
# Guide to the New Galaxy of "Minor Injury" and "Serious Impairment"

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## INTRODUCTION

Effective April 1, 2019, British Columbians who are injured in a motor vehicle crash enter the new caps regime. Part of the regime is filled with additional barriers and restrictions for individuals to navigate in both the medical and legal systems. At the time of writing this paper, the new regime will have been in effect for less than 45 days. Lawyers, injured claimants, and physicians will inevitably be forced to confront the ever-evolving area head on.

The aim of this paper is to provide background on the terminology of "minor injury" and "serious impairment," the relevant legislation, the interpretation of these terms by the Insurance Corporation of British Columbia (ICBC) and the Civil Resolution Tribunal (CRT), and what we can learn from Alberta's experience with the caps. I also discuss some possible strategies for addressing the issues.

## I. EVOLUTION OF THE TERMINOLOGY

In 2018, political rhetoric revolved around the over simplification of the term "minor injury." The evolution and different interpretations of the term need to be better understood to best prosecute or defend what may not always be a "minor injury." Moreover, this area of law will remain unstable pending the release of CRT decisions and even then, any further clarity is likely expected to follow on judicial reviews. Added to the foregoing is the current constitutional challenge launched by TLABC on April 1, 2019.

The first announcement of the "minor injury" caps (up to $5,500) was made on February 6, 2018 when Attorney General David Eby stated that the government would be creating a definition for minor injuries that would likely include sprains, aches and pains, mild whiplash, cuts and bruises, anxiety, and stress. He further noted that concussions, broken bones, and other serious injuries would not be classified as "minor."[1]

On May 2, 2018, Eby issued a press release further expanding the definition of "minor injury" stating: "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."[2] He also stated mental health conditions lasting longer than 12 months would not be considered "minor."

Six months later, on November 9, 2018, the *Insurance (Vehicle) Act*, R.S.B.C., c. 231 (the "*Insurance (Vehicle) Act*")[3] was amended and *Insurance (Vehicle) Act,* Minor Injury Regulation, B.C. Reg. 234/2018 (the "Minor Injury Regulation")[4] was introduced. The legislation resulted in a broadening of the "minor injury" definition to now include brain injuries (i.e. concussion) and further provided the "serious impairment" criteria which mirrors the "incapacity" definition for psychological/psychiatric and brain injury

conditions. The legislation and surrounding issues are discussed in greater detail later in this paper.

Less than two months later, at the Canadian Bar Association BC Branch Civil Litigation section meeting, A.G. Eby added a differing interpretation of the "minor injury" definition, as follows:

> "The regulations and the legislation have established a complete definition of what we are defining as a minor injury. If I could go back, I don't think I'd call it minor injury, because for an individual who may be affected by this, it would be quite a serious injury. It's a relative term. It's more minor compared to the injuries that are not in this category. And what it is, is an attempt to establish proportionality in the process, that more minor injuries are dealt with, with less process, and more serious injuries with more process and safeguards in place."[5]

At the same meeting, when asked if it was a correct estimate that 80% of all claims would now be categorized as minor injuries, Eby refuted the estimate and stated:

> "60 percent of claims would fall within that category of more minor injuries. 20 percent beyond that would be injuries like, maybe a broken bone, that would be considered not a minor injury, but would fall beneath the $50,000 threshold. So the -- the total group of claims that's estimated to be affected is 80 percent, but there's a couple categories and there's kind of an overlap in that Venn diagram..."[6]

In summary, by the Attorney General's own admission, the "minor injury" definition went from "sprains and aches," excluding brain injuries/concussions, to now capture injuries "whether or not chronic", which include psychological/psychiatric and brain injuries catching over 60% of the injury claims with the new laws affecting 80% of all injury claims globally.

## II. WHO DETERMINES A "MINOR INJURY"?

It is up to the claimant's physician to determine whether or not the claimant's injury is "minor." If a) the physician is "unable to make a clear diagnosis; b) the claimant is not recovering as expected; or c) factors are present that complicate the claimant's recovery from the injury,"[7] then the physician must refer the claimant to a registered care advisor. The registered care advisor must assess the claimant's injury within 15 days of accepting the referral.[8] Upon seeing the claimant, the registered care advisor must provide the report to the referring physician (and presumably ICBC) outlining the diagnosis or treatment of the claimant's injury within 10 days.[9] If a dispute occurs over what is or is not "minor" a determination can be brought to the Civil Resolution Tribunal (CRT) where an adjudicator will decide how the injury is classified.

Unfortunately, understanding the definitions and their application is not a straight forward exercise given their ambiguity in the legislation. This further complicates matters for the claimant, who may already be suffering physical and/or emotional injuries, in navigating the complex legislation while also carrying the burden of proof in advancing their claim (i.e., the burden in establishing: "the injury is not a minor injury is on the party making the allegation that it is not a minor injury"[10]).

## III. THE LEGISLATION

The two key pieces of legislation relating to "minor injury" and "serious impairment" are the *Insurance (Vehicle) Act*[11] and the Minor Injury Regulation.[12]

The *Insurance (Vehicle) Act* and the Minor Injury Regulation provide the framework and definitions to some of the commonly used terms, such as "minor injury," "incapacity," "serious impairment," "prescribed criteria," and so on.

