NAVIGATING THE "MINOR INJURY" LEGISLATION AND REGULATIONS: A PRIMER FOR MEDICAL AND LEGAL PROFESSIONALS

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INTRODUCTION

On May 17, 2018 amendments to British Columbia's *Insurance (Vehicle) Act* and *Civil Resolution Tribunal Act* received Royal Assent and became law.

- Bill 20 concerns amendments to the *Insurance (Vehicle) Act*.[1]
- Bill 22 concerns amendments to the *Civil Resolution Tribunal Act*.[2]

Unless otherwise specified in this paper, the changes are to take effect April 1, 2019 and apply to motor vehicle collisions occurring on or after that date. However, some changes as they affect injury claims apply earlier.

As not all amendments are identified, the aim of this paper is two-fold: to highlight the most notable changes affecting injury claims and claimants and to identify some considerations for lawyers in this province as brought about by Bills 20 and 22 and the associated regulations.

An earlier version of this paper was drafted prior to the accompanying regulations being released, which occurred on November 9, 2018 through Order in Council (*the "New Insurance Regulations"*).[3] The most notable additions come from the new *Minor Injury Regulation* to accompany the Bill 20 changes. On the same date regulations pertaining to the Civil Resolution Tribunal were also released (the "*CRT Regulations*").[4] Any interpretive errors are my own.

BILL 20: THE *Insurance (Vehicle) Amendment Act, 2018*[5]

Part 7 – Minor Injuries

The most significant amendment to the legislation is the addition of Part 7 (of the *Insurance (Vehicle) Amendment Act, 2018* – not "part 7 benefits") to the *Insurance (Vehicle) Act*, which is titled '*Minor Injuries*'.

The new law caps non-pecuniary losses for all "minor injuries" at $5,500.[6]

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[1] Being the *Insurance (Vehicle) Amendment Act, 2018*.
[2] Being the *Civil Resolution Tribunal Amendment Act, 2018*.
[3] Order in Council No. 595/2018, Approved and Ordered November 9, 2018, as amending the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (per Appendix 1 immediately and Appendix 2 effective April 1, 2019) and making the *Minor Injury Regulation*, effective April 1, 2019, through Appendix 3 (collectively, the "*New Insurance Regulations*").
[4] Order in Council No. 594/2018, Approved and Ordered November 9, 2018, as adding to or bringing into force provisions as contained *Civil Resolution Tribunal Act* and the *Civil Resolution Tribunal Amendment Act*, 2018 and adding the *Accident Claims Regulation* (collectively, the "*CRT Regulations*").
[5] An earlier version of this paper regarding Bill 20 flows in part from an earlier TLABC paper titled "*Submission Regarding Insurance (Vehicle) Amendment Act & Regulations and BCSC Rules of Court for Non-Minor MVAs*" dated June 29, 2018, which was the result of contributions from TLABC members John Rice, Bill Dick, Liz Sadowski and Anthony Leoni. I was fortunate to have their comments and insights on the Bill 20 and notably the s. 83 amendments where adopted herein.
[6] *New Insurance Regulations - Minor Injury Regulation*, Appendix 3, effective April 1, 2019, Part 2 – Rules in Relation to Minor Injuries, s. 6.

This cap applies to collisions and resulting injuries occurring on or after April 1, 2019.

As noted, the cap applies to non-pecuniary losses. Ongoing claims for other heads of damage such as past pecuniary losses, 'in-trust' claims, impaired earning and housekeeping capacity, or cost of future care remain. However, the new amendments affect some of the other heads of damages as well and will be discussed in more detail below. Aside from non-pecuniary damages, the changes affect a claimant's ability to claim, as before, special damages and cost of future care as well as pecuniary losses covered by third parties – i.e. extended health benefits providers.

Part 7 - Minor Injuries adds sections 101 – 104 to the *Insurance (Vehicle) Act*.

Minor Injury?

Before the *New Insurance Regulations* were recently introduced on November 9, 2018, a "minor injury" was broadly defined as capturing both physical and mental injuries/symptomologies, whether or not chronic, that are considered:

i) an abrasion, a contusion, a laceration, a sprain or a strain,
ii) pain syndromes,
iii) a psychological or psychiatric condition, or
iv) something that is "*a prescribed injury or an injury in a prescribed type or class of injury*"

that do not result in a "serious impairment" or a "permanent serious disfigurement".[7]

"**Permanent serious disfigurement**" "means a permanent disfigurement that, having regard to any prescribed criteria, significantly detracts from the claimant's physical appearance".

A "**serious impairment**" "means a physical or mental impairment that is not resolved within 12 months, or another prescribed period, if any, after the date of an accident, and meets prescribed criteria".

A "minor injury" includes a symptom or condition associated with the injury "*whether or not the symptom or condition resolves within 12 months, or another prescribed period, if any, after the date of an accident.*"[8]

Attorney General David Eby had earlier said as follows about the forthcoming minor injury scheme and future regulations, in a press release dated May 2, 2018[9]:

> 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.

[7] Section 101(1) of the *Insurance (Vehicle) Act*, as amended.
[8] Section 101(4) of the *Insurance (Vehicle) Act*, as amended.
[9] Ministry of Attorney General, Statement: Further transparency on regulations planned for ICBC reforms, May 2, 2018, https://archive.news.gov.bc.ca/releases/news_releases_2017-2021/2018AG0028-000810.pdf

> 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.

New "Minor Injury" Regulations Since Bill 20 – The *Minor Injury Regulation*[10]

So, what did the *New Insurance Regulations* bring in on November 9, 2018?

What does the "*prescribed injury*" or "*prescribed type or class of injury*" catch-all at the end of the earlier definition now encompass?

Concussions, being brain injuries, are now included in the minor injury scheme as are TMJ injuries as are partial tears under the sprain/strain umbrella of 'minor injury'. Psychological/psychiatric conditions were no more defined save for saying they must result in incapacity to not be minor.

Per the *New Insurance Regulations*, "minor injury" also now includes the following "prescribed injuries":

a. a concussion that does not result in an incapacity;
b. a TMJ disorder;
c. a WAD injury.[11]

The latest list of "minor injuries" is now, at this time:

a. an abrasion, a contusion, a laceration, a sprain or a strain,
b. pain syndromes,
c. a psychological or psychiatric condition that does not result in an incapacity;
d. a concussion that does not result in an incapacity;
e. a TMJ disorder; or
f. a WAD injury.

[10] *New Insurance Regulations* as adding the *Minor Injury Regulation*, Appendix 3, effective April 1, 2019.
[11] *New Insurance Regulations* as adding the *Minor Injury Regulation*, section 2.

that do not result in a **"serious impairment"** or a **"permanent serious disfigurement"**.

The above injuries/definitions require further breakdown. From the above, the following injuries carry the following definitions:[12]

"TMJ disorder" is an "injury that involves or surrounds the temporomandibular joint".

"Sprain" "means an injury to one or more ligaments unless all the fibres of at least one of the injured ligaments are torn".

"Strain" "means an injury to one or more muscles unless all the fibres of at least one of the injured muscles are torn".

- For sprains and strains then, partial tears to the muscles or ligaments, for example to the hip or shoulder girdle, would be captured by the "minor injury" definition.

