



No. S193931  
Vancouver Registry

In the Supreme Court of British Columbia

Between

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA and JANE DOE

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH  
COLUMBIA and ATTORNEY GENERAL OF BRITISH COLUMBIA

Defendants

## **RESPONSE TO CIVIL CLAIM**

**Filed by:** Her Majesty the Queen in right of the Province of British Columbia  
and the Attorney General of British Columbia (the “defendants”)

### **Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS**

#### **Division 1 – Defendants’ Response to Facts**

1. The facts alleged in paragraphs 6-9, 11, 15-16, 18-19, 34-35, 39 and 42 of Part 1 of the notice of civil claim are admitted.
2. The facts alleged in paragraphs 1, 10, 12-14, 17, 20-33, 36-38, 40-41, and 43-47 of Part 1 of the notice of civil claim are denied.
3. The facts alleged in paragraphs 2-5 of Part 1 of the notice of civil claim are outside the knowledge of the defendants.

#### **Division 2 – Defendants’ Version of Facts**

4. In response to paragraphs 6-7 of the Notice of Civil Claim (the “Claim”), the defendant Her Majesty the Queen in right of the Province of British Columbia is not a proper party. As an action seeking a bare declaration of statutory invalidity,

the Claim is properly brought against the defendant the Attorney General of British Columbia alone.

**(a) Rate Affordability Action Plan & Minor Injury Amendments**

5. The Insurance Corporation of British Columbia ("ICBC") is a provincial Crown corporation mandated by the *Insurance Corporation Act*, R.S.B.C. 1996, c. 228, the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, and the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, to provide universal compulsory automobile insurance to drivers in British Columbia ("basic insurance"). The British Columbia Utilities Commission regulates basic insurance rates.

6. Over a period of several years prior to April 1, 2019, a trend of substantial increases in ICBC claims costs became established, jeopardizing ICBC's long-term sustainability and its ability to keep basic insurance rates affordable for British Columbians.

7. From in or around July 2017 government considered potential initiatives aimed at maintaining the affordability of basic insurance for British Columbians. Pursuant to Order in Council 84/2018, these initiatives are termed, collectively, the Rate Affordability Action Plan ("RAAP").

8. On May 17, 2018, the *Insurance (Vehicle) Amendment Act, 2018* (Bill 20) and the *Civil Resolution Tribunal Amendment Act, 2018* (Bill 22) received royal assent, enacting amendments to the *Insurance (Vehicle) Act* and the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 ("CRT Act").

9. On November 9, 2018, Orders in Council 594 and 595/2018 were approved, enacting:

- a. the *Accident Claims Regulation*, B.C. Reg. 233/2018 under the CRT Act;
- b. the *Minor Injury Regulation*, B.C. Reg. 234/2018 under the *Insurance (Vehicle) Act*; and
- c. amendments to the *Insurance (Vehicle) Regulation*, B.C. Reg 447/83 under the *Insurance (Vehicle) Act*.

10. On November 27, 2018, the *Attorney General Statutes Amendment Act, 2018* (Bill 57) received royal assent, enacting further amendments to the CRT Act.

11. On March 29, 2019, Order in Council 136/2019 was approved, enacting amendments to the *Accident Claims Regulation*, the *Minor Injury Regulation*, and the *Insurance (Vehicle) Regulation*.

12. The enactments described in paragraphs 8-11 above are collectively

referred to in this response to civil claim as the "Minor Injury Amendments".

13. As of April 1, 2019, all the Minor Injury Amendments had come into effect.

14. In response to Part 1, paragraphs 10 and 12-13 of the Claim, the Minor Injury Amendments were enacted to effect comprehensive reforms to British Columbia's public automobile insurance scheme to ensure, *inter alia*, the sustainability and affordability of basic insurance rates for British Columbians.