The legislation enables ICBC, in conjunction with a claimant's family physician and "in support of a resident care advisor" to determine whether or not the claimant has a "minor injury" and to determine whether or not a "serious impairment" has occurred.

### a. "Minor Injury" and "Serious Impairment"

Section 101 (1) of the *Insurance (Vehicle) Act* defines a minor injury as: "a physical or mental injury, whether or not chronic, that: (a) subject to subsection (2), does not result in a serious impairment or a permanent serious disfigurement of the claimant, and (b) is one of the following:

(i) an abrasion, a contusion, a laceration, a sprain, or a strain;

(ii) a pain syndrome;

(iii) a psychological or psychiatric condition;

(iv) a prescribed injury or an injury in a prescribed type or class of injury."[13]

The Minor Injury Regulation further defined "prescribed injuries for the purposes of paragraph (b) (iv) of the definition of "minor injury" in section 101 (1) of the *Insurance (Vehicle) Act* as:

(a) a concussion that does not result in an incapacity;

(b) a TMJ disorder;

(c) a WAD injury."[14]

The definition is problematic for several reasons. First, a contradiction exists in having to satisfy the "serious impairment criteria" for an injury to be classified as "minor" with a caveat that states that an injury can still be considered to be "minor" "whether or not [it is] chronic."

Another issue arises as the above-listed medical injuries and conditions are defined differently in the legislation compared to mainstream academia. The definitions within the legislation fail to appreciate the subtleties of conditions, which are not always evident in the acute stages. For example, a psychological or psychiatric condition is defined under the Minor Injury Regulation as a condition that does not result in an incapacity (defined as a condition that is "not resolved within 16 weeks") yet the British Columbia Psychological Association has stated that "the duration of symptoms after an event is not an appropriate scientific measure of the severity of the psychological injury."[15] Other examples are ligament tear (see definition of "sprain") and muscle tear (see definition of "strain") that are classified as "minor" within the Minor Injury Regulation but are sometimes far from being "minor" as in a rotator cuff injury that may require surgical intervention.[16]

Given the nuances in these definitions, having a strong understanding of the medical terms in the legislation and how they are interpreted is necessary to successfully apply or refute the definition.

**Some of the Important Definitions of Medical Injuries and Conditions under Part 1 of the *Minor Injury Regulation***

| | |
|---|---|
| Abrasion, contusion, laceration; concussion | Undefined |
| Pain syndrome | A syndrome, disorder or other clinical condition associated with pain, including pain that is not resolved within 3 months. |
| Permanentserious disfigurement | A permanent disfigurement that, having regard to any prescribed criteria, significantly detracts from the claimant's physical appearance.<br>Note: This definition can be found under section 101 (1) of the *Insurance (Vehicle) Act*. |
| Psychological or psychiatric condition | A clinical condition that (a) is of a psychological or psychiatric nature, and (b) does not result in an incapacity. |
| Sprain | An injury to one or more ligaments unless all the fibres of at least one of the injured ligaments are torn. |
| Strain | An injury to one or more muscles unless all the fibres of at least one of the injured muscles are torn. |
| TMJ disorder | An injury that involves or surrounds the temporomandibular joint. |
| WAD disorder | A whiplash associated disorder other than one that exhibits one or both of the following: (a) decreased or absent deep tendon reflexes, deep tendon weakness or sensory deficits, or other demonstrable and clinically relevant neurological symptoms; (b) a fracture to or dislocation of the spine. |

To prove that an injury is not "minor," the claimant has to prove that the injury has caused "serious impairment" which essentially is a "substantial inability" to perform essential tasks at work, at school or training, or at home ("activity of daily living"). The Minor Injury Regulation defines "serious impairment" as a "physical or mental impairment" which "must meet the following prescribed criteria:

(a) the impairment results in a substantial inability of the claimant to perform

i. the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

ii. the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to

accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or

iii. the claimant's activities of daily living;

(b) the impairment is primarily caused by the accident and is ongoing since the accident;

(c) the impairment is not expected to improve substantially."[17]

The above-referenced "claimant's activities of daily living" include "the following activities: (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."[18] It does not specify whether all or some of the listed activities need to be affected to satisfy the "serious impairment" definition. Moreover, the spectrum of what meets "minor" on this definition and those injuries which do not, are at opposite ends of the injury spectrum. Many claimants have serious injuries, including brain injuries, are capable of brushing their teeth or cleaning their home, for example, yet are unable to function in a consistent manner on a day-to-day basis. Such a person may therefore fail to meet the criteria required to move them out of the "minor injury" regime.

In addition to the "serious impairment" definition, one must prove "incapacity," in the context of concussions and psychological and/or psychiatric conditions. Incapacity is defined as "…a mental or physical incapacity that

(a) is not resolved within 16 weeks after the date the incapacity arises, and

(b) is the primary cause of a substantial inability of the claimant to perform

i. essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's incapacity and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

ii. the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's incapacity and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or

iii. the claimant's activities of daily living."[19]

While it appears to be a drafting error in the legislation, at present a concussion or psychological/psychiatric condition must meet both "serious impairment" and prove "incapacity" as both definitions apply to the list. It cannot be the concussion must expressly last longer than 16 weeks but then also meet a 12-month timeline. That is a

clear drafting error, in my opinion, apparently the by-product of rushed legislation. The timeline applicable to concussion or psychological/psychiatric condition is 16 weeks and not 12 months.

