THE CANADIAN BAR ASSOCIATION
British Columbia Branch

August 20, 2020

Sent via email: AG.minister@gov.bc.ca

The Honourable David Eby,
Attorney General of British Columbia,
Ministry of Justice
1001 Douglas Street
Victoria, BC V8W 2C5

Dear Minister Eby:

RE: Limits on Expert Reports and Disbursements in Motor Vehicle Personal Injury Litigation

Thank you for your letter dated July 24, 2020, requesting that the CBABC provide input on limits for expert reports and disbursements in motor vehicle personal injury litigation.

Specifically, you request submissions regarding:

1. The per report limit that a successful party may recover from an unsuccessful party for expert reports relating to the assessment of damages.

2. The overall limit that a successful party may recover from an unsuccessful party for disbursements.

3. The monetary amount of these limits, or a transitional rule on how these limits should be applied to claims already existing in the system.

Limits on Expert Fees

Currently, there is no limit on what fees an expert can charge for a report. The private market for expert reports is subject to the law of supply and demand. As our CBABC Automobile Insurance Working Group (the "AIWG") noted in our May 29, 2020 submissions to government (the "AIWG Submissions"), fees experts charge for reports are outside the control of parties and their counsel.

We have consulted our membership and the AIWG regarding what the determination of the appropriate and proportionate amount of an expert's fee should be.

In the experience of our members, $3,000 per expert report is too low and does not reflect the current private market for expert reports. While admittedly some expert reports are below

$3,000, it is common that expert fees for their reports exceed $3,000 and often by a considerable amount. With complex personal injury claims, there is a need for multiple reports from specialists and in those cases the expert fees can be very high. For example, where neuropsychological opinions or occupational therapy functional capacity evaluations and cost of future care opinions are required, often two or more days of objective testing are required before the expert can even begin to distill the data and formulate an opinion, before even drafting a written report. The report fee includes all of these costs, which are well in excess of $3,000 and sometimes over $10,000.

As is made clear by the AIWG Submissions, we cannot support the arbitrary capping of expert fee recovery by parties.

We have considered a number of palatable options. One option is for the expert's fees to be determined by the court on a case by case basis. This is the current system. If the parties are unable to agree, the court determines what is reasonable based on the nuanced circumstances of each case.

Another option is for government to enact a regulation that sets a mandatory tariff for experts' fees. The government would negotiate with each professional organization. There would be a category for general practitioners, specialists, engineers, economists, *et cetera*. The tariff would set out the maximum fee that an expert within each professional category could charge for each report.

A final option is a sliding scale. Under this option, the maximum fee an expert could charge for a report in fast track litigation matters under R. 15 of the *Supreme Court Civil Rules* would be fixed at $5,000 whereas mainstream actions would have report fees capped at $10,000 per expert report.

The option with the most support from our membership is to continue to maintain judicial discretion of recovery of expenses incurred by the parties on the basis of reasonableness and necessity in the circumstances. We continue to support this option.

If the government decides to change the status quo, we would support a mandatory tariff, created after negotiation with the affected professions, which specifies the maximum fee that an expert could charge for each expert report. As described in the AIWG Submissions, mandatory maximums for fees would ensure that experts (and the middle-person assessment companies) do not overcharge for the services they are providing, and these maximums would also provide certainty and provide fair and reasonable compensation for experts.

Limits on Disbursements

Our position on limiting disbursements is that there should be no prescribed reduction or limit to the recovery of disbursements that are necessarily and properly incurred.

In the AIWG's Submission, we have shown how the government's proposed 5% disbursements cap will significantly limit access to justice. As well, our Access to Justice Committee has previously advised you that the proposed 5% disbursement recovery limit creates a significant power imbalance between insured defendants and individual plaintiffs, and particularly those who are marginalized.[1]

We have also consulted our membership and the AIWG regarding what the determination of the overall amount of appropriate and proportionate disbursements should be.

A majority of our membership and the AIWG support our position that disbursements should be determined by the court on a case by case basis as it is now.

We also sought feedback on the idea to set disbursements as a percentage, ranging either from 5%, 10%, 15% or 20% of the amount of damages. Our members and the AIWG did not support setting disbursements as a percentage, on any amount.

While we cannot support arbitrary limits on disbursements due to the inherent unfairness that results, if the government proceeds to impose a limit on the recovery of disbursements, it is critical, in a fair and just society, that the limit be balanced when applied to either a defendant's or a plaintiff's claim for disbursements. Tying the amount of disbursements recovered to the amount of damages recovered is, of course, only relevant to a plaintiff as the defendant does not recover damages and, as such, a percentage cap appears to be targeting only one side of the litigation. It is inherently unfair. The only just method of determining recovery of disbursements when the parties cannot agree, is to have an objective and impartial hearing before a registrar of the court. Judicial discretion in these circumstances must be maintained. Further, it is important to note a 5% cap on disbursements would not permit full recovery of even a single $3,000 expert report for any award below $60,000, let alone any allowance for mandatory court filing fees and examination for discovery transcripts.

[1] See page 13 and 16 of the CBABC Access To Justice Committee, Submissions on the Proposed *Evidence* Amendment Act, 2020 (Bill 9) (May 25, 2020), https://bit.ly/3j1L2qg.

Transitional Rule

While we do not agree that these regulations should be implemented due to the inherent unfairness aforementioned, if they are implemented despite protest from the profession, litigants and their counsel need advanced notice of these provisions coming into effect. Substantial work is completed by both counsel and their expert prior to the final product of a report being furnished. Any work done by the expert must be fully recoverable up to and including the date of the announcement of the provisions coming into effect. Thereafter, we propose a three-month lead period such that counsel have an opportunity to instruct their experts to provide notice to them if their estimated fee is expected to exceed the imposed recovery cap. Counsel will need that information to be able to provide options and potential repercussions to their clients, to make recommendations, and to obtain informed consent instructions from their clients before proceeding with incurring the cost.

Thank you for the opportunity to continue to consult. We look forward to further collaboration on this important access to justice issue.

Yours truly,

Kenneth Armstrong, President

cc. The Honourable Chief Justice Christopher Hinkson, Supreme Court of British Columbia
Richard Fyfe, QC, Deputy Attorney General
Craig Ferris, QC, President of the Law Society of British Columbia
John Rice, President of the Trial Lawyers' Association of BC