15. The Minor Injury Amendments bring into force central components of the RAAP, namely, changes to ICBC's basic insurance product and rate structure, including without limitation:

- a. a limit on non-pecuniary damages resulting from minor injuries, currently set at \$5,500;
- b. assignment of jurisdiction to the Civil Resolution Tribunal ("CRT") to determine entitlement to accident benefits; whether an injury is a minor injury; and, in respect of a claim for \$50,000 or less, liability and damages;
- c. enhanced first party (no fault) accident benefits;
- d. timely payment of wage loss and medical expenses; and
- e. diagnostic and treatment protocols to encourage the early treatment and recovery of claimants with minor injuries.

16. The purpose of the Minor Injury Amendments is to preserve a sustainable and affordable automobile insurance system for British Columbians that strikes a balance between increased care for accident victims and more affordable and fair insurance rates, including without limitation by:

- a. providing increased scope, availability, and quantum of accident benefits for accident victims; and
- b. providing a forum for the determination of entitlement to accident benefits, characterization of injuries, and liability and damages in accident claims of \$50,000 or less that is fair, accessible, timely, proportional, and economical.

**(b) Cap on Non-Pecuniary Damages for Minor Injuries**

17. In response to Part 1, paragraph 14 of the Claim, pursuant to s. 103 of the *Insurance (Vehicle) Act* and s. 6(1) of the *Minor Injury Regulation*, the amount recoverable as damages for non-pecuniary loss arising from one or more minor injuries suffered in a single accident is limited for accidents occurring on or after April 1, 2019 (the "Cap"). The Cap is currently set at \$5,500 and is adjusted on

an annual basis. The Cap does not apply to pecuniary damages.

18. In response to Part 1, paragraphs 18-20 and 22-23 of the Claim, as defined in s. 101 of the *Insurance (Vehicle) Act* and ss. 1-3 of the *Minor Injury Regulation*, the term "minor injury" captures a class of less severe injuries in relation to which:

- a. early intervention and recovery-focused care benefit the injured patient; and
- b. claims costs have increased at an extraordinarily high rate in British Columbia over the past decade, in disproportion to the rates of increase for other injuries.

19. The definition of "minor injury" references a set of injury types in conjunction with exclusions based on measurable criteria that are fair and sensitive to the severity of the injury experienced by the claimant. The definition of "minor injury" excludes, without limitation, the following:

- a. any specified injury type that results in a "serious impairment" of the claimant, meaning a physical or mental impairment that is not resolved within 12 months after the date of the accident; meets an incapacity threshold in relation to the claimant's activities of daily living or the essential tasks of his or her work or school setting; and is ongoing and not expected to improve substantially;
- b. any concussion, or psychological or psychiatric condition that exceeds a 16-week incapacity threshold in relation to the claimant's activities of daily living or the essential tasks of his or her work or school setting;
- c. any specified injury type that results in a "permanent serious disfigurement" of the claimant;
- d. any sprain or strain in which all the fibres of the injured ligament or muscle are torn; and
- e. any whiplash associated disorder that exhibits demonstrable and clinically relevant neurological symptoms, or a fracture to or dislocation of the spine.

20. In response to Part 1, paragraph 21 of the Claim, pursuant to s. 4 of the *Minor Injury Regulation*, the burden of proof that the injury is not a minor injury is on the party asserting that it is not a minor injury. This will often, though not invariably, be the accident claimant.

21. In response to Part 1, paragraphs 24-29 of the Claim, the defendants deny that the Cap adversely affects persons subject to it, and deny that it disproportionately adversely affects women, the elderly, or persons with pre-

existing conditions, as alleged or at all. The defendants further deny that the minor injury definition includes conditions that have been subject to prejudice and stereotyping, historically or at all.

**(c) CRT Determination of Accident Benefits Entitlement & Minor Injury Claims**

22. In response to Part 1, paragraphs 30-33 of the Claim, the CRT's mandate is to resolve claims within its jurisdiction in a manner that is "accessible, speedy, economical, informal and flexible" and to encourage the resolution of disputes by agreement between the parties (*CRT Act*, s. 2).

23. In fulfilling its dispute resolution mandate, the CRT applies practices and procedures as necessary to enable a proper consideration of the issues in dispute, while also focusing on timely, collaborative case management, and dispute resolution.