Further, while keeping in mind "serious impairment" and "incapacity," subsection (4) of section 101 of the *Insurance (Vehicle) Act*, states that the injury can still be considered "minor" if "a symptom or a 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."

The legislation has several problematic issues due to its ambiguity and broad language. For example, it is unclear how one's family physician, ICBC, a "resident care advisor," the CRT and the Supreme Court of BC, would interpret an injury that may or may not be chronic that results in a "serious impairment," "incapacity of 12 months" (when relevant) or "another prescribed period" while proving that the injury "is not expected to improve." As it currently stands, the legislation seems to cover the vast majority of claimant cases.

### b. "Prescribed Treatment Protocol"

For a balanced understanding of the medical terminology, satisfying the "serious impairment" criteria, while noting the "incapacity" definition when relevant, and meeting the minimum 12-month duration requirement, a claimant must also satisfy subsections (2) and (3) of the *Insurance (Vehicle) Act* to be classified as not a "minor injury." These two subsections, which will undoubtedly prove to be some of the most challenging pieces to deal with, essentially state that despite a claimant's best efforts to meet the terminology and interpretations set out in the *Act* and regulations, ICBC can still maintain that the injury is minor if the claimant has not followed the "prescribed treatment protocol."[20]

Section 101 (2) of the *Insurance (Vehicle) Act* states: "Subject to subsection (3) and the regulations, an injury that, at the time of the accident or when it first manifested, was an injury within the definition of "minor injury" in subsection (1) is deemed to be a minor injury if

> (a) the claimant, without reasonable excuse, fails to seek a diagnosis or comply with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury, and
>
> (b) the injury
>
> (i) results in a serious impairment or a permanent serious disfigurement of the claimant, or
>
> (ii) develops into an injury other than an injury within the definition of "minor injury" in subsection (1)."[21]

Subsection (3) states that "an injury is not deemed, under subsection (2), to be a minor injury if the claimant establishes that either of the circumstances referred to in subsection (2) (b) would have resulted even if the claimant had sought a diagnosis and complied

with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury."[22]

In other words, it has never been more important for clients and patients to attend their physicians regularly.

### c. Multiple "Minor Injuries"

As opposed to assessing injuries with the "global" approach, which had been previously applied in the Courts, under the new Minor Injury Regulations, each injury is diagnosed separately as to whether or not it is "minor." Section 5 of Part 2 of the Rules in Relation to Minor Injuries within the Minor Injury Regulation,[23] with respect to multiple injuries, states:

"If a claimant sustains more than one injury as a result of an accident,

a) each injury must be diagnosed separately as to whether the injury is or is not a minor injury,

b) if there are one or more minor injuries and one or more non-minor injuries, the total amount of damages assessed for non-pecuniary loss for all the injuries is the sum of

   (i) the amount of damages assessed for non-pecuniary loss for the minor injuries, and

   (ii) the amount of damages assessed for non-pecuniary loss for the non-minor injuries, and

c) the maximum amount of damages for non-pecuniary loss recoverable by the claimant for all the minor injuries in total must not exceed the minor injury limit."[24]

The CRT further states that "damages for pain and suffering is limited to $5,500, for all the minor injuries together," which includes "more than one minor injury from the same accident."[25]

### d. Access to Justice and Discrimination Issues

Much has to be digested within the confines of the *Insurance (Vehicle) Act* as amended and the new Minor Injury Regulation - and more developments on how it is interpreted are likely as time goes on. As it stands, a reading of the legislation appears to neglect and fail to fully appreciate the impact it will have on stay-at-home parents and some of the province's most vulnerable such as the working poor, students, immigrants, seniors and those who already have pre-existing injuries that limit their physical, emotional, and/or cognitive function.

#### i. Stay-at-Home Parents

The Minor Injury Regulation is silent on stay-at-home parents. It speaks to impairments in the context of employment and school and mentions impairments to "the claimant's

activities of daily living,"[26],[27] however, it does not fully define how the affected parents will meet the definition of "minor injury."

