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Résumé de l'article

En mai 2021, la société de l'assurance automobile de la Colombie-Britannique a fait la transition vers un régime de responsabilité sans égard à la faute pour fixer le montant forfaitaire de la compensation à verser aux blessés d'un accident de la route, plutôt que de passer par des litiges délictuels et des avocats. Ce régime établit les droits aux soins prévus par la loi, ainsi que les prestations de rétablissement et de remplacement du revenu. Les litiges relatifs à ces types de prestations sont maintenant du ressort du tribunal de règlement des différends civils (« Civil Resolution Tribunal » ou « CRT »), un tribunal en ligne en plein essor qui a été encensé, sur le plan de l'accès à la justice, en tant que plateforme de négociation et de règlement des différends plus simples et de moindre importance qui ne requièrent pas l'intervention d'avocats. Le présent article examine si l'effet combiné de la transition vers un régime de responsabilité sans égard à la faute et du transfert de la compétence au CRT satisfait efficacement aux besoins en matière d'accès à la justice des accidentés de la route. Après un examen des changements institutionnels dans l'accès à la justice pour les accidentés de la route et des explications liées à ces changements, ainsi qu'un examen quantitatif des résultats de l'analyse sur les décisions du CRT entre les demandeurs et la société de l'assurance automobile, le présent article conclut que le nouveau régime de responsabilité sans égard à la faute crée des problèmes au titre de l'accès à la justice et des inégalités importantes sur le plan de la négociation, au détriment des accidentés de la route, problèmes et inégalités qui ne sont pas résolus par le recours au CRT. De façon plus générale, l'article illustre la complexité de l'accès à la justice, un phénomène relationnel et multifacette dans une époque où des valeurs unidimensionnelles comme l'économie de coûts, la brièveté des délais et l'efficience sont souvent mises de l'avant comme des solutions toutes désignées en matière d'accès à la justice.

No-Fault, Motor Vehicle Accidents, and The Civil Resolution Tribunal: Effective Justice or False Prophet?

Kaitlyn Cumming[*]

Since May 2021, instead of using tort litigation and lawyers to determine a lump-sum amount for what a person should be compensated for after being injured in a car crash, the Insurance Corporation of British Columbia [ICBC] has shifted to a new No-Fault system that provides statutorily defined entitlement to care, recovery and income replacement benefits. Disputes over those benefits are now under the jurisdiction of the rapidly growing Civil Resolution Tribunal [CRT], an online tribunal lauded for its contribution to access to justice (A2J) as a negotiation and adjudication platform for use without lawyers for smaller and simpler civil matters. This article asks whether the combined shift to No-Fault and CRT jurisdiction effectively meets the access to justice needs of those injured in motor vehicle accidents. After surveying the institutional changes to the A2J landscape for those injured in MVAs, narratives surrounding the changes, and conducting a quantitative outcome of analysis of CRT decisions between individual claimants and ICBC where ICBC was found to be successful before the CRT in 73% of cases, this article concludes that ICBC's new No-Fault system creates A2J concerns and significant bargaining inequalities for those injured in MVAs that are not overcome by recourse to the CRT. More broadly, this article illustrates the complexities of A2J as a relational and multi-faceted phenomenon in an era where one-dimensional metrics of cost-savings, speed, and efficiency are frequently promoted as novel A2J cures.

En mai 2021, la société de l'assurance automobile de la Colombie-Britannique a fait la transition vers un régime de responsabilité sans égard à la faute pour fixer le montant forfaitaire de la compensation à verser aux blessés d'un accident de la route, plutôt que de passer par des litiges délictuels et des avocats. Ce régime établit les droits aux soins prévus par la loi, ainsi que les prestations de rétablissement et de remplacement du revenu. Les litiges relatifs à ces types de prestations sont maintenant du ressort du tribunal de règlement des différends civils (« Civil Resolution Tribunal » ou « CRT »), un tribunal en ligne en plein essor qui a été encensé, sur le plan de l'accès à la justice, en tant que plateforme de négociation et de règlement des différends plus simples et de moindre importance qui ne requièrent pas l'intervention d'avocats. Le présent article examine si l'effet combiné de la transition vers un régime de responsabilité sans égard à la faute et du transfert de la compétence au CRT satisfait efficacement aux besoins en matière d'accès à la justice des accidentés de la route. Après un examen des changements institutionnels dans l'accès à la justice pour les accidentés de la route et des explications liées à ces

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changements, ainsi qu'un examen quantitatif des résultats de l'analyse sur les décisions du CRT entre les demandeurs et la société de l'assurance automobile, le présent article conclut que le nouveau régime de responsabilité sans égard à la faute crée des problèmes au titre de l'accès à la justice et des inégalités importantes sur le plan de la négociation, au détriment des accidentés de la route, problèmes et inégalités qui ne sont pas résolus par le recours au CRT. De façon plus générale, l'article illustre la complexité de l'accès à la justice, un phénomène relationnel et multifacette dans une époque où des valeurs unidimensionnelles comme l'économie de coûts, la brièveté des délais et l'efficience sont souvent mises de l'avant comme des solutions toutes désignées en matière d'accès à la justice.

I. INTRODUCTION

In a news release announcing the Insurance Corporation of British Columbia's [ICBC] shift from a tort-based litigation system to a No-Fault, benefits-based insurance model ("No-Fault"),[1] government officials proclaimed the state-run insurer's financial and operational challenges to be a thing of the past. They did not hesitate to spell out the source of the trouble they had excised. Then Premier John Horgan was quoted as saying: "The old government ignored ICBC's problems, allowing it to become a system that made lawyers rich, while drivers paid too much for insurance." Then Attorney General David Eby, now Premier: "You shouldn't need a lawyer to access the benefits you've paid for. By removing expensive lawyers and legal fees from the system, we are making ICBC work for British Columbians again with more affordable insurance rates and much better coverage, so anyone injured in a crash gets the care they need."[2]

Since May 2021, instead of using tort litigation and lawyers[3] to determine a person's lump-sum entitlement to compensation after being injured in a car crash through the fault of another driver, ICBC's new No-Fault system means that ICBC adjusters determine an injured person's entitlement to insurance benefits, regardless of fault, on an ongoing basis. Disputes over those benefits are now under the jurisdiction of the rapidly growing Civil Resolution Tribunal [CRT], an online tribunal lauded for its contribution to access to justice (A2J) as a negotiation and adjudication platform for use without lawyers for smaller and simpler civil matters.[4] These changes represent a major shift in the process those injured in MVAs navigate after being injured in an accident and raise important questions about the role of lawyers, methods of dispute resolution, and what A2J looks like for those injured in motor vehicle accidents [MVAs].

We know that, at a population level, A2J reforms are sorely needed: civil A2J is an enduring challenge in Canadian society and legal services are expensive and out of reach for many.[5] We've gained an

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1 British Columbia, Attorney General, News Release, "Transforming ICBC to deliver lower rates, better benefits" (6 February 2020), BC Gov News <https://news.gov.bc.ca/21540>.

2 *Ibid.*

3 Not everyone injured in an MVA would retain a lawyer; however, use of lawyers was common and widespread and generally accessible via a contingency fee arrangement, as discussed more fully below.

4 For example, see self-reporting on the Civil Resolution Tribunal's expansion of jurisdiction into the realm of motor vehicle accidents as an A2J-enhancing initiative in Action Committee on Civil and Family Justice, "Tracking Our Progress: Canada's Justice Development Goals in 2019", online: <http://www.justicedevelopmentgoals.ca/sites/default/files/drupalexp/jollyness/images/jes-images/canadajdg_report19_en.pdf> [2019 JDG Report] at 33.

5 For some of the literature and statistics on this topic, see Statistics Canada, "Experiences of Serious Problems or Disputes in the Canadian Provinces, 2021" by Laura Savage & Susan McDonald, "*Juristat*, Catalogue No 85-002-X (2021),

understanding of some reasons driving poor civil A2J through studies asking about peoples' experiences of justice and associated pathways for seeking rights recognition.[6] However, the literature is sparse on empirical assessments of civil A2J within specific rights and adjudication regimes. In particular, little scholarship to date has focused on understanding justice pathways for those injured in MVAs.[7] This article will begin to fill this gap and point to the pressing need for further research to understand the experiences of those coping with the effects of injury in navigating recovery and justice.

Are insured British Columbians getting the care they need, and is the system better off without those pesky, greedy lawyers? More broadly, in a justice system that offers many pathways to dispute resolution and adjudication, ranging from private alternative dispute resolution to administrative schemes to courts, how do we assess which model provides the ideal balance of practicality, cost, fairness and justice in any given context? In this article, I do not purport to definitively answer these questions, but instead take on the more modest task of outlining and testing a framework within which we can begin to evaluate claims about whether ICBC's new No-Fault scheme delivers on providing meaningful A2J. The discussion will further illuminate deeper questions about the nature of A2J and outline future directions for research.

In Part II, I will outline a framework for evaluating A2J in negotiation and adjudication contexts that aims to capture the relational complexity of A2J by incorporating salient and undertheorized considerations of equality, legal capital, and bargaining power. In Part III, to provide the institutional context needed to understand the significance of the study in Part IV, I will recount how the changes to British Columbia's MVA landscape came about, the role of the CRT, and responses to the reforms. In Part IV, through a quantitative outcome analysis study of CRT decisions involving ICBC as a party, I will apply Part II's framework to demonstrate that strong indications of pervasive power imbalances exist between MVA claimants and ICBC and highlight what this suggests about A2J for those injured in MVAs. Lastly, in Part V, I will provide recommendations to both improve and better understand A2J for those injured in MVAs.

The main finding of this study, that ICBC is successful against individual claimants before the CRT at a rate of 73%, indicate that ICBC's new No-Fault system creates A2J concerns and significant power imbalances for those injured in MVAs that are not overcome by recourse to the CRT. While eliminating tort awards and lawyers from the system may result in cost savings to ICBC, lack of meaningful advocacy

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online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2022001/article/00001-eng.pdf?st=LS0GbQ7O> ["Serious Legal Problems"]; Action Committee on Civil and Family Justice, "Access to Civil & Family Justice: A Roadmap for Change" (October 2013), online: <http://cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>; CBA Access to Justice Committee, "Reaching Equal Justice Report: An Invitation to Envision and Act" (November 2013), online: <https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf>; Legal Aid BC, "2020 Everyday Legal Needs Survey by Sherry Poirier & Brad Daisley (24 August 2020), online: <https://legalaid.bc.ca/sites/default/files/2020-09/Everyday%20Legal%20Needs%20Survey_1.pdf>.

6 Yvon Dandurand et al, "Navigating Access to Justice Pathways: Problem Resolution Routes for People Experiencing Civil and Family Law Problems in British Columbia" (Victoria: University of Victoria Access to Justice Centre for Excellence, 2022).

