make fully transparent the drafting process for the Regulations and the anticipated policies and procedures for the CRT. Compelling secret meetings with doctors, other clinicians and lawyers with non-disclosure agreements is undemocratic and undermines the public's confidence in the "minor" injury cap scheme.

2. **NARROW THE DEFINITION OF MINOR INJURY.** The current definition of minor injury is overly broad and will invariably capture injuries that on any analysis are not, in fact, minor. The BC government has deviated from other jurisdictions in Canada in terms of the scope of what constitutes minor injury. If the intention of the NDP is to cap minor injuries, it should restrict its definition to include only truly minor injuries as has been done in other provincial jurisdictions.

3. **EXCLUDE MENTAL HEALTH CONDITIONS.** The legislature has included pain syndromes in its definition of minor injury. As currently legislated, all psychological and psychiatric conditions are included in the definition of minor injury. The DSM-V distinguishes between mental distress, which impacts a person but does not qualify as a mental disorder, and diagnosed mental disorders, which are ongoing and serious conditions. If the regulations are going to contemplate any psychological or psychiatric conditions as minor, it should be restricted to mental distress and not to any other mental health condition.

4. **MAKE THE DEFINITION OF MINOR INJURY SIMPLE.** The definition of minor injury, like the definition of serious impairment, should be clear and easily understood by the ordinary person and the test to determine whether someone falls within this definition should not be complex. For example:

   (a) Is the injury one of the enumerated injuries set out in the definition? If no, the cap does not apply.

   (b) If yes, does the injury result in serious impairment? If yes, the cap will not apply. If no, the cap will apply.

   A determination of whether or not someone's injuries are minor, will involve submissions to the CRT. Under the new system, injured people will undoubtedly face a difficult choice. They will either have to represent themselves without any legal help,

leaving them vulnerable against defendants who are represented by a sophisticated insurer; seek legal advice from a lawyer, meaning that they will have to sacrifice part of their compensation to pay for legal advice; or abandon the claim altogether, meaning they will receive no justice. One of the stated goals of the Attorney General is to provide greater access to justice in this province. Nevertheless, with respect to the determination of whether or not an injured person falls within the definition of minor injury, the current definition is medically complicated; will likely require in many instances medical opinion; is imprecise, and will not be easily understood by the average person. This complexity will lead to uncertainty and undoubtedly the need for medical opinion and expertise. How the unrepresented claimant will access this medical information and pay for it is unclear.

5. **DEFINE "SERIOUS IMPAIRMENT"**. The current legislation leaves the definition of "serious impairment" undefined. This is concerning. The only reference that is set out is to the type of impairment and a timeframe of 12 months being a requirement (but the government may change that timeframe if it wishes to do so). All other provinces that have enacted minor injury legislation have defined serious impairment without any apparent difficulty. For the most part, these definitions are consistent and the wording has arisen from judicial interpretation. These definitions define serious impairment to mean an impairment of a physical or mental function that result in a substantial inability to perform: (a) essential tasks of regular employment; (b) essential tasks of a claimant's regular training or education; or, (c) normal activities of daily living. If the government does enact a definition similar to other jurisdictions then at least ICBC, counsel, claimants, tribunals and courts will be able to look to other jurisdictions for guidance in how these provisions have been interpreted to date.

6. **LET MEDICAL PROFESSIONALS DO THEIR JOBS.** The regulations must narrow not broaden obligations on victims and caregivers to report to ICBC, allowing them to focus on healing, treating and developing individually tailored treatment plans, not "cookie-cutter diagnostic and treatment protocols". At minimum, include in the regulations the express provision that any attending physician can alter or prescribe treatment protocols as they deem medically appropriate to a specific patient. Let doctors, clinicians and patients choose what is best for them, not what ICBC wants injured British Columbians to do in "assembly line" fashion. What British Columbians do not want is "WCB" for car accidents.

7. **ELIMINATE THE STATUTORY PROVISION THAT A VICTIM CAN BE DEEMED TO HAVE SUFFERED A MINOR INJURY IN THE EVENT THEY FAIL TO FOLLOW PRESCRIBED TREATMENT PROTOCOLS**. This is patently unreasonable. The common law already visits

strict obligations on victims of negligence to mitigate their losses. This section of the legislation allows ICBC to sidestep its burden of proof in convincing a judge that a claimant has not taken all reasonable steps to mitigate their damages. This section of the law is on its face drafted by ICBC for ICBC, there is no other logical basis to include it in the legislation.

8. **REMOVE THE RESTRICTION ON RECOVERY OF OUT-OF-POCKET EXPENSES.** Eliminate the restriction that victims may only recover ICBC price-fixed treatments or at minimum allow for alternative recovery of the actual cost of treatments incurred provided they are "reasonable and medically justified" as required under the common law (see *Milina* v. *Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; aff'd (1987), 49 B.C.L.R (2d) 99 (C.A.).* The related legislative changes represent a concerning and marked departure from decades of well-established law on the scope of recovery for out of pocket medical expenses for victims of injury.