At the same talk discussed earlier, at the Canadian Bar Association BC Branch Civil Litigation section, Eby was asked about this very issue. He responded after looking to his staffers for assistance on how to answer the question:

> "…I don't -- yeah. So ICBC does -- we have increased homemaking benefits as well. And as far as the current tort system, in recognizing lost wages, there wouldn't be any particular change in this system from the existing system as far as how it recognizes lost wages or the need to hire people to do -- to do necessary work at home…So just the -- the proposal on the table is for people who fall in the minor injury definition will be capped or limited at $5,500 in pain and suffering awards. There is not a limit on the compensation for you to have to bring someone in to help with childcare, you have to bring someone in to help with housekeeping, you have to pay for physiotherapy, all those kinds of things…"[28]

It remains unclear how stay-at-home parents will be able to fully satisfy the criteria of a "serious impairment"[29] because childcare is noticeably absent from the definition of "activities of daily living."[30]

### ii. The Working Poor

More than half of British Columbians live pay-cheque to pay-cheque.[31] Anecdotally, many claimants are forced to work despite their pain when they have injuries due to their financial obligations. Sustainability is often the issue in the associated tort compensation claim. While the increased disability payments for employed individuals is a step in the right direction, ICBC will require a claimant to exhaust other avenues for funding (extended health carriers, employment insurance, etc.) before being eligible for ICBC coverage.[32] The issue of time and the inevitable shortfall between wages will result in many claimants forcing themselves to go to work, despite being injured, and perhaps against medical advice, consequently resulting in them failing to meet the "serious impairment" (e.g., failing to meet the requirement that the impairment with work has been ongoing since the accident).

### iii. Other Groups

Students, immigrants, seniors, the physically and mentally disabled will similarly face challenges within the legislation. Many look to lawyers for support in navigating the legal process of a motor vehicle claim. Inevitably, lawyers will continue to be much more reluctant to take on cases that ride the line between what may or may not be considered a "minor injury." As a result, the power imbalance between unrepresented claimants and a more sophisticated litigant (ICBC) will lead to many people falling through the cracks due to their inadvertent failure to adhere to all that is required of them by the legislation.

It remains to be seen just how these individuals will be treated in the context of this broad legislation and the many onerous and/or unclear requirements to meet in order to prove the injury is not minor.

## IV. ICBC'S INTERPRETATION

Adding to the challenges of the "minor injury" and "serious impairment" definitions are the ways in which certain groups are choosing to oversimplify the legislation in public media. On ICBC's website, definitions are provided that fail to fully capture the way in which the definitions are fully reflected within the legislation.

### a. "Minor Injury"

According to ICBC, the "minor injury" definition includes: "sprains, strains, general aches and pains, cuts, bruises, road rash, persistent pain, minor whiplash, temporomandibular joint disorder (TMJ; pain in your jaw joint and in the jaw muscles), mild concussions, and short-term mental health conditions."[33]

The use of "mild" and "minor" are problematic and may result in claimants believing that their injuries are classified as "minor injuries" when in fact, many of these injuries may well be or develop into chronic and disabling conditions rather than "minor whiplash," "mild concussion" and "short-term mental health conditions." Many people may unreasonably rely on ICBC telling them their injury is "minor". The result: many claimants failing to appreciate the seriousness of their injuries - all without proper medical and legal intervention.

On their website, ICBC further states that "a medical professional – not ICBC – will diagnose your injury, and this diagnosis will determine whether or not it is minor."[34] ICBC further states that a determination of what constitutes a "minor injury" can change with new developments in a claimant's case.

ICBC encourages claimants to communicate with their adjuster (or "claims representative") to "understand all the factors involved" and to "point out any details that may have been overlooked or ask questions about how the minor injury determination was made."[35] ICBC also states that if a claimant is still not satisfied after these communications, the claimant may ask to speak to their manager.

Much of the dialogue around going to management first, as opposed to escalating matters litigiously was echoed in a meeting on January 17, 2019, with TLABC table officers and ICBC executives Kathy Parslow, Vice President, Claims and Driver Licensing Operations, and Jason McDaniel, Vice President of Corporate Affairs. They reiterated the same idea about moving concerns to management: "If counsel feels adjusters are being unfairly rigid, they invite calls to the operations manager or move further up the food chain."[36] Such an approach defies reality: the adjuster's approach no doubt flows from management. The food chain is top down at ICBC.

### b. "Serious Impairment"

ICBC does not specifically define "serious impairment," though they provide examples of how one can get out of the "minor injury" determination to move into what appears to be "serious impairment"[37]:

- "Your injury may have been determined to be minor after the crash, but if the injury turns out to impact your life for more than 12 months – for example, you're still not able to go to work or school, have to modify your work hours or duties, or you're unable to care for yourself – it will no longer be considered minor and will not be subject to the payment limit."[38]

- "If the injury is impacting your life for longer than 12 months, or 16 weeks in the case of concussions or mental health conditions."[39]

The obvious issues with these examples are that they directly contradict what is set out in the legislation. Nowhere does it state that a claimant needs to be off work for 12 months; instead, it states that there must be a "substantial inability" to do essential tasks within the context of work, school, or at home.[40] An important distinction.

## V. THE CIVIL RESOLUTION TRIBUNAL'S INTERPRETATION

### a. "Minor Injury"

The legal recourse to challenge the determination of a "minor injury" is to pursue a claim through the CRT. Under section 133 (1) (a), the *Civil Resolution Tribunal Act*, SBC 2012, c. 25,[41] the CRT has jurisdiction in determining "whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act*."

Similar to the ICBC website, the CRT website has oversimplified language that makes it seem that claimants may not have any merit in their claims and essentially that most injuries are in fact "minor."