24. In response to Part 1, paragraphs 34-38 of the Claim, the CRT's jurisdiction over accident claims is set out in Part 10, Division 7 of the *CRT Act* and in the *Accident Claims Regulation*. Pursuant to s. 133(1) of the *CRT Act*, the CRT has jurisdiction in respect of:

- a. determination of entitlement to benefits paid or payable under the *Insurance (Vehicle) Act*;
- b. determination of whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act*; and
- c. an accident claim concerning liability and damages, if the amount, including loss or damage to property related to the accident but excluding interest and any expenses referred to under s. 49, is less than or equal to \$50,000.

25. Pursuant to s. 11(1) of the *CRT Act*, the CRT may refuse to resolve a claim or dispute over which it otherwise has jurisdiction where, *inter alia*, the CRT considers that the claim or dispute would be more appropriate for another legally binding process, or if the issues in the claim or dispute are too complex for the CRT's dispute resolution process.

26. In further response to Part 1, paragraph 31 of the Claim, the defendants deny that the CRT is controlled by government, as alleged or at all, and says that:

- a. the chair, vice-chairs, and members of the CRT (collectively "CRT Members") are appointed by the Lieutenant Governor in Council following a merit-based process;
- b. the merit-based process for appointment of CRT vice-chairs and

members is conducted by the chair, culminating in recommendations that the chair makes to the Lieutenant Governor in Council through the Crown Agencies and Board Resourcing Office; and

- c. CRT Members who adjudicate vehicle accident claims are required to, *inter alia*, have qualifications that include, at a minimum, a law degree and no less than three years' current experience and expertise relating to this area of the CRT's decision-making jurisdiction.

27. The statute mandates the merit-based appointment process and requirement for vice-chair and member appointments to be made only upon consultation with, or upon the recommendation of, the chair (*CRT Act*, ss. 67-68).

28. In addition, and in further response to Part 1, paragraph 31 of the Claim, CRT Members' remuneration is set in accordance with general directives of the Treasury Board (*CRT Act*, s. 75), and, in particular, the Remuneration Guidelines for Appointees to Administrative Tribunals and Regulatory Boards (the "Guidelines"). The chair of the CRT is responsible for administering the remuneration and benefits of the vice chair and members in accordance with the Guidelines.

29. In further response to Part 1, paragraph 38 of the Claim, the *CRT Act* and *Accident Claims Regulation* do not limit a claimant's ability to prove accident claims before the CRT. The CRT is required to provide procedural fairness in adjudicating claims before it and in doing so, can receive and accept relevant evidence in a variety of forms, ask questions of the parties and witnesses, and inform itself as appropriate.

**(d) No Limitation on Access to Superior Court**

30. In response to Part 1, paragraphs 39-47 of the Claim, the jurisdiction conferred on the CRT in respect of accident claims does not create a barrier to access to justice in the superior court, as alleged or at all. In particular and without limitation:

- a. the superior court retains exclusive jurisdiction to hear and determine vehicle accident claims for damages in excess of \$50,000;
- b. vehicle accident claims for damages of \$50,000 or less may be brought in the superior court:
  - i. by consent of all parties (*CRT Act*, ss. 16.4(2)(b), 133(1)(c); *Accident Claims Regulation*, s. 7);
  - ii. where the superior court determines that it is not in the interests of justice and fairness for the CRT to determine the claim (*CRT Act*, ss. 16.2, 16.4);

iii. where the CRT refuses to determine a vehicle accident claim because it would be more appropriate for another legally binding process or the issues are too complex for the CRT's dispute resolution process (*CRT Act*, s. 11); and

c. CRT decisions are subject to the supervisory jurisdiction of the superior court by way of judicial review.

