March 9, 2021

Sent: Via E-Filing

Marija Tresoglavic
Acting Commission Secretary
British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Re: **Insurance Corporation of British Columbia – 2021 Revenue Requirements Application – Project No. 1599153 – Intervener Information Request No. 1**

Dear Ms. Tresoglavic:

Please find The Fournier Auto Group's Information Requestion # 1 pertaining to the above noted matter.

Sincerely,

Rob Fournier
Fournier Auto Group
CEO – Independent Vehicle Examiner
rob@rfautogroup.com
www.rfautogroup.com
778-908-2804

Insurance Corporation of British Columbia 2021 Revenue Requirements Application
INFORMATION REQUEST NO. 1 TO INSURANCE CORPORATION OF BRITISH COLUMBIA

ICBC is introducing the Basic Vehicle Damage Coverage (BVDC) as part of Insurance Corporation of British Columbia 2021 Revenue Requirements application. This BVDC will replace our current Third-Party Liability insurance, which is the policy that current awards accelerated depreciation claims. The changes occurring May 1, 2021 will remove an insureds ability to pursue these headings of damages.

According to ICBC Business page - https://www.icbc.com/partners/material-damage/Documents/md-bvdc-frequently-asked-questions.pdf

ICBC will no longer pay for accelerated depreciation under any circumstances for crashes in BC.

- Similar to collision coverage, Basic Vehicle Damage coverage (BVDC) will not pay for accelerated depreciation.
- Accelerated depreciation may not be claimed even where the customer is not responsible.

According to the attached document - Accelerated Depreciation Defense Strategy – ICBC.pdf, ICBC sees accelerated depreciation as “posing a real threat to the Corporation in terms of monetary consideration.”

If these claims represent such a threat, why has the public not been consulted on the proposed changes removing recourse for people pursuing accelerated depreciation?

My information requests are follows:

1. Assuming this rate reduction is approved, please provide the value of claims being saved by the removal of accelerated depreciation claims over the next 5 and 10 years.
2. Assuming this rate reduction is not approved, please provide the value of claims ICBC predicts it will pay in accelerated depreciation claims over the next 5 and 10 years.
3. How many accelerated depreciation claims are currently open with ICBC?
4. Please provide the average value estimated per accelerated depreciation claim.
5. Please provide how many accelerated depreciation claims ICBC estimates (in terms of quantity and value) will occur over the next 5 and 10 years.
6. Please provide how many accelerated depreciation claims have been settled over the last 5 and 10 years.
7. Please provide how much accelerated depreciation has been paid out by year over the last 5 and 10 years.
8. Please provide how many potential accelerated depreciation claims that are currently open, this is not claims that have been commenced, but claims that people could pursue. In other words, a person has a valid claim, but has not mentioned a claim.
9. Please provide the percentage of potential accelerated depreciation claims vs actual being claimed.

Suite 300 – 3665 Kingsway, Vancouver, BC V5R5W2
Office 778-908-2804

Accelerated Depreciation

Litigation Support and Strategy

A Historical Overview

Potential Defense Strategies

Case Law Review

Index of Case Law
(Successful & Unsuccessful Cases)

Submitted by:

Lynn Braun – Litigation
Catherine Sleigh – Litigation
Mark Metzner – Dispute Resolution

Accelerated Depreciation
Litigation Support and Strategy

The issue of accelerated depreciation claims against the Corporation has been an on-going matter for more than the past two decades. This position paper will put forward a strategy to effectively deal with these demands in a consistent manner that will protect the Corporate position. Accelerated depreciation demands pose a real threat to the Corporation in terms of monetary consideration. As can be seen by reviewing case law on the matter, the issue appears to be cyclical in the volume of writs issued and court cases heard. The reason as to why these demands come in "waves" is speculative at best. However, one rationale that can be put forth and substantiated, to a degree, is the attendance of automobile dealership representatives at "trade shows" throughout North America. These shows are open to virtually any entity that wishes to display their wares. There are a number of predominantly U.S. based companies (Wreck Check Record, Accident Record etc., copies attached) which aggressively market their services to advance accelerated depreciation claims against insurers. This information is brought back into Canada (the information is also available on the Internet) by these dealership representatives and the actions seem to flow from that source. This can be seen in the fact that as of late there has been a substantial increase in accelerated depreciation actions being brought against the Corporation from comparatively small communities such as Williams Lake, Terrace and Prince George.