The CRT has a website function called the Solution Explorer[42] that has some legal information and tools for assisting claimants with their motor vehicle claims. The Solution Explorer, while hoping to provide information for claimants, defines "minor injury" as "a physical or mental injury that does not result in a serious impairment or permanent disfigurement. This could include: bruising, cuts or scrapes; a sprain or strain; concussion that does not result in an incapacity; certain whiplash-associated disorders; pain syndrome, including pain that is not resolved within three months; psychological or psychiatric conditions that do not result in incapacity; and TMJ disorder."[43]

### b. "Serious Impairment"

Again, the oversimplification leads claimants to believe that they would not fall under the "minor injury" definition by simply proving their injuries; however, neither details about the "serious impairment" definition are given, nor are details about the "substantial inability of the claimant" to perform tasks at work, school, or in "activities of daily

living."

The CRT further provides cheat sheets within the Solution Explorer about how to gather medical evidence to support a claimant's "minor injury" determination and the assessment of damages. The obvious implications of a layperson gathering such evidence without fully understanding their obligations or how "minor injury" is defined are problematic. Claimants need to fully appreciate the definitions of "serious impairment," "incapacity," "prescribed treatment protocol," and so forth, to ensure that the evidence supporting their claims is fulsome and accurate.

## VI. WHAT WE CAN LEARN FROM ALBERTA

Several provinces have caps regimes that define "minor injury" and "serious impairment." Please refer to Appendix 1, Canadian Provinces' Definitions of "Minor Injury" and "Serious Impairment."

Alberta (and Ontario) appear to have the most similar characteristics to our legislation. The *Minor Injury Regulation* (MIR) and the *Diagnostic and Treatment Protocols Regulation* (Protocols) have been in place in Alberta since October 1, 2004.

### a. "Minor Injury"

Both BC and Alberta have been following each other's legislation closely for better or worse. The Government of BC has noted alleged loopholes with the "minor injury" definition within their legislation. In particular, Eby stated, "…in Alberta, they missed a jaw injury called TMJ and Alberta became the North American capital of TMJ injuries because it got you outside of the injury cap."[44] Therefore, TMJ was added to BC's legislation.

Subsequently, Alberta reviewed BC's Minor Injury Regulation proposals that addressed TMJ and psychological conditions, and made their own amendments. Alberta defines a "minor injury" as "…a sprain, strain or WAD injury…that does not result in serious impairment"[45] and on May 17, 2018, the Government of Alberta expanded the "minor injury" definition to include "some temporomandibularjoint injuries, as well as physical or psychological conditions or symptoms arising from sprains, strains and whiplash injuries and that resolve with those injuries"[46] for accidents that occurred on or after June 1, 2018. That being said, to date, the Government of Alberta has yet to include concussion or other brain injuries in its legislation.

Alberta is fortunate to have legal recourse through the Courts as opposed to a tribunal. The new regime in B.C. presently and effectively strips claimants of the ability to go to an independent court to challenge the finding of "minor injury". As a result of Alberta's continued access to the courts,, a body of case law has helped evolve the definition of a "minor injury." For example in *Jones v. Stepanenko*, 2016 ABQB 295,[47] the defence's view that chronic pain and fibromyalgia were "minor injuries" was rejected by the Courts and it was accepted fibromyalgia can be caused by trauma. While the CRT does not

follow case law per se, we can be informed by the case law and practice points from the Alberta experience to date.

### b. "Serious Impairment"

With respect to "serious impairment," the definitions in Alberta and BC are virtually the same. Both definitions involve an impairment that "results in a substantial inability to perform essential tasks" involving a claimant's employment; school or training; or in their daily living.

Greg Rodin, Q.C. in his paper, "Serious Impairment, Chronic Pain and the Minor Injury Regulation," sheds light on how this definition works in practice in the context of employment in Alberta:

> "…In order to come within the "serious impairment" exclusion, a claimant will only need to demonstrate an inability to do at least one essential task associated with her usual employment that cannot be accommodated. A claimant cannot perform the essential tasks of her employment if she cannot perform all of the essential tasks of her employment."[48]

### c. Strategies

For more than a decade, Alberta has dealt with "minor injury" and "serious impairment" definitions, which caused lawyers, and physicians, to perfect their approach to these terms. Many excellent strategies can be learned from Alberta for lawyers and physicians who are confronted with the "minor injury" and "serious impairment" definitions.

Some of the strategies recommended by Alberta trial lawyers include:

- **Ensure that clients/patients are aware of the implications of not seeking treatment:**

Early intervention seems to be a common theme throughout much of the literature from Alberta. Educating clients on their rights, obligations, and duties is crucial to ensure that they are able to navigate the "minor injury" determination process and satisfy the "serious impairment" criteria, which are crucial for successfully advancing a case within a caps regime.

