SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION (BRITISH COLUMBIA BRANCH) ACCESS TO JUSTICE COMMITTEE

TO THE

MINISTRY OF ATTORNEY GENERAL OF BRITISH COLUMBIA

REGARDING THE

PROPOSED *EVIDENCE AMENDMENT ACT, 2020* (BILL 9)

Issued by:

Canadian Bar Association BC Branch
Access to Justice Committee
May 25, 2020

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PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) ("CBABC") is to:

- Improve the law;
- Improve the administration of justice;
- Improve and promote access to justice;
- Promote equality, diversity and inclusiveness in the legal profession and the justice system;
- Improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession;
- Provide opportunities for members to connect and contribute to the legal community;
- Represent the legal profession provincially, nationally and internationally; and
- Promote the interests of the members of the Canadian Bar Association.

The CBA nationally represents approximately 36,000 members and the British Columbia Branch itself has over 7,000 members. Our members practice law in many different areas. CBABC has established 76 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. CBABC has also committees and working groups on specific policy and advocacy areas.

CBABC ACCESS TO JUSTICE COMMITTEE

This submission was prepared by the CBABC Access to Justice Committee (the "AJC"), a standing committee of the CBABC. The AJC works to improve and promote access to justice for the poor and middle classes in BC. The AJC stresses government responsibility for a sufficiently publicly funded legal aid system as an essential foundation, promotes pro bono services in the legal profession, and supports innovative legal system reform and delivery options for greater access to legal services.

The AJC is composed of the following members:

Frank Durnford	Oliver Fleck;	Judith Hoffman
Isabel Jackson	Zahra Jimale	Perbeen Mann
Myrna McCallum	Scott Morishita	Tina Parbhakar
Paul Pearson	Leslie-Anne Wall.	

The AJC is pleased to provide submissions to the Ministry of Attorney General of British Columbia (the "Ministry") on the proposed *Evidence Amendment Act, 2020* (Bill 9).

EXECUTIVE SUMMARY

In 2020, the Ministry of the Attorney General introduced the *Evidence Amendment Act, 2020* (Bill 9). Bill 9 proposes to amend the *Evidence Act* to limit the number of experts and expert reports, restrict the amount recoverable from the unsuccessful party for the cost of each expert report to $3,000 and limit total recoverable disbursements to 5% of the settlement or judgment amount. The AJC's recommendations on Bill 9 are:

1. The AJC supports a presumptive limit on the number of experts to be used in personal injury actions, but only if such a limit is made subject to agreement of the parties or at the discretion of the Court.

2. The AJC opposes the proposed $3,000 cap on recoverable expert costs. These costs often substantially exceed $3,000, and capping the recoverable amount will result in negative financial consequences to the successful party, offending the basic principle and essential purpose of tort law. Plaintiffs are required to prove their injuries and damages, and the proposed changes will likely impede their ability to fully investigate and present their claim at trial, which impedes their access to justice. The impacts will be more severe on marginalized groups. The AJC instead recommends addressing the rising cost of expert fees.

3. The AJC opposes the proposed 5% cap on what a successful litigant can recover for disbursements. This arbitrary limit does not reflect any rational or realistic analysis. The limit will result in many plaintiffs not recovering a substantial portion

of their reasonably-incurred disbursements, even if the claim settles before trial. The impact will be more severe for plaintiffs who proceed to trial. The shortfall will ultimately come out of the damages settlement or trial award, which offends the basic principle and essential purpose of tort law. Because the limit is the same, regardless of whether an action proceeds to trial or not, it will prevent most plaintiffs from choosing to proceed to trial due to negative financial consequences, impeding their access to justice. These impacts will be more severe for marginalized groups.