7 For treatment in other jurisdictions, see: Jeb Barnes, Elli Menounou & Parker Hevron, "Turning on Those Who Turn to the Courts: Experimental Evidence of Backlash Against Personal Injury Litigants" J Law & Courts, (25 April 2023), online: <https://doi.org/10.1017/jlc.2023.9>; Lisa Hoogendam et al, "Involvement in a Personal Injury Claim Is Associated With More Pain and Delayed Return to Work After Elective Nonsurgical or Surgical Treatment for Hand or Wrist Disorders: A Propensity Score–Matched Comparative Study" (2013) 481:4 Clinical Orthopaedics & Related Research 751, online: <https://doi.org/10.1097/CORR.0000000000002410>; Tiho Mijatov, Tom Barraclough & Warren Forster, "The Idea of Access to Justice: Reflections on New Zealand's Accident Compensation (or Personal Injury) System" (2016) 33:2 Windsor YB Access to Just 97, online: <https://doi.org/10.22329/wyaj.v33i2.4852>; Genevieve M Grant, "Claiming Justice in Injury Law" (2015) 41:3 Monash UL Rev 618.

and assistance for those injured in MVAs increases the administrative burden on them and exacerbates bargaining inequalities which, I argue, the CRT's user-friendly process does not sufficiently mitigate. In particular, the findings of this study highlight that when systemic bargaining inequalities are present in adjudication, something more than user-friendly procedural designs (such as the CRT) are required to balance the scales of justice. Ultimately, the results put into question the government's characterization of the No-Fault scheme as a system that does not require legal expertise to successfully navigate.

More broadly, this case study illustrates the complexities of A2J as a relational and multi-faceted phenomenon in an era where one-dimensional metrics of cost-savings, speed, and efficiency are frequently promoted as novel A2J cures.

II. LEGAL DISPUTES AND EQUITABLE ACCESS TO JUSTICE

A. Evaluating Civil A2J

Like many countries, Canada's civil justice system falls far short of meeting the legal needs of its people. Over the last two to three decades, surveys and interview research in Canada and across the globe have sought to document the unmet justice needs of broader society;[8] the first in Canada was the 2003 National Survey of Civil Justice Problems.[9] At the time of writing, the most recent iterations of this research nationally are the *Everyday Legal Problems and the Cost of Justice in Canada* (2016) report and Department of Justice Legal Needs survey (2021).[10] The former concluded that almost half (48.4%) of Canadians over 18 will experience at least one civil or family justice problem (for example, a consumer, employment, or housing issue) over any given three-year period[11] and that a significant number of these problems go unresolved. The personal costs of experiencing ongoing or unresolved legal problems, both financial and psychosocial, are high, as are the externalized costs to the state and society at large.[12]

In British Columbia, the Law Society's Legal Services in BC survey (2020) found that consumer problems are the most commonly reported legal issue (29% of respondents in the preceding 3 years), followed by employment (21%), then housing and land issues (20%).[13] Consistent with the findings of the *Everyday Legal Problems* report, 74% of respondents found legal problems to be disruptive to their daily life[14]. Lack of knowledge, stress, practical considerations (such as time) and cost were all commonly reported barriers to effective resolution.[15]

In response to these staggering numbers, prominent justice system stakeholders and researchers have increasingly focused attention on civil A2J. The result has been a turn away from siloed legal-centric

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8 World Justice Project, "Atlas of Legal Needs Surveys" (last visited 10 April 2024), online: <https://worldjusticeproject.org/our-work/research-and-data/atlas-legal-needs-surveys>.

9 Canada, Department of Justice, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns" by Ab Currie (April 2005), online; <http://www.cfcj-fcjc.org/sites/default/files/docs/2006/currie-en.pdf>.

10 Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (2016), online: <http://www.cfcjfcjc.org/sites/default/files//Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>; "Serious Legal Problems", *supra* note 5.

11 *Ibid* at 5.

12 *Ibid* at 12-19.

13 Law Society of British Columbia, "Legal Services in BC 2020 Survey" (2020), online: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/IPSOSReid2020-LegalServicesSurvey.pdf> at 17.

14 *Ibid.*

15 *Ibid* at 17, 23.

thinking towards a reform agenda that seeks to improve, evaluate and assess A2J from a data-driven, empirical, and person-centered perspective.[16] While the need for evidence-based reforms is acknowledged and measurement frameworks continue to evolve, whether increased focus has translated to improved A2J remains a challenging question to answer among multiple social forces. Furthermore, there remains deep uncertainty about the relationship between essential components of access to justice, including the relative importance of cost, speed, process satisfaction, and substantively just outcomes in any given context.[17] If our underlying understanding of what civil A2J is and means is incomplete, measures of progress will be inaccurate. Furthermore, normative ambiguity leaves the concept of A2J vulnerable to being invoked in support of nearly any reform without due critical attention. Exploring the shifting ground of civil A2J in MVA claims presents an opportunity to texture and deepen our understanding of A2J and to test the promises made by politicians and justice system stakeholders about civil A2J. To this end, I will now introduce a framework for considering A2J in the context of dispute resolution and adjudication processes.

B. Evaluating Institutional Civil A2J Reforms: Prioritizing Equitable Access to Justice

Canada's current dominant frame for understanding what will improve civil A2J focuses on how features of the civil justice system interact with individual experiences of navigating justice. For example, a system that is faster and easier to navigate than traditional courts, such as the CRT, is often promoted as an emblematic example of improvement in A2J based on those virtues alone. The underlying nature of a claim, power dynamics between users, substantive outcomes and systemic impacts remain all but unexamined.[18] I propose that this leaves our discussions of A2J sterilized of the realities of an unequal society and risks creating significant blind spots. In particular, it risks reducing A2J to a measure of procedural satisfaction that fails to "promise an interest in achieving substantive justice."[19]

What an individualized and de-contextualized perspective misses is the inherent relationality of legal disputes. A tenant experiences a housing issue in relation to a landlord. A consumer experiences a product deficiency issue due to the negligent or fraudulent behaviour of a large corporation. An employee's rights are ignored by their employer. A family business breaks up and old wounds open, entrenching the parties. Two large corporations arm themselves with lawyers to fight over a contractual provision affected by changing economic conditions. I argue that the recurring relational dynamics underlying different types of legal disputes carry with them a distinct set of institutional and social forces influencing A2J outcomes which require careful consideration when determining a fair and proportionate system for dispute resolution and adjudication.

Given the entrenchment and pervasiveness of inequality and social stratification[20] in broader Canadian society, this relationality takes on added significance. Within the justice system, inequalities are embodied

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16 See e.g. Access to Justice BC, *Access to Justice Measurement Framework* (2018), online: <https://ajrndotco.files.wordpress.com/2018/03/a2jbc-measurementframework.pdf>; Brea Lowenberger et al, "Measuring Improvements in Access to Justice: Utilizing an A2J Measurement Framework for Comparative Justice Data Collection and Program Evaluation across Canada" (2022) 37:1 Windsor YB Access Just 337, online: <https://doi.org/10.22329/wyaj.v37i1.7281>; Canada, Research and Statistics Division of the Department of Justice Canada, "Development of An Access to Justice Index for Federal Administrative Bodies" by Susan McDonald (2017), online: <https://www.justice.gc.ca/eng/rp-pr/jr/fab-eaf/p3.html>.

17 For one discussion of what the normative content of access to justice and person-centred justice should be, see Andrew Pilliar, "Filling the Normative Hole at the Centre of Access to Justice: Toward a Person-Centred Conception" (2022) 55:1 UBC L Rev 149.

18 See e.g. 2019 JDG Report, *supra* note 4 at 33.

19 Pilliar, *supra* note 17 at 182.

20 See e.g. Nicole Fortin et al, "Canadian Inequality: Recent Developments and Policy Options" (2012) 38:2 Can Public Policy 121, online: <https://doi.org/10.1353/cpp.2012.0017>; Edward G Grabb & Neil Guppy, eds, *Social Inequality in*

as unequal bargaining power and legal resources – otherwise stated, parties have varying degrees of *legal capital*. In this context, the definition of capital I employ is "the set of actually usable resources and powers" in a given social setting.[21] When applied to formal legal settings such as courts, resources and powers that influence access to justice have been documented to include access to money to fund litigation and hire a lawyer,[22] legal and strategic knowledge,[23] and social network access.[24] I contend that sufficient legal capital to meaningfully navigate and present a case in a legal setting is as essential to A2J as institutional elements such as timeliness, comprehensibility, and fairness of the procedural rules of a given forum, though the two are inter-related and inter-dependent. Otherwise stated, sufficient legal capital to navigate a given dispute resolution or adjudicative forum is a precondition to mobilizing rights. By extension, legal capital is connected to the development of new rights through the ability to engage with law-making processes, such as through common law evolution.[25]

Moreover, legal capital has an inherently relative dimension. I theorize that the wider the gulf between degrees of legal capital held by each party, the more difficulty a legally disadvantaged party is likely to have mobilizing the law and gaining key legal 'resources and rewards' (defined as relatively more beneficial judicial outcomes and experiences navigating legal disputes) within a given legal setting. In addition, the wider the gulf, the less effective facially-neutral procedural mechanisms and designs, such as user-friendly designs and plain language, will be at levelling the playing field. This is illustrated, in part, by the finding in several North American empirical studies that having a lawyer - who embodies a professionalized version of legal capital - increases your odds of success at adjudication.[26] I argue that our

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Canada: Patterns, Problems, and Policies, 5th ed (Toronto: Pearson/Prentice Hall, 2009); Statistics Canada, "Changes in wealth across the income distribution, 1999 to 2012" by Sharanjit Uppal & Sébastien LaRochelle-Côté, (Ottawa: Statistics Canada, 2015); Danielle Lamb, Margaret Yap & Michael Turk, "Aboriginal/Non-Aboriginal Wage Gaps in Canada: Evidence from the 2011 National Household Survey" (2018) 73:2 *Relations Industrielles* 225.

21 Erik Olin Wright, ed, *Approaches to Class Analysis* (Cambridge: Cambridge University Press, 2005) at 87

22 See *infra* note 26 for some of the literature on the impacts of access to legal representation.

23 See e.g. Judith Resnik, "A2j/A2k: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations" (2018) 96:3 NCL Rev 605 .

24 See e.g. Erin York Cornwell, Emily S Taylor Poppe & Megan Doherty Bea, "Networking in the Shadow of the Law: Informal Access to Legal Expertise through Personal Network Ties" (2017) 51:3 Law & Soc'y Rev 635, online: <https://doi.org/10.1111/lasr.12278>.

25 This is captured, in part, by the notion of the shadow of the law and public justice; see Noel Semple, "Better Access to Better Justice: The Potential of Procedural Reform" (2022) 100:2 Can Bar Rev 124 at 149-153, online: <https://cbr.cba.org/index.php/cbr/article/view/4772>. [Semple, "Better Access"].