In her paper, "Emerging Defence Tactics and How to Deal with Them," Donna C. Purcell, Q.C., notes the importance of educating clients/patients:

> "One of the first pieces of advice Plaintiff's counsel should give is no longer just that there is a duty to mitigate by seeking and following treatment, but further: if they do not, without reasonable excuse (which must be accepted by the Courts), they shall be considered to have a minor injury unless they can prove, even with

> the diagnosis and treatment, they would have had serious impairment. Emphasizing the potential outcome may further encourage a Plaintiff who plans to go on that long booked holiday no matter how much pain they are in, for example, that the risk may not be worth it (to their health and case)."[49]

Ms. Purcell, Q.C., further details more practical steps on how to deal with clients who may have financial barriers that could prevent them from seeking treatment:

> "Although often Plaintiffs cannot afford treatments personally so benefits are important, there are also those that seem to feel that if an insurance company will not pay or coverage is exhausted, then it is not important enough to go to or seek further treatment. If they can afford treatment, I tell them to go if insurance coverage is the only hold back. If they cannot afford it, given the implications of failures to get treatment, they need to look into loans from family, government coverage, etc. and counsel can often canvass an advance. I make it clear to clients that I do not ever want to hear after the fact that they did not go for treatment, I want them advising me right away so that we can review the implications and potential funding issues. This is perhaps more important in the Cap setting. We as lawyers cannot give medical advice, but we do have to give legal advice, and part of that relates to the impact of failing, without reasonable excuse, to seek and follow medical advice – the duty to mitigate."[50]

- **Lawyers (specifically, plaintiffs' counsel) and physicians should develop a strong relationship:**

Another common theme in the papers written by Alberta trial lawyers is reiterating the crucial role that physicians have in a post-caps regime given the eccentricities of the legislation.

In their article, "Working Creatively with Automobile Insurance Reform Legislation from the Plaintiff's Perspective," Kevin P. Feehan, Q.C. and Lorena K. Harris highlight the lawyer/physician relationship:

> "Of importance, Plaintiffs' counsel should note that the primary responsibility under the regulations falls upon the healthcare practitioner. Therefore, potentially one of the most valuable approaches Plaintiffs' counsel can take is to develop clear lines of communication and a good working relationship with healthcare providers. Such a relationship will make it easier to ensure that the healthcare provider has all of the necessary information to enable him or her to make a determination as to whether a client's injury is a 'minor injury'."[51]

- **Lawyers and physicians should be aware of a client's past medical history:**

The importance of a client/patient being completely forthright about any pre-existing health issues is paramount. Ms. Purcell, Q.C., provides helpful insight into the importance of doing so:

> "I try to collect the pre-existing medical information very early to determine other factors at play, and to remind the client of prior health issues, both for answering my investigations and so as not to forget about them when dealing with other health professionals (often the reason they do not recall prior matters is they were healed and moved on; the opposing side may instead see it as concealment). Reviewing the history early also helps your client's credibility, both as it relates to a perception of truthfulness by the opposing side but also as it relates to accuracy and reliability.
>
> Other factors may also be important including other accidents, medical treatments, psychological factors and social factors (e.g. marriage breakdown, loss of a job, death in the family). In this context, you must explore whether the additional factors are accident related, pre-existing or merely unrelated. If the further factors are due to the accident injuries, the sprain, strain or WAD injury may remain the primary contributing factor. At the time something happens to my client, I ask if it has anything to do with the accident."[52]

Mr. Feehan, Q.C. and Ms. Harris echo Ms. Purcell, Q.C., in reiterating the importance of knowing a client/patient's medical history and the consequences of not having a complete picture:

> "The passing of these regulations makes it incumbent upon Plaintiff's counsel to become knowledgeable as to the client's past medical history early in the early stages of the file. While prior to the enactment of these regulations, the gathering of past medical history could take place during the litigation itself (i.e. subsequent to the drafting and issuance of a Statement of Claim), and was subject, first of all, to the scrutiny of Plaintiffs counsel to determine an initial opinion regarding relevance (having regards to the nature of the injury at hand, the past medical history, and the proximity of the injury to past medical issues), given the direction to healthcare practitioners to take such a history, Plaintiffs counsel must now be certain to ensure that a full and complete history is taken at the early stages. The danger of an incomplete past medical history taken by a healthcare provider could, without more, present an incomplete picture of a patient with a past history of psychological, emotional, cognitive or social disturbance that really has little relevance to the injury at hand. Being fully aware of the client's past history at the outset provides counsel with the opportunity to advocate the minimal relevance of the past history.
>
> While this is no different from arguments that are typically raised with respect to past physical, complaints that have little bearing on the injury at hand, or with respect to past histories of psychological or psychiatric counselling, again, Plaintiff's counsel must be fully informed of the client's past history so as to enable him or her to present a complete picture in support of an argument that the past history has no relevance or bearing upon the injuries at hand."[53]

## VII. ADDITIONAL STRATEGIES FOR FIRMS AND CLIENTS

In the new post-caps era, several firms have been implementing their own strategies for dealing with clients who may or may not fall under the "minor injury" cap. A lot of firms are emphasizing the importance of their lawyers to learning about the new system. Others are implementing their own set of guidelines for clients to take on. Ultimately, all firms are being careful because of the obvious potential business issues that could arise by taking on clients who might be capped such as accumulating disbursements that might never be paid back.

### a. Within a Firm

#### i. Education

Education is imperative for lawyers, physicians, and their respective staffs. In the legal context, this means encouraging your lawyers and their respective staff to attend conferences like the TLABC paralegal and lawyers' conferences, reviewing past papers from TLABC and the Continuing Legal Education Society of BC, and conferences, etc. A number of Canadian Bar Association BC Branch section meetings have also been held.