"Pain syndrome" "means a syndrome, disorder or other clinical condition associated with pain, including pain that is not resolved within 3 months."

"WAD injury" means a whiplash injury other than one involving one or both of the following:

i. "decreased or absent deep tendon reflexes, deep tendon weakness or sensory deficits, or other demonstrable and clinically relevant neurological symptoms;

ii. a fracture to or dislocation of the spine."

"Concussion" is not defined.

To be excluded from the minor injury scheme, the injury, depending on which one, must result in "incapacity" or "serious impairment" or both.

Incapacity or Serious Impairment?

Through the *New Insurance Regulations*, "incapacity" has been added and "serious impairment" has been further defined as has its "prescribed criteria" from Bill 20.

"Incapacity"[13] means a physical or mental incapacity that is not resolved within 16 weeks after it arises and is the "primary cause of a substantial inability of the claimant to perform":

i. essential tasks of the claimant's employment or training or education, enrolled in or accepted into at the time of the accident, despite reasonable efforts to accommodate

[12] Ibid., Part 1 – Definitions.
[13] Ibid., Part 1 – Definitions.

and the claimant's reasonable efforts to use those accommodations to continue in the employment/training/education; or

ii. activities of daily living.

If the incapacity exceeds 16 weeks, the concussion or psychiatric injury is not minor.

Like for "incapacity", **"serious impairment"**[14] (currently an injury which does not resolve within 12 months) has been further defined by the *New Insurance Regulations* to capture only those physical or mental impairments that result in one's "substantial inability" to perform:

i. essential tasks of the claimant's employment or training or education, enrolled in or accepted into at the time of the accident, despite reasonable efforts to accommodate and the claimant's reasonable efforts to use those accommodations to continue in the employment/training/education; or

ii. activities of daily living.

Further, to be a "serious impairment", the impairment must be:

i. primarily caused by the accident, and

ii. ongoing since the accident.[15]

Finally, to satisfy the definition, the resulting impairment must not be "expected to improve substantially."[16]

For **"activities of daily living"**, this has been expressly defined in the *New Insurance Regulations* to capture the following activities one must be substantially impaired in or incapacitated from performing:

a. preparing own meals;
b. managing personal finances;
c. shopping for personal needs;
d. using public or personal transportation;
e. performing housework to maintain a place of residence in acceptable sanitary condition;
f. performing personal hygiene and self-care;
g. managing personal medication.[17]

[14] Ibid., s. 3(a)(i) – (ii).
[15] Ibid., s. 3(b).
[16] Ibid., s. 3(c).
[17] Ibid., Part 1 – Definitions.

Even if the injury satisfies the above requirements, ICBC can still say the injury is minor if you cannot prove you followed the prescribed treatment protocol. This is a deeming provision added by Bill 20.[18]

Burden of Proof and Onus[19]

Part 2 of the *Minor Injury Regulation* added by the *New Insurance Regulations* states the burden of proof that the injury is not a 'minor injury' is on the party making that allegation.

Interpretively it appears the injury is *presumed* to be minor to start, unless the burden is overcome that it is not.

Multiple Injuries[20]

If a person suffers more than one injury as a result of a collision, each injury must be diagnosed separately as to whether or not it is a minor injury.

If one or more injuries is minor and one or more is not, the total non-pecuniary damages for all of the injuries is the sum of: 1) up to the maximum minor injury cap of $5,500 for all minor injuries combined plus 2) the amount of damages for the non-minor injury or injuries.

Registered Care Advisors[21]

"Registered Care Advisor" ("RCA") is a new term and is added as being a "prescribed class of persons" referenced in the Bill 20 new *Minor Injuries* section.

Under the *Minor Injuries* scheme a doctor, in good standing with the *College of Physicians and Surgeons*, can join a register for referrals/assessments of injured claimants.

In order to be a registered care advisor one must, among other things, provide the *College* with a declaration that the physician is "knowledgeable in **evidence-informed practice** with specific competencies in the assessment and treatment of:

i. musculoskeletal injuries,
ii. acute and chronic pain, or
iii. mental health issues and other psychosocial issues."[22]

Beyond submitting this declaration, there is no further information required to support that designation or claim as to competencies. This declaration must be repeated annually.

[18] See s. 101(2) of the *Insurance (Vehicle) Act*, as amended and discussed below.
[19] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 4.
[20] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 5.
[21] Ibid., Part 2 – Rules in Relation to Minor Injuries, ss. 7-12.
[22] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 8(d).

"Evidence-informed practice" has been defined in the *Minor Injury Regulation* as meaning "the current best practice for making decisions about the care of a patient, integrating individual clinical expertise with the best available clinical evidence from systematic research".[23]

The "Ministry", which is the Minister responsible for administering the *Insurance (Vehicle) Act*, creates and manages this RCA registry.[24] The ministry must publish the register on a public website maintained by or on behalf of ICBC.[25]

A physician whose patient may have suffered a minor injury in an accident must, no later than 90 days after the accident, consider referring the patient to a RCA if the doctor

i. is unable to make a clear diagnosis;
ii. the patient is not recovering as expected; or
iii. there are factors complicating recovery.[26]

If the referral is made and a report is sent to the original physician and the factors leading to the referral remain, the original doctor may, "within the first 9 months following the accident, refer the patient to the same or to a different registered care advisor."[27]

Timeline for Referred RCA to Assess and Report Back

Per the *New Insurance Regulations*, once referred a patient, the following timelines apply to the RCA:

i. assess the patient within 15 days; and

ii. within 10 days of the assessment, provide a written report to the referring physician addressing diagnosis and treatment.[28]

In terms of restrictions, the RCA cannot be the referring physician or administer the recommended treatment.[29]

Fees for a RCA Assessment and Report

What then will a doctor be paid to fulsomely and competently assess and opine on one's concussion or shoulder tear, or psychological disturbance, for example?

As provided for in the *New Insurance Regulations*, a RCA doctor who signs on to assess injury claimants will receive $380 for the assessment and report and $120 for any follow-up assessment.[30]

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[23] Ibid., Part 1 – Definitions.
[24] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 9.
[25] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 9(4).
[26] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 10(1).
[27] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 10(2).
[28] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 11.
[29] Ibid., Part 2 – Rules in Relation to Minor Injuries, s. 12.
[30] *New Insurance Regulations*, Schedule 3.1, Table 2.

When it comes to one's 'minor injury' determination from a medical perspective, this scheme begs the question: is $380 or $120 for a report written within 10 days of the assessment going to yield fulsome, complete, accurate and specialized medical opinion?

Diagnostic and Treatment Protocols[31]

This schedule added by the *New Insurance Regulations* begins by stating a health care practitioner must use "evidence-informed practice" when:

i. diagnosing, and

ii. providing treatment or making a referral of an injury falling under the protocol.[32]

Again, "evidence-informed practice" has been defined in the *Minor Injury Regulation* as meaning "the current best practice for making decisions about the care of a patient, integrating individual clinical expertise with the best available clinical evidence from systematic research".

Under this section the health care practitioner must establish a diagnosis for the injuries above as captured by the minor injury definition.

When diagnosing a sprain, strain or WAD injury, a health care practitioner "must determine the severity of the injury."[33] So, it appears the health care practitioner is required to state, from their point of view, the severity of an injury which is predicated on an obvious subjective component of pain interpretation, tolerance, etc. on the part of the patient.