Potentially this issue has far reaching ramifications for the Corporation. If these actions are not consistently and successfully defended and precedent case law grows in the favor of the Plaintiffs, a dangerous situation could manifest where *all* tort-feasors would seek recovery for accelerated depreciation.

The strategy that is being put forward in this paper is to have a central corporate litigator who would be the "focal point" for *all* accelerated depreciation actions. This person would receive copies of *all* Suit Reports that contain accelerated depreciation as a head of damage. That person would assist claims staff to determine what course of action would be taken on a particular Writ of Summons given the dynamics of the situation. These actions would take the following forms:

1) Defend the action themselves,
2) Provide impute to other in-house Defense council or external council.

This "focal point" would be responsible for maintaining a repository of all accelerated depreciation decisions and providing guidance to the Claim Offices on this topic.

Accelerated Depreciation

An Overview and Defense Strategies

It should be noted that any discussion of accelerated depreciation must begin with the concept that this special head of damage *is* recoverable in a court of law. Attached to this article, for your reference, are numerous court decisions that award accelerated depreciation. The purpose of this paper is to give an overview of accelerated depreciation and some *possible* defense strategies. As each particular case that involves accelerated depreciation is unique unto itself, it is vital that defense strategies be tailored in a likewise manner.

Historical Overview

Two articles from *The Advocate* have been included in this paper for your reference. The first article is **Accelerated Depreciation: Driving an Investment**(1) by Steve Wexler, an associate professor, Faculty of Law, U.B.C. This article examines two 1985 British Columbia cases, ***West Mount v. Sidhu***(2) and ***Turnbull v. Gammie***(3) in detail. The second article is entitled **Accelerated Depreciation Revisited**(4) by Kieran A.G. Bridge, a lawyer in private practice. This article examines a further two British Columbia cases, ***Martyn v. Hy's of Canada***(5) and ***Conner v. MacInnis***(6) which changed some of the established principles for recovery of accelerated depreciation. These two articles present a very good insight into the issue of accelerated depreciation and it is encouraged that they be carefully read by anyone wishing to gain a more complete understanding of this topic.

As can be seen from these two articles, the concept of recovering damages for accelerated depreciation has been a tenet in law for at least 160 years - ***Hughes v. Quentin (1838).***(7) Early court decisions surrounding accelerated depreciation obviously did not contemplate automobiles but rather livestock and commercial cargo ships ***(The Loch Trool,***(8) ***The Helgoland,***(9) ***Hughes v. Quentin***(10)***).*** It should be noted that these early cases, as well as most later cases, tend to view the issue from the perspective of the maxim *restitutio in integrum* - restitution to the original state. In these older cases, the concept of "real value" is a strong influence.

> "As for the notion of a reduction in "real value", there is authority that if a chattel is repaired so as to be strong and practically useful as it was before it was damaged, no award will be made for residual depreciation" (*accelerated depreciation*).

Further, from *The Loch Trool*(11):

> " This is so clear a statement of the rule which rejects evidence of depreciated market value as an element of damage, when a vessel has been fully repaired and thereby made as serviceable as before a collision, and of the reasons underlying the rule, that further discussion of the question is not deemed necessary."

And from ***The Monitor and The Hill***(12)*:*

> "I am unable to agree with this contention. The vessel, by the repairs made, was, as has been stated, restored to her full efficiency as an ocean carrier, the purpose for which she was constructed and used; and the libellant is therefore only entitled to recover the reasonable costs of repair ....".
>
> "And if the vessel is made precisely as strong, staunch and serviceable as she was before the collision, she is restored to her former condition within the meaning of [the rule of *restitutio in integrum*].

"Real value" in these older cases can be interpreted to mean the value that the chattel has in terms of its function, use and serviceability as opposed to its market value. The concept of "residual depreciation" (or accelerated depreciation) was met with much skepticism by the earlier judges and in some cases only accepted, in an allowance form, upon the presentation of evidence that the "repaired chattel" had not been returned to its "original state"

> "The court went on to consider ***The Helgoland***(13), where an allowance for depreciation in value of the damaged vessel was allowed upon the express finding that the boat remained overtly sprung and twisted out of shape despite the repairs which were made, as that the ship did not have the endurance or life of an undamaged boat."