A strategy for staying on top of the latest information in a more succinct, distilled manner is through creating a paper and/or paperless (depending on your preference) binder of all the relevant articles on the most recent legislation, CRT, and so forth. The same is true for the new changes surrounding part 7 benefits. A list of some resources that could be in a collection of articles and papers can be found in section VII of this paper.

Regular monthly firm meetings – including discussions of recent talks, blogs, and articles – are also imperative for ensuring that everyone is up to date with the most recent developments.

Lawyers should regularly lean on their networks. The same is true for physicians. Thus, everyone involved can exchange ideas and consider strategies for getting through these uncertain times. By learning from what worked, or did not work, efficient and cost effective strategies can be developed for this new caps era.

#### ii. Monitor Deadlines and Develop Precedent Letters

A number of dates and deadlines revolve around the referrals to resident care advisors, and submission of receipts in the CRT system. Important dates in the CRT system are especially noteworthy and should be diarized as BF precedents.

Like updating one's BF system, precedent letters for prospective and new clients are vital. The letters should be developed sooner rather than scrambling with the task later. New clients need to be aware of the risks with this new litigation and understand that a lawyer's job is to assess that risk.

### b. With Prospective and New Clients

#### i. Prospective Clients

Some lawyers are understandably reluctant about taking on new clients. Given the strict "prescribed treatment protocol,"[54] they tend to be more selective about the clients they sign up and want their future clients to follow instructions well. Others are asking their clients to keep pain diaries to detail the effects of their injuries at work and at home.

Other important dates include those involving incapacity – for example, the 16-week mark for concussions and/or psychological or psychiatric conditions – that need to be monitored by lawyers and staff. Lawyers will likely consider whether or not they want to sign up a client right away or wait and see the prospective client's condition after some monitoring. Everyone has their own approach, but whatever strategy is used, it should be done with caution, particularly since there are no published decisions by the CRT on how these laws, rules and timelines are applied.

#### ii. New Clients

New clients need to be aware of the risks of the new legislation and be equipped to best navigate the new caps regime. Increased scrutiny will be exerted through the lens of denying a claim, because it is "minor." New clients will need to take a larger role in documenting their case, ensuring they attend their doctors, and being aware of strict deadlines.

As noted above for prospective clients, many lawyers encourage their new clients to keep pain diaries and document the impact that the accident has had on their lives. Particular care should be given to clients with possible brain, psychological, and/or psychiatric injuries that can hamper their ability to follow instructions.

Lawyers should know their new clients' support systems (if they have one) much earlier in the process. For example, lawyers need to be familiar with the client's or patient's spouse, adult children, their employers, and so forth. To establish that a claim is not "minor," the people who are in the client's life (in addition to physicians and treatment providers, as discussed in section VI. What We Can Learn From Alberta) will be crucial in providing supportive evidence.

## VIII. ADDITIONAL RESOURCES

### a. Legislation

- *Insurance (Vehicle) Act*, RSBC 1996, c. 231[55]
- *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25[56]
- *Insurance (Vehicle) Act*, Minor Injury Regulation, B.C. Reg. 234/2018[57]

**b. Articles and Papers**

- "Minor Injury" Laws and the CRT - Changes to Injury Claims, by Nicholas W. Peterson, Collins Peterson LLP - Injury Lawyers, The Verdict[58]
- The Civil Resolution Solution Explorer Fact Sheets:[59]
    - The CRT and Motor Vehicle Accidents
    - About Personal Injury
    - Making a Claim with the CRT – MVA
    - About Minor Injury Determination
    - About Medical Expert Evidence
    - Workbook for Personal Injury Claims

- Available for purchase through the Alberta Civil Trial Lawyers Association:
    - Emerging Defence Tactics and How to Deal with Them, by Donna C. Purcell, Q.C.
    - Serious Business: Serious Impairment Under the Minor Injury Regulations, by Michael N. Hossein
    - Serious Impairment, Chronic Pain and the Minor Injury Regulation, by Greg Rodin, Q.C.
    - The Certified Medical Examination in the Minor Injury Regulation of Alberta: Just Another Defence Examination in Disguise, by Norm Assiff
    - Working Creatively with Automobile Insurance Reform Legislation from the Plaintiff's Perspective, by Kevin P. Feehan, Q.C. and Lorena K. Harris

**c. Conferences and Section Meetings**

- TLABC Conferences (materials are available for download for TLABC members):
    - 2019 Medical Legal Conference XVII (Costa Rica) Seminar Materials, January 24, 2019[60]
    - 2019 Time to Adapt (Plaintiff Only) Seminar Materials, February 22, 2019[61]
        - Cap Busting: *A Practitioner's Guide to the NDP's CRT & Minor Injury Cap Scheme***,** by John Rice & Caitlin Fraser
- CBABC Conferences (materials and video can be accessed for purchase in various ways):
    - Civil Resolution Tribunal and Personal Injury Practice 2019, April 25, 2019[62]