31. Pursuant to s. 16.3 of the *CRT Act*, factors to be considered by a court in determining whether it is in the interests of justice and fairness for the CRT to adjudicate the claim include, without limitation, where:

a. an issue raised by the claim is of such importance that it would benefit from being adjudicated by the court to establish a precedent;

b. an issue raised by the claim or dispute is sufficiently complex to benefit from being adjudicated by the court;

c. the parties agree that the claim or dispute should not be adjudicated by the CRT; and

d. the claim should be heard together with a claim or dispute currently before the court.

32. In addition, and in further response to Part 1, paragraphs 41 and 45 of the Claim, where a superior court proceeding is stayed pending a determination of entitlement to accident benefits or a minor injury determination under ss. 133(1)(a) or (b) of the *CRT Act*, the superior court retains jurisdiction over the ultimate resolution of the claim before it and:

a. a determination by the CRT as to a claimant's entitlement to accident benefits under the *Insurance (Vehicle) Act* applies in calculating the award of damages in the superior court proceedings (*Insurance (Vehicle) Act*, s. 101); and

b. if the CRT determines that an injury is a "minor injury", then the Cap applies in the superior court proceeding with respect to the award of non-pecuniary damages (*Insurance (Vehicle) Act*, s. 103; *Minor Injury Regulation*), s. 6(1)).

33. In further response to Part 1, paragraph 40 of the Claim, the superior court is only required to dismiss an action before it in circumstances where all of the matters in the proceeding before it are within the jurisdiction of the CRT.

34. In further response to Part 1, paragraphs 40 and 43 of the Claim, on judicial review, a CRT accident claim decision is not invariably subject to the patent unreasonableness standard of review. The standard of review will vary depending on the ground of review advanced.

35. CRT orders are enforceable by way of filing with the Supreme Court of British Columbia or the Provincial Court of British Columbia, as applicable and in accordance with ss. 57 and 58 of the *CRT Act*.

### **Division 3 – Additional Facts**

#### **(a) *Enhanced Accident Benefits under the Insurance (Vehicle) Regulation***

36. In addition to the Minor Injury Amendments, the RAAP also included enhanced accident benefits for all accident victims, regardless of fault. The enhancements increased payments for treatments and provided coverage for additional types of treatments in order to assist accident claimants in their recovery.

37. As amended effective June 1, 2018 by Order in Council 259/2018 and effective April 1, 2019 by Order in Council 595/2018, the *Insurance (Vehicle) Regulation* provides the following enhanced accident benefits:

- a. increased disability, homemaker, funeral and death benefits (*Insurance (Vehicle) Regulation*, Schedule 3, ss. 2, 4);
- b. doubling of the upper limit for medical and rehabilitation costs from \$150,000 to \$300,000, retroactive to accidents occurring on or after January 1, 2018 (*Insurance (Vehicle) Regulation*, Schedule 3, s. 3);
- c. increased quantum and expanded scope of coverage for medical and rehabilitation benefits to more accurately reflect claimants' out of pocket costs, including compensation for health care services, occupational therapy, and other prescribed services (*Insurance (Vehicle) Regulation*, s. 88); and
- d. timely payment of wage loss and medical expense accident benefits at four-week intervals or within 60 days of the expense being incurred (*Insurance (Vehicle) Regulation*, s. 101)

(collectively, the "Enhanced Accident Benefits").

38. The Enhanced Accident Benefits are funded, *inter alia*, by anticipated savings from the implementation of the Minor Injury Amendments, including, without limitation, the Cap.

#### **(b) *Rate Design Improvements***

39. In addition to the changes effected by way of the Minor Injury Amendments, the RAAP also included implementation of changes to ICBC's



rating structure to improve fairness in rate design and hold drivers fully accountable for their driving behaviours. These changes included without limitation:

- a. assigning basic insurance premiums to drivers based on claims experience and years licensed;
- b. adding convictions to optional insurance pricing and increasing penalty premiums on basic insurance;
- c. increasing discounts available to low-risk drivers; and
- d. rebalancing basic automobile insurance pricing to reflect current risk of accidents associated with vehicle use and location

(collectively, the “Rate Design Improvements”).