26 A helpful literature review on this topic can be found in Sarah Buhler & Michelle C Korpan, "Measuring the Impacts of Representation in Legal Aid and Community Legal Services Settings: Considerations for Canadian Research" (2019) 56:4 Alta L Rev 1117, online: CanLIIDocs 2092 <https://canlii.ca/t/skqf>; For a few specific examples, see: Mike Cassidy & Janet Currie, "The Effects of Legal Representation on Tenant Outcomes in Housing Court: Evidence from New York City's Universal Access Program" (March 2022) Princeton University Working Paper, online: <https://economics.princeton.edu/wp-content/uploads/2022/03/Currie_Cassidy_UA.pdf>; Banks Miller, Linda Camp Keith & Jennifer S Holmes, "Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability" (2015) 49:1 Law & Soc'y Rev 209 online: <https://doi.org/10.1111/lasr.12123>; Craig Damian Smith, Sean Rehaag &Trevor CW Farrow, "Access to Justice for Refugees: How Legal Aid and Quality of Counsel Impact Fairness and Efficiency in Canada's Asylum System" (8 December 2021), online: SSRN <https://ssrn.com/abstract=3980954>; In British Columbia specifically, the advantage of legal representation was found to hold in a 2018 sample of general civil adjudication outcomes at the Supreme Court and Provincial Court; Kaitlyn Cumming, "Current Trends in Canadian Civil Justice System Reform: Manufactured Simplicity or Equitable Access to Justice?" (LLM Thesis, University of British Columbia, Faculty of Law, 2020) online: <http://dx.doi.org/10.14288/1.0395134> at 132.

failure to properly account for the relative nature of legal capital has, in part, led to over-reliance on procedural reform as a mechanism for improving access to justice.[27]

Turning back to the subject of this article, this framework elucidates an important question: is there evidence of bargaining asymmetries between ICBC and MVA claimants? Embedded within this question is whether recourse to the CRT neutralizes, exacerbates, or replicates underlying power imbalances in legal capital. More specifically, does the CRT's user-friendly design endow those traditionally legally disadvantaged with sufficient legal capital through use of user-friendly design, case managers, and other mechanisms? For example, does access to a case manager and plain language legal information on the CRT's Solution Explorer[28] translate into access to the requisite legal knowledge required to gather effective evidence (such as medical reports) and present a compelling case to a CRT adjudicator?

If the CRT does not neutralize underlying power imbalances through user-friendly design and other procedural mechanisms, this suggests that individual claimants require assistance of a different quality to mobilize their rights. This has implications for both the CRT and No-Fault, as both have been promoted as systems that do not require legal assistance to effectively navigate. I note that there are other potential critiques of the CRT, for example the argument that the CRT lacks independence from government,[29] which I do not address in this article.

This conception of legal capital builds on earlier scholarship that recognizes the critical importance of inequality and relational dynamics in civil justice disputes. The most well-known of these is Marc Galanter's "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change",[30] which explores the distribution of advantage and disadvantage within civil justice through the typology of comparing "one-shotters" and "repeat players" and exploring the underlying features that contribute to repeat players' disproportionate successes.[31]

Galanter explains how institutional "passivity and overload" allows for disproportionate advantage by assuming that "parties are treated as if they were equally endowed with economic resources, investigative opportunities and legal skills";[32] in other words, equal legal capital is assumed. Among other strategies, Galanter notes that a specialized legal bar for "one shotters" can help to "overcome the gap in [legal] expertise" that may exist between party types.[33] Relatedly, in a prescient example, Galanter notes that personal injury cases represent an anomaly in the unequal dynamic between one-shotters (those injured) and repeat players (insurers) given the wide availability of contingency fee agreements within personal injury practice.[34]

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27 For a deeper discussion of the relationship between procedural reform and access to justice, see Semple, "Better Access*"*, *supra* note 25.

28 British Columbia Civil Resolution Tribunal, "Solution Explorer: Vehicle Accidents" (last visited 12 April 2024), online: <https://civilresolutionbc.ca/solution-explorer/vehicle-accidents/>.

29 This argument has been raised in TLABC's most recent constitutional challenge against No-Fault; Notice of Claim, *Timothy Schober and Trial Lawyers Association of British Columbia v Attorney General of British Columbia* (4 July 2022) Vancouver Registry S-225367 [*Schober*].

30 (1974) 9:1 Law & Soc'y Rev 95 [Galanter, "Haves Come Out Ahead"].

31 *Ibid* at 97-98. A similar focus on relational dynamics and bargaining inequalities has been the subject of scholarship in the negotiation context. See e.g. Ilan G Gewurz, "(Re)designing mediation to address the nuances of power imbalance" (2001) 19:2 Conflict Resolution Q 135; Robert S Adler & Elliot M Silverstein, "When David Meets Goliath: Dealing with Power Differentials in Negotiations" (2000) 5 Harv Negot L Rev 1.

32 Galanter, "Haves Come Out Ahead", *supra* note 30 at 119-121.

33 *Ibid* at 118-119.

34 *Ibid* at 110.

Cappalletti & Garth's (1978) seminal *Access to justice: The newest wave in the worldwide movement to make rights effective*[35] illustrates a similar distributional understanding and links it to the concept of A2J. In line with many general definitions of A2J, Cappalletti & Garth (1978) define A2J broadly as "the means by which rights are made effective" but goes further than most in specifying the normative requirement that the system be "equally accessible to all".[36] For example, Cappalletti & Garth (1978) recognize that while banning legal representation is effective in reducing costs, it can serve to exacerbate differences in relative party capability (i.e. degrees in legal capital) and thus undermine equal access.[37] Galanter's and Cappalletti & Garth's works have enduring relevance today, and remind us that we must go from asking "what does this individual need to access justice?" to "what does this individual need to access justice given the social context and relationships embedded in their legal problem?"

Given limited judicial and administrative resources, complex laws, spending-wary governments, and entrenched societal inequalities, A2J reforms are most often a series of trade-offs. The task of researchers, justice system stakeholders, and policy evaluators ought to be concerned with whether there is a *net* increase in A2J, while paying particular attention to the *distribution* of A2J benefits. Who has what, who gets what, and in what measure matters.

The implication of this is that streamlining, simplification, process improvement and technological advances alone – the focus of many contemporary A2J initiatives – are insufficient, particularly if the legally advantaged have a greater ability to leverage new processes and technologies. In fact, when unequal uptake of new processes occurs – the use of rapidly developing AI comes to mind – these advances might serve to widen legal inequalities. Because of this, it is essential to consider party dynamics and the distribution of legal capital before designing and undertaking A2J reforms in dispute resolution and adjudicative forums.

In the context of this article, this relates to two elements of the move to No-Fault: the move to CRT jurisdiction and streamlining through the creation of a statutorily defined, benefits-based system, both of which government has argued removes the needs for expensive lawyers from the system as a whole.

As will be illustrated through the findings and discussion in Part IV, it is only with a distributional orientation that we can truly track whether we are moving closer to the normative goal of a system of civil justice that is "equally accessible to all" and effective in practice. Indeed, given the starkly unequal distribution of legal capital in society, I argue that a distributional orientation is a precondition to addressing the civil justice gap in a meaningful way. In other words, our explicit goal in institutional civil A2J reforms should be equitable access to justice.

In Part IV, I seek to apply this framework within the shifting ground of MVA disputes in British Columbia. First, it is necessary to provide an account of the institutional context in which the shift to ICBC's No-Fault scheme occurred, including the reactions and against changes. This account will bring many of the typical trade-offs at play in contemplated A2J reforms to the fore.

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35 Mauro Cappalletti & Bryant Garth, "Access to justice: The newest wave in the worldwide movement to make rights effective" (1978) 27 Buff L Rev 181.

36 *Ibid* at 185.

37 *Ibid* at 196.

III. THE TRANSFORMED MVA LANDSCAPE

A. The Reforms & Shift to No-Fault

The ICBC was created by the provincial government in 1973 through the *Insurance Corporation of British Columbia Act*, SBC 1973, c 44[38] to provide universal public automobile insurance.[39] By law, all automobile owners must purchase basic insurance through ICBC. Excess optional insurance can be purchased through ICBC or on the private insurance market.[40]

While ICBC has gone through a range of changes and controversies since its inception, a full account of which is beyond the scope of this paper, major structural changes began taking place in responses to significant financial losses reported by ICBC.[41] In response, the government commissioned the report *Affordable and effective auto insurance – A new road forward for British Columbia* (EY Report).[42] The report was authored by Canadian accounting firm Ernst & Young LLP in 2017, which follows a broader trend of the use of external consulting firms by government on important policy and operational questions.[43]

The EY Report and resulting reforms culminated in a shift to a No-Fault insurance scheme in May 2021. Change was prompted by escalating costs that the EY Report outlined could not be covered by ICBC's revenues without external financial help or significant increases in premiums for drivers. The EY Report estimated that, without significant reform, premiums would have to increase by 30% (to approximately $2000 per year to insure a vehicle, on average) above July 2017 rates for ICBC to cover its own costs.[44]

The EY Report traces increases in costs to several separate contributing factors, mainly: (1) a higher number of motor vehicle accidents on BC roads; (2) the filing of new claims outpacing the increasing number of accidents; (3) growing average settlements for what the report calls "minor injuries"[45] (in particular, compared to smaller relative increases for "major" or "significant" injuries), and (4) increasing claim costs (such as legal costs) for what the EY Report defines as "minor injuries" relative to total bodily injury claim costs.[46] As will be further detailed in later sections, the cause of the relative rise "minor injury"-related costs are not meaningfully addressed in the EY Report. Instead, the EY Report

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38 The current Act that continues ICBC as a Crown corporation is the *Insurance Corporation Act*, RSBC 1996, c 228.

39 Ernst & Young, "ICBC: Affordable and effective auto insurance – A new road forward for British Columbia" (July 2017) at 7, online: <https://www.icbc.com/about-icbc/company-info/Documents/Affordable-and-Effective-AutoInsurance-Report.pdf> [EY Report].

40 *Ibid.*

41 For example, for fiscal year 2017/2018, ICBC reported over 1.3 billion dollars in losses; ICBC, "2017/2018 Annual service plan report" at 21, online: <https://assets.ctfassets.net/nnc41duedoho/3dxcvoGlz3zF3q7FtO1m0O/af7c7fe2f8b9de5adf9a04cc06fd2009/ar-18.pdf>; since No-Fault came into effect, ICBC has reported gains in some years, and losses in others: see ICBC, "About ICBC, Annual Report" (2023), online: <https://icbc.com/about-icbc/company-info/Annual-Report>.

42 EY Report*, supra* note 39.

43 See e.g. David Macdonald, "The Shadow Public Service: The swelling ranks of federal government outsourced workers" (March 2011), online: Canadian Centre for Policy Alternatives <https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2011/03/Shadow_Public_Service.pdf>.