For **"pain syndromes"** and **"psychological or psychiatric conditions"** a health care practitioner must establish a diagnosis for the condition by using the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association.[34] This sections applies to any "health care practitioner" seeing the patient and does not expressly say this diagnosis is to be made by a qualified health care practitioner in the relevant field of psychology or psychiatry.

When treating a patient with an injury caught by the "minor injury" injury listing, a health care practitioner "must educate the patient with respect to, at a minimum, the following matters:[35]

i. if applicable, the desirability of an early return
    a. to the activities the patient could perform before the injury, and
    b. to the patient's employment, occupation or profession or the patient's training or education in a program or course;
ii. an estimate of the likely length of time the symptoms will last;
iii. the usual course of recovery;

[31] *New Insurance Regulations - Minor Injury Regulation*, Diagnostic and Treatment Protocols.
[32] Ibid., s. 2
[33] Ibid., s. 3(2).
[34] Ibid., s. 3.
[35] Ibid., s. 5(1).

iv. the likely factors that are responsible for the symptoms; and
v. appropriate self-management and pain management strategies.

And, when treating a pain syndrome or psychological or psychiatric condition, the health care practitioner must identify any comorbid conditions.[36]

The new addition is silent on what that treatment is. Just that whatever the patient is advised of, it should be complied with properly or risk being deemed a minor injury.

Fees for making the Diagnosis, Opining on Severity and Providing Proper Education to Patient

The following are the fees for the following treaters to assess and provide a report, opining on diagnoses, severity and providing education to the patient: [37]

Health Care Service	Fee Limit for Assessment and Report
Acupuncture	$105
Chiropractic	$199
Counselling	$210
Kinesiology	$135
Massage therapy	$107
Physiotherapy	$250
Psychology	$340
Physicians	$120 (standard) $325 (extended) $210 (re-assessment)

Like for RCAs, are these fees realistically going to yield fulsome, complete, accurate and specialized medical opinion?

Moving forward

If not caught by the above statutory definition and scope of "minor injury", it follows then the injury is not classified as a minor injury. The matter would proceed in the normal course - likely

[36] Ibid., s. 5(2).
[37] *New Insurance Regulations*, Schedule 3.1, Tables 1 and 2 combined, in part.

in the Provincial or Supreme Courts for adjudication should the injury claim not resolve beforehand.

In any event, it will be interesting to assess moving forward how the above statutory definitions, scope and regulations regarding a "minor injury" classification/determination are to be aligned with, or reflective of, the comments from our courts. Specifically, those comments regarding ongoing pain and their effects on people long-term. For example, our Courts to date finding, as fact, as follows:

> *… In other words, throughout each and every day of her life, Ms. Morlan would have to cope with some level of discomfort. In my view, it was open to the trial judge to find—essentially as a matter of common sense—that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make*. - *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.
>
> *There is a real and substantial possibility that, as he ages, Mr. O'Brien's tolerance for chronic pain and discomfort will decline. As Madam Justice Griffin observed in Davidge at para. 166, "As a matter of ordinary human experience and common sense, a person's ability to tolerate chronic pain diminishes with age*." - *O'Brien v. Cernovec*, 2016 BCSC 1881 at para. 140.
>
> *Medical science and technology have advanced since the Price decision. Medical science has come to accept that some people can suffer an increased and prolonged sensitivity to pain from what to others appears to be a minor injury. - Deol v. Sheikh*, 2016 BCSC 2404 at para. 112.

An issue then remains as to the interplay between pain and suffering being capped at $5,500 for a condition that, in time, common sense dictates will have a detrimental effect on a person's ability to work or one's ability to tolerate diminishes.

The above examples concern pain only, and not the medical advancements made with respect to better understanding the long-term impacts from brain injuries or psychological/psychiatric impairments, for example.

Moreover, the minor injury classification scheme brought about by Bill 20 provides that an injury falls into only one of two classes: those that are "minor" and those that are "serious" or "significant" or incapacitating in how they impair/impact someone.

"Deemed" Minor Injury

Bill 20 adds a deeming provision to what will be classified as a "minor injury".[38]

This change provides that an injury which "*results in a serious impairment or a permanent serious disfigurement of the claimant*" or develops into an injury not caught by the minor injury definition will be deemed to be a "minor injury" if that injury "*at the time of the accident or when it first manifested, was an injury within the definition of 'minor injury'*" and the injured claimant

[38] Section 101(2) of the *Insurance (Vehicle) Act*, as amended.

"*without reasonable excuse, fails to seek a diagnosis or comply with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury*".

Put another way, if at the time of your accident or when your injury first came about it could be labeled a minor injury, it will later be deemed a minor injury if you unreasonably fail to seek a diagnosis or comply with a treatment protocol regardless of you having what is a serious impairment, permanent serious disfigurement or an injury not caught by the "minor injury" definition. For example, a pain syndrome or a brain injury resulting in a serious impairment or incapacity will be deemed minor should the claimant be unable to establish he or she appropriately sought a diagnosis or complied with "*treatment in accordance with a diagnostic and treatment protocol prescribed for the injury*".

If the claimant can establish the result would have been the same even had he or she sought a diagnosis and complied with the appropriate treatment, it will not be deemed to be minor.

Something to keep in mind from this is a reverse onus on a mitigation issue. That is, the claimant in proving their injury is a non-minor one, must prove they participated in proper treatment from a prescribed treatment protocol.

The diagnostic and treatment protocols have now been added by the *New Insurance Regulations* and referenced above under the *Minor Injury Regulation* discussion.

Health Care Reports

Section 28 of the *Insurance (Vehicle) Act* previously provided for ICBC's ability to obtain medical reports, commonly being the CL-19 or other reports used in the Part 7 no-fault benefits realm.

The new amendments brought in by Bill 20 apply such that the existing s. 28 now applies to collisions in BC occurring before April 1, 2019 and the newly added s. 28.1 applies to collisions occurring in BC on or after April 1, 2019.

Effectively, the new addition provides a more general but seemingly expanded list of practitioners who will now be required to provide ICBC with reports regarding claimants. The list of whom was required to do so before Bill 20 was more narrowly identified.

Through the new addition, the list of practitioners who are required to provide reports to ICBC is generally referred to as "*health care practitioner*". This may include psychologists, massage therapists, occupational therapists, dieticians, acupuncturists, traditional Chinese medicine practitioners, etc., of whom were not previously required to do so. A resulting issue to consider is the scope of expertise and whether such practitioners can adequately opine on the issues asked of them by ICBC.

The definition of **"health care practitioner"** means any of the following: a medical practitioner, a nurse practitioner, a person who is entitled to practice a health profession under the *Health Professions Act* or "*a person in a prescribed class of persons who provides health care*".[39]

The definition of **"health care"** was similarly added by Bill 20 and is defined as: *anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose*.

The fees for the health care reports as noted earlier are reproduced below:

Health Care Service	Fee Limit for Assessment and Report
Acupuncture	$105
Chiropractic	$199
Counselling	$210
Kinesiology	$135
Massage therapy	$107
Physiotherapy	$250
Psychology	$340
Physicians	$120 (standard) $325 (extended) $210 (re-assessment)

Limited Recovery for Health Care Costs

Section 82.2 has been added to the *Insurance (Vehicle) Act* by Bill 20 which now provides an injured claimant cannot recover an amount paid to a health care practitioner that exceeds the amount set by regulation for any "*health care loss*".