A recurring theme that is present when one looks at the case law involving accelerated depreciation is that through out the decades there is an inconsistent approach to the subject by the various presiding judges. A "landmark" case that is often referred to is the 1974 English Court of Appeal decision: ***Payton v. Brooks***(14). There are three important statements of law from that case:

> "The cost of repairs is a prima facie method of ascertaining the diminution of value. But it is not the only method of measuring the loss. In a case where the evidence justifies a finding that there has been, on top of the cost of repairs, some diminution in market value – or to put the point another way, justifies the conclusion that the loss to the plaintiff has not been fully compensated by the cost of complete and adequate repairs, because of a resultant diminution in market value – I can see no reason why the plaintiff should be deprived of recovery under that head of damage also."

And:

"While a plaintiff may recover damages for diminution in value of a vehicle, despite adequate repairs, depreciation cannot be assumed, but must be proven by appropriate evidence ... success in a given case will depend upon what evidence as to depreciation is led and accepted."

And:

"I can only add one word of caution. This conclusion is not a charter under which infuriated plaintiffs, who have had the misfortune to have their cars damaged by careless drivers, acquire an unfettered right to recover diminution of value in every case in addition to the cost of repairs. It is essential in such a case, in my judgment, for appropriate evidence to be called to prove diminution in value."

This ruling reinforced the concept that accelerated depreciation is a recoverable head of damage but also strongly put forth that any award would be dependent on "appropriate evidence".

The quality of evidence put forward by either the Plaintiff or the Defendant is of utmost importance. As can be seen from ***Turnbull v. Gammie et al***(15), the Plaintiff put forth an independent expert witness, who was unchallenged by the Defense, and the result was the highest award for accelerated depreciation from the cases reviewed in this paper. As was stated at the beginning of this article, each case of accelerated depreciation must be viewed on its' own merits. However, one conclusion that can be drawn from a review of the case law is that once the issue is to be decided in a court of law, a large influence upon the presiding Judges will be the type of evidence put forth, the quality of evidence put forth and the source of that evidence. Independent expert witness testimony will be given considerable weight by the court when the basis for that evidence is fully explained and documented (***Turnbull v. Gammie et al***(16), ***Chisan v. Fast et al***(17), ***Hook et al v. Richardson***(18), ***Reinders v. Wilkinson***(19), ***Mawhood v. Stokes***(20)). (See <u>*Expert Evidence*</u>).

A Plaintiff that wishes to pursue a claim for accelerated depreciation ***does not*** have to dispose of their vehicle to be successful in their action. While on the surface, this pre-requisite may appear to be a reasonable measure for damages, the majority of court decisions state that it is not required. While ***Martyn v. Hy's of Canada Ltd.***(21) and ***Conner v. MacInnis***(22) appear to state that disposal of the vehicle is mandatory, these two cases are contrary to most decisions on the subject and as such have little or no bearing on cases subsequent. However, if the vehicle is disposed of and that transaction is to form the basis of the Plaintiff's argument for accelerated depreciation, the method and amount of that sale must be closely scrutinized. The Plaintiff has an obligation to mitigate their loss. Part of that mitigation is to seek the highest value for their vehicle that is reasonably possible. (*See* <u>*Facts and Evidence*</u>).

Defense Strategies

The following is a summary of defense strategies, *after* a Writ of Summons has been received by the Corporation, for claims of accelerated depreciation:

For the Material Damage Manager (or designate) and Adjuster

1) Examine the writ served upon the Corporation for completeness and heads of damage being demanded by the Plaintiff. Identify what the Plaintiff is seeking. Ensure that a Litigation Suit Report (CL 147) has been filed to assign Defense council. The writ may be issued in either Small Claims Court or Supreme Court.
2) Review entire claim file with an emphasis on the Material Damage portion as well as any actions that have been taken prior to receiving the writ – i.e. accelerated depreciation worksheet on the e-mail bulletin board, steps taken with the insured, if any, during the repair process etc.
3) Discuss the claim file with the handling Adjuster and Defense council to understand the dynamics of the situation. There may be a bodily injury claim in conjunction with the accelerated depreciation claim and this issue *may* influence the defense strategy to be employed.
4) The following facts should be examined:

    a) Are there any accidents that the vehicle has been involved in either prior to or subsequent to the loss in question? - i.e. is there a damage declaration pre or post accident. Locate APV 9T Transfer documents (through SIU) and CL 14 Claim Estimate Sheets. Also, take into consideration the liability of other losses. If the Plaintiff is arguing that by virtue of having to make a statutory damage declaration they will, or have suffered a loss, a prior declaration from another loss will eliminate this position once identified.