44 EY Report, *supra* note 39 at 8.

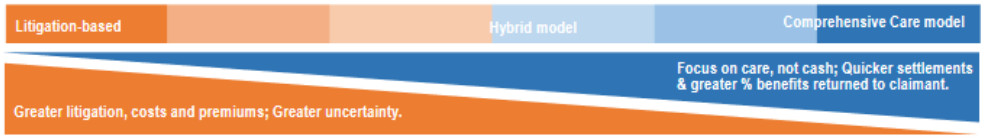
45 Defined in the EY Report as an injury that is "a sprain, strain or a whiplash-associated injury other than a neurological disorder or a fracture or dislocation of the spine", *ibid*. Some of the difficulties with this definition will be surveyed later in this paper.

46 *Ibid* at 8.

characterizes minor injury claim cost increases as something that represents a system that is out of control, noting that "[b]odily claim costs for minor injury claims are disproportionately high".[47]

The government viewed a steep premium rise or external government subsidization of ICBC as an unaffordable and unsustainable policy option before commissioning the EY Report's independent review.[48] As large premium increases were off the table, the EY Report focused on presenting different automobile insurance models (along with strategies for increasing road safety) – with reference to the experiences of comparable jurisdictions – that would control premium costs and claim costs to more "sustainable" levels. The range of options were visually summarized in the chart below.[49]

Chart 1: Spectrum of different auto insurance models, with features of litigation-based models on the left and care-based models on the right



ICBC's existing model was primarily a litigation-based system, where those injured in MVA accidents could sue negligent drivers in tort based one the general compensatory principle to be made whole (e.g., put back in their original position as though the accident had not occurred as near as possible).[50] ICBC paid out settlement or judgment awards subject to applicable policy limits of the driver responsible for the accident. In addition, all insured drivers injured in accidents were entitled to limited "Part 7" accident benefits paid by ICBC that would cover a modest portion of ongoing care expenses and wage loss benefits.[51]

In practice, this meant that those injured in MVAs would access Part 7 benefits to partially fund care, treatment and wage loss benefits until their tort claims were resolved and a lump sum was paid out through settlement or adjudication at trial, which could take years; in fact, some of these claims for accidents that took place before regulatory changes are still being litigated. Subject to any coverage disputes, defendant drivers were represented by ICBC and ICBC-appointed legal counsel. Injured plaintiffs were often represented by legal counsel through contingency fee agreements, with lawyers generally taking 25-33% of the final settlement.[52] As part of a contingency fee retainer, legal counsel might assist with the tort claim and ongoing negotiation with adjusters regarding Part 7 benefits.

While the EY Report did not bind the government of British Columbia in its subsequent ICBC reform agenda, its reasoning has been relied on and echoes the government's justifications for moving towards a No-Fault model. In addition to the EY Report's cost-savings promises for ICBC and insured drivers, the shift was justified as improving access to care and the efficiency and timeliness of resolving disputes, as illustrated by the Hansard comments made throughout discussion of the changes:

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47 *Ibid* at 108.
48 *Ibid* at 8.
49 *Ibid* at 7.
50 For an elaboration of this principle, see *Ratych v Bloomer*, [1990] 1 SCR 940.
51 EY Report, *supra* note 39 at 7; British Columbia, Insurance (Vehicle) Regulation, BC Reg 447/83, Part 7.
52 Law Society of British Columbia, "Lawyers' Fees" (last visited 12 April 2024), online: <https://www.lawsociety.bc.ca/working-with-lawyers/lawyers-fees/>.

> Hon. D. Eby: I want to note that there are a couple of reasons for the transition to the CRT [The Civil Resolution Tribunal]. Certainly, it is a reduced-overhead process that provides some savings in terms of dispute resolution. But it's also meant to be more efficient and timely for resolving disputes, for claimants, than court processes. It wasn't exclusively a money-saving initiative.[53] (July 24, 2020)
> …
> Hon D. Eby: Enhanced care coverage for bodily injuries significantly increases the amount of care and recovery benefits and provides additional benefits available to anyone injured in an auto crash, providing enough care for a lifetime for those who need it, without the need for costly, stressful, uncertain and time-consuming litigation.[54] (March 4, 2020)

Before turning to an examination of whether the new model lives up to these promises, the new model's features and its relationship to the CRT will be contrasted with the tort model that it replaced.

B. Before the Transformation: Primary Features of the Tort Model

Prior to the shift to No-Fault insurance in May 2021, MVA claims made up a large proportion of filings in British Columbia Supreme Court, which is the province's superior trial court of inherent jurisdiction.[55] For example, in 2018, 31% of all Supreme Court filings related to MVAs.[56] Though the Supreme Court does not break down trials heard with the same level of specificity as filings, there were 310 civil trials (which would include MVA claims) heard in 2018, out of a total of 870 trials for the year (352 criminal trials and 208 family trials)[57]. Though it will take time to see the full effects of the combined shift to CRT jurisdiction and change to a No-Fault benefit-based statutory scheme, new filings in 2022 were down from 31% (in 2018) to 11% of claims, falling from 23,789 filings in 2018 to 5,633 in 2022.[58]

Several contributing factors made it possible for MVA claims to make up a high proportion of total filed claims while ICBC had a litigation model in place. The first is the basic fact of the frequency of motor vehicle accidents, which averaged 505 accidents per 100,000 people annually in British Columbia from 2005-2014.[59] This, combined with mandatory automobile insurance, ensured a reliable source of recovery for tortious actions on the road.

The reliability of payment along with the frequency of MVAs occurring and being litigated contributed to the widespread willingness of lawyers to offer contingency fee agreements, which carry greater risk

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53 BC Legislative Assembly Hansard Debates, 41: Committee of Supply, Section A, Issue 16 24 July 2020, Afternoon session), online: <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/5th-session/20200724pm-CommitteeA-n16#16CSA:1645>.

54 BC Legislative Assembly Hansard Debates 41:5, Issue 323 (4 March 2020), online: <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/5th-session/20200304pm-Hansard-n323#323B:1345>.

55 Superior courts in Canada also enjoy constitutional protection of their "core" or original areas of jurisdiction by virtue of s. 96 of the *Constitution Act, 1867*: *Trial Lawyers Association of British Columbia v British Columbia* 2017 BCCA 324 at paras 47-48.

56 Or, 23,789 out of 75,963; other categories were: General Civil (24,645), Foreclosure (1,528), Probate (10,872), Family (11,678), Bankruptcy (1,421), Adoption (379), and Criminal (1,651), Supreme Court of British Columbia, *Annual* Report *2018*, at 57, online: <https://www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2018_SC_Annual_Report.pdf>.

57 *Ibid* at 65.

58 5,633 out of 52,512; other categories were: General Civil (17,732), Foreclosure (1,227), Probate (13,508), Family (11,114), Bankruptcy (869), Adoption (237), Criminal (2,292); 2022 Supreme Court of British Columbia, *Annual Report 2022* at 62, online: <https://www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2022_SC_Annual_Report.pdf>.

59 EY Report, *supra* note 39 at 42.

and are less frequently offered for claims and practice areas with more uncertain outcomes or judgment recovery. The significance of this is stark when compared to other areas of civil litigation under Supreme Court jurisdiction that do not share the relative certainty and efficiencies of tort MVA claims; in such areas, not only is the availability of contingency fees constrained, but it may also be harder to find a lawyer willing to take on your case at all.[60] In other words, as Galanter observed,[61] a robust plaintiff personal injury practice served to enhance the legal capital available to MVA victims against an institutional insurer with informational and resource advantages gained through being a repeat player in MVA-related claims. Indirectly, these dynamics raise questions about the EY Report's characterization of increases in minor injury claim costs and settlement amounts as trends that are "disproportionate" and concerning. While the principles of proportionality[62] have not fully been taken up by legal professionals as hoped, more litigation does not always equate to frivolous or excessive litigiousness.[63] What this increase may in fact reflect is the common law – through MVA claims' robust representation in litigation – evolving alongside medical practice to better understand the true impact of "invisible" injuries on wellbeing and livelihood. For example, invisible and chronic pain has long been understudied and underrecognized in the medical field, particularly for women.[64]

Rather than representing a disproportionate increase, as the EY Report contended, many "minor injury" awards – the EY Report's definition of which included many forms of invisible injury – may instead have been catching up to the true costs of experiencing an invisible injury. This, if true, is one example of traditional courts working in service of everyday civil legal problems – it is the common law, through incremental evolution, working as it was intended.

It cannot be denied that this evolution comes at a cost, and the features of a robust tort-based system are not without their own drawbacks that chip away at A2J. Contingency fees, generally in the range of 25-33%, represent a significant portion of a claimant's recovery. Litigation is stressful, costly and often protracted. It is invasive and re-traumatizing for those that have to re-live traumatic accidents and face scrutiny about their claims in an environment that is often not conducive to healing.[65] Lawyers can fail to take heed of the important principle of proportionality in litigation by incurring excessive costs through procedural disputes, overuse of expert reports, or by convincing their clients to take unreasonable

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60 See also commentary in the dissenting judgment of the Honourable Madam Justice Bennett in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2022 BCCA 163 paras 197-200 [*TLABC 2022* (BCCA)].

61 Galanter, *Haves Come Out Ahead, supra* note 30.

62 For a discussion of the concept of proportionality, see *Hryniak v Mauldin*, 2014 SCC 7 and Semple, "Better Access", *supra* note 25 at 162.

63 For a comprehensive review of the myths surrounding litigiousness in the US Context, see Marc Galanter, "The Turn against Law: The Recoil against Expanding Accountability" (2002) 81:1 Tex L Rev 285.

64 For a survey of some of this literature, see "Women and pain: Disparities in experience and treatment," (9 October2018), online (blog): *Harvard Health Blog* <https://www.health.harvard.edu/blog/women-and-pain-disparities-in-experience-and-treatment-2017100912562>.; Carmen Ramírez-Maestre & Rosa Esteve, "The Role of Sex/Gender in the Experience of Pain: Resilience, Fear, and Acceptance as Central Variables in the Adjustment of Men and Women With Chronic Pain" (2014) 15:6 J of Pain 608, online: <https://doi.org/10.1016/j.jpain.2014.02.006>.

65 For a discussion of the psychological and other costs of litigation, see Michaela Keet, Heather Heavin & Shawna Sparrow, "Anticipating and Managing the Psychological Cost of Civil Litigation" (2017) 34:2 Windsor YB Access Just 73–98 and Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar Rev, online: <https://cbr.cba.org/index.php/cbr/article/view/4358>; for other discussions about problems with traditional civil litigation processes relevant to the discussion, see: Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal (2016-2017) 3 McGill J Dispute Resolution 113, online: 2016 CanLIIDocs 136, <https://canlii.ca/t/713> and Shannon Salter, "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal" (2017) 34:1 Windsor YB Access Justice 112.

settlement positions. Given the difficult realities of litigation, the relevant question becomes: does the new No-Fault model better serve the care and recovery needs of injured MVA claimants? In this article, I do not directly address whether No-Fault's statutory benefits provide sufficient levels of compensation for someone injured in an MVA, but instead focus on MVA claimants' ability to access benefits that are provided. I leave open the question of whether No-Fault's underlying benefits provide enough compensation on their own.