9. **PUT PATIENT CARE FIRST. REALLY.** The anticipated regulations and schedules relating to health care fees are deeply troubling. This is reminiscent of the deal that the British Columbia Chiropractic Association and ICBC struck a few years ago. It was called the "chiropractic treatment program," where ICBC paid a lump sum of $900 to the chiropractor for treatment. At the end, the chiropractor was under a duty to confirm whether the patient had reached "full recovery". Consequently, the care provider had a financial incentive to defer to ICBC instead of the patient. A risk is present that ICBC will use its considerable financial influence to impose similar programs on physiotherapists, psychologists, occupational therapists, and other health care practitioners, giving an incentive to the care providers to defer to ICBC's interests over those of their patients.

10. **PROTECT VICTIMS FROM SUBROGATED CLAIMS.** Revise the legislative changes relating to the elimination of subrogated health and disability claims in car accident cases to ensure that victims are protected from mandatory repayment schemes by their third party insurers. As presently drafted, while the new sections 83(7) and 84(1.1) take away third party insurer's right of subrogation, they do not prohibit insurers from attempting to collect these payments from the victim, something that insurers have sought to do in the past (*i.e*. repayment provisions that force the victim to reimburse the insurer from their gross recovery, meaning that a victim may be required to reimburse a third party insurer from their pain and suffering award). The protection of victims from such rapacious steps by third party insurers or trust plans must be of paramount concern to the legislature. Clearly third party insurers who cannot recover from ICBC should likewise be precluded from recovering from the remaining damage awards of victims, be

it by agreement, contract or otherwise. A failure to legislate a clear and express prohibition for this conduct by regulation will only serve to re-victimize injured British Columbians.

11. **DO NOT TOUCH THE RULES OF COURT.** TLABC cautions against the NDP government making any changes to the Rules of Court that would further erode the civil liberties of British Columbians and this must be especially true for litigants in Supreme Court with "non-minor" claims. The government has projected that its proposed legislative changes "will reduce ICBC's claims costs by more than $1 billion every year, helping make it sustainable for decades to come." To make further changes that will serve to curtail the rights of major and catastrophic injury victims while potentially increasing costs would be draconian. With tectonic changes to BC's civil justice system already underway, it would be imprudent to make further changes until stakeholders are able to assess the impacts.

2.0 INTRODUCTION

In a May 2, 2018 news release, Attorney General David Eby said as follows with respect to the regulatory scheme under draft:

> "In my continued effort to be as transparent as possible, I want to provide British Columbians with more detail of what we anticipate to be included within the supporting regulatory framework.
> "Our intention remains the same as we announced in February. If, after 12 months, a customer's injury continues to have a significant impact on their life, the injury would no longer be considered minor. This is true for any form of physical or mental injury sustained in a crash.
> "We intend that regulations will further define a serious impairment as one which is not expected to improve, and results in a substantially compromised ability to perform essential tasks, such as being able to work or go to school.
> "Based on ongoing consultation with the medical community by ICBC and government, and analysis of the experience in other jurisdictions that have a limit on pain and suffering awards for minor injuries, we anticipate that the regulations will include temporomandibular joint disorder (TMJ) – pain in your jaw joint and in the muscles that control jaw movement – as well as the more minor whiplash associated disorders (WAD) 1 and 2 in the definition. The most serious of whiplash-associated disorders will not be included in the definition, nor will third-degree sprains, strains, broken bones or brain injuries.
> "We are also working in consultation with the medical community to refine and narrow the scope of mental-health conditions, which are listed in the legislative definition of minor injury. As with other minor injuries, if the mental health condition results in a serious impairment over 12 months, it will not be considered a minor injury.
> "B.C. has the opportunity to learn from other provinces which have already made these changes. We know other jurisdictions have experienced increased reports of conditions not included in their minor injury definition, such as TMJ and chronic pain. Increased self-reporting of these minor injuries, which do not have a serious impairment, erodes the minor injury definition and reduces the costs savings, which are needed in order to increase accident benefits.
> "ICBC will continue to rely on a medical professional to determine the diagnosis for a customer's injuries, and this will determine whether the injury meets the minor injury definition. Customers will choose their treating medical professional, not ICBC. Protocols for treating minor injuries and fees for treatments are still undergoing consultation with

health-care professionals, and the regulations will reflect input from the medical community.

"A new, independent, and straightforward dispute resolution process for customers with injuries is being established. The amendments to the Civil Resolution Tribunal Act expand the Civil Resolution Tribunal's (CRT) scope to include making decisions on the classification of an injury as a minor injury, entitlement to accident benefits and decisions around who is at-fault in the crash, and settlement amounts for all motor vehicle injury claims below a threshold. Our intention is to establish this threshold in regulation as one not exceeding $50,000.