    b) Does the Plaintiff still own the vehicle and was the Plaintiff intending on keeping it and if so, for how long? If the Plaintiff has kept the vehicle and will continue to do so, the measure of loss becomes more difficult to prove and the "re-absorption" of any accelerated depreciation increases over time.

    c) Was the vehicle sold on the open market or traded-in and if so for what price?

    d) Was the vehicle disposed of in an "arm's length" transaction as opposed to a "tax driven" sale or "dumping" of the vehicle to a person known to the Plaintiff?

    e) What kind of efforts did the Plaintiff make to dispose of the vehicle at a good market price? (i.e. – were reasonable efforts made to mitigate the loss).

f) All documents surrounding the disposal of the vehicle must be examined closely. The particulars surrounding the disposal of the vehicle are very important in strategizing defenses. Also, any subsequent sales of the vehicle in question must be documented i.e. – was the vehicle traded-in to a dealer and if so what price did that dealer realize upon resale. If a statutory damage declaration was required on the vehicle, has this declaration "survived" through to subsequent owners. The "losing" of statutory damage declarations *may* provide some defense avenues with regard to the amount paid or allowed by dealers on trade-in values.

g) Were there any verifiable pre-accident offers to purchase the vehicle?

h) Is the real issue adequacy of repairs? If possible, the Material Damage Manager should view the vehicle in person to ascertain if the Plaintiff has legitimate concerns with regard to the repair quality. If the issue is repair quality, this should be clearly differentiated from the accelerated depreciation demand with the Plaintiff and all efforts made to rectify the situation as per normal procedures.

i) In some cases, the dealership that is negotiating with the Plaintiff to trade-in their repaired vehicle, is the business entity that affected those repairs through their own collision repair facility (dealer owned body shop). This type of situation will require a frank dialog between the Material Damage Manager and the principles of that dealership. The obvious point here is that on the one hand the collision repair arm of the dealership is affecting repairs (that may be lifetime guaranteed through the c.a.r. shop Program or through their own guarantee) with an obligation to restore the vehicle to pre-accident condition, and the sales arm of the dealership who are discounting the vehicle trade-in price by virtue of the fact that a statutory damage declaration now exists. Depending on the situation, the dealership collision repair facility *may* be third partied in on the action against the Corporation. This is a very sensitive issue and should only be contemplated with the input of the Material Damage Regional Manager, the Claim Office Manager, Corporate Law and Material Damage Technical Services.

5) An independent expert witness should be hired by the Defense. This expert witness must be accepted by the Court as an expert and be able to provide the following types of evidence:

- A thorough inspection report of the subject vehicle that comments upon the quality of repairs, the extent and nature of repairs (i.e. – cosmetic v. structural and/or mechanical repairs), the quality of the collision repair facility who affected the repairs, the repair guarantee of the repair facility. This inspection

report should include, if possible, the results of a road test carried out by the expert as well as any issues or problems that the vehicle owner has encountered since the repairs were completed.

- A complete repair analysis should be produced of the vehicle which breakdown *all* repair aspects by a percentage basis of the whole.
- A report which comments upon the market conditions relevant to the particular loss vehicle, factors affecting that market, examples of sold vehicles or vehicles for sale of the loss vehicle type, provide evidence of the vehicle's value immediately before and immediately after the loss and clearly provide the methods used to arrive at those values, facts, assumptions and conclusions.
- A Resume of the independent expert witness for submission to the court.
- The independent expert witness should give evidence as to the marketability of the repaired vehicle and the prospective purchasers of that type of vehicle.
- The independent expert witness should give evidence as to how the damage to the vehicle did not affect, or only minimally affected, the value of the vehicle after repairs.

6) The independent expert witness should critically examine the evidence of the expert Plaintiff witness in all aspects and provide comment to the Material Damage Manager, Adjuster and Defense council.

