

**TRACKING COURT CHALLENGES TO BC'S NO-FAULT AUTO INSURANCE**

In response to a question during the current ICBC 2023 and 2024 rate request, the public auto insurer provided a summary of court challenges to the hybrid tort and the no-fault Enhanced Care models.<sup>1</sup> The hybrid tort scheme was in place from 1 April 2019 to 30 April 2021, when it was replaced by the no-fault model now in operation.

**1.0 The Shift to a Hybrid Tort Model**

In February, 2018, Attorney General David Eby announced that the government was amending the ICBC's full tort liability model to limit minor injury pain and suffering claims, and to have the Civil Resolution Tribunal handle disputes with a value of up to \$50,000.

**May 7, 2018**

The *Civil Resolution Tribunal Amendment Act, 2018* (Bill 22) (CRTA) was passed by the Legislature providing the Civil Resolution Tribunal (CRT) with jurisdiction over the matters related to the *Insurance (Vehicle) Amendment Act, 2018* (Bill 20). Specifically, the determination of Insurance (Vehicle) Act entitlements; whether an injury is 'minor' and liability and damages up to a \$50,000 threshold.

**May 10, 2018**

The *Insurance (Vehicle) Amendment Act, 2018* (Bill 20) passed placing a cap of \$5,500 on non-pecuniary damages and limited the definition of minor injuries and increased the overall medical care and recovery allowance from \$150,000 to \$300,000 among other improvements to benefits.

**April 1, 2019**

A Notice of Civil Claim was filed seeking declarations that the amendments to both the CRTA and IVA in respect of the minor injury definition and the jurisdiction of the (CRT) were unconstitutional.

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<sup>1</sup> [https://docs.bcuc.com/Documents/Proceedings/2023/DOC\\_70508\\_B-5-ICBC-response-Intervenors-IR1.pdf](https://docs.bcuc.com/Documents/Proceedings/2023/DOC_70508_B-5-ICBC-response-Intervenors-IR1.pdf) pdf 230/331.

## **March 2, 2021**

The British Columbia Supreme Court (BCSC) ruled that the CRT's jurisdiction over minor injury claims was unconstitutional. The Attorney General and ICBC appealed this decision.

## **May 12, 2022**

The British Columbia Court of Appeal overturned the BCSC decision.<sup>2</sup> The plaintiffs filed leave to appeal to the Supreme Court of Canada (SCC).

## **December 22, 2022**

The Supreme Court of Canada denied leave to appeal, ending this challenge.

## **2.0 Limiting Expert Witness Costs**

The government tried to reduce the cost of disputed claims by limiting the cost of expert witnesses. The Order-in-Council (OIC) method to amend the court rules was rejected by the BC Supreme Court (BCSC).

### **2.1 The OIC Approach**

#### **February 11, 2019**

Amendments to the *Court Order Act* passed introducing Rule 11-8, Experts in Vehicle Actions, that places a limit on the number of expert witnesses.

#### **March 22, 2019**

Further amendments [passed by OIC] were made to minimize the impact of the new court rules on cases before the courts. Rule 11- 8(11) exempted parties to a motor vehicle action from the limit on adversarial experts in Rule 11-8(3) if the trial date was on or before December 31, 2019.

#### **April 17, 2019**

A Petition was filed seeking a declaration that the amendments to the *Court Order Act* were unconstitutional and of no force and effect, being contrary to section 96 of the *Constitution Act, 1867*, or alternatively that the Rule 11- 8 Orders were not authorized by the *Court Rules Act*, R.S.B.C. c. 80.

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<sup>2</sup> <https://www.nsnews.com/highlights/icbc-tribunal-case-could-go-to-supreme-court-of-canada-5378325>

## **October 24, 2019**

BCSC declared that the Rule 11-8 Orders were, in part, contrary to s. 96 of the *Constitution Act, 1867*, and thus unconstitutional and of no force or effect. In the result, sub Rules 11-8 (3), (4), and (5) and sub Rules 11-8(10) and (11) were set aside.

## **2.1 The Legislative Amendment Approach**

The government then changed the rules through a legislative amendment.

### **July 8, 2020**

*Evidence Amendment Act, 2020* (Bill 9) passed in the Legislature approving the limitation on the number of experts and expert reports entered into evidence, subject to judicial discretion to allow additional reports as well as placing a 6% limit on the recovery of disbursements regarding the experts and expert reports.

### **August 13, 2021**

A Notice of Civil Claim was filed in the BCSC seeking a declaration that the 6% cap on disbursements to be unconstitutional.

### **July 8, 2022**

The BCSC ruled the 6% cap on disbursements to be unconstitutional.

### **July 12, 2022**

The Attorney General and ICBC appealed the decision.

### **January 25 to 26, 2023**

An appeal hearing took place with the court reserving its decision until a later date. ICBC believes it will be at least a few months before the decision is rendered.

ICBC has not included any savings from the proposed limitation on expert witness costs in its provision for unpaid claims.<sup>3</sup>

## **3.0 The No-Fault or Enhanced Care Model**

In February 2020, the government announced that the hybrid tort model would be replaced by a no-fault (Enhanced Care) system based on the model in place in Manitoba. This new system came into effect on 1 May 2021.

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<sup>3</sup> [https://docs.bcuc.com/Documents/Proceedings/2023/DOC\\_70505\\_B-3-ICBC-response-BCUC-IR1.pdf](https://docs.bcuc.com/Documents/Proceedings/2023/DOC_70505_B-3-ICBC-response-BCUC-IR1.pdf) pdf 169/470.

**August 14, 2020**

*Attorney General Statutes (Vehicle Insurance) Amendment Act, 2020* (Bill 11) amending the *Insurance Corporation Act, Insurance (Vehicle Act)* and the CRTA passed introducing the Enhanced Care [No-Fault] model.

**July 4, 2022**

A Notice of Civil Claim was filed in the BCSC to challenge the constitutionality of the Enhanced Care model introduced under the IVA and CRTA.

The Attorney General has filed a detailed Response to the Civil Claim. ICBC will be seeking to be added as a defendant. Counsel for the plaintiff passed away late last year, which has contributed to some delay in moving this forward.

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The writer is a retired senior BC government public servant whose paper describing the BC government's manipulation of the finances of BC Hydro from 2008 to 2014 was published by *BC Studies* in November 2016. *BC Studies* published his paper on the 40-year financial history of ICBC in 2013. He is an intervener in the BC Utilities Commission's reviews of ICBC's and BC Hydro's rate requests.