SUBMISSIONS

BACKGROUND

On February 25, 2020, the Attorney General introduced Bill 9. Bill 9 proposes to amend the *Evidence Act* to:

1. Limit the number of experts and expert reports used in motor vehicle injury actions to one in Rule 15-1 Fast Track cases and three in all other cases, subject to the discretion of the Court;

2. Restrict the amount recoverable from the unsuccessful party for the cost of each expert report to $3,000; and

3. Limit total recoverable disbursements to 5% of the settlement or judgment amount.

The CBABC opposes Bill 9.[1]

Regarding the general limit on the number of experts, the CBABC supports this limit, subject to agreement of the parties or the Court's discretion. This is in keeping with the principle of proportionality.

[1] See https://www.cbabc.org/News-Media/Media-Releases/2020/CBABC-opposes-changes-evidence-act (February 25, 2020).

The CBABC opposes the new $3,000 cap on the amount of an expert's fee that can be recovered, since expert fees for reports often exceed $3,000. Costs in excess of $3,000 should not be borne by the successful party, as proposed by Bill 9.

Similarly, the CBABC opposes the proposed 5% cap on what a party can recover for payments made to put forward the party's case. The cost of gathering evidence to present an injured party's case is usually more than 5% of the settlement or judgment amount and the successful party should not bear the burden of these necessary payments. As CBABC President Ken Armstrong stated:

> These proposed changes disproportionately limit access to justice for our most marginalized residents. …
>
> CBABC instead proposes a schedule of fees limiting the amount experts can charge, subject to the discretion of the courts. Additionally, there is already an assessment procedure in place for courts to determine the necessity and reasonableness of expenses incurred by parties prosecuting their claims. CBABC says an arbitrary cap on disbursements is unwarranted.[2]

[2] Ibid.

EXPERT REPORT DISBURSEMENTS

Bill 9 limits the number of experts and reports that can be used in motor vehicle actions and the amount of expert costs that can be recovered by the successful party. More specifically, parties in a Rule 15-1 Fast Track action will be limited to one expert and one report. Parties in all other motor vehicle actions will be limited to three experts and three reports. Absent consent, parties can apply to the Court for leave to rely on additional experts and additional reports. In addition, Bill 9 also limits the disbursement amount that can be recovered by the successful party to $3,000 per expert. The changes will apply retroactively, with some limited exceptions.

PERCENTAGE CAP ON RECOVERABLE DISBURSEMENTS

Bill 9 retroactively, and in the future, also limits the recovery of disbursements generally by motor vehicle litigants. Disbursements include expenses like court filing/trial fees, photocopying, faxes, expert reports, expert testimony in court, witness fees (and transportation costs), postage, couriers, cost of mediations, cost of records obtained from third parties, transcripts and court reporters.

Bill 9 gives the BC government the power to cap the amount of disbursements payable as a percentage of the total amount recovered in an action at 5%.

AJC'S POSITION ON BILL 9

The AJC offers its analysis and recommendations in three areas:

1. Proposed limit on the number of experts that can be used by parties in motor vehicle actions and its impact on access to justice.

2. Proposed limit on the cost for each report that can be recovered by the successful litigant from the unsuccessful litigant and its impact on access to justice.

3. Proposed 5% limit on disbursements that can be recovered by the successful litigant from the unsuccessful litigant and its impact on access to justice.

Limit on the Number of Experts and Access to Justice

The AJC's position on Bill 9's proposed limit on the number of experts is consistent with the position of the CBABC. Specifically, the AJC supports this limit, subject to agreement of the parties or the discretion of the Court, as it is in keeping with the principle of proportionality.

Reducing expert costs and trial length benefits not only the parties to a specific action, but also the judicial system as a whole. Reduction in trial lengths will most likely reduce the strain on the justice system in general, and allow for cases to get to trial faster and with fewer trials getting bumped off the trial list for lack of judges.

That said, reducing costs and improving efficiency should not prejudice a party to an action. In personal injury actions, the plaintiff has the onus of proving their injuries. Care must be taken to ensure that parties, both plaintiffs and defendants, are able to have injuries and damages appropriately investigated and adjudicated by the Courts. Cases involving complex injuries or complicated causation issues may require more experts than the proposed limit. Parties must be able to use sufficient experts to present the necessary evidence. The parties and the Court must be mindful of these challenges when a party seeks consent or leave to rely on additional expert reports. The ability to obtain appropriate evidence to prosecute or defend an action is an important access to justice consideration.