"The $5,500 limit on pain and suffering payouts for minor injuries will be introduced by regulation. Payments for pain and suffering are entirely separate from compensation for any medical care and wage losses.

"For all injuries, regardless of severity, ICBC will be paying more for customers' medical care and wage loss as a result of the significant increases to accident benefits that will also be specified in regulation. As announced, the intention is that the available medical and rehabilitation benefits will be increased to $300,000 for accidents occurring on or after Jan. 1, 2018. Wage replacement benefits will increase to $740 per week, and household support benefits to $280 per week, effective April 1, 2019. We will also increase funeral expenses to $7,500 and survivor benefits up to $30,000, effective April 1, 2019.

"Also very significant is that the regulations will set a fair market rate for the cost of treatments the customer needs to get better after a crash.

With this backdrop, and because government would not share any draft regulation with TLABC in the absence of an executed non-disclosure agreement, which the TLABC leadership could not execute in light of its fiduciary duties to its Board of Governors, members and the public more broadly, here follows our analysis.

3.0 PART 7 – MINOR INJURIES

3.1 Minor Injury Defined

One of the stated goals of the NDP is to bring BC "in line" with other Canadian provinces that have introduced minor injury caps. Nevertheless, the NDP has clearly introduced a minor injury definition that is far more encompassing and far-reaching than any other equivalent minor injury definition used by the other provinces.

3.2 Minor Injury in Other Provinces

Nova Scotia, New Brunswick, PEI, and Alberta have all enacted legislation that limits damages for minor injuries. Ontario also has a minor injury cap for the treatment of victims with minor injuries. The definition of minor injury in other provinces is set out below:

PEI: “minor personal injury” means any of the following injuries, including any clinically associated sequelae that did not result in serious impairment: (i) sprain, (ii) strain, or (iii) whiplash or associated disorder injury.

Nova Scotia: “minor injury” with respect to an accident, means (i) a sprain, (ii) a strain, or (iii) a whiplash or associated disorder injury caused by an accident that does not result in serious impairment.

New Brunswick: “minor personal injury” means any of the following injuries including any clinically associated sequelae that do not result in serious impairment or in permanent serious disfigurement: (a) a contusion, (b) an abrasion, (c) a laceration, (d) a sprain, (e) a strain, or (f) a whiplash-associated disorder.

Ontario: “minor injury” means one or more of a sprain, strain, whiplash-associated disorder, contusion, abrasion, laceration, or subluxation and includes any clinically associated sequelae to such an injury.

Alberta: “minor injury” in respect of an accident means (i) a sprain, (ii) a strain, or (iii) a WAD (whiplash-associated disorder) injury caused by an accident that does not result in serious impairment.

Comment

With a few minor exceptions, the definition of minor injury is similar across the provinces. These definitions restrict a minor injury to mean a limited number of injuries plus their medical consequences. They are clearly meant to capture truly minor injuries such as soft-tissue injuries, lacerations, bruises, etc. The definitions are relatively restrictive in nature and easily identifiable to the public as being minor in nature.

3.3 British Columbia's Minor Injury Definition

In BC, minor injury means a physical or mental injury, whether or not chronic, that:

(a) subject to subsection 2 does not result in a serious impairment or a permanent serious disfigurement of the claimant, and

(b) is one of the following: (i) an abrasion, a contusion, a laceration, a sprain or a strain; (ii) a pain syndrome; (iii) a psychological or psychiatric condition; (iv) a prescribed injury or any injury in a prescribed type or class of injury.

Clearly, the NDP has defined minor injury to be far less restrictive than the definition by the other provinces, with the objective of capturing a far greater range and type of injury. In particular, BC's minor injury definition includes chronic conditions and adds pain syndromes and psychological and psychiatric conditions.

3.4 Minor Injuries?

An injury should not be defined as minor simply to suit government policy to save ICBC money. Medical experts ought to have been consulted on whether or not chronic pain syndromes or chronic mental disorders should in any way be characterized as minor. TLABC is confident that had the medical community been consulted it would have strongly disagreed with the inclusion of chronic conditions and mental disorders that, by their very definition, are not minor.

The Attorney General stated that "chronic" was added because of an Alberta Court decision which held that any soft tissue injury that remained symptomatic after three months was chronic, and as a result, such injuries would not fall within Alberta's definition of minor injury. Rather than address this specific concern, the NDP included "pain syndromes" in its definition. A pain syndrome could arguably include such injuries as: chronic pain syndrome, fibromyalgia, complex regional pain disorder, myofascial pain syndrome, migraine or headache disorder, carpal tunnel syndrome, compartment syndrome, thoracic outlet syndrome, temporomandibular joint disorder, or patellofemoral pain syndrome.