7) The chances of success at trial must be weighed and the danger of solicitor/client costs (substantially increased court costs if the case is lost) should be considered. If an action has been commenced, consideration should be given to making a formal offer to settle if the Defense case is very weak. Offers of this nature must be very carefully considered because if the Corporate position is so tenuous to begin with, the matter should not have reached the level where potential court costs become an issue.

8) Was the claim brought within the two year limitation period (two years from the date of loss). If not, no claim will be allowed. However, be aware that the issuance of a writ will preserve (extend) this limitation period.

9) Was the claim brought in tort (the Plaintiff is suing the person who caused the accident). If the Plaintiff attempts to sue ICBC in contract under their own collision coverage there is no accelerated depreciation claim – it is allowed only in tort.

10) Examination of the Plaintiff's documents is vital to sound defense strategies. There is an exchange of expert reports between the parties 60 days prior to trial (30 days in small claims court). These are the documents that are relied upon in trial by the respective sides. A thorough understanding of the Plaintiff's documents cannot be emphasized enough.

11) If the Plaintiff is relying on either expert witness evidence from a vehicle dealership representative or documents supplied by these witnesses as to the reduction in value of a particular vehicle due to the fact that the vehicle has

statutory damage declaration a report is available from Tom Cino (T.C. Consultants) which provides effective arguments to the contrary. This report was accepted by the courts in ***Brosseuk v. Lynn et al***(23) in a recent accelerated depreciation claim against the Corporation.

It is imperative that the Material Damage Manager/Adjuster understand that once Defense council is assigned to an accelerated depreciation claim, that lawyer will need instructions from the Corporation on how to proceed. There may be times when council is advising to take a particular course of action with regard to a demand, however, the ultimate decision lies with the Corporation once all factors are taken into consideration. It is incumbent upon the Material Damage Manager to give instructions to Defense council to successfully resist these types of claims. It is strongly encouraged that this paper be read in its' entirety to fully understand the concept of accelerated depreciation and the possible defense strategies that can be lead as evidence in a court of law.

The Courts

The following is a brief synopsis of the procedure involved in a court proceeding:

Supreme Court

Generally, in an action where the *total* amount of the damages being sought are in excess of $10,000.00 the matter will be heard in Supreme Court.

1) A Writ of Summons is issued by the Plaintiff and served upon the Defendant and the Corporation's Writ Handling Department.
2) A Litigation Suit Report (CL 147) is completed (usually by the handling Adjuster) and forwarded to Writ Handling for Defense council assignment. Defense council can be either "in-house" council or external council.
3) Defense council will apply to have the matter heard as soon as possible in the courts (to set an early trial date). The longer that a case remains "open" the higher the Defense costs are – i.e. on-going correspondence, trial adjournments (having to prepare for trial again with updated information) etc.
4) In Supreme Court either the Plaintiff or the Defendant can elect to have the matter heard by a jury as opposed to a Judge. However, if a jury is used, the party requesting the Jury must pay the Jury fee into the court in advance of the trial. As well, if the *only* issue is that of accelerated depreciation it may well be in the Corporation's best interest to have it heard by a Judge only.
5) An exchange of expert reports between the Plaintiff and the Defendant takes place 60 days prior to the trial date. These are the documents (expert witness reports, witness lists etc.) that will be relied upon by either side at trial. All other documents are to be produced within 21 days of a demand for discovery of documents being made. If

Plaintiff counsel does not produce the documents, Defense counsel will need to apply to chambers for the production of the documents. The reason this exchange of documents takes place is to provide an opportunity for each side to examine the other's evidence that will be put forth at trial so that neither side is "ambushed" by information that could influence their position in the matter i.e.- the disclosure of certain information may lead to a settlement or abandonment of the issue.

Small Claims Court

In this forum disputes are settled in actions where the *total* amount of damages being sought is under $10,000,00. There is a $50.00 filing fee for Plaintiff's in action entailing amounts up to $3,000.00 and a $100.00 filing fee for issues between $3,000.00 and $10,000.00.

1) A Writ of Summons is issued by the Plaintiff and served upon the Defendant and the Corporation.
2) A Litigation Suit Report (CL 147) is completed (usually by the handling Adjuster) and forwarded to Writ Handling for Defense council assignment. Defense council can be either "in-house" council or external council.
3) The trial date will be assigned by the trial registry.
4) In Small Claims Court, expert reports are to be served 30 days prior to trial, all other documents (i.e. – repair estimate sheets etc.) are to be produced at least 14 days prior to trial.
5) Settlement Conference - this occurs prior to the trial. A Judge meets with both parties and discusses the merits of each party's arguments in an attempt to resolve the matter.