C. The Civil Resolution Tribunal & MVA Jurisdiction

British Columbia's CRT began to operate in 2016. It advertises a user-friendly online interface that takes a litigant through escalating stages from diagnosis (through an online "Solution Explorer") to negotiation to adjudication.[66] It had humble beginnings: starting in July 2016, the CRT decided condo disputes. Its jurisdiction then expanded in 2017 to include small claims disputes under $5,000, then again in 2019 for disputes involving non-profit societies.[67] By default, parties are not allowed to be formally represented by lawyers for claims, though they can apply for permission to have representation.[68] An exception to this general rule applies for motor vehicle accident claims and intimate image protection claims.[69]

The CRT emphasizes its ability to "offer an accessible, affordable way to resolve many types of civil law disputes without needing a lawyer or attending court",[70] which it seeks to achieve through user-centered design principles, the flexible application of procedural and evidentiary rules, and an evidence-informed approach to improving processes.[71] The number of claims brought to the CRT has increased since its inception, with 7,260 claims being brought in fiscal year 2023 (April 1, 2022 – March 31, 2023).[72] Overall, participant satisfaction rates reported by CRT users are high, though the CRT's reporting of participant surveys (completion rate: 6%) does not break down satisfaction rates by dispute type:

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66 Civil Resolution Tribunal, "The CRT Process" (last visited 12 April 2024), online: <https://civilresolutionbc.ca/wp-content/uploads/Media-Release-CRT-Jurisdiction-Expands-to-Include-Motor-Vehicle-Accident-Responsibility-Claims-Sep-2022.pdf>.

67 Civil Resolution Tribunal, "Media Release" (September 2022), online: <https://civilresolutionbc.ca/wp-content/uploads/Media-Release-CRT-Jurisdiction-Expands-to-Include-Motor-Vehicle-Accident-Responsibility-Claims-Sep-2022.pdf>. [CRT, "Media Release"]

68 Exceptions can be granted on application, though these are rare. *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 20 [*CRT Act*]

69 *Ibid*, s. 20.1.

70 CRT, "Media Release", *supra* note 67.

71 For a helpful overview, see Katie Sykes et al, "Civil Revolution: User Experiences with British Columbia's Online Court" (2021) 37 Windsor YB Access Just 161.

72 Civil Resolution Tribunal, *2022-2023 Annual Report* (2023), online: <https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2022-2023.pdf> [CRT, *2022-2023 Annual Report*]

Question	Answer	2023	2022	2021
1. Would you recommend the CRT to others?	Yes	78%	81%	80%
2. Did the CRT provide information that prepared you for dispute resolution?	Yes	84%	86%	85%
3. How easy to understand was the CRT process?	Easy, and neither easy nor difficult	82%	83%	85%
4. How easy to use were the CRT's online services?	Easy, and neither easy nor difficult	83%	83%	86%
5. Do you feel CRT staff were professional?	Very or somewhat professional	91%	95%	91%
6. Do you feel the CRT treated you fairly throughout the process?	Yes	84%	86%	82%
7. Do you feel the CRT handled your dispute in a timely manner?	Yes	67%	76%	80%

Extract from CRT 2022-23 Annual Report, Appendix B, page 35[73]

In the context of British Columbia's civil justice system, a primary impact of the CRT's creation was to introduce a third public forum for the resolution of general civil disputes in addition to the Provincial Court – Small Claims division (monetary claims $5,001-$35,000) and the Supreme Court of British Columbia (monetary claims $35,000 and above). CRT decisions are judicially reviewable on procedural fairness grounds and statutorily-mandated standards of either patent unreasonableness [56.7(1)(a) – certain MVA issues relating to fault and damages][74] or correctness [56.7(1)(c) – all other matters]. There are additional jurisdictional complexities between the three forums, a full discussion of which is outside the scope of this article.

The CRT's role steadily expanded in its initial years with no sign of this trend abating.[75] This expansion accelerated in 2018, when the CRT was granted jurisdiction over certain elements of MVA claims, which are more fully detailed next.

D. The New Model: No-Fault & the CRT

The government of British Columbia initiated ICBC's first reforms in 2018, which came into force in April 2019 (the "Minor Injury" reforms). The Minor Injury reforms created a "statutory category of injuries called minor injuries" which capped non-pecuniary damages (also called "pain and suffering damages") to $5,500 and created a rebuttable presumption that minor injury damages would fall below a $50,000 threshold.[76]

In tandem, the CRT was vested with jurisdiction over the determination of entitlement over all accident benefits (previously known as Part 7 benefits), the determination over whether an injury was "minor" and therefore capped, and liability and damages for claims under the tribunal limit amount of $50,000 (including "minor injury" claims with damages statutorily deemed to fall under $50,000).[77] This meant

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73 *Ibid* at 35.

74 These provisions have changed over time. For example, some CRT decisions could previously be statutorily appealed rather than subject to judicial review. In addition, "minor injury" determinations were previously reviewable on a patent unreasonableness standard, which has since been amended to a correctness standard.

75 Most recently, the CRT has been granted jurisdiction over certain aspects of claims and protection orders that can be brought under the new *Intimate Images Protection Act,* SBC 2023, c 11, ss 1, 5 and 6.

76 *TLABC 2022* (BCCA), *supra* note 60 at para 24.

77 *Ibid* at para 25.

that claims under $50,000 fall under the jurisdiction of the CRT, while claims over $50,00 continued to fall under the jurisdiction of the Supreme Court of British Columbia. Subject to applicable limitation periods, this jurisdictional division continues to apply for accidents that occurred while the Minor Injury reforms were in place.

The Minor Injury reforms immediately came under heavy criticism by plaintiff-side personal injury lawyers, resulting in a constitutional challenge launched by the Trial Lawyers Association of British Columbia [TLABC]. TLABC argued that the changes were an impermissible incursion into the constitutionally protected jurisdiction of the Supreme Court and that they "violate[d] the rights of British Columbians and limit[] access to justice… by creating layers of litigation and undue hardship for claimants."[78]

While the TLABC claim was being litigated, the government shifted course and announced a more fulsome shift to a No-Fault, benefit-based model where, as of May 2021, anyone injured in an MVA regardless of fault has entitlement through insurance to a defined set of care, treatment and wage loss benefits that replaces the combination of Part 7 benefits and compensation paid out through lump sums after litigation. Entitlement to benefits is now predominately governed by the Enhanced Accident Benefits Regulation, BC Reg 96/2022 (*EAB Regulation*).

The shift to No-Fault has made the statutory minor injury designation and the TLABC constitutional challenge largely obsolete, except for a limited subset of claims that can still be pursued through a tort action, such as when an at-fault driver is charged with a criminal offence.[79] While the TLABC challenge was successful in part at trial, the decision was then overturned by the British Columbia Court of Appeal.[80] More recently, in July 2022, TLABC and an individual injured in an MVA launched a constitutional challenge against the No-Fault system, arguing that the system infringes section 15 equality rights found in the *Charter of Rights and Freedoms* and that the CRT's jurisdiction over MVA claims violates section 96 of the *Constitution Act, 1867*.[81] At the time of writing, that case has not proceeded to trial.

Under the new No-Fault scheme, those injured have access to an approved number of treatments (up to "standard treatment fee" limits) through a variety of practitioners such as chiropractors and physiotherapists within the first 12 weeks after a crash.[82] Longer-term care benefits kick in after 12 weeks, which requires that, at ICBC's request, treating health care practitioners submit a treatment plan to an ICBC "support and recovery specialist" for approval. For health care treatment funding, approval is limited to those expenses that are deemed "necessary" and "provided by an authorized health care provider, using evidence-informed practice".[83] At the time of writing, the scheme provides for income replacement benefits, based on statutorily-defined calculations, of up to 90% of net income up to a $105,500 limit which can be increased through optional top-up coverage at the time of applying for or renewing an insurance policy.[84]

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78 Notice of Civil Claim, *Trial Lawyers Association of British Columbia and Jane Doe* (1 April 2019), Vancouver Registry S-193931.

79 *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 116(2)(f).

80 *TLABC 2022* (BCCA), *supra* note 60; leave to appeal to the Supreme Court of Canada was sought but denied.

81 *Schober*, *supra* note 28.

82 Insurance Corporation of British Columbia, "Getting medical care and treatment after a crash", online: <https://www.icbc.com/claims/injury/accessing-treatment-during-your-first-12-weeks-of-recovery>.

83 *Enhanced Accident Benefits Regulation,* BC Reg 96/2022, s 19.

84 Insurance Corporation of British Columbia, "Financial benefits to support your recovery" (last visited 12 April 2024), online: <https://www.icbc.com/claims/injury/Pages/your-injury-benefits.aspx>.

Those that meet the threshold of "permanent" impairment can apply for additional benefits such as permanent impairment compensation, personal care assistance, and a recreational benefit.[85] In some cases, when "recovery is not going as expected", ICBC can initiate a "Comprehensive Medical Assessment" through an "independent, multi-disciplinary team" of health professions to provide an injury assessment and treatment plan.[86]

In tandem with the new insurance scheme, the CRT was granted exclusive jurisdiction over all motor vehicle accident benefit disputes.[87] It further has exclusive jurisdiction over whether an injury is a "minor injury" (s. 133(1)(b)), and is deemed to have specialized expertise in relation to decisions about liability and damages (including property damage) under $50,000 (s. 133(1)(c)) and over decisions reviewing ICBC's accident fault determinations (s. 133(1)(d)). In accident benefit claims, parties are limited to the introduction of one expert report, with additional discretionary authority of the CRT to directly appoint an expert and allow up to two additional experts.[88] Unlike other areas of CRT jurisdiction where, as a general rule, parties must represent themselves, parties may be represented by a lawyer as of right for all types of accident claims.[89]

The *Civil Resolution Tribunal Act* further designates the standard of review for findings of fact and law by superior courts as patent unreasonableness[90] for all types of MVA claims except those relating to fault and damages under $50,000.[91] Notably, this statutorily prescribed standard of review is a narrower form of review than the standard of review which applies to most judicial reviews of administrative decision-making, which is the presumptive standard of reasonableness as articulated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[92] Since the CRT first gained jurisdiction over MVA claims, only one judicial review has been filed relating to a motor vehicle injury claim (up to the end of the 2002/2023 fiscal year).[93] In general, judicial review is more limited than a traditional appeal from a trial-level court to an appeal court.