Limit on the Cost of Expert Reports and Access to Justice

Bill 9's proposed limit on the expert costs that can be recovered by the successful party will limit access to justice.

No analysis or rationale has been provided for why the recoverable expert cost limit is set at $3,000. While some expert report costs are below this amount, the AJC's understanding is that the fees of many experts generally exceed $3,000, sometimes considerably.

The AJC's understanding is that the cost of expert reports has increased considerably in the past 10 to 15 years. The past decade has witnessed the growth of medical assessment companies that provide examination rooms, logistical and administrative support, and marketing. These for-profit companies, who often bring in specialists from out of province, may have contributed to the overall rise in expert costs.

The increase in expert fees and reports is extremely problematic. The challenge for parties is that they have limited ability to control what these experts charge. Further, as medical knowledge and expertise has become more specialized, so too have medical experts that are relied on for personal injury claims. Not surprisingly, the top specialists in their respective fields are also the most in demand for medical legal assessments. Personal injury litigation can sometimes trend towards a "battle of experts." Because of supply and demand, accompanying this phenomenon is a battle *for* experts. Unfortunately, parties generally have no choice but to pay the fees as charged by the experts.

The AJC's position is that the focus should be on limiting, possibly through regulation, what the experts charge, and not what the successful party can recover. By not limiting what experts charge and instead arbitrarily capping the amount that a successful party can recover, the successful party will bear the burden of the non-recoverable cost. Given that in motor vehicle actions the successful party is generally the plaintiff, the non-recoverable amount will ultimately come out of the damages portion of a settlement or judgment.

The purpose of damages awarded in tort cases is to adequately compensate an innocent party for the injuries and damages they sustained as a result of another party's negligence. The plaintiff must be placed in the original position they would be in absent the defendant's negligent act. The effect of Bill 9 will be to offend this established principle and purpose of tort law, as any non-recoverable amount of expert costs will come out of a plaintiff's damages settlement or judgment.

Last, the AJC is concerned that the proposed change will have a "chilling effect," such that many plaintiffs, and/or their counsel, may be reluctant to fully investigate a plaintiff's injuries and adequately present their claim at trial, which will impede access to justice.

Limit of 5% for Recovery of Disbursements and Access to Justice

Bill 9's proposed 5% limit on disbursements that can be recovered by the successful party will limit access to justice. Of the proposed changes proposed in Bill 9 this change, in the AJC's view, is the most concerning. The effect of the 5% limit will be that most plaintiffs in motor vehicle cases will be precluded from taking their claims to trial.

Under the current law, successful parties are entitled to their "reasonable" disbursements. The B.C. *Supreme Court Civil Rules* require that disbursements be necessarily or properly incurred in the conduct of a proceeding. If that is established, a reasonable amount for those disbursements will be allowed. These appropriate limitations already

provide sufficient means to ensure that the recovery of disbursements is reasonable. No additional limitations are needed.

The BC government has given no indication of how it arrived at the 5% limit. In the view of the AJC, the 5% limit does not reflect any rational or realistic analysis. The 5% limit does not include court filing costs or jury fees; however, some of the basic costs that are included in the 5% limit are as follows:

- Process server fees;
- Investigation costs;
- Courier fees;
- Photocopying fees;
- Expert fees;
- Witness fees;
- Cost to obtain records;
- Travel costs;
- Mediation costs; and
- Examination for discovery costs.

Bill 9's proposed 5% disbursements limit will severely limit access to justice for the following reasons. First, motor vehicle plaintiffs have to prove their case – both liability and damages. When disbursements are incurred, plaintiffs may not have a full sense of what the quantum of their case may be. Plaintiffs bear the burden of investigating and ultimately proving their injuries

and damages, including establishing causation. In other words, in order to have these questions answered, the plaintiff must incur costs, without the benefit of hindsight. The current approach to the recovery of disbursements recognizes this challenge – the determination of whether a disbursement was reasonably incurred is based on the time the disbursement was incurred.