Court of Appeal

If an accelerated depreciation judgment is to be appealed, a submission to the ICBC Appeal Committee must be made. This committee is presently chaired by Michael Biggs.

Review of the Law

From review of more than sixty cases dating from 1927 to 1998 regarding accelerated depreciation claims, it is apparent that although the claim for accelerated depreciation is accepted by the courts in British Columbia, the judgments contain inconsistencies with respect to the application of certain principles of law and do not agree on what kind of evidence is sufficient to prove the Plaintiff's allegations of accelerated depreciation. This conclusion is also reached in the article **"Accelerated Depreciation: Driving an Investment(24).**

Principles

The basic principle of law with respect to accelerated depreciation cases is *restitutio in integrun,* to restore the injured party, so far as money can do, to the position in which he would have been if the damage had not occurred. *(Payton v. Brooks(25), Lengret v. Gladstone(26),* and *Gunn v. Tritow Systems Ltd.(27))*

It is accepted that where a vehicle damaged by the Defendant's negligence has been repaired but remains depreciated in value as a result of the damage, a Plaintiff is entitled to recover for such depreciation as well as for the costs of repairs. *(Walter v. Seibels(28),* and *Nesbitt v. Carney(29))*

The proper measure of damages is the difference in value of the vehicle immediately before and immediately after the act which damaged it. *(Gunn v. Tritow Systems Ltd.(30), Lengert v. Gladstone(31), Payton v. Brooks(32)* and *Reinders v. Wilkinson(33))*

The vehicle does not have to be sold for a loss to have been suffered by the Plaintiff. *(Rethmeier v. Webster et al(34), Badger et al v. Hiltz et al(35),* and *Reinders v. Wilkinson(36))*

While a Plaintiff may recover damages for decrease in the value of a vehicle despite adequate repairs, depreciation cannot be assumed but must be proven by evidence. The fact that owners must disclose to purchasers that a vehicle has sustained damage over $2000.00 as required by s. 23 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288 does not alter the requirement that there must be evidence to prove alleged decrease in value. *(Payton v. Brooks(37), Lengert v. Gladstone(38)* and *Gunn v. Tritow Systems Ltd.(39)).* Neither would the Plaintiff's burden of proof be discharged, " ... merely by calling an individual to prove his idiosyncratic view of a particular loss in a particular case." *(Payton v. Brooks(40)).*

Expert Evidence

In cases where the Plaintiffs won, they called expert witnesses who had experience in sales, purchasing or appraisals of the type of vehicle in question. In *Turnbull v. Gammie et al(41)* the Judge awarded $8000.00, being the highest award for accelerated depreciation in the cases reviewed, on the basis of uncontradicted evidence of the Plaintiff's expert witness who was a sales manager of a dealership with extensive experience. In *Chisan v. Fast et al(42)* the court preferred the evidence of the Plaintiff's expert witness, who had experience in sales and who had seen the vehicle before the accident, to that of the Defendant's expert witness who was an I.C.B.C. Estimator with experience in repairs but little or no experience in sales and who had only seen the vehicle after repairs over a year after the accident.

In *Hook et al v. Richardson(43)* a sales manager from Mercedes-Benz gave evidence that it was his dealership's practice to discount the used price of any Mercedes which had been in

a heavy collision by between 25% - 30% and while the Judge did not accept this discount as the basis for his award, he found it to be a factor affecting the market. The Plaintiff's second expert, an experienced appraiser and body man with no experience in sales, based his opinion on valuation of loss after conversations with three dealerships. The Defendant also called an experienced collision appraiser and body man with no current sales experience with luxury automobiles who did not talk with sales persons. He testified that there was no depreciation because of quality of repairs. The Judge was not willing to apply a formula for loss to the vehicle but accepted the evidence of the second expert witness for the Plaintiff. Generally, the Defendant's expert evidence would have been given more weight if that expert had experience in sales rather than just repairs.