In addition, ICBC has created a new "Fair Practices Office", replacing and updating the previous role of Fairness Commissioner, where those with benefit claims can submit complaints to an independent adjudicator that focus on procedural fairness.[94] The Fairness Office's most recent 2022/2023 annual report was released in May 2023, with a modest number of complaints detailed.[95]

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85 *Ibid.*

86 Insurance Corporation of British Columbia, "If your recovery takes longer than 12 weeks" (last visited 12 April 2024), online: <https://www.icbc.com/claims/injury/Pages/When-your-recovery-isnt-going-as-expected.aspx>.

87 *CRT Act, supra*, note 68, s 133.

88 *Accident Claims Regulation*, BC Reg 233/2018 at ss 3-4.

89 *CRT Act*, *supra* note 68, ss. 20, 20.1.

90 *Ibid*, s 56.7(2)(b).

91 *Ibid*, s. 133(1)(c).

92 Matthew Voell, "Swimming Against the Tide: Standards of Review and the British Columbia Civil Resolution Tribunal" (2019) 31:3 Can J Adm L & Prac 207 commenting on *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

93 CRT, *2022-2023 Annual Report*, *supra* note 72 at 36.

94 Insurance Corporation of British Columbia, "Filing a dispute", online: <https://www.icbc.com/claims/disputes-appeals/Filing-a-dispute>.

95 Michael Skinner, ICBC Fairness Office, *2022/2023 Annual Report* (15 May 23), online: <https://assets.ctfassets.net/nnc41duedoho/6YXupPf8INxBWDTbvgobue/6a2a31a1f81d226e37d55ecc4d792ea3/2023_20Fairness_20Officer_20Annual_20Report.pdf>.

E. Conclusion

The new model represents a major shift in both what rights those injured in MVAs are entitled to and the process by which those rights are accessed, making any assessment of change a complicated undertaking. As the preceding sections have illustrated, whether the new model improves access to justice is a contested claim. To begin to evaluate these contested claims, it is necessary to look behind political and judicial statements towards the outcomes of those injured in MVAs who have accessed the CRT. This article now turns to that task.

IV. QUANTITATIVE OUTCOME ANALYSIS OF ICBC DECISIONS

A. Overview of Study

This study is composed of a quantitative case analysis of CRT decisions relating to MVA claims which tracks the relative success rates of ICBC and individual claimants. The intent of the study is to provide insight into one dimension of the relative legal capital of ICBC, as an institutional repeat player with in-house legal resources and frequent claim experience, and of individuals seeking to assert rights under British Columbia's motor vehicle accident scheme who often have no familiarity with the scheme until they are injured. Understanding the ability to gain beneficial judicial outcomes – one key element of legal capital – has important implications for understanding A2J for those injured in MVAs. The documentary analysis of legal and policy changes and responses surveyed in Part II of this article provides the larger institutional picture needed to understand the significance of the study and will be returned to in the discussion.

Quantitative case outcome analysis allows for the identification of systemic patterns that might be obscured or otherwise go unnoticed through personal experience and observation. Outcome analysis can help foster accountability by uncovering who benefits from adjudication processes, though caution is required in interpreting correlations between outcomes and any individual causative factor. Imbalanced success rates by party type (in this study, either ICBC or an individual) are not a conclusive indicator that an adjudicative body is failing to decide cases on their legal merits, though this is one potential explanation. Dispute behaviour is complex and there are many factors that might influence what cases proceed to adjudication.

For example, some claims may fail because a claimant does not have the skills or knowledge to effectively present their claim (i.e., they lack sufficient legal capital), while others may fail because a claimant is determined to go through an adjudicative process despite getting repeated advice that their case has no legal merit. Given increasing reliance on forums that encourage and facilitate people to represent themselves, both these phenomena warrant greater and more nuanced attention by academics and justice system stakeholders.

Beyond this, understanding systemic patterns in judicial outcomes has larger significance. A2J is not only about the courts' ability to decide cases based on legal merit. It is also about the intelligibility and perceived legitimacy of adjudicative processes, and the ability of those processes to serve the interests of a wide variety of people. For example, if self-represented users are unknowingly set up to face failure in an adjudication process that falls short of their expectations of justice and fairness,[96] this has access to justice and legitimacy implications even where such cases are decided correctly according to the law on the books. In addition, the body of reported decisions – and whose interests those serve and represent –

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[96] For research on the experiences of self-represented litigants in the Canadian justice system more generally, see the work of the Self Represented Litigants Project, online: <https://representingyourselfcanada.com/>.

impacts the evolution of the common law, which may have long-range implications for rights evolution and recognition that are difficult to track and conceptualize.[97]

Ultimately, outcome analysis can help point to groups that are systemically disadvantaged by procedural processes, substantive laws, or more likely, a combination of both. It can further help to define research questions that seek to understand causation, such as qualitative studies exploring experiences navigating adjudicative processes.

B. Methodology & Sample

Though the No-Fault system has only been in place since May 2021, the CRT has had jurisdiction over "accident benefits" (through Part 7 or the *EAB Regulation*, which confer different amounts of benefits) since the initial Minor Injury reforms came into force in April 2019. While Accident Benefit decisions under the *EAB Regulation* have the greatest relevance in understanding the impact of the shift to a No-Fault system on those injured in MVAs going forward, and will become the primary type of decision adjudicated by the CRT as transitional aspects of the Minor Injury reforms conclude, what all of cases in the sample have in common is that they involve an individual involved in an MVA as one party, and ICBC as the other party (or as the insurer representing the other party). As such, all cases have relevance in understanding how party dynamics and relative legal capital translate to adjudicative outcomes.

Cases (N=263) in the outcome analysis conducted fall into four different categories of CRT filings. The first category of decisions sampled are Fault & Damages filings (n = 88 decisions), which are decisions where ICBC is not named as a respondent but where ICBC assumes defense on behalf of an insured respondent and makes arguments defending their challenged determinations of fault and damages resulting from an MVA for accidents that occurred while the Minor Injury reforms were in place and where damages are under $50,000 (during this same period, cases with damages over $50,000 remained under the jurisdiction of the Supreme Court of British Columbia). These decisions were found on the CRT's website under their Fault & Damages case classification. All 88 decisions decided by the CRT in this category (up to December 31, 2023) were included in the sample.

The second category of decisions are Accident Benefit decisions (n = 32). These decisions were found on the CRT's website under their Accident Benefit case classification. Accident Benefit decisions will be the main avenue for those injured in MVAs to seek compensation going forward. All 32 decisions decided by the CRT in this category (up to December 31, 2023) were included in the sample.

The third category of decisions sampled were Minor Injury Determinations (n = 9) which decided whether pecuniary (pain and suffering) damages should be capped at $5,500 and which create a rebuttable presumption that damages from a minor injury fall below a $50,000 threshold. With the full shift to No-Fault insurance, Minor Injury Determinations are no longer relevant for most types of accidents. All 9 decisions decided by the CRT in this category (up to December 31, 2023) were included in the sample.

The final category are decisions (n = 134) cases from the period of June 12, 2020 to September 26, 2022 naming ICBC as a respondent relating to fault and damage determinations not involving bodily injury that have been decided under the CRT's Small Claims jurisdiction. These decisions were found through a search of the Civil Resolution Tribunal's database of decided cases under its Small Claims registry that named ICBC as a party. Small Claims decisions were sampled at the outset of research to ensure a large enough sample size for the study, as bodily-injury claims decided by the CRT were still

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[97] This is captured, in part, by the notion of the shadow of the law and public justice; see Semple, "Better Access", *supra* note 25 at 149-153.

few in number. As research progressed, more bodily injury-related cases were decided to increase the size of the sample, and so the sub-sample of Small Claims decisions was not expanded past September 2022.

The total sample included 263 cases. Of those 263 cases, 18 (7%) included decisions where the person claiming against ICBC was formally represented by a lawyer on the record. There may be other cases where a claimant received some form of independent legal advice behind the scenes, but the prevalence of this is unknown.

C. Results

Case outcomes were reviewed, analyzed and coded as either "ICBC substantially successful", "Party claiming against ICBC substantially successful" or "Mixed result". A substantially successful result meant that an applicant got all or most of what it was asking for from the CRT. A breakdown of outcome results is produced below:

CRT Outcomes - All MVA cases (263)	
ICBC successful	73% (192/263)
Party claiming against ICBC successful	17% (44/263)
Mixed result	10% (27/263)
CRT Outcomes - Accident Benefit Decisions (32)	
ICBC successful	91% (29/32)
Party claiming against ICBC successful	3% (1/32)
Mixed result	6% (2/32)
CRT Outcomes - Fault & Damages Decisions Under $50,000 (88)	
ICBC successful	60% (53/88)
Party claiming against ICBC successful	25% (22/88)
Mixed result	15% (13/88)
CRT Outcomes - Small Claims Decisions (134)	
ICBC successful	77% (103/134)
Party claiming against ICBC successful	14% (19/134)
Mixed result	9% (12/134)
CRT Outcomes - Minor Injury Determinations (9)	
ICBC successful	78% (7/9)
Party claiming against ICBC successful	22% (2/9)
Mixed result	0% (0/4)

In the cases sampled, ICBC had an overall success rate of 73%. ICBC was most successful in Accident Benefit decisions, at a rate of 91%.

For comparative purposes, and to better understand the significance of the MVA claim outcomes, on a systemic scale, ICBC (who is almost always a respondent) has been substantially more successful at the CRT than all other types of respondents and applicants that have used the CRT to resolve Small Claims disputes. In an earlier sample size of 224 general Small Claims CRT cases decided in 2018, collected as

part of my master's thesis and categorized by user type, average rates of success were broken down as follows:[98]

Applicant Success % by User Type		Respondent Success % by User Type	
Avg. Success Rate	51.34% (115/224)	Avg. Success	38.4%
Single Corp.	66.67% (48/72)	Single Corp.	45.59% (31/68)
Ind. Male	42.22% (38/90)	Ind. Male	28.99% (20/69)
Ind. Female	48.94% (23/47)	Ind. Female	36% (18/50)

As shown in the table above, ICBC's overall success rate of 73% outperformed all other types of parties (individuals using male gender pronouns, using female gender pronouns, and corporate entities) – whether as applicant or respondent – by a sizeable measure. The next most systematically successful user type in the 2018 sample was corporate applicants, who in the 2018 sample, succeeded in their cases 66.67% of the time, as compared to ICBC's overall success rate of 73%. Self-represented individual claimants were much more likely to succeed in pursuing a general Small Claims case (42.22% - Male and 48.94% - Female) at the CRT compared to individuals pursuing an MVA-related one (17% - all individuals).

What about success rates for those injured in accidents under the previous tort-based model as compared to the CRT? In a sub-sample of 23 Vancouver and New Westminster Registry British Columbia Supreme Court (BCSC) 2018 MVA cases, which formed part of a larger sample of 200 civil cases[99] analyzed as a part of my master's thesis, plaintiff MVA claimants were substantially successful in 8/23 (35%) cases, while ICBC-represented defendants were substantially successful in 3/23 (13%) of cases, and 12/23 (52%) of cases had a mixed result. All plaintiffs were represented by legal counsel except in one case, and ICBC was always represented by legal counsel.