"*Health care loss*" is defined as "*a cost or expense incurred or to be incurred for health care provided by a health care practitioner*".[40] This would affect both special damages and cost of future care claims as a result.

[39] Section 1 "definitions" of the *Insurance (Vehicle) Act*, as amended.
[40] Section 82.2(1) of the *Insurance (Vehicle) Act*, as amended.

This section applies to losses resulting from an accident occurring on or after April 1, 2019. It remains to be seen what the monetary amounts will be set at. For its part, section 45.1 of the *Insurance (Vehicle) Act* is added through Bill 20 to make the regulations to set those amounts.

ICBC can set the amounts for health care services via agreement with the health care practitioner.[41] These regulations must be reviewed every 5 years.[42]

Monetary Cap on Treatment

These rates have now been set through the *New Insurance Regulations*, with the following rates set by ICBC for the following specialities:[43]

Item	Column A Health Care Service	Column B Fee Limit for Assessment Visit and Report	Column C Fee Limit for Standard Treatment	Column D Number of Pre-Authorized Treatments
1	Acupuncture	$105	$88	12
2	Chiropractic	$199	$53	25
3	Counselling	$210	$120	12
4	Kinesiology	$135	$78	12
5	Massage therapy	$107	$80	12
6	Physiotherapy	$250	$79	25
7	Psychology	$340	$195	12

Frequency Cap on Treatment

A further change from the *New Insurance Regulations* is added to affect the amount of treatment one can get under their benefits coverage. That is, any treatment in excess of the Column D amounts in the table above or being provided more than 12 weeks after the collision, is deemed "not a necessary health care service" unless ICBC's medical advisor or the claimant's physician "certifies to [ICBC] in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured."[44]

In application then, section 82.2 affects the amount a person can claim and recover from a tortfeasor as out-of-pocket special damages or expenses to be incurred, i.e. future care claims. If there is a shortfall from what is recoverable versus what was actually paid, the injury claimant suffers the shortfall, not the tortfeasor. This consequence would be more notable into the future if treatments are required on a recurring basis. While this change affects all claimants, its impact

[41] Section 45.1(b) of the *Insurance (Vehicle) Act*, as amended.
[42] Section 45.1(4) of the *Insurance (Vehicle) Act*, as amended.
[43] *New Insurance Regulations*, Schedule 3.1, Table 1.
[44] *New Insurance Regulations*, section 12 (c) adding s. 1.01 to s. 88 of the *Insurance (Vehicle) Regulation*.

may be greater on those individuals in more remote areas with less choice of practitioner or those who need to see a more specialized practitioner who charges more for their services.

Deductions and Subrogated Claims[45]

Section 83 of the *Insurance (Vehicle) Act* was amended by Bill 20. This particular amendment, which applies as of May 17, 2018 "*in relation to a bodily injury or death caused by a vehicle or the use or operation of a vehicle on or after*" this date, provides that additional insurance benefits are now deductible from a tort claim. Previously s. 83 would concern a post-trial issue commonly dealing with the deductibility of ICBC Part 7 no-fault benefits deducted from the tort award.

In essence these amendments to ss. 83 and 84 increase the potential deductions from the tort award, now capturing all private insurance providing benefits, wherever issued, E.I., government benefits, or benefits extended through an employment agreement and any loans and advance payments.[46] The loss covered by the benefits is deductible post-trial and not recoverable on settlement. "Benefits" means amounts "*paid or payable*".[47]

In estimating the amount to be deducted from the award, the new law says the court may not consider the likelihood that the benefits will actually be paid or otherwise provided in the future.[48]

MSP and monies paid pursuant to the *Health Care Costs Recovery Act* and compensation paid under the *Workers Compensation Act* are excluded.[49]

The amendments also eliminate the subrogation rights of extended health benefits providers from claiming any repayment from the at-fault party following a collision.[50] Subrogation is the right of a first party insurer to recover amounts they pay to their insured per their policy of coverage when that payment is necessitated by the conduct of an at-fault third party. While there always exists a common law right of subrogation, the first party policy itself will likely contain a provision dealing with the first-party insurer's right to recover payment.

Third Party Benefits Insurers' Response?

Something to consider from this legislated change is that moving forward extended health benefits insurers may write into their policies that no benefits will be payable should the need to use those benefits arise from a collision where a third party may be liable. The outcome would be an injured person not having health benefits pursuant to an extended benefits plan they have

[45] This section reproduces what was said by John Rice, Bill Dick, Liz Sadowski and Anthony Leoni in their paper titled "*Submission Regarding Insurance (Vehicle) Amendment Act & Regulations and BCSC Rules of Court for Non-Minor MVAs*" dated June 29, 2018. I am grateful to them for their earlier insights.
[46] Section 83(1)(b) of the *Insurance (Vehicle) Act*, as amended and *New Insurance Regulations*, adding s. 67.1 to the *Insurance (Vehicle) Regulation* amended s. 83.
[47] Section 83(1) of the *Insurance (Vehicle) Act*, as amended.
[48] Section 83(5.1) of the *Insurance (Vehicle) Act*, as amended.
[49] Section 83(1)(d) and 83(1.1) of the *Insurance (Vehicle) Act*, as amended.
[50] Section 84(1.1) and s. 83(7) of the *Insurance (Vehicle) Act*, as amended.

paid for – benefits which may provide timelier or more expansive coverage for medical treatment and care needs.

Perhaps more notable, a concern exists that in the event benefits are still extended by the extended benefits provider to an injured claimant, the amendments do not expressly prohibit the extended benefits provider from attempting to recover payment from the injured claimant despite the claimant being unable to claim those expenses from the tortfeasor. This outcome would of course depend on the specific wording of the first-party policy or if the benefits were extended pursuant to some sort of a trust plan. For example, some trust plans are treated as loans that require repayment if *any* money is collected from the tortfeasor, not simply repayment only if *matched* to the compensation recovered from the tortfeasor. In any event, through the *New Insurance Regulations*, "loans and advance payments" "in relation to the loss or expense" are now expressly caught by the s. 83 amendments and deductible from the tort claim.[51]

A couple potential scenarios may emerge if benefits are repayable to the third-party insurer no matter what. One, use the benefits and have to repay even though you cannot recover that particular loss from the tortfeasor (i.e. paying back for something you didn't recover). Two, you don't use the benefits and they are deducted anyway as paid or payable (i.e. effectively paying for something you didn't use). Either way, compared to a person with no private insurance, you could be worse off holding private insurance than none at all. Curiously such practice seems to shift long-standing compensation goals and accountability away from the tortfeasor and onto the injured claimant.

It may also be the case that as these are post-trial deductibility issues there will be a proliferation of post-trial litigation whereby the court is asked to consider what is paid or payable by third parties and asked to reduce the amount payable by the liable party accordingly. This expands the post-trial s. 83 deductibility issues beyond the more common deductibility of part 7 no-fault benefits.

This more expansive deductibility scheme may also impact how formal offers are viewed and acted upon, again raising the potential for more litigation.