The Attorney General stated that it is consulting the medical community to narrow and restrict the definition of psychological and psychiatric conditions and may amend this definition by regulation. As it stands, all psychological and psychiatric conditions are included in the NDP's definition of "minor injury". The DSM-V distinguishes between mental distress, which impacts a

person but does not qualify as a mental disorder, and diagnosed mental disorders, which are ongoing and serious conditions. TLABC encourages the NDP government to consult with psychologists and psychiatrists to significantly restrict and narrow the definition.

Comment

The government's definition of minor injury is overly broad and will invariably capture injuries that on any analysis are not, in fact, "minor". The NDP has also clearly deviated from other jurisdictions in Canada. Simply put, this expanded definition of minor injury is over reaching and extreme. Significantly injured people will undoubtedly be captured by this definition in the first instance. If the intention of government is to cap minor injuries, it should restrict its definition to include only truly minor injuries as has been done in other provincial jurisdictions.

3.5 Complexity and Access to Justice

The determination of whether or not someone's injuries are minor will involve submissions to the Civil Resolution Tribunal. Under this new system, injured people will undoubtedly face a very difficult choice. They will either have to represent themselves without any legal help (leaving them vulnerable against defendants who are represented by a sophisticated insurer); seek legal advice from a lawyer (meaning that they will have to sacrifice part of their compensation to pay for legal advice); or abandon the claim altogether (meaning they will receive no justice). One of the stated goals of the Attorney General is to provide greater access to justice in this province. Nevertheless, with respect to the determination of whether or not an injured person falls within the definition of minor injury, the current definition is medically complicated, will likely require in many instances medical opinion, is imprecise, and will not be easily understood by the average person. The definition of minor injury, like the definition of serious impairment, should be clear and easily understood by the ordinary person and the test to determine whether or not someone falls within this definition should not be complex; for example:

(a) Is the injury one of the enumerated injuries set out in the definition? If no, the cap does not apply.

(b) If yes, does the injury result in serious impairment? If yes, the cap will not apply. If no, the cap will apply.

With respect to the current definition of minor injury, BC's definition is profoundly more complex than that in any other jurisdiction. This complexity will lead to uncertainty and undoubtedly the need for medical opinion and expertise. How the unrepresented claimant will access this medical information and pay for it is unclear.

If the NDP had not deviated so far from other provincial legislations, ICBC, counsel, unrepresented claimants, tribunal adjudicators, and courts would have been able to look to other jurisdictions for guidance in interpreting minor injury definitions. For the conceivable future, however, little or no guidance is available for anyone involved.

3.6 Serious Impairment

The current legislation leaves the definition of serious impairment undefined. It simply states:

> "serious impairment" in relation to a claimant means a physical or mental impairment that (a) is not resolved within 12 months or another prescribed period if any, after the date of an accident and (b) meets prescribed criteria.

The reason for the NDP to leave the definition of serious impairment out of the current legislation is unclear. The only reference that is set out is to the type of impairment and a timeframe of 12 months being a requirement (but the government may change that timeframe if it wishes to do so).

All other provinces that have enacted minor injury legislation have defined serious impairment without any apparent difficulty. For the most part, these definitions are consistent and the wording has arisen from judicial interpretation. These definitions define serious impairment to mean an impairment of a physical or mental function that results in a substantial inability to perform: (a) essential tasks of regular employment; (b) essential tasks of a claimant's regular training or education; or, (c) normal activities of daily living.

The NDP has chosen to leave this important definition to be enacted by regulation. There is no reason why the NDP should define serious impairment that deviates in any substantial way from the definition of other jurisdictions. If the government does enact a definition similar to other jurisdictions then at least ICBC, counsel, claimants, tribunals and courts will be able to look to other jurisdictions for guidance in how these provisions have been interpreted to date.

3.7 Diagnostic and Treatment Protocol

"Diagnostic and treatment protocol" has been defined under the amendment to mean a protocol prescribed for the purposes of examining, assessing, diagnosing, and treating a minor injury. The NDP has reserved the right to make regulations with respect to examinations, assessments, and treatment protocols, specifically granting itself the ability to make regulations as follows:

(a) respecting the examination and assessment of injuries, the determination of whether or not an injury is a minor injury and the onus of proof for such a determination;

(b) respecting the examination, assessment, diagnosis, and treatment of minor injuries, including without limitation:

(i) establishing or adopting procedures, guidelines, criteria, requirements, or standards to be followed or met, as applicable, by claimants, insurers, and prescribed health care practitioners; and

(ii) establishing time limits for the purposes of obtaining an examination, assessment, diagnosis, or treatment;

(c) prescribing circumstances in which a prescribed diagnostic and treatment protocol applies and providing when a protocol no longer applies;

(d) governing the roles, in relation to a protocol, of claimants, insurers, and prescribed health care practitioners in imposing limits on those roles;

(e) respecting treatment plans for minor injury and respecting the number and type of treatments for minor injury, including, without limitation, prescribing different numbers or types of treatment for different circumstances;

(f) respecting referrals, including referrals to a person in a prescribed class of persons, for the purposes of obtaining an opinion about (i) the examination, assessment, or diagnosis of an injury, (ii) the treatment plan for minor injury, or (iii) the condition of a claimant;

(g) for the purposes of paragraph (f)(i) prescribing a class of persons, (ii) requiring the establishment of a register of persons in the class, (iii) prescribing requirements and qualifications for persons in the class, (iv) requiring treatment plans for persons in the class, and (v) requiring reports from persons in the class and established in the form of and information to be included in those reports.

