

# BRIEFING NOTE

## B.C. Government passes 6% disbursement limit on “vehicle injury proceedings” – what are the limits and when are they applicable

In part of its ongoing package of reforms to reduce litigation cost, the British Columbia government has recently enacted into law a new regulation—the *Disbursements and Expert Evidence Regulation*, B.C. Reg. 31/2021—which limits the amount of disbursements that are recoverable by the successful party in “vehicle injury proceedings”. The regulation sets out separate limits for recoverable disbursements for expert reports, as well as recoverable disbursements globally.

This regulation is important for both claims examiners and their legal counsel to consider when assessing claims for disbursements as well as for strategic use in trying to drive earlier settlement negotiations before further costs are incurred. This briefing note will examine the actions in which the disbursement limitations are applicable, the amount of the applicable limits, and the implications of same on vehicle injury litigation

The following table provides a summary of the applicable limits:

Type of proceeding	Total allowable expert disbursements (damages reports only) <sup>1</sup>	Total allowable for disbursements (including expert disbursements)
<b>Regular (non fast-track) proceeding</b>	Amount incurred for up to <i>three</i> primary reports from different experts <u>plus</u> unlimited responding reports served within 126 days of the trial date <u>plus</u> any additional reports tendered at trial with the consent of the opposing party or on application to the court	6% of damages awarded or accepted offer to settle <u>plus</u> <i>excluded disbursements</i>

<sup>1</sup> In addition to these limits, a party can recover the amount incurred in respect of any joint expert reports and reports ordered by the court on the court’s own initiative

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<b>Fast-track Proceeding (i.e., a proceeding in which a Notice of Fast Track action has been filed)</b>	Amount incurred for <i>one</i> primary report <u>plus</u> unlimited responding reports served within 126 days of the trial date <u>plus</u> any additional reports tendered at trial with the consent of the opposing party or on application to the court	6% of damages awarded or accepted offer to settle <u>plus</u> <i>excluded disbursements</i>
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## I. Application of the regulation

The regulation is applicable to “vehicle injury proceedings”. “Vehicle injury proceedings” are defined in section 12.1(1) of the *Evidence Act*, R.S.B.C. 1996, c. 124, as proceedings that include a claim for “vehicle injury damages”. “Vehicle injury damages” are defined as “damages for personal injury or death resulting from the use or operation of a vehicle”. Therefore, this regulation is applicable to any legal action that includes *a claim* for damages for personal injury or death resulting from the use or operation of a vehicle.

While there has not yet been any case law interpreting this definition, it appears likely that it would include actions involving allegations of negligence against road maintenance contractors, liquor establishments and automotive mechanics, among others, whose negligence is alleged to have caused or contributed to a motor vehicle accident.

## II. Expert disbursement limit

The new expert disbursement limits are targeted at primary expert reports. For regular (non fast-track) proceedings, only three primary expert reports from different experts are recoverable as disbursements, plus any additional primary reports that were consented to by the parties to the litigation or allowed by order of the court on application. For fast-track proceedings, only one primary expert report is recoverable as a disbursement.

The expert disbursement limit does not affect the ability to recover amounts incurred for:

1. responding expert reports served within 126 days of the scheduled trial date;
2. joint expert reports; and
3. reports ordered by the court on its own initiative.

The expert disbursement limit **does not apply** to:

1. amounts that were necessarily or properly incurred before February 6, 2020 for a report from an expert; and
2. actions where the notice of trial was filed and served before February 6, 2020 and the trial date was before October 1, 2020.

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### III. Global disbursement limit

#### Calculation of amount of global disbursement limit

The global disbursement limit for action where the plaintiff is awarded damages is 6% of the total award of damages assessed by the court or, if an offer to settle is accepted, 6% of the amount offered. Note that there are certain “excluded disbursements” which are not included in the calculation of disbursements subject to the disbursement limit. We will address these disbursements in the “excluded disbursements” section below.

The global disbursement limit where the defendant is successful on liability, or the court does not award any damages to the plaintiff, is an amount determined by the court. Our office is not aware of any authority to date determining the test for allowable disbursements where the defendant is successful on liability, or the court does not award any damages.

#### Excluded disbursements

The regulation provides for certain “excluded” disbursements which are not included in the calculation of disbursements subject to the global disbursement limit.

The following constitute “excluded” disbursements:

1. Fees payable to the Crown under the Supreme Court Civil Rules. These are the fees set out in Appendix C to the Supreme Court Civil Rules and include filing fees for court documents as well as hearing fees.
2. The \$1,000 non-refundable deposit paid to the Sheriff for a civil jury trial. Note that the regulation does not appear to include the individual juror fees set out in the *Jury Regulation*, B.C. Reg. 282/95 as “excluded disbursements” meaning that these fees are likely included in the calculation of disbursements subject to the global disbursement limit.
3. Expert reports on the issue of liability, if the court orders that those expenses are excluded disbursements. Our office is not aware of any authority to date defining the test for whether a liability report will or will not be considered an excluded disbursement.

The regulation also provides that the disbursement limit is not applicable to legal actions where the court orders that the costs of the proceeding be paid as special costs.

#### Actions where the global disbursement limit does not apply

The global disbursement limit **does not apply** to actions where:

- The notice of trial was filed and served before August 12, 2021 and the trial date is before June 1, 2021.
- The notice of trial was filed and served before August 12, 2020, the trial date is on or after June 1, 2021 and the court is satisfied that the party necessarily or properly incurred disbursements before August 12, 2020 in excess of the disbursement limit.

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## Courts' discretion

The regulation does not appear to provide for any discretion by the court in calculating the allowable disbursements. The court may only allow the sum of (i) the "included" disbursements up to the global disbursement limit and (ii) the "excluded" disbursements.

### IV. Implications of the disbursement limits

The disbursement limits have the implication that parties to vehicle injury proceedings can no longer have the expectation that all of their disbursements will be recovered by the successful party. We can expect that plaintiffs will be more hesitant in respect of incurring disbursements for items such as clinical records and that more plaintiff firms will try to pass those costs off to defendants and their insurers as part of the litigation process as opposed to at its conclusion.

The separate expert disbursement limit for fast-track proceedings might also provide incentive for defendants and their insurers to issue notices of fast track action where the damages sought by the plaintiff are likely below \$100,000 or the trial can be completed in three days. The fast-track designation would reduce the number of compensable expert reports from three to one, although this effect may already be achieved by the global disbursement limit of 6% of the damages awarded.

For insurers, this regulation should reduce the length and expense associated with vehicles injury trials and may result in earlier negotiations before expenses are incurred that may exceed the disbursement limit. Insurer clients and their counsel should be aware of and strategically use these limits in negotiating pre-trial settlements or bills of cost following trial.

We can anticipate that there may be a constitutional challenge to this new piece of regulation which may lead to uncertainty as to its application in the interim.

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