Increased Part 7 No-fault Benefits

Through the *New Insurance Regulations*[52] flowing from the Bill 20 changes, no-fault benefits are being increased to include as follows:

- Medical and rehabilitation benefits increased lifetime to $300,000 from $150,000 for collisions occurring on or after January 1, 2018;
- TTD benefits are increased to maximum $740 per week from $300 per week, effective April 1, 2019;

[51] *New Insurance Regulations*, adding s. 67.1 to the *Insurance (Vehicle) Regulation* amending s. 83.
[52] See New Insurance Regulations, ss. 20 – 27 and the *Insurance (Vehicle) Regulation* - Schedule 3.

- Homemaker assistance benefits are increased from $145 per week to $280 per week, effective April 1, 2019;
- Funeral expenses are increased to $7,500 and survivor benefits up to $30,000, effective April 1, 2019.

Of course, increased rehabilitative benefits and coverage is welcomed. Of note, however, is that only a few individuals each year will ever trigger the increased lifetime benefits amount. Attorney General Eby confirmed in the Hansard Debate on this point as follows:[53]

> M. Lee: Just before we leave section 18, I recollect from our last committee session on this particular section that the Attorney General referred to the increase, of course, of accident benefits coverage from $150,000 lifetime to $300,000 lifetime. I'd just like the Attorney General to indicate how many instances there have been where a person's lifetime level of $150,000 has been exceeded.
>
> Hon. D. Eby: There are about 40 every year.

Power to Make Regulations

The reality is things can change at any time by Order in Council making a regulation. An Order in Council is a directive of the Lieutenant Governor on the advice of cabinet as cabinet sees fit to do at any time. This would be different procedurally than a Bill being read three times before receiving royal assent and passing to become new or amended law. As noted, this has now occurred with the first set of regulatory additions coming through Order in Council on November 9, 2018.

The power to make changes through Order in Council is continuous moving forward. Almost all aspects of the new amendments via Bill 20 are capable of change through regulation and further "*prescribed criteria*" including: the definitions applicable to "minor injury"; the timelines involved; what treatment plans/protocols consist of and are approved; how much is recoverable for treatments; who can provide the treatments; onus issues; and the procedure(s) for how one's injuries are to be assessed.[54]

Sections 105 and 106 as added by Bill 20 expressly provide for this power to make regulations under the *Insurance (Vehicle) Act* going forward, including any "transitional regulations".

One notes that the new laws authorize the Lieutenant Governor in Council when making any regulation to *"delegate a matter to or confer a discretion on [ICBC]*".[55]

Section 106 concerns any *transitional regulations* needed to be made to the *Insurance (Vehicle) Act*, which may be retroactive in nature and provides regulations may be made essentially respecting any matter the LGIC finds is not already addressed and those regulations the LGIC considers appropriate to give effect to the *Insurance (Vehicle) Act*.

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[53] Hansard Debate, Third Session, 41st Parliament (2018), May 10, 2018 - morning session.
[54] See section 104(1)(a)-(n) of the *Insurance (Vehicle) Act*, as amended.
[55] Section 105(4) of the *Insurance (Vehicle) Act*, as amended.

Section 106 will remain in force until April 1, 2021 or some earlier date prescribed by the LGIC.

The general regulation making authority in section 105 is not transitional, provides regulation making power regarding the whole of the *Insurance (Vehicle) Act*, and does not expire.

Attorney General Eby stated as follows regarding the "minor injury" definition and regulations, in the May 2, 2018 press release referenced earlier:

> We intend for B.C.'s minor injury definition to be clear and comprehensive. That's why there is more detail on the 'minor injury' definition in B.C.'s legislation than is the case in Alberta, Nova Scotia or New Brunswick, where similar limits on pain and suffering awards for minor injuries are in place by regulation.
>
> However, just as the case is in other jurisdictions, it is essential that there is flexibility to adjust the particulars of the changes over time. This can best be done through regulation and will ensure that the changes achieve the intended balance of fairness, increased care and fiscal responsibility.
>
> 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.

The first round of regulatory additions quietly came on November 9, 2018.There appears to have been no public notice, consultation process or debate of any draft regulations. It appears many other interested stakeholders were not canvassed in advance of the Regulations being released. Ultimately this regulatory making process remains a government one, with delegation during the process being explicitly provided for in the new legislation to ICBC, as needed or as desired.[56]

Limit on Expert Reports

On February 11, 2019, effective immediately, the government introduced a further regulation by Order in Council (OIC) to limit the number of expert reports a party can rely on in proving their injuries in a "vehicle action". The OIC specifically amends the *Supreme Court Civil Rules* and adds Rule 11-8.[57]

This *Expert Cap Regulation* overrides any other applicable Rule in the event of a conflict, save for Rule 15-1.[58] The *Expert Cap Regulation* provides that a party to a vehicle action may tender at trial only expert opinion on the issue of damages for injury or death a maximum of 3 experts, and no more than 1 report from each expert.[59] Parties can consent to a further report from one of the three experts.[60] This limit does not apply to response reports in response to a report that was

[56] Section 105(4) of the *Insurance (Vehicle) Act*, as amended.
[57] Order in Council No. 040/2019, Approved and Ordered February 11, 2019, as amending the Supreme Court Civil Rules, B.C. Reg. 168/2009 [*Expert Cap Regulation*], and Rule 11-8(10).
[58] *Ibid*., Rule 11-8 (2).
[59] *Ibid*. Rule 11-8 (3)
[60] *Ibid*. Rule 11-8 (4)

served on the party within 126 days before trial[61] or to a supplementary report that is required under Rule 11-6(5) or (6).[62]

For Rule 15-1 fast-track claims, the maximum is 1 report with recoverable disbursements set at 1 report.[63]

On application a party can seek leave of the court to provide for further expert opinion from one or more additional experts as a joint expert or as a court-appointed expert[64] or, if not joint or court-appointed, then only a further report with leave from one of the earlier 3 experts used.[65] Nothing prevents a court from appointing its own expert.[66]

Recovery of associated disbursements for expert reports is capped at the necessary or proper expenses associated with up to 3 reports, if the reports are served and from different experts, or for additional reports if served as responding or supplementary, or by court order or by consent.[67]

The limits described above apply immediately unless the reports were served or the expenses incurred before February 11, 2019.[68]

If *not* a "vehicle action", the following exceptions apply if the claim was filed before February 1, 2020: the 3-report limit does not apply if reports are served before February 1, 2020; the recoverable disbursement limit for expert opinion in such a claim does not apply to amounts necessarily or properly incurred before February 1, 2020.[69]

[61] *Ibid*. Rule 11-8 (6)
[62] *Ibid*. Rule 11-8 (7).
[63] *Supra*, s. 5 amending Rule 15-1 by adding sub. (12.1).
[64] *Ibid*. Rule 11-8 (5)(a)(i) and (ii).
[65] *Ibid*. Rule 11-8 (5)(b).
[66] *Ibid*. Rule 11-8 (9).
[67] *Ibid*. Rule 11-8 (8).
[68] *Ibid*. Rule 11-8 (11).
[69] *Ibid*. Rule 11-8, Schedule 2, adding (12).