The NDP and ICBC appear to plan to take complete control over the examination, assessment, diagnosis, and treatment of minor injuries. The legislation allows the government to establish guidelines, procedures, and standards that must be followed or met by claimants, including the number and type of treatments for a minor injury and prescribing different numbers of treatments for different circumstances. It leaves little or no room for individual circumstances.

To ensure that the government and ICBC have complete control over the process, the legislation sets out that if a claimant does not follow a treatment protocol that the government and ICBC has established, then any injury is deemed to be minor even if it is not resolved within 12 months, unless the claimant can prove that he or she would not have recovered even if they had followed the established treatment protocol. The Attorney General has stated that this provision is attempting to remedy situations where people refuse to receive treatment and as a result do not recover. Nevertheless, the legislation is quite draconian in its controlling effect.

The NDP has not yet provided any written procedures, guidelines, criteria, requirements, etc. with respect to the examination, assessment, diagnosis, and treatment of minor injuries. As such, TLABC cannot provide any useful commentary with respect to what may ultimately be proposed.

We know that traditionally the treatment of individuals who have been injured is typically overseen by the injured person's treating family doctor. A family physician is clearly in the best position to understand the individual needs of his or her patient. The amendments to this legislation gives power to the NDP and ICBC to dictate to an injured person's physician what treatment protocols are allowed and what treatment protocols are to be followed.

The Attorney General has stated that the goal is to provide better benefits to help people recover from injuries. It appears, however, that ICBC will now have complete control over the types of treatment, and the frequency and number of treatments that will be permitted for minor injuries. This control will doubtlessly allow ICBC to limit the number of treatments that injured people receive to save money, even in circumstances where a claimant's medical doctor feels that further treatment or different treatment is warranted.

3.8 Unknown Issues

The government has left several issues and related approaches unknown. Some of these include:

(i) Who has the onus of proof for establishing a minor injury – the claimant or ICBC/defendant? The government has specifically retained the power to determine who has the onus but has not answered that question.
(ii) What will be the mechanism for assessing the determination of a minor injury? What expert evidence can be provided and who will ultimately pay for it?
(iii) What will be the treatment protocol for minor injuries? What will be the procedures, guidelines, criteria, etc. with respect to the examination and assessment of injuries and the diagnosis and treatment of minor injuries?
(iv) How will it be determined whether an injured person is entitled to the full minor injury cap limit of $5,500 or some portion of it?
(v) How will the government deal with claims where one of the injuries is minor, but another injury is not?
(vi) When will the determination be made whether or not a person will be deemed to fall within the minor injury cap, and can such a determination be revisited?

As previously mentioned, the answers to these questions are expected to be coming in further regulations, without transparency or consultation.

3.9 Conclusions on Minor Injury

The amendment to the *Insurance (Vehicle) Amendment Act* 2018 as it relates to minor injuries is already far broader in scope than any other equivalent minor injury definition in Canada. TLABC urges the government to:

1. Re-assess and restrict its current definition and take a more measured and balanced approach to the "minor injury" definition, as has been done in other provincial jurisdictions.
2. Balance the goal of cost savings and better benefits with the tremendous impact that injuries such as chronic pain syndrome can have on individuals and families in this province.

3. Refine the legislation to provide for greater access to justice rather than create a system that is so daunting to unrepresented claimants that they may simply give up and accept that they have a minor injury.
4. Commit to transparency and consultation (beyond simply ICBC) in any contemplated regulatory changes or additions. As it stands, the current amendment provides only a loose framework with the government retaining the power and ability to modify and change definitions as it wishes.
5. Provide strict guidelines to ICBC for how adjusters are to deal with claimants in determining whether a person falls within the minor injury definition. Make these guidelines public.

4.0 OTHER AMENDMENTS

4.1 Section 28.1: Health Care Reports for Accidents on or after April 1, 2019

This section will require a long list of yet to be prescribed health care practitioners to report to ICBC about the health of their patients who are injured in car accidents. An obvious expansion from the current law will be that treating psychologists, who are currently not included under section 28, will have to provide reports to ICBC.