Second, the value of a case is not necessarily directly proportional to the amount of disbursements that may be required. A specific case may not be of high value, but could still be quite complex, and thus require significant medical legal expenses. For example, if a plaintiff has a complex pre-existing medical history the disbursements will likely be disproportionally high, because there may be complex causation issues, requiring more experts and the examination of voluminous medical records. Thus, the proposed changes will likely discriminate against people who have complicated pre-existing health conditions, such as people with disabilities. Further, the proposed changes will likely discriminate against people who earn lower incomes, as the value of their claims are often lower due to lower income loss claims. Bill 9 will further marginalize these groups, who already have disproportionate access to justice challenges.

Third, the 5% limit will negatively impact parties that live outside of the main urban centres. These parties generally need to travel to attend discoveries, medical legal assessments, and trial. These travel costs will count towards the 5% limit. Thus, the proposed changes in Bill 9 will serve to discriminate against rural British Columbians, a group that already experiences difficulties accessing justice.

The proposed 5% limit applies to all actions regardless of whether the action proceeds to trial or not. The overall result of Bill 9's proposed 5% limit will be that very few plaintiffs will choose to go to trial. Trial and trial preparation disbursements in motor vehicle actions are considerable. Experts charge fees to prepare for trial and to testify. Witnesses require conduct money and reimbursement for travel costs. Photocopying costs can be considerable. In motor vehicle cases is it not uncommon for trial and trial preparation disbursements to exceed pre-trial disbursements.

In the AJC's analysis, the 5% limit will only cover a portion of the typical disbursements that are reasonably-incurred by plaintiffs prior to trial. This will result in many plaintiffs not recovering a substantial portion of their reasonably-incurred disbursements even if they choose not to go to trial. The shortfall will ultimately come out of their damages settlement. As outlined in the previous section, such a result offends the basic principle and essential purpose of tort law, which is to put a plaintiff in the original position they would be in absent the defendant's negligence.

If a plaintiff is not satisfied with a defendant's final offer, they could choose to proceed to trial. However, proceeding to trial would result in the plaintiff incurring considerably more disbursements, most of which they are unlikely to recover due to the 5% limit. The plaintiff's damages award at trial would need to be considerably higher than the defendant's settlement offer in order to recover a significant portion of the trial and trial preparation disbursements. In the AJC's analysis, in most scenarios, even if a plaintiff beats a defendant's offer by a considerable amount at trial, they will end up with less compensation as a result of the 5%

recovery limit. This result is even more pronounced in cases of lower value or ones that are medically complex and by necessity require more experts. The AJC reiterates that such cases may involve people who earn lower incomes or have pre-existing medical issues and disabilities. Thus, Bill 9 may have a disproportionally negative impact on these marginalized groups with chronic access to justice challenges.

In the AJC's view, the proposed 5% disbursement recovery limit creates a significant power imbalance between insured defendants and individual plaintiffs, and particularly those who are marginalized. The AJC is concerned that defendants will take advantage of this imbalance and make unreasonable settlement offers, knowing that a plaintiff's ability to proceed to trial is limited by the financial constraints caused by the 5% limit. In impeding a person's ability to have a dispute adjudicated by an independent Court, these proposed changes are limiting access to justice.

CONCLUSION

On behalf of the Access to Justice Committee of the CBABC, we thank you for this opportunity to provide our position on Bill 9. We would be pleased to discuss our submissions further with the Attorney General, in order to provide any clarification or additional information that may be of assistance to the Ministry.

Communications in this regard can be directed to:

SCOTT MORISHITA
CBABC Access to Justice Committee
Tel.: (604) 682-3771
Email: smorishita@rhelaw.com