40. The Rate Design Improvements as a component of RAAP were approved by the British Columbia Utilities Commission on or about September 28, 2018, and the majority of the Rate Design Improvements come into effect on or about September 1, 2019.

## **Part 2: RESPONSE TO RELIEF SOUGHT**

41. The defendants consent to the granting of the relief sought in none of the paragraphs of Part 2 of the Claim.

42. The defendants oppose the granting of the relief sought in all the paragraphs of Part 2 of the Claim.

43. The defendants take no position on the granting of the relief sought in none of the paragraphs of Part 2 of the Claim.

## **Part 3: LEGAL BASIS**

### ***Standing***

44. The plaintiffs lack standing to bring this action.

45. The plaintiffs have not identified any individual directly impacted by the Minor Injury Amendments. Jane Doe is not an identifiable person and does not have legal capacity to sue. An action commenced by a plaintiff that does not exist is a nullity.

46. The Trial Lawyers Association of British Columbia (“TLABC”) does not have public interest standing, in particular and without limitation, because in the absence of an individual plaintiff this action lacks the necessary factual underpinning to make it an effective means of challenging the Minor Injury

Amendments under s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), s. 96 of the *Constitution Act, 1867*, or at all.

***Section 15 of the Charter***

47. The Cap does not infringe s. 15 of the *Charter*, as alleged or at all.

48. Any distinction that the Cap may draw among accident claimants is based on severity of injury, not mental or physical disability. Severity of injury is not an enumerated or analogous ground under s. 15 of the *Charter* and thus a distinction drawn on this basis cannot violate the equality rights guaranteed by s. 15.

49. In the alternative, if the Cap does draw a distinction based on an enumerated or analogous ground under s. 15, which is denied, the distinction does not create a disadvantage by perpetuating prejudice or stereotyping against minor injury claimants. In particular and without limitation:

- a. the definition of "minor injury" is sensitive to the variable and individualized manner in which the specified injury types may affect claimants;
- b. persons who have incurred a "minor injury" within the meaning of s. 101 of the *Insurance (Vehicle) Act* have not been subject to prejudice or stereotyping, either as a group or in respect of particular conditions;
- c. the interest affected by the Cap (quantum of non-pecuniary damages) is limited and non-fundamental; and
- d. the Minor Injury Amendments, including the Cap, create a scheme that, as a whole, responds to the needs, capacities, and circumstances of claimants who have suffered minor injuries.

50. In the further alternative, if the Minor Injury Amendments constitute an infringement of s. 15 of the *Charter*, which is denied, they are a reasonable limit prescribed by law that are demonstrably justified in a free and democratic society. The Minor Injury Amendments were enacted in furtherance of a pressing and substantial objective and any impairment of equality rights that they cause, which is denied, is proportionate to that objective.

***Section 96 of the Constitution Act, 1867***

51. The defendants deny that the Minor Injury Amendments infringe on the core jurisdiction of the superior courts, as alleged or at all.

52. There is no constitutional or fundamental right to have vehicle accident claims determined by a superior court. Historically and at Confederation, the superior courts exercised concurrent jurisdiction with inferior courts and tribunals

for personal injury claims.

53. The Minor Injury Amendments do not impair the core jurisdiction of the superior courts, nor do they otherwise cause undue hardship thereby impeding access to justice for accident claimants to whom they apply.

**Costs**

54. TLABC is not entitled to an award of special costs on the basis that it is a public interest litigant.

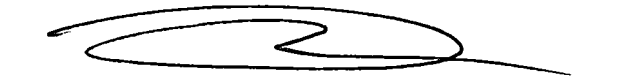
Defendants' address for service:

Ministry of Attorney General  
Legal Services Branch  
1301 – 865 Hornby Street  
Vancouver, BC V6Z 2G3  
Attn: Jacqueline D. Hughes/Heather Lewis

Fax number address for service (if any): 604.660.6797

E-mail address for service (if any): n/a.

Date: May 7<sup>th</sup>, 2019

  
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Counsel for the defendants,  
Jacqueline D. Hughes

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.