ICBC will be able to create the form of the required report and ask any questions it wishes from health care providers – a significant further infringement on the privacy of victims. Under the wording of the new section 28.1, it is conceivable that ICBC may request reports from such disparate professions as dietitians, midwives, denturists, massage therapists, occupational therapists, psychologists, traditional Chinese medicine practitioners, and acupuncturists – none of whom were required to provide reports under the previous section of the *Insurance (Vehicle) Act*.

This is a further erosion of the privacy of victims and an intrusion into a person's life, even in cases where a lawsuit has not been started.

4.2 Section 45.1 Regulations respecting Health Care Fees

The Attorney General has stated that *"the regulations will set a fair market rate for the cost of treatments the customer needs to get better after a crash."* In committee debates, the Attorney General further stated "*Government, ICBC and the medical associations are currently in*

negotiations on exactly that issue. It's the same way, for example, that doctors of BC reach agreements with the government of British Columbia around fee-for-service under our public health care system. Those negotiations are taking place right now."

ICBC thus appears to be currently *"negotiating"* or "*consulting"* with health care professionals, including physiotherapists, chiropractors, psychologists, and medical doctors regarding the fees they can charge for providing care to injured victims.

As stated above, this is reminiscent of the deal that the British Columbia Chiropractic Association and ICBC struck a few years ago. This raises the risk that ICBC will use its considerable financial influence to impose similar programs on physiotherapists, psychologists, occupational therapists, and other health care practitioners, giving an incentive to the care providers to defer to ICBC's interests over those of their patients.

The issue of confidentiality is also involved as ICBC may try to give itself the ability to obtain records directly from care providers as a condition for their funding agreements. This could include the care provider's records for the accident, and also any pre-existing information or records that the provider has for the purpose of giving treatment. This is another example of ICBC giving itself broad and sweeping powers to gather private information about victims, which they are currently not entitled to without an Order of the Court.

4.3 Section 82.2 – Liability limited for Health Care Costs

In reviewing section 82.2, it is important to keep in mind the context of section 45.1, which gives ICBC the right to set amounts payable for health care services. Section 82.2 "caps" the amount payable to the victim by the amount that is set in the regulation.

Imagine a situation where ICBC decides that a physiotherapy session is to be billed at $60. The physiotherapist, however, charges the victim $80 – and that physiotherapist is the only one in the victim's community. ICBC will pay its portion, but after 20 sessions the victim will be out of pocket by $400. Under the present tort law, the victim is entitled to full recovery from the bad driver, so ICBC would have to reimburse the $400 at the time of settlement or judgment. Under this section, the bad driver (and ICBC) will be shifting that loss to the victim, who will remain out of pocket only for having sought the necessary treatment for injuries.

Imagine another situation where a high-earning contractor tears his rotator cuff after being rear-ended by a distracted driver on a cell phone. Being unable to work, he is losing thousands

of dollars every month. The waiting time for a shoulder arthroscopy in the public health care system is 18 months or more. He cannot support his family. To get back to work, he chooses to have the surgery done privately to mitigate his damages. Under the present tort law, he is entitled to seek full recovery from the bad driver. Under the new law, he will be out of pocket for the cost of the surgery.

The Attorney General has promised that this section "*assures British Columbians that they'll be able to get the health care costs covered, as they need them, going forward*" (Hansard, Third Session, 41st Parliament (2018): Committee of the Whole, May 10, 2018, 11:25 a.m.). To the contrary, this section creates huge gaps in recovery and a significant inflexibility for victims to seek the treatments they require – treatments that may in fact reduce the loss. It imposes a "one size fits all" approach to health care funding, according to ICBC's discretion that shifts the costs away from the bad driver (and ICBC) to the victim.

The section is further intended to have an impact on future care awards and, according to the Attorney General, it "*restrict[s] expenses associated with time, administration and expert opinions on future cost of care awards, where the judge gets out the crystal ball and tries to determine how much health care is going to cost in the future and tries to figure out how much a person's going to need and how much it's going to cost and provides an award based on that projection*." Again, this section restricts the right of the victim to full recovery for health care costs, including those in the future – something that the government has said it intends to preserve. Not only does this not take care of the victim, but it leaves the victim out of pocket for needed treatments, as a result of the fault of the bad driver.

On behalf of victims, we hope that the outcome of the regulatory process will be the approval of funding for health care costs that accurately reflect the real costs of those services, including the cost of expedited and private services when warranted. If that is not the case, we believe this section runs contrary to the Attorney General's stated goal of promoting a *"care-based insurance system".*

4.4 Section 83 and 84 – Liability reduced and Subrogation

The removal of subrogation – the right of a third party insurer to recover from the bad driver for benefits paid by the third party insurer to the victim – was supported by TLABC (Trial Lawyers Association of BC, Safe Roads to a Strong ICBC, October 24, 2017), and it is a sensible way to reduce the financial burden on ICBC. Nevertheless, the amendments to sections 83 and

84 are unclear, and they may result in the proliferation of post-trial litigation processes and do significant further harm to victims.