In *Reinders v. Wilkinson*(44) the trail Judge would not accept the opinion evidence of the Plaintiff's expert without supporting data and a more thorough explanation of the basis of his opinion and this decision was upheld on appeal. Similarly, in *Conner v. MacInnes*(45) the Judge did not accept the Plaintiff's expert evidence as his opinion failed to state the facts and assumptions on which it was based.

Although in *Mawhood v. Stokes*(46) the Plaintiff's expert witness could not point to the sale of any comparable vehicle because of the unique nature of the vehicle and relied simply on his own experience in car sales, the court found that under the circumstances the Plaintiff had done all she could in calling expert evidence rather than just presenting her own opinion as evidence. The Plaintiff's expert evidence would have been more credible if he could have provided specific examples of what similar cars had sold for without damage rather tan generalizations.

In most cases in which there is no award for accelerated depreciation, the court found that the Plaintiff had not provided sufficient evidence to support his claim. In *Burthwick v. Lucas*(47), although the court found it reasonable to believe that there had been a loss caused by accelerated depreciation, the Plaintiff failed to present any evidence.

However, in many cases where the vehicle owner lost, the expert witness they used had similar expertise and gave similar evidence as in the successfully litigated cases. In *Bond v. Tamajka*(48) the Judge found the evidence of the expert witnesses for each side equally compelling and found that the Plaintiff had not discharged her burden of proof and dismissed the claim.

Even if there is no specific problem with the Plaintiff's expert evidence, in some cases other factors were considered sufficient to preclude a damage award for accelerated depreciation. In 1927 in *Vancouver Ice & Storage Co. v. B.C. Electric Railway Co.*(49) the Plaintiff called a mechanic to give evidence, who provided a percentage estimate of loss but this was not convincing to the court as the car was in better shape after repair than before the accident. There have been changes in law since, but in 1985, the Judge in *Westmount Properties Ltd. et al v. Sandhu et al*(50) found it " ... unreasonable to expect both the most expensive and thorough repair job (perfection itself) and an award for

accelerated depreciation", and found that the "enhanced exterior finish ... more than offset" any loss caused by accelerated depreciation.

In *Maritime Aircraft v. Savoie*(51), the Judge awarded damages to perfect repairs but called it an award for depreciation. The 1993 Supreme Court case, *Kromidas v. Reilly*(52), the Judge said that the question of accelerated depreciation arises where adequate repairs have been done but the fact of the collision itself is said to diminish the value of the automobile. In that case the Judge said that the Plaintiff was actually complaining about the adequacy of repairs and awarded a sum sufficient to return the vehicle to its former state and denied the claim for accelerated depreciation.

Cosmetic v. Structural Damage

In *Gunn v. Tritow Systems Ltd.*(53) the Judge doubted whether a distinction could be drawn between cases where there has been mechanical or structural damage and where cosmetic damage only has occurred. However, in cases where the owner looses, that distinction is often made. In *Raymond v. Buster's Auto Towing Service Ltd.*(54), there was some paint discoloration caused by slow fading of the metallic paint (cosmetic damage) and in 1977 the Judge found that the head of damage was too remote from the casual effect of the accident to be recoverable. Note that in 1984, the Judge in *Gunn v. Tritow Systems Ltd.*(55) questioned this decision and pointed out that it appeared that the Judge in *Raymond v. Buster's Auto Towing Services Ltd.*(56) did not address the question of whether there was a diminution of market value immediately after the accident but instead addressed the question as to whether there was a loss in value over an indefinite period of time.

However, in *Westmount Properties Ltd. v. Sandhu et al*(57), the Judge stated that the more serious the damage the easier it would be to prove accelerated depreciation. In *Martyn v. Hy's of Canada Ltd*(58)., the Judge stated that the depreciation of a structurally damaged car is greater than a cosmetically damaged car and the "re-appreciation" (the effect of the passage of time on accelerated depreciation) would take longer for the structurally damaged car.

In *Kerbel v. Fisher*(59), because there was cosmetic damage only the Judge stated that the Plaintiff could convince a prospective buyer that because of the excellence of the reputation of the repair shop, the vehicle was more than adequately repaired and therefore there was no loss. Similarly, in 1998 in *Chowdhry v. Brailey et al*(60), the vehicle sustained cosmetic damage only and the repaired vehicle was "indistinguishable" from an undamaged vehicle. The Judge said that a prospective buyer might try to gain a bargaining advantage but this is not to say he would be successful.