The most apt comparison to the BCSC 2018 MVA decisions are CRT Fault & Damages decisions, which involve claims under $50,000 over which the CRT has jurisdiction for accidents that occurred while the Minor Injury reforms were in effect. Unlike Accident Benefit decisions, which relate to decisions made by ICBC regarding entitlement to a specific statutorily defined benefit (for example, approval for a series of medical treatments), Fault & Damages decisions adjudicate MVA claims using the same substantive tort legal principles as the BCSC. Under the CRT, ICBC was substantially successful in 60% of Fault & Damages cases (compared to 13% in the BCSC 2018 MVA sample) , while claimants were substantially successful in 27% of cases (compared to 35%). This comparison reveals a significant difference between outcome rates for CRT Fault & Damages decisions and BCSC MVA decisions. However, given the small size of the BCSC 2018 MVA sub-sample, these results should be interpreted with caution, and a larger sample size would be required to validate the results. However, the numbers suggest that ICBC's substantial outcome advantages at the CRT may be a distinct phenomenon related to the CRT's process, access to legal representation, or both.

Lastly, rates of resolution by consent or withdrawal of MVA-related claims, as reported by the CRT in their annual reporting,[100] are high and stand out as outliers compared to overall experiences at the CRT:

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98 Cumming, *supra* note 26 at 134.

99 This sample of 200 cases included civil cases of various types, including but not limited to MVA personal injury claims.

100 Civil Resolution Tribunal, *Annual Reports* 2019-2022, online: <https://civilresolutionbc.ca/about-the-crt/reports-and-publications/>

	MVA Disputes Resolved by Consent or Withdrawn	Disputes Resolved by Consent or Withdrawn – All CRT Disputes
Fiscal Year 2019-2020	83% (Motor Vehicle Injury)	38%
Fiscal Year 2020-2021	65% (Motor Vehicle Injury) 88% (Accident Benefits)	42%
Fiscal Year 2021-2022	89% (Motor Vehicle Injury) 75% (Accident Benefits) 100% (Accident Responsibility)	47.4%

D. Discussion

Parsing out interactional dynamics and their theorized relationship to levels of legal capital (defined earlier as the "the set of actually usable resources and powers" in a given legal setting) provides a potential explanation for imbalances in outcomes and resolution numbers.

Returning to the foundational work of Galanter, individual claimants are less likely to be repeat players in the civil justice system, and corporations may or may not be repeat players depending on their size and the nature of their operations. In this context, it makes sense that self-represented individuals claiming against other self-represented individuals or corporations would have moderate and more balanced success rates before the CRT as compared to a large, well-resourced institutional litigant such as ICBC.

This dynamic, and the reality of an uneven playing field, is not unique to the CRT. However, what is unique to the CRT is the relative ease of access and comprehensibility of its basic procedural process for a lay-person. While, on its face, this access appears to be a positive for access to justice, it is a false promise to the extent that it induces a claimant to enter a process where they unknowingly do not have a reasonable prospect of being successful in their claim. It is particularly troubling when a claimant *could* have a reasonable prospect at success if they had the requisite strategic knowledge – one element of legal capital – to develop a stronger case. For example, a common part of any civil justice process is to exchange relevant evidence with the other party. However, legally experienced parties – often through their legal counsel – do not take this to be a passive enterprise. Instead, they seek out and obtain helpful evidence, where possible, such as through expert reports.

ICBC is a repeat player that is engaged in constantly knowing and administrating its own system. From an informational and resource perspective, ICBC is better positioned to know which claims to settle, those to pursue, and how to communicate their arguments in adjudication. The cases support that ICBC has an advantage in this respect: throughout my review of cases, there were recurring examples of claimants incorrectly framing arguments, showing a lack of understanding of what remedies they could gain, or failing to adduce any type of evidence to support a claim for damages. For example, in *Ali v Chan*[101]:

> 27. As noted above, the applicant claims $4,000 for vehicle repairs, $604.85 for car rental costs, and $2,720 for past income loss.
> 28. The problem for the applicant is that she provided no evidence or substantive submissions for these claims. Parties are told during the CRT process to submit all relevant evidence.
> 29. For example, she provided no photographs of her damaged vehicle or any estimate or invoice for repairs. Similarly, she provided no invoice for the alleged car rental costs. For her income loss, she provided no employment information, such as what she did for work, how much work she missed, or how much she earned.

[101] 2022 BCCRT 1315 at paras 27-30.

> 30. As a result, I find the applicant has not proven any entitlement to her claimed damages. I dismiss her claims.

And in *Jinks v ICBC*[102]:

> 17. ICBC provided evidence showing it requested records from Mr. Jinks' family doctor, and the doctor's office responded that it had no records related to any ICBC injury between January and June 2020. I find the records provided from June 2020 to July 2021 also do not refer to the bus incident or any injury to Mr. Jinks' right leg. In other words, I find there is no medical evidence before me establishing that Mr. Jinks was injured in a January 4, 2020 bus incident for which he required any treatment or assessments. There are also no receipts for treatment in evidence, and Mr. Jinks has not explained what medical treatment he says he requires.
> 18. Mr. Jinks has the responsibility of proving his claim for entitlement to Part 7 benefits, and I find he has failed to do so. I dismiss Mr. Jinks' claims.

Findings of this nature suggest that claimants either proceed to adjudication despite having no legal basis for challenging a decision made by ICBC, or that claimants do not have the legal, strategic or other resources to present and prove their claims. In the latter case, I argue that A2J's substantive aims suffer regardless of how easy or efficient proceeding through the CRT's processes are for MVA claimants. In both cases, the A2J landscape suffers through an incalculable effect on the development of the law as a whole for those injured in MVAs.[103] In addition, there is also an unknown category of potential claimants who decide not to challenge ICBC determinations for a variety of reasons.

Further compounding these interactional disadvantages is the reduction of availability in legal services and advocacy services for those injured in MVAs. It is well known that hourly rate legal services are out of reach for most, and lawyers are only beginning to provide alternative services such as legal coaching or unbundled or limited retainer services.[104] The services of legal advocates[105] are also limited, and legal aid does is virtually non-existent for civil legal issues[106] -- even those that relate to cases of diminished capacity such as personal injuries. With contingency fee arrangements no longer being considered viable or attractive options for one-off benefits-based claims (compared to global tort awards) within the legal

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[102] 2023 BCCRT 70 at paras 17-18.

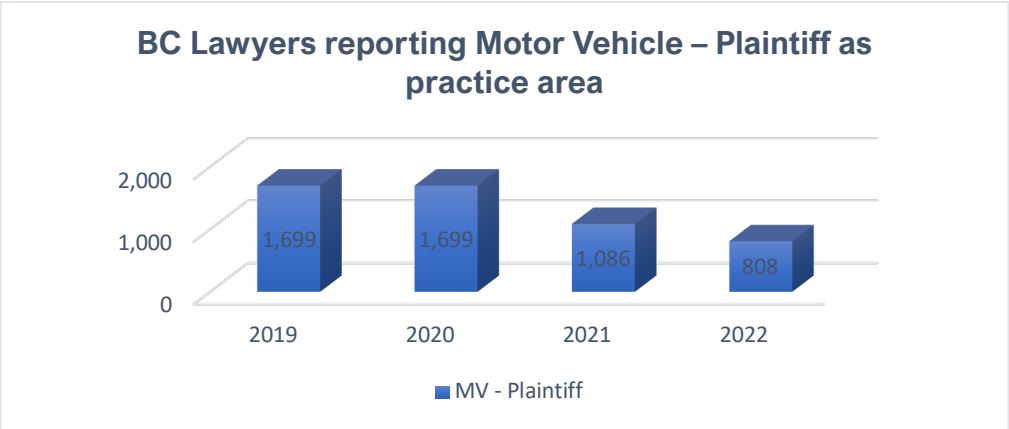
[103] See Semple, "Better Access", supra note 25.

[104] For a general overview, see the Law Society of British Columbia, "Unbundling Legal Services" (last visited 12 April 2024), online: <https://www.lawsociety.bc.ca/priorities/access-to-justice/unbundling-legal-services/>; and the Law Society of British Columbia Report of the Unbundling of Legal Services Task Force, "Limited Retainers: Professionalism and Practice" (4 April 2008), online: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/LimitedRetainers_2008.pdf>.

[105] For a listing of legal advocacy services available in British Columbia, see PovNet, "Find an Advocate" (last visited 12 April 2024), online: <https://www.povnet.org/find-an-advocate>.

[106] For example, defunding of civil legal aid in British Columbia has been a persistent issue since at least 1997, when austerity measures were originally introduced by the provincial government; all poverty law funding (the only form of civil legal aid in the province) for legal representation was eliminated in 2002. It was only in 2019 that poverty law funding, in the form of a $20-million investment into eight new legal clinics, was introduced again: Jamie McLaren, *Roads to Revival: An External Review of Legal Aid Service Delivery in British Columbia* (January 2019) online: BC Attorney General <https://news.gov.bc.ca/files/Roads_to_Revival-Maclaren_Legal_Aid_Review-25FEB19.pdf> at 20.

profession as it exists, plaintiff personal injury lawyers are fleeing the practice area, as evidenced by the Law Society of BC's annual practice declaration statistics:[107]



While the CRT allows for MVA claimants to have legal representation as of right, if lawyers are not offering services or services are unaffordable for claimants, the right is in name only. Ease of access to the CRT's process also means that, despite this right, claimants may feel confident proceeding without a lawyer, even when the true underlying complexity of a claim warrants legal expertise. Taken together, both these phenomena may be contributing to imbalanced success rates in favour of ICBC, who has ready access to experienced adjusters and in-house legal counsel.

Another theorized mechanism driving imbalanced outcomes is a legislative scheme that systematically advantages ICBC's interests over those injured in MVAs. While the focus of this article is not focused on whether No-Fault benefits are sufficient to attend to the care and recovery needs of those injured in MVAs, this factor is important to highlight, and is relevant to the interplay between substantive rights and access to process such as through the CRT.

For example, under the legislative scheme, income replacement benefits are generally defined by reference to a calculation based on income earned in a defined period, compared to a wider-ranging "make whole" analysis that occurs in tort litigation assessing future income loss, though portions of the regulations seek to cover situations where income potential may change over time.[108] Extensive and prescribed regulations serve to limit the range of potential arguments for challenging determinations made by ICBC. Even where such arguments might exist, without legal expertise, whether these arguments can be successfully mobilized is in question.

As another example, does the *EAB Regulation* reference to "evidence-informed" practice as a precondition to eligibility for rehabilitation benefits mean that little legal recourse exists for those impacted by chronic or invisible injuries? The Honourable Madam Justice Bennett's dissenting reasons in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*[109] , speaking in the context of the Minor Injury reforms, highlights potential adverse impacts of the No-Fault scheme on

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[107] Law Society of British Columbia, *Annual Reports 2019-2022*, online: <https://www.lawsociety.bc.ca/about-us/strategic-planning-and-annual-reports/>.