BILL 22: THE *Civil Resolution Tribunal Amendment Act, 2018*

Bill 22 adds a new area of jurisdiction to the Civil Resolution Tribunal ("CRT") to deal with certain matters under the *Insurance (Vehicle) Act* (benefits and "minor injury" determinations) and damages and liability claims arising from motor vehicle collisions up to $50,000. Bill 22 removes this jurisdiction from our courts.

Before turning to the new jurisdiction of the CRT added by Bill 22 and associated changes through the *CRT Regulations*, some background on the CRT and its process is warranted.

The Civil Resolution Tribunal

The CRT is a tribunal created and governed by the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 (the "*CRT Act*"), that legislation having received Royal Assent on May 31, 2012. The *CRT Act* was amended in 2015 before the CRT began accepting strata disputes in July of 2016. As of June 1, 2017, the CRT started accepting small claims up to $5,000.

The CRT describes itself on its website as "*Canada's first online tribunal*".[70]

Bill 22, the *Civil Resolution Tribunal Amendment Act, 2018*, amends the *CRT Act*. On November 9, 2018 the government through Order in Council release the *CRT Regulations*.[71]

Aside from the above-noted legislation, the CRT also has separate rules which can be found here: Civil Resolution Tribunal – Rules.

Like for the discussion of Bill 20, the following discussion is not exhaustive and for purposes of the CRT, unless otherwise stated, focusses on amendments as they relate to the newly added "accident claims" and caps system to take effect April 1, 2019.

Brief Background to CRT (to date)

Phases

Section 17 (1) of the *CRT Act* currently provides for two phases in the CRT process.

There is 1) the case management phase and 2) the tribunal hearing phase.

In the case management phase resolution by agreement is the goal and is facilitated by a case manager, failing which preparations are made for the tribunal hearing should that be necessary.

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[70] See https://civilresolutionbc.ca/

[71] Order in Council No. 594/2018, Approved and Ordered November 9, 2018, as adding to or bringing into force provisions as contained *Civil Resolution Tribunal Act* and the *Civil Resolution Tribunal Amendment Act*, 2018 and adding the *Accident Claims Regulation*.

In the tribunal hearing phase "the dispute is heard and the tribunal gives a final decision to resolve the dispute if it is not resolved in the case management phase".

From the *CRT Act*, the "proceeding is to be conducted with as little formality and technicality and with as much speed as permitted by the requirements of this Act, the rules and a proper consideration of the issues in the dispute."[72]

In-person hearings, while discretionary, may be reserved for "extraordinary circumstances". The hearing may be conducted in writing, by telephone, videoconferencing or email, or through other electronic means, or a combination of those means. [73]

Not all means of communication necessarily take place at the same time.

The tribunal may impose restrictions on a person's participation in or attendance at the hearing and may exclude a person from the hearing until the tribunal orders otherwise.[74]

A review of CRT decisions to date suggests that in practice the CRT generally prefers the parties to submit evidence and arguments in writing and has rarely decided that in-person hearings were necessary.

Starting the Process

The CRT process is started by an initiating party seeking from the tribunal an initiating notice. Once an initiating notice is issued, the initiating party must serve the notice in accordance with the CRT Rules and the served party is required to respond in accordance with the CRT Rules. [75]

If the served party does not respond, the CRT will advise the initiating party of this and must proceed to adjudicate the dispute.[76]

If the served party does respond, the CRT may do one of the following:[77]

1. determine if the CRT has jurisdiction pursuant to the *CRT Act*;
2. refuse to resolve the claim pursuant to the *CRT Act*; or
3. proceed to the case management phase.

Government as a Party

The government cannot be a party to a CRT proceeding. This was amended by Bill 22 to allow the government to be a party if the proceeding is in relation to a claim over which the CRT has

[72] Section 18 of the *CRT Act*.
[73] Section 39 of the *CRT Act*.
[74] Sections 39(5)(a) and (b) of the *CRT Act*.
[75] Section 6 of the *CRT Act*.
[76] Section 7(3) of the *CRT Act*.
[77] Section 7(4) of the *CRT Act*.

exclusive jurisdiction, an accident claim, or a claim in a class of claims that is prescribed by regulation. [78]

New Jurisdiction for the CRT – "*Division 7 – Accident Claims*"

Starting April 1, 2019, the most notable change through Bill 22 is that it adds "Part 10 – Tribunal Jurisdiction" to the *CRT Act* and Division 7 added therein concerns "Accident Claims".

From the *CRT Regulations* released, the *Accident Claims Regulation* was created.

The CRT now has jurisdiction over accident claims concerning:

(a) benefits paid or payable;

(b) minor injury determinations; and

(c) liability and damages if under the limit of $50,000. [79]

The CRT has "exclusive jurisdiction" for:

(a) benefits paid or payable; and

(b) minor injury determinations.[80]

The CRT is considered to have "specialized expertise" for:

(c) liability and damages if under the limit of $50,000.[81]

$50,000 Limit

It is presumed the claim will fall within the $50,000 monetary limit "*unless a party establishes on the basis of satisfactory evidence that there is a substantial likelihood that the damages will exceed the tribunal limit amount*".[82]

What if it is established the amount of damages will exceed the tribunal's monetary limit amount?

If the case manager during the case management phase or the tribunal during the proceeding phase determines the damages will likely exceed the limit, then subject to the CRT Rules, the case manager may, if requested by all parties, provide to the parties a non-binding evaluation of the likely amount of damages.[83] This amount may not be disclosed to the court or tribunal.

[78] Section 9 of the *CRT Act*, as amended.
[79] Section 133(1)(a) – (c) of the *CRT Act*, as amended.
[80] Section 133(2)(a) of the *CRT Act*, as amended.
[81] Section 133(2)(b) of the *CRT Act*, as amended.
[82] Section 135(1) of the *CRT Act*, as amended.
[83] Section 135(2) of the *CRT Act*, as amended.

A party may also request the claim be continued in the Supreme Court if it's established the limit will be exceeded.[84]

Costs Consequences

If the case instead proceeds to the Supreme Court on liability and damages and the settlement or award is less than the tribunal's monetary limit, then costs and disbursements are limited to an amount that would have been allowed in the tribunal proceeding.[85]

No Jurisdiction

The CRT expressly does not have jurisdiction on the following matters covered by the *Insurance (Vehicle) Act* relating to:[86]

(a) section 18 (2) *[financial responsibility in other provinces]*;

(b) section 42.1 *[offence]*;

(c) section 68 *[relief from forfeiture]*;

(d) section 77 (2), (8) and (9) *[rights of insurer]*;

(e) section 78 *[payment of insurance money into court]*;

(f) section 79 *[defence if more than one contract]*.

The tribunal does not have jurisdiction in relation to claims under the *Family Compensation Act* in respect of a death or claims from which the *Arbitration Act* applies.[87] (The *Arbitration Act* applies to UMP claims.)

Evidence at the Tribunal Hearing

At present, and of course subject to regulations, the CRT is not bound by the rules of evidence.[88]

Evidence may be admitted in electronic form,[89] and in conducting the hearing the CRT may receive or accept any information it considers relevant necessary and appropriate whether or not admissible in a court of law, may ask questions of the parties and witnesses, and may "inform itself in any other way it considers appropriate".[90]

The CRT Rules clearly anticipate that evidence will primarily be admitted electronically. CRT Rule 17 states that parties must only submit original documents and physical evidence when they are directed or ordered to do so.