The Attorney General described the purpose of ss. 83 and 84 amendments as follows:

> **Hon. D. Eby:** We don't believe that ICBC should be reimbursing other insurance companies for benefits contracts that they've entered into with other individuals. It's up to those companies to determine what the insurance contracts are that they enter into with various individuals — what their costs are. ICBC has no knowledge of those things.
>
> What I can say is that we don't believe that basic insurance from British Columbians should be compensating major insurance companies for private contracts they've entered into with individuals.
> (Hansard, Third Session, 41st Parliament (2018): Committee of the Whole, May 10, 2018, 11:40 a.m.)

These amendments make the deduction of insurance benefits a post-trial issue. In simple terms, this means that after the conclusion of a Court case, the Judge must consider what is paid or payable by third parties, and reduce the amount that ICBC has to pay the victim accordingly. Currently this is already done with ICBC no-fault benefits (see *Norris v. Burgess*, 2016 BCSC 1452) but the addition of all types of disability and extended health insurance payments as deductions will greatly increase the burden upon the Court to make these determinations. It will also unfairly upset the status quo with respect to ICBC formal offers, a matter that is beyond the scope of this submission, but will also result in significant further litigation.

Of even more potential significance to victims is what third party insurers will likely do in response to these changes. Although the new sections 83(7) and 84(1.1) take away the third party insurer's right of subrogation, they do not prohibit the insurer from attempting to collect the payment from the victim. Certain insurers and employers have "Trust Plans" that are akin to insurance that seek to apply draconian repayment provisions and repayment agreements to victims' compensation even when no specific "match" exists between the insurance payments made and the compensation required. For example, see *Brugger v. The Trustees of the IWA – Forest Industry Long Term Disability Plan*, 2015 BCSC 2363 (appeal allowed in part on other grounds, 2016 BCCA 445), where the victim's recovery under the underinsured motorist protection ("UMP") was eroded by a repayment to a Trust Plan even though those benefits were not recoverable under the UMP.

The protection of victims from such rapacious steps by third party insurers and Trust Plans must be of paramount concern to the Legislature – one that is not satisfactorily addressed by present legislation. Clearly, third party insurers and similar entities who cannot recover from ICBC also cannot seek to recover from the remaining awards of the victims by agreement, contract, or otherwise. A failure to legislate a clear and express prohibition (in regulation or in the *Insurance Act*) creates the potential to re-victimize injured persons, which is contrary to the Attorney General's stated intent for these amendments.

4.5 Sections 105 and 106 – Power to make Regulations and Transitional Regulations

Sections 105 and 106 give the Lieutenant Governor in Council the broad power to make regulations including *"resolving any errors, inconsistencies or ambiguities arising in this act"* (s. 106(1)(d)) and providing that the regulation prevails over the Act, which has been passed by the elected Legislature after some debate. The regulatory process is now taking place, behind closed doors, with the participation of ICBC but without advocacy groups on behalf of victims. This process should be in the open, with draft regulations being public, and debate being conducted in public with the participation of both sides. The manner by which this process has been structured is to have ICBC and the government working together against victims, the most vulnerable people in our society, who are excluded from any meaningful participation.

In particular, section 105(4) permits the government to delegate the power to make regulation to ICBC. This is akin to a player in a game being able to make up rules as they go. The absurdity of this section can be seen by phrasing it in the converse: what would ICBC say if TLABC was allowed to make up the rules?

5.0 RESPONSE TO THE CIVIL JUSTICE REFORM WORKING GROUP RECOMMENDATIONS

By way of background, the Working Group was constituted in late 2017. At that time, there was considerable discussion about shortfalls at ICBC. The Corporation had expressed significant concerns regarding what it alleged to be increases in claim costs for "minor injuries." This was emphasized in ICBC's July 2017 report from Ernst & Young, as well as in its public pronouncements.

TLABC agreed to engage in the Working Group on the understanding that it was constituted to look at creative ways of promoting efficiency and savings in the civil justice system. TLABC was

eager to identify changes to the *Supreme Court Civil Rules* that could promote efficiency without jeopardizing the rights of British Columbians.

In the midst of the Working Group's discussions, the provincial government announced proposed changes that were expected to impact dramatically civil litigation in British Columbia. These changes included capping pain and suffering awards in minor injury claims at $5,500 and removing such claims from the Court system. BC's Civil Resolution Tribunal, a body that to date had primarily handled strata disputes of $5,000 or less, would be empowered to adjudicate the majority of ICBC injury claims.

According to the Ernst & Young Report, there were 35,000 minor injury claims closed in 2016 compared to 15,000 major or catastrophic injury claims. If the proposed legislative changes place those minor claims within the jurisdiction of the CRT, more than two thirds of injury claims will be removed from our civil justice system. As a consequence, any changes to the *Supreme Court Civil Rules* will only impact victims of major and catastrophic injuries. *Compromising the rights of major injury and catastrophic injury victims was not part of the Working Group's mandate*.

