

FEB09 2018

WHITELAW TWINING UPDATE

GOVERNMENT DIRECTS CHANGES TO ICBC

The British Columbia government has just announced its intended changes for the Insurance Corporation of British Columbia (ICBC) to offset projected losses in excess of \$1 billion per year and to avoid drastic premium increases. These changes have implications for underwriters of excess auto and for out-of-province insurers as well.

The key change is a \$5,500 cap on damages for pain and suffering for “minor injuries”. There are no details as to the wording of the definition of the cap and the actual wording will be critical to assess its ramifications. In provinces that have a cap, the form of wording varies and has a significant effect on how broadly it applies. In Ontario, a minor injury is defined to encompass almost all soft tissue injuries. In Alberta, the cap only applies to a soft tissue injury “that does not result in a serious impairment”. As a result, it is much easier to avoid the minor injury cap in Alberta than in Ontario. These changes are said to be coming in April 2019 and will apply to losses occurring after that date.

Another major change, and distinct from other jurisdictions, is that disputes over classification of injury will be adjudicated by the B.C. Civil Resolution Tribunal. If the examples from other provinces are any guide, the Tribunal will be very busy indeed and likely inundated with actions challenging the application of the cap. No announcements have yet been made as to how the Government intends to hire and recruit the necessary adjudicators for this new process and whether appeals will be permitted. No details have yet been provided as to whether the cap will apply to excess or out-of-province insurers either. Further details are expected over the coming weeks and months.

Another major change is with respect to no-fault accident benefits. The Government is proposing that those benefits will double from \$150,000 to \$300,000 (retroactive to January 1, 2018). As well, ICBC will provide more money per treatment, coverage for more types of treatment, increased wage loss payments, and other new benefits.

This major proposed increase in no-fault accident benefits will have a major impact on most out-of-province insurers whose insureds are involved in an accident in BC. Out-of-province insurers have been able to file a Power of Attorney and Undertaking (“PAU”) with federal regulators, undertaking to provide at least the minimum required limits and to not raise any defence to a claim that would be unavailable to a locally licensed insurer (i.e. ICBC). The key to understanding the operation of the PAU is found in the words “not to set up any defence to any claim, action, or proceeding...” The rule of thumb is that if ICBC would be required to pay a certain amount or provide a certain benefit, the out-of-province insurer cannot avoid doing so merely because its own policy does not contain the same obligations. As a result, an out-of-province insurer will likely be required to match the newly outlined ICBC no-fault benefits.

From the limited details currently available, the good news appears to be that on the tort side, all auto insurers will likely receive the benefit of the cap on damages for minor claims that is available in most other Canadian jurisdictions. Hopefully, the legislation will be drafted to allow out-of-province insurers to deduct the expanded no-fault benefits from the tort claims arising from BC accidents. On the no-fault side, it appears likely that most out-of-province insurers will be faced with additional and expanded 1st party no-fault coverage in accordance with the expanded ICBC Part 7 entitlement.

Full details of the changes, according to the B.C. government news release are here:
<https://news.gov.bc.ca/releases/2018AG0003-000164>.

Should you have any questions or require further information respecting these procedural changes, please do not hesitate to contact us:

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