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[84] *Ibid*.
[85] Section 135(4) of the *CRT Act*, as amended.
[86] Section 134(1) of the *CRT Act*, as amended.
[87] Section 134(2) of the *CRT Act*, as amended.
[88] Section 42 of the *CRT Act*.
[89] Section 42(3) of the *CRT Act*.
[90] Section 42(1)(a) - (c) of the *CRT Act*.

A party may prepare and serve a summons to require a person to provide relevant evidence.[91] The CRT has authority to cancel any summons in accordance with the CRT Rules.[92] The CRT Rules appear to be silent on when they may cancel the summons, other than the general discretion to control its own process. CRT Rule 112 permits the CRT to issue summons to a person to provide expert evidence. The tribunal may require a party to prepare and serve a summons and require a person to provide relevant evidence under oath.[93]

Expert Evidence

Regarding expert evidence, CRT Rules 113-118 apply. The CRT can direct a party to obtain expert evidence, direct parties obtain a joint expert, and the CRT can decide who pays for the expert opinion evidence as a cost of the proceeding.[94]

A party relying on an expert opinion must provide it by a certain time as set by the Tribunal Decision Plan. Service must also include "the expert's invoice and any correspondence with that expert relating to the requested opinion."[95]

A review of the decisions to date suggests the CRT rarely deals with expert evidence.

The *CRT Act* earlier provided that in preparation of the tribunal hearing the case manager may direct the parties to "arrange for the preparation of expert evidence, including by requiring the parties to do this jointly."[96] This section has been repealed by Bill 22 and substituted, now giving the case manager expanded authority in:

- "limiting the number of experts a party may call"; or
- "limiting the giving of expert evidence in respect of one or more issues in a claim to an expert appointed by the tribunal."[97]

A question arises about the realistic use of *viva voce* evidence at the CRT, the use of expert evidence at all, the form of that evidence, and whether the case management and hearing phases will proceed more commonly on a review of records versus opinion evidence in an oral hearing and subject to cross-examination.

Independent Medical Examinations

If requested by a party or on its own motion, the CRT may appoint an expert to conduct an IME and provide a report covering diagnosis, condition at the time of the IME and prognosis.[98]

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[91] Section 33 of the *CRT Act*.
[92] Section 33(4) of the *CRT Act*.
[93] Section 34 of the *CRT Act*.
[94] CRT Rule 115 and 116 (a).
[95] CRT Rule 118.
[96] Section 32(1)(e) of the *CRT Act*.
[97] *Ibid*, as amended.
[98] *CRT Regulations*, *Accident Claims Regulation*, s. 3.

Further Expert Evidence?

Other than an IME report resulting from the above appointment, a party may introduce expert evidence from one other expert.[99]

The CRT may allow a party to introduce evidence "from up to 2 additional experts if the tribunal considers that the introduction of additional evidence is reasonably necessary and proportionate to the accident claim."[100] So, an injury claimant is limited to one expert but can have up to two more if the CRT allows it.

Allowable Expenses for (Expert) Evidence and CRT Proceeding

$2,000 is the maximum allowable limit for "expenses and charges associated with" an IME, excluding reasonable travel and out of pocket expenses associated with the IME.[101] This appears to relate to the IME arranged by the CRT.

$2,000 is the maximum allowable amount for each expert. This appears to relate to any additional expert evidence sought by the party directly.

$5,000 is the maximum total limit for "all recoverable fees, expenses and charges" relating to the CRT proceeding, exclusive of the IME associated fees and expenses.[102] This includes tribunal fees, expert fees (separate from an IME through the CRT), and legal fees.

Unless the CRT orders otherwise, the expenses and charges associated with an IME are payable by the requesting party.[103] The IME fees are shared between the parties if the expert is appointed by the CRT.[104] The amounts payable are recoverable by the successful party.[105]

Bringing or Continuing a Claim in Court

As added by Bill 22, if the CRT has jurisdiction over a claim it cannot be brought or continued in court unless the CRT decides not to issue an initiating notice, refuses to resolve the claim as falling outside its authority, or otherwise refuses to resolve the claim. Or, if the court orders the CRT not resolve the claim as relating to: a matter under the *Human Rights Code*, the claim is a counterclaim to a Notice of Civil Claim filed in the Supreme Court or if "the person is in a class of persons prescribed by regulation."[106]

Despite the CRT having jurisdiction to resolve the claim, a liability and damages determination up to $50,000 (or the limit set) may proceed in Supreme Court if all parties consent.[107] So, parties

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[99] *CRT Regulations*, *Accident Claims Regulation*, s. 4(1).
[100] *CRT Regulations*, *Accident Claims Regulation*, s. 4(2).
[101] *CRT Regulations*, *Accident Claims Regulation*, s. 5(1)(a).
[102] *CRT Regulations*, *Accident Claims Regulation*, s. 5(1)(b)(i) and (ii).
[103] *CRT Regulations*, *Accident Claims Regulation*, s. 6(a)(i).
[104] *CRT Regulations*, *Accident Claims Regulation*, s. 6(a)(ii).
[105] *CRT Regulations*, *Accident Claims Regulation*, s. 6(b).
[106] Section 16.4 of the *CRT Act*, as amended.
[107] Section 16.4(2)(b) of the *CRT Act*, as amended.

can consent out of the CRT process for an accident claim as it concerns quantum and liability for an accident claim. But, the minor injury determination is within the exclusive jurisdiction of the CRT.

Court Must Stay or Dismiss Certain Proceedings

If a claim is brought in court that is within the exclusive jurisdiction of the CRT (i.e. benefits or minor injury determinations), the court must dismiss the proceeding.[108]

If a claim is brought in court that is within the jurisdiction of the CRT and is a claim in respect of which the CRT is considered to have "specialized expertise" (i.e. liability and quantum up to $50,000), the court must dismiss the proceeding unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim.[109]

Court May Order that Tribunal Not Adjudicate Claim

The court may order the CRT not adjudicate a claim if the CRT does not have jurisdiction or it is not in the interests of justice and fairness for the CRT to decide the claim.

However, this does not apply when the CRT has exclusive jurisdiction over the claim (i.e. for benefits and "minor injury" determinations).[110]

Authority to Refuse to Resolve a Claim or Dispute

The CRT may refuse to resolve a claim if it considers the claim would more appropriately be resolved by another legally binding process or (curiously) has been resolved through a legally binding process.[111]

The CRT may also refuse if it decides "the request for resolution does not disclose a reasonable claim or is an abuse of process"[112], the "issues in the claim or the dispute are too complex for the dispute resolution process of the tribunal or otherwise impractical for the tribunal to case manage or resolve"[113], involves a constitutional question or application of the *Human Rights Code*[114] or the CRT is otherwise satisfied the claim is beyond its jurisdiction.[115]

[108] Section 16.1(1)(a) of the *CRT Act*, as amended.
[109] Section 16.1(1)(b) of the *CRT Act*, as amended.
[110] Sections 16.2(1) and (2) of the *CRT Act*, as amended.
[111] Section 11 of the *CRT Act*, as amended.
[112] Section 11(1)(b) of the *CRT Act*, as amended.
[113] Section 11(1)(c) of the *CRT Act*, as amended.
[114] Section 11(1)(d) of the *CRT Act*, as amended.
[115] Section 11(1)(e) of the *CRT Act*, as amended.