- CBABC Section Meetings (video of the meetings are viewable for CBABC members):
    - Civil Resolution Tribunal - 2019 Update and Need-to-Know for Litigators, April 16, 2019[63]
    - 2019 Update and Q&A with Minister Eby, January 17, 2019[64]
    - An Update on Legislative Changes to ICBC, January 31, 2019[65]

**d. Online Resources**

- TLABC Listserves (the archives on the general and plaintiff-only listserves go back over 15 years)[66]
- Erik Magraken's BC Injury Law and ICBC Claims Blog[67]

**Appendix 1: Canadian Provinces' Definitions of "Minor Injury" and "Serious Impairment"**

| Province | "Minor Injury" | "Serious Impairment" | Source |
|---|---|---|---|
| **Alberta** | In respect of an accident, means (i) a sprain, (ii) a strain, or (iii) a WAD injury* caused by that accident that does not result in a serious impairment<br><br>* = "For the purposes of this Regulation, an injury in respect of an accident involving or surrounding the temporomandibular joint is a sprain, strain or WAD injury unless the injury involves (a) damage to bone or teeth, or (b) damage to or displacement of the articular disc." | "Serious impairment," in respect of a claimant, means an impairment of a physical or cognitive function (i) that results in a substantial inability to perform the (A) essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession, (B) essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or (C) normal activities of the claimant's daily living, (ii) that has been ongoing since the accident, and (iii) that is expected not to improve substantially; | *Minor Injury Regulation*, AR 123/2004, s. 1(h) and (j), s. 2[68] |
| **New Brunswick** | "Minor personal injury" means any of the following injuries, including any clinically associated sequelae, that do not result in serious impairment or in permanent serious disfigurement: (a) a contusion; (b) an abrasion; (c) a | "Serious impairment" means, in respect of a plaintiff, an impairment of a physical or cognitive function that (déficience grave)<br>(a) results in a substantial inability to perform<br>(i) the essential tasks of the plaintiff's regular employment, occupation or profession, despite the plaintiff's reasonable efforts to use any accommodation provided to assist the plaintiff in performing those tasks,<br>(ii) the essential tasks of the plaintiff's | *Injury Regulation*, 2003-20, s. 4.2(1)[69] |

| | | | |
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| | laceration; (d) a sprain; (e) a strain; and (f) a whiplash associated disorder | training or education in a program or course in which the plaintiff was enrolled or had been accepted for enrolment at the time of the accident, despite the plaintiff's reasonable efforts to use any accommodation provided to assist the plaintiff in performing those tasks, or<br>(iii) the plaintiff's normal activities of daily living,<br>(b) has been ongoing since the accident, and<br>(c) is not expected to improve substantially. | |
| **Nova Scotia** | "Minor injury", with respect to an accident, means<br>(i) a sprain,<br>(ii) a strain, or<br>(iii) a whiplash-associated disorder injury, caused by that accident that does not result in a serious impairment. | "Serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment. | *Insurance Act*, RSNS 1989, c. 231, s. 113E(1)(a) & (b)[70] |
| **Ontario** | "Minor injury" means one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury | A person suffers from permanent serious impairment of an important physical, mental or psychological function if all of the following criteria are met:<br>1. The impairment must,<br>i. substantially interfere with the person's ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,<br>ii. substantially interfere with the person's ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person's impairment | *Statutory Accident Benefits Schedule*, O. Reg. 34/10, s. 3 & s. 4.2 (1)[71] |

| | | | |
|---|---|---|---|
| | | and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training, or iii. substantially interfere with most of the usual activities of daily living, considering the person's age.<br>2. For the function that is impaired to be an important function of the impaired person, the function must,<br>i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,<br>ii. be necessary to perform the activities that are essential tasks of the person's training for a career in a field in which the person was being trained before the incident, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training,<br>iii. be necessary for the person to provide for his or her own care or well-being, or<br>iv. be important to the usual activities of daily living, considering the person's age.<br>3. For the impairment to be permanent, the impairment must,<br>i. have been continuous since the incident and must, based on medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment, be expected not to substantially improve,<br>ii. continue to meet the criteria in paragraph 1, and<br>iii. be of a nature that is expected to continue without substantial | |

| | | | |
|---|---|---|---|
| | | improvement when sustained by persons in similar circumstances. | |
| **P.E.I.** | "Minor personal injury" means any of the following injuries, including any clinically associated sequelae, that do not result in serious impairment:<br>(i) sprain,<br>(ii) strain, or<br>(iii) whiplash-associated disorder injury; | "Serious impairment" means an impairment of a physical or cognitive function that meets all of the following requirements:<br>(i) the impairment results in a substantial inability to perform any or all of the following:<br>(A) the essential tasks of the person's regular employment, occupation or profession, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her employment, occupation or profession,<br>(B) the essential tasks of the person's training or education in a program or course that the person was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her training or education,<br>(C) the normal activities of the person's daily living,<br>(ii) the impairment has been ongoing since the accident, and<br>(iii) the impairment is expected not to improve substantially; | *Insurance Act*, RSPEI 1988, c. I-4, s. 254.2. (b) & (d)[72] |

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