

# TRIAL LAWYERS ASSOCIATION *of* BC

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23 April 2019

VIA EMAIL

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

Dear Minister Eby:

## **Introduction**

Since April 1, 2019, the CRT Injury Cap Scheme has taken effect and the main interface between the CRT and the public is its website. In its press releases, both your office and Ms. Salter's have repeatedly described the CRT as an "independent tribunal", an assertion with which we respectfully have concerns given that tribunal members are appointed by government for modest fixed terms, and who render decisions that directly impact ICBC (a government owned Crown Corporation that answers directly to you as the Attorney General). The CRT is structured to operate primarily as an online tribunal, thus it is crucial that the information available be fair and unbiased. Since April 1<sup>st</sup>, TLABC and its members have identified content on the CRT's website which:

1. provides misleading or inaccurate representations on the law with regard to the Injury Cap Scheme, the law of damages, and even the basic laws of evidence; and,
2. creates a bias in favour of ICBC and insurance companies by suggesting "faster resolution" is available through negotiating directly with an insurer.

This letters sets out our concerns which we would ask you, as the Attorney General, take immediate steps to rectify.

## CRT Website Wrong or Misleading on the Law

We have noticed a pattern of misstating the new legislative scheme on the CRT's website, the very tribunal that is supposed to interpret and apply the law. For example:



### What you should know about minor injury

Minor injuries are defined in legislation. A "minor injury" is a physical or mental injury that doesn't result in a serious impairment or permanent disfigurement.

This could include:

- Bruising, cuts or scrapes
- A sprain or strain
- Concussion that doesn't result in an incapacity
- Certain whiplash-associated disorders
- Pain syndrome, including pain that isn't resolved within 3 months
- Psychological or psychiatric condition that doesn't result in incapacity
- TMJ disorder

It's not a minor injury if you're assessed with a "serious impairment". A serious impairment is when you're unable to work, go to school, or care for yourself for more than 12 months after the accident.

The actual definition of *serious impairment* in the legislation does **not** require one to be "unable to work" or "unable to go to school", and the above-noted explanation does not make that clear. *Serious impairment* is defined as physical or mental impairments that result in one's "substantial inability" to perform "essential tasks" of employment or training or education.

Consider a brain injured teen-age girl who, while "able" to go to high school, struggles in class, her marks suffer and she only completes assignments with the assistance of tutors or aids. She is not allowed to participate in PE for fear of another head injury, and she can't play on sports teams or sing in the choir because of noise sensitivity. She may be "able to go to school" but she would not in our view substantially performing the essential tasks of her schooling. A claimant who relies solely on the website information would conclude that her injury is "minor" because she is still going to school. As the tribunal interpreting and applying the law, at minimum the CRT must ensure that it describes the law accurately.

The CRT has also published on its website a work sheet for the public to calculate the amounts for one's damages claim wherein the CRT misstates the law with respect future diminished income earning capacity by describing this loss as where "you are unable to work in the future because of the accident". This is a profound misdirection on the law of British Columbia for future loss of income earning capacity. Not only need a British Columbian **not** prove they are "unable to work in the future" to recover compensation under this damage heading, the jurisprudence clearly recognizes that ongoing physical and psychological injuries are compensable so long as they are real and substantial. Factors used by the courts in assessing this loss include:

1. Has the plaintiff been rendered less capable overall from earning income from all types of employment?
2. Is the plaintiff less marketable or attractive as an employee to potential employers;
3. Has the plaintiff lost the ability to take advantage of all job opportunities which otherwise might have been open but for the injuries;
4. Is the plaintiff less valuable to himself as a person capable earning income in a competitive labour market.

Instead of the court-mandated analysis for loss of income earning capacity, the CRT Worksheet invites a layperson to prognosticate and to calculate their future losses, which would be a supreme feat of clairvoyance heretofore unknown to British Columbians. Inappropriate or impossible questions asked of claimants include: "how much time do you expect to miss from work? What's your salary or hourly rate? Do you think you miss any opportunities to earn income? Do you think that there is an impact on your ability to work." *How can a car crash victim summon the medical evidence and foresight required to answer these questions in any meaningful or reliable way?*

Moreover, to ensure fairness, the CRT should suggest that if the claimant believes they have sustained a substantial loss of earning capacity, their injuries may be enough to remove them from the minor injury definition and they should consider challenging the designation if they have not already done so.

In the interest of brevity, we have only one further example of an institutional misapprehension on the basic laws of evidence. With regard to "helpful documents for calculating a damages claim", the CRT website says this:

## Helpful documents for calculating a damages claim

Generally, claims for damages require evidence such as:

- Medical records and/or reports
- Decision letters from your insurer about fault and accident benefits

Decision letters from an insurer, adverse in interest to a claimant, are inadmissible hearsay, not proof of their truth, and inherently self-serving. Why is the CRT relying on a hearsay decision letter from ICBC about a liability apportionment as either: a) proof of its truth; or, b) even as anything on which the CRT could rely in assessing fault? Similarly, if an ICBC letter says “we won’t pay benefits”, will the CRT accept this letter as proof of its truth, and proof that the Plaintiff is not entitled to benefits, without weighing or measuring the actual medical evidence for reasonable and medically justified treatments?