[108] For the current scheme, see British Columbia, *Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation*, BC Reg 60/2021; the tort test for future loss of earning capacity requires the court to make an assessment that is "fair and reasonable" and which "compare[s] the plantiff's likely future working life with and without the accident": *Dornan v Silva*, 2021 BCCA 228 at paras 156-157 and *Lo v Vos*, 2021 BCCA 421 at para 117.

[109] 2022 BCCA 163.

MVA claimants, in particular on those facing chronic or invisible injuries. Citing the difficulty of statutory benefit schemes generally in addressing chronic and invisible injuries, Madam Justice Bennett adopted comments from *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board)*, which are worth reproducing in their entirety:

> Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians…(Emphasis added)[110]

The Honourable Madam Justice Bennett's observation that chronic and invisible injuries cause real disability yet evade objective observation raises an important question: how would a claimant experiencing chronic or invisible injury go about proving that the care and rehabilitation they seek to have covered by ICBC is "evidence-based", and do claimants understand that this is a standard that is tied to their eligibility and to ICBC's decision-making process? The "evidence-based" standard further highlights an important point about the relationship between substantive benefits, as defined in the *EAB Regulation*, and process, as adjudicated by the CRT: in some cases, eligibility is not just a matter of what the statute prescribes, but is a matter of evidence and proof tendered by a party. Recall as well that, by default, the CRT process limits each party to one expert report pursuant to the *Accident Claims Regulation*, BC Reg 233/2018. In this context, can we confidently say that a claimant has no need for legal expertise in navigating No-Fault through interactions with both ICBC and the CRT? These are but a few questions prompted by the evidence of ICBC's disproportionate successes at the CRT.

In addition to high rates of success experienced by ICBC in CRT decisions, high numbers of MVA-related claims are resolved by consent or are withdrawn by individual applicants compared to all types of CRT disputes (the average of which includes MVA-related claims). Given the opacity and confidentiality of settlement processes, we do not know why this occurs. We know that such CRT claimants are concerned enough with ICBC's decision about their benefits that they launch a CRT claim, thus prompting the CRT's negotiation and facilitation mechanisms. Are individual applicants consenting to settlements that align with their rights, with ICBC coming around to treat their concerns fairly once brought to the table, or do they consent for other reasons?

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[110] *Ibid*, at para 200, citing *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54 at para 1.

We know from existing access to justice research that many people "lump it" and give up on seeking rights recognition when faced by a legal problem and attendant barriers to resolution; this phenomena may cause claimants to not challenge ICBC determinations at all, or may cause them to prematurely consent to settlement.[111] We also know that administrative burden[112] increases the difficulty of navigating bureaucratic schemes and accessing benefits, though we don't know the degree of administrative burden MVA claimants now face under No-Fault as compared to the previous tort-based model. This question is important: those injured in MVA's may face capacity challenges in dealing with paperwork, screentime (for example, in the case of concussion and traumatic brain injury) and coordinating with medical professionals. Further research is needed to understand the dynamics behind these outcomes and their impacts on MVA claimants.

Outcome analysis, as presented in this article, does not definitively establish the driving mechanisms behind imbalanced success rates. As reviewed in this section, I theorize that multiple mechanisms are at play and interact in complex ways which would require qualitative study to better understand.

However, regardless of the degrees to which claimant behaviour, substantive law, CRT process, lack of legal representation or administrative burden contributes to the significant systematic advantages experienced by ICBC in outcomes before the CRT, these results should still alert justice system stakeholders and policy makers to the possibility that the CRT's current structure – despite user-friendly design, accessibility of legal information, and access to case managers – does not endow claimants with sufficient legal capital to neutralize power imbalances between parties, particularly in the context of ICBC disputes. Given this, and given that structural power imbalances underlie many types of legal disputes, we should be wary of wholesale promotion of the CRT as a venue where legal expertise and support is not required. It should further prompt justice system stakeholders and policy makers to determine whether the care and recovery needs of MVA claimants are being met through ICBC's new No-Fault scheme.

V. RECOMMENDATIONS

ICBC's new model is young, and on several fronts, the jury is still out when it comes to No-Fault insurance and the shift to CRT jurisdiction. The study in this paper does, however, provide a clear warning sign that we need to continue to pay attention to A2J for those injured in MVAs. To this end, qualitative research investigating the lived experiences of those navigating the new No-Fault system would be a valuable and important area to start.

Lawyers should also turn their attention to how they can serve the legal needs of those injured in MVAs. While MVA litigation may not be viewed by most lawyers as economical or profitable as claims were under the tort system, there are still ways in which affordable services can be provided through unbundled services (for example, helping to draft a written submission to the CRT, or providing guidance on the need to gather stronger medical evidence) or legal coaching services that help individuals navigate their interactions with ICBC. These legal interventions are likely to help balance the playing field and result in better outcomes for those injured, so long as legal services are provided with proportion, practicality and common sense in mind. In addition, the government should consider greater funding for civil legal aid,

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[111] Dandurand et al, *supra* note 6; Hazel Genn, *Paths to Justice: What People do and Think about Going to Law* (Oxford: Hart, 1999).

[112] Generally, the concept of administrative burden examines the causes and consequences of administrative burden, defined as the informal rules, policies and behaviours that incur learning, compliance and psychological costs on individuals accessing government services: Ayesha Masood & Muhammad Azfar Nisar, "Administrative Capital and Citizens' Responses to Administrative Burden" (2021) 3:1 J Pub Admin Res & Theory 56 at 58, online: <https://doi.org/10.1093/jopart/muaa031>.

subsidized legal services and other forms of direct advocacy for those facing diminished capacity through the effects of injury – whether through lawyers, designated paralegals, legal advocates, or other legal service providers.

Finally, enhanced procedural protections and substantive legislative changes could be designed that would help to equalize and redistribute legal capital to those experiencing injury, such as shifting the onus onto ICBC in some circumstances. Examples of similar approaches already exist in the realm of disability insurance and workers compensation.[113] Altering or creating statutory standards regarding approvals and thresholds for benefits that reduce the administrative burdens and the burden of proof on MVA claimants is a related mechanism that would help level the playing field. The CRT could further change its processes to provide more effective assistance to claimants in building the necessary components of a case, such as facilitating ways in which to collect and submit evidence to proceedings through the creation of checklists, referrals, and more.

While deeper societal changes are needed to promote a truly equitable playing field, each of these actions, if designed and implemented properly, would help to redistribute forms of legal capital and contribute to a more equitable playing field between those injured in MVAs and ICBC.

VI. CONCLUSION

As detailed in Part II, the new No-Fault model relies on an ongoing relationship – for as long as the effects of an injury are experienced – between someone injured in an MVA, their medical practitioners, and an ICBC representative. At this early stage, there is limited public knowledge and a lack of reliable data about how well the new No-Fault system is functioning beyond anecdotal news reports which call attention to negative experiences.[114]

Like many other people with everyday civil legal needs, those who cannot afford a lawyer out of pocket (or are dealing with an issue where the cost of a lawyer is disproportionate to the value of a claim) now navigate interactions with ICBC and the CRT on their own – all while suffering potentially debilitating impacts of injury. The ability of the No-Fault, care-based system therefore depends on effective, good faith administrative of the system of benefits and, when disputes do arise, on the CRT's ability to provide equitable A2J to injured claimants with less theorized average legal capital than ICBC's institutional advantages. In other words, the success of the system depends on the culture change packaged as a part of the reforms:

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[113] For example, it is a well established principle that exclusion clauses in insurance policies are interpreted narrowly and in favour of the insured when ambiguity exists (see *Tanious v The Empire Life Insurance Company*, 2016 BCSC 110 at para 233); similarly, a reverse onus is applied to an employer as part of the test for a discriminatory action complaint under the *Workers Compensation Act*, RSBC 1996, section 152(3) as a way to reduce power imbalances (see *WCAT-2016-00080 (Re)*, 2016 CanLII 17397 (BC WCAT) at para 16).

[114] Simon Little, "Eby says ICBC safeguard in place amid latest complaints about No-Fault insurance" *Global News* (13 January 2023), online: <https://globalnews.ca/news/9409474/eby-No-Fault-insurance/>; Amy Judd & Catherine Urquhart, "B.C. woman hit by car says she's getting no help from ICBC's No-Fault insurance" *Global News* (22 April 2022), online: <https://globalnews.ca/news/8773809/icbc-No-Fault-insurance-bc-woman/>; Stefan Labbé "'Absolute nightmare': B.C. man recounts 10 months with ICBC's No-Fault' insurance" (12 March 2022), online: *Vancouver is Awesome* <https://www.vancouverisawesome.com/highlights/absolute-nightmare-bc-man-recounts-10-months-with-icbcs-No-Fault-insurance-5142726>.

> M. Elmore (NDP): We know that the enhanced care coverage is really proposed to be transformational to the culture of ICBC. It enables ICBC to focus solely on helping injured people get better and allows ICBC, as an organization, to focus on that and not be split between having to mitigate between and defend itself against injured ICBC customers who are seeking benefits. That requires… a transformative change in culture.[115]

Are the results of this study, which establishes that ICBC is substantially more successful in claims before the CRT than individual claimants, consistent with the transformative culture change promised by government? Without deeper qualitative study of the experiences of those injured in MVAs, we cannot pinpoint what role the institutional culture of ICBC plays in the equation, and I leave that question open for further research. We can, however, treat the results as a warning sign bubbling up to the surface that something in the multi-faceted A2J landscape of MVA claimants is amiss.

Further, this study illustrates that the current and unequal A2J landscape is not conducive to legal change or evolution. In the context of MVA claims, disproportionate successes by ICBC strongly suggests that engaging the CRT's processes does not result in meaningful legal discourses that represent the common law adversarial system's best impulses. With low success rates for individual claimants and diminished legal involvement in MVA-related claims, there is little indication that published CRT decisions will provide a vehicle through which those injured in MVAs can assert and develop their rights. Without robust, balanced and open methods of adjudication – or other effective means of mobilizing legal change at a systemic scale – statutory provisions remain untested and their effects on those injured in MVAs are relegated to the shadows. While proportionality, speed and efficiency are important features of an accessible justice system, an adjudicative regime starved of meaningful engagement with the substantive laws that underlie decisions falls short of the true aims of A2J. The result is a system of manufactured simplicity and promises of justice that ring hollow.

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[115] British Columbia, Legislative Assembly Hansard Debates, 42:25(9 March 2021, Afternoon session) at 2:20pm (Hon Mable Elmore), online: <https://www.leg.bc.ca/documents-data/debate-transcripts/42nd-parliament/1st-session/20210309pm-Hansard-n25#25B:1425>.