Legal Representation in Accident Claims

Other than when a party is a child or is a person with impaired mental capacity, the *CRT Act* previously prohibited a party from being represented the CRT by counsel unless the party had special permission.[116]

This prohibition has been amended by Bill 22 for motor vehicle accident claims. A party is now permitted as of right to have legal representation in accident claims.[117]

Appeals – Judicial Review – Standard of Review

Previously, "*Division 6 – Appeal of Strata Property Final Decision*" of the *CRT Act* governed such appeals. Bill 22 repeals this entire section and replaces it with "*Part 5.1 – Judicial Review of Tribunal Decisions*", likely because of its new jurisdiction.

The previous section of the *CRT Act* which governed appeals of strata property final decisions stated a party must appeal directly to the Supreme Court and may only do so if the other party consents or leave is granted. Appeals were allowed on questions of law. The Court could would grant leave if "it is in the interests of justice and fairness to do so".[118]

Time Limit for Judicial Review

The newly added s. 56.6 replaces s. 56.5 and concerns time limits for the new judicial review process and states that on this point, s. 57 of the *Administrative Tribunals Act* applies.

An application for judicial review of a final CRT decision must be started within 60 days of the decision unless the court orders otherwise.[119]

Standard of Review

Bill 22 adds a new section dealing with "standard of review" for CRT decisions.[120]

This addition again links the CRT proceeding to the *Administrative Tribunals Act* standard of review section. In doing so, the new legislation says the CRT "must be considered an expert tribunal" in relation to judicial review for final decisions in claims that are within

1) the exclusive jurisdiction of the CRT, and

2) for which the CRT is considered to have "specialized expertise".[121]

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[116] Section 20 of the *CRT Act*.
[117] Section 20.1 of the *CRT Act*, as amended.
[118] Section 56.5 of *CRT Act*, repealed by Bill 22.
[119] Section 57 of the *Administrative Tribunals Act*, and sub (2) which states "the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay."
[120] Section 56.7 of the *CRT Act*, as amended.
[121] Sections 56.7 (1)(a) and (b) of the *CRT Act*, as amended.

Recall, the CRT now has jurisdiction over accident claims concerning:

(a) benefits paid or payable;

(b) minor injury determinations; and

(c) liability and damages if under the limit of $50,000. [122]

The CRT has "exclusive jurisdiction" for:

(a) benefits paid or payable; and

(b) minor injury determinations.[123]

The CRT is considered to have "specialized expertise" for:

(c) liability and damages if under the limit of $50,000.[124]

The combined effect of the amendments to CRT jurisdiction and standard of review through Bill 22 is that for CRT decisions regarding

benefits,

minor injury determinations, or

damages up to $50,000 (not liability[125]),

if the decision concerns a finding of fact or law or an exercise of discretion that decision will not be interfered with by a court unless it is found to be **"*patently unreasonable*"**.[126]

Patently Unreasonable?

How has "patently unreasonable" been described in the case law?

In *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52 the Supreme Court of Canada held that under this standard, in order to warrant judicial intervention the decision be considered:

- "clearly irrational";
- "evidently not in accordance with reason"; or
- "so flawed that no amount of curial deference can justify letting it stand".

Later in *Dunsmuir v. New Brunswick*, 2008 SCC 9 the Supreme Court of Canada confirmed "patently unreasonable", being a variant of the "reasonableness" standard, should be collapsed

[122] Section 133(1)(a) – (c) of the *CRT Act*, as amended.
[123] Section 133(2)(a) of the *CRT Act*, as amended.
[124] Section 133(2)(b) of the *CRT Act*, as amended.
[125] Section 56.7(2) of the *CRT Act*, as amended.
[126] The combined effect of ss. 56.7(1)(a) and (b) of the *CRT Act* as added by Bill 22 and s. 58(2) and (3) of the *Administrative Tribunals Act*.

with the other variant being "reasonableness *simpliciter*". Thus only two standards of review at common law exist: correctness and reasonableness.

However, our Court of Appeal in *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 ("*PNG*") subsequently confirmed the legislated standard of "patently unreasonable" remains, post-*Dunsmuir*. Thus, so too does the meaning of that standard as stated above in *Law Society of New Brunswick v. Ryan*, the Court of Appeal in *PNG* holding:

> [44] I do not accept the Employer's submission that there is conflict in the decisions of this Court as to whether *Dunsmuir* changed the meaning of the term "patently unreasonable". In my view, the decisions are entirely consistent with the conclusion that the meaning was not changed. In any event, the most recent decision of this Court on this point is clear. In *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2013 BCCA 497 (CanLII), Madam Justice Saunders said the following:
>
> > [53] … It is clear that whereas the term "reasonableness" describes a range of decision, "patently unreasonable" is at the high end of the deference spectrum and it retains its pre-*Dunsmuir* character.
>
> …
>
> [48] When the *ATA* came into effect, the term "patent unreasonableness" had the meaning as set out above in *Law Society of New Brunswick v. Ryan*. There has been no change to its meaning since the enactment of the *ATA*, and the meaning set out in *Law Society of New Brunswick v. Ryan* continues to apply. It does not, as asserted by the Employer, have the same meaning as the reasonableness standard adopted in *Dunsmuir*.

In *PNG* leave to appeal to the Supreme Court of Canada was dismissed: 2015 CanLII 69424 (SCC). So, "patently unreasonable" remains.

Applying to discretionary decisions, the *Administrative Tribunals Act* expressly provides that a decision is "patently unreasonable" if it:

> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.[127]

If not concerning a finding of fact or law, or an exercise of discretion, or questions about the application of common law rules of natural justice and procedural fairness, the standard on review is "correctness".[128]

[127] Section 58(3) of the *Administrative Tribunals Act*.
[128] Section 58(2)(c) of the *Administrative Tribunals Act*.

When there is no privative clause (e.g. a final decision on liability by the CRT), the following standard of review applies:

- if not concerning a finding of fact, an exercise of discretion, or questions about the application of common law rules of natural justice and procedural fairness, the standard is "correctness".[129]

- a court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise "unreasonable".[130]

- for discretionary decisions, again, the standard is "patently unreasonable".[131]

CONCLUSION

The more notable changes to the *Insurance (Vehicle) Act*, *Insurance (Vehicle) Act Regulation*, the *Civil Resolution Tribunal Act* and the associated regulations have been highlighted.

Much turns on the practical application of these laws moving forward.

For now, as a general starting point, an injury that is sprain, strain, whiplash-related soft tissue based, a brain injury, a pain syndrome, or a psychological/psychiatric illness is classified as a minor injury unless the injury claimant can prove it's incapacitating and/or a serious impairment and in accordance with the definitions. Both standards of impairment mean effectively the same thing. Under these new laws there is no in-between. There is no spectrum of injury or consequential impact on a person. The CRT is the deciding tribunal for minor injury determinations, not the courts - subject to an application for judicial review on a pre-defined and highly deferential standard of review, being patent unreasonableness.

For convenience, the relevant Bills, Acts and regulations have been hyperlinked.

[129] Section 59(1) of the *Administrative Tribunals Act*.
[130] Section 59(2) of the *Administrative Tribunals Act*.
[131] Section 59(3) of the *Administrative Tribunals Act*.