The errors of law that we have identified all favour the insurers’ interests. Anyone attempting a comprehensive legal summary may make errors of law. However, in the absence of bias, errors that favour insurers should be roughly equal to errors that favour claimants. It is troubling that all examples we found favour the insurers’ interests. This makes it very hard to believe that the CRT is neutral.

### **CRT Bias Favoring Financial Interests of ICBC & Insurers, not Victims**

The government has empowered the CRT with almost total jurisdiction over motor vehicle accident related claims in British Columbia, with no meaningful judicial oversight to ensure that the CRT is making fair or accurate determinations. Per the excerpts from the CRT website below, and in the interest of transparency and independence, how can the very tribunal assigned to render judgment on insured car crash cases actively encourage a litigant to “deal directly” with insurers who are adverse in interest to victims and oppose the litigants? *One can only imagine the public outrage if such solicitations favoring one litigant were posted on the websites of the BC Provincial or Supreme Courts!* There is a gross imbalance of bargaining power and sophistication between individual car crash victims and insurance companies like ICBC and the CRT. Imploring the public to negotiate “directly” with insurers only exacerbates this imbalance and gives the public the impression that the CRT is aligned with ICBC and other insurers and that the advice given will be reliable.

Here are just a few instances from the CRT website that are of concern:

### *How can I resolve my claim myself?*

Before you make a claim, consider trying one of the Solution Explorer's self-resolution options. You can use these free tools to try and resolve your problem as quickly as possible.

The insurer might be able to settle your claim if you give them more information about your injury. This may include medical evidence.



## **What you should know about medical expert evidence**

You might get a faster resolution if you negotiate a settlement with the insurer. If the insurer made a settlement offer, consider whether you've given them enough medical information. Medical information generally includes a healthcare provider's treatment notes.

You may even want to make them a counter-offer.

### **What would you like to do next?**

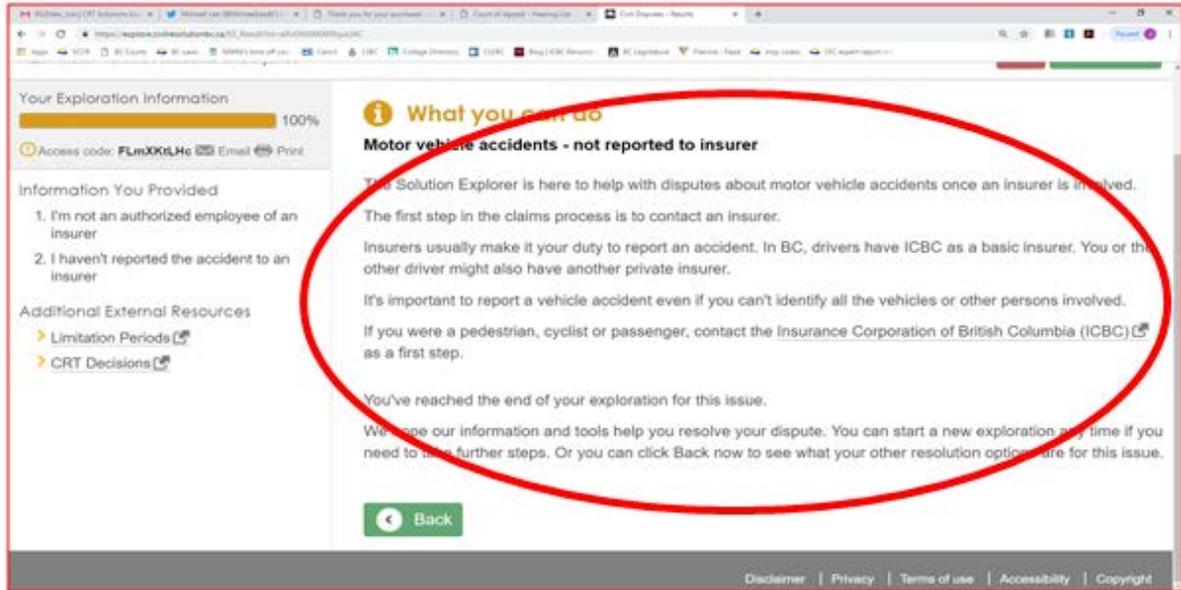
- Ask the insurer to make an offer to settle

*You may get a faster resolution if you negotiate a settlement with the insurer. We'll give you a letter template.*

- Ask the Civil Resolution Tribunal (CRT) to decide fault for the accident and award damages

*You might get a faster resolution if you negotiate a settlement with the insurer. If you make a claim with the CRT, your fault for the accident may be raised again during the dispute. You may also need to provide special medical expert evidence. We'll give you more information about this.*

In fact, from the very outset, the CRT is inviting victims of negligence to contact ICBC directly, on their own, regardless of whether there are liability issues that put their legal interests directly at odds with ICBC's.



### **Concluding Comments**

Despite the disclaimers to the contrary, it is troubling that the CRT is effectively giving legal advice to claimants that is not only misleading, but also wrong because the CRT website is offering advice on subjects over which it will ultimately make rulings. If the CRT is truly independent of ICBC and government, it must purge its website and all communications reflecting ICBC/insurance defense bias and avoid giving any legal advice, let alone misleading legal advice, to vulnerable British Columbians being forced to have virtually all their motor vehicle accident related claims before the CRT.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ron Nairne".

Ron Nairne  
President

Cc Shannon Salter, CRT Chair  
Andrea Ritchie, CRT MVI Section Vice Chair