The government has projected that its proposed legislative changes "will reduce ICBC's claims costs by more than $1 billion every year, helping make it sustainable for decades to come." To make further changes that will serve to curtail the rights of major and catastrophic injury victims while potentially increasing costs would be supremely unjust. With tectonic changes to BC's civil justice system already underway, it would be imprudent to make further changes until stakeholders are able to assess the impacts.

Below we discuss the issues raised in the Working Group's Draft Recommendations, including those items that TLABC supports.

5.1 Expert Evidence

The Working Group's recommendation is to limit disbursements to a percentage of the settlement value. In the draft recommendations, it was said that this proposal "seemed to attract some of the strongest support."

The recent legislative changes have focused on minor injury claims and what ICBC has alleged to be spiralling claim costs for those claims. We understand that a major concern of ICBC's was disproportionately high disbursements on such claims.

The current test for recoverability of disbursements is whether the expense incurred was "necessary and reasonable." When counsel are deciding whether to incur an expense to assist in proving a claim for their catastrophically injured client, it is expected counsel will turn their mind to whether the expense is both necessary and reasonable. Once it is determined that an expense is necessary and reasonable to help prove their catastrophically injured client's claim, counsel should not also be forced to consider whether it will exceed an arbitrarily set cap.

The proposed rule would mean that in many cases, the cost of an expense that is necessary and reasonable to prove the claim of a catastrophically injured victim would come out of the pocket of that victim if it exceeds the arbitrary cap.

We also anticipate that this could lead to additional court applications and expense. Any cap on recoverability would have to be subject to an order of the Court, allowing counsel an opportunity to justify expenses that exceed the arbitrary cap. Particularly in major loss and catastrophic cases, there are often complexities that require counsel to take additional steps to develop the evidence. We expect that a rule such as the one envisioned would result in many applications and a new body of jurisprudence on when the disbursement cap can be exceeded. Any potential savings may well be negated.

The "necessary and reasonable" test, particularly in the context of major and catastrophic injury claims, is working. We strongly oppose any further changes at this time that will come at the expense of vulnerable British Columbians.

5.2 Pre-Trial Examination of Witnesses

No recommendation is made.

5.3 Encouraging Early Settlement

With respect to formal offers to settle, these are designed to encourage settlement. They should also encourage early settlement. Anecdotal evidence suggests costs are increasing because claims are not settling until very shortly before a scheduled trial date. This also increases the demands on the Courthouse and its staff as they try to manage trial scheduling and judicial resources.

There is currently no defined rule for the timing of formal offers. Case law typically finds that formal offers should be delivered at least a week before trial to be effective but there are many

exceptions to this rule. Amending the Rule to provide that a formal offer must be delivered 28 days prior to trial in order to be effective may encourage parties to get their best offers on the table earlier and thereby encourage earlier settlement. We do not believe this would discourage late settlement, only encourage earlier negotiations that could result in potential savings without harming litigants. Further discussion is necessary, and certainly consultation with judiciary, the Rules Committee and the Canadian Bar Association (BC Branch) should be pursued before any changes to the current rules on point are revised.

We do not support any of the other discussion points under this heading.

5.4 Part 7 Filing Fees

This would have to be done through changes to the *Regulation*. TLABC supports these changes and expect it will lower costs for all parties.

5.5 Limitation on Examinations for Discovery

No recommendation is made.

5.6 Controlling the Court Process

No recommendation is made.

5.7 Civil Tariff Consultation Paper

We agree with the Working Group's recommendation that any steps to amend the changes should be deferred until after the impact of legislative changes can be assessed.

5.8 Conclusion

The Working Group was placed in an exceptionally difficult position. It was attempting to recommend changes to a system that was substantially changed in the middle of their deliberations. By the end, it was attempting to recommend changes to a system that will look much different in April 2019.

Like the Working Group, TLABC cannot predict how the legislative changes will affect motor vehicle litigation in BC Supreme Court. It would be reckless to make significant changes without first allowing stakeholders an opportunity to understand the impact of those changes.

Given that minor injury victims will be removed from the system, policymakers should be reluctant to curb the rights of major and catastrophic injury victims.

6.0 FINAL THOUGHTS

In providing this paper to the Attorney General, TLABC is continuing – on a good faith basis – to provide the government with an expert alternative view as to how ICBC can sustainably serve British Columbians now and into the future, while still protecting tort rights.

With respect to its approach to addressing the so-called financial crisis at ICBC, the NDP government had promised transparency but the manner in which the regulations are being drafted, requiring stakeholders like doctors and therapists to execute non-disclosure agreements, is opaque and undemocratic. TLABC hopes that in the interest of transparency and fairness, government will listen to stakeholders and especially victims' rights groups and strike a more reasonable balance between ICBC revenues and the civil liberties of British Columbians.