Despite *Gunn v. Tritow Systems Ltd.*(61), both the kind and extent of damage could be important evidence in such cases.

Facts and Evidence

Evidence as to the actual price or trade-in value of the damage vehicle is important evidence. Distinctions are drawn between "Black Book" value, replacement value, trade-in value wholesale value and retail value. The expert witness for the Defense in *Gunn v. Tritow Systems Ltd*(62). gave evidence that he invariably "bumped up" the trade-in price and lowered the list price so initial offers should be examined with care.

In *Chen v. Mercedes-Benz Canada Inc.*(63), the Plaintiff traded-in his vehicle for $43,000.00 and the dealership subsequently sold it for $45,000.00 without a declaration of damage. This latter price was found to be the best evidence of its value without damage and accordingly no loss was found. The Judge in *Chowdhry v. Brailey et al*(64) noted that a dealer would be able to get top prices, whereas a Plaintiff could not do so.

In *Lee et al v. Hawkins et al*(65), the Plaintiff traded-in his vehicle for a price within the range of prices for non-damaged, similar vehicles in the dealer's "Black Book", so the court found that the Plaintiff in reality had not suffered any damage.

In *Middleton et al v. Vanpelt et al*(66), the Plaintiff received full market value without discount from I.C.B.C. after a subsequent accident so he could not establish that he suffered any loss. Note that if the vehicle was involved in a previous or subsequent accident, this would diminish the weight of the declaration argument and it could be argued that some or all of any accelerated depreciation may have been caused by another accident. *(Kerbel v. Fisher*(67) and *Lee et al v. Hawkins et al*(68))

The circumstances of the sale of the damaged vehicle are also relevant and the Plaintiff must do his best to obtain a good price for his vehicle. In *Cunningham v. Mensch*(69), the Plaintiff did not attempt to negotiate with the dealer or compare the dealer's offer for the trade-in of his vehicle so his claim failed.

There was a non-arms length, "tax driven" sale of the damaged vehicle in *Miles et al v. Mendoza et al*(70) and it was found that the sale price was not evidence of its real market value. The Judge dismissed the Plaintiff's claim for accelerated depreciation and stated that no evidence had been presented that particular clientele may be more concerned with investment or resale value than the operation or reliability of the vehicle and stated that this type of evidence regarding prospective purchasers often exists in the case of a luxury vehicle.

Although the argument has not been used yet, I.C.B.C. may want to say that the options, color and mileage are more important than the amount of damage to a vehicle when determining its value on re-sale after an accident. Recent reviews of vehicle prices paid at auction could be used as evidence to support this.

"Re-absorption" and Real Loss

It was the Plaintiff's expert evidence in *Turnbull v. Gammie et al*(71) and generally accepted as true that accelerated depreciation would be greatest in cases involving relatively expensive vehicles, which are in or near their current model year and have low mileage. With the exception of vintage vehicles, the price reduction tends to decrease with the vehicle's age and with the passage of time from completion of repairs. The premise is that the reliability of the repairs is proven over time and that the loss caused by accelerated depreciation is generally absorbed over time.

In certain cases the courts have looked at what actually transpired after the repairs of the vehicle and disallowed the Plaintiff's claim on the basis that there was no actual loss. *(Martyn v. Hy's of Canada Ltd.*(72)*)*. The courts have decided in some cases that the Plaintiff did not suffer a loss if he planned to keep the vehicle and this argument is predictably most successful in cases that come to trial some time after completion of repairs. In *Conner v. MacInnes*(73) the Judge pointed out that if the Plaintiff were awarded damages for accelerated depreciation and kept the vehicle after the passage of time he would actually be making a profit.

The article published in 1989, **"Accelerated Depreciation Revisited"**(74) states that these two (B.C. County Court) cases say that unless the Plaintiff actually incurs an out of pocket loss by selling his vehicle for a lower price than he would have if it had not been damaged, he is not entitled to an award for accelerated depreciation. The author notes that *Martyn v. Hy's of Canada Ltd.*(75) "swept aside 150 years of precedent" which said that the Plaintiff is not required to sell his vehicle or demonstrate a reduction in it's "real value" to recover damages for accelerated depreciation.

However, in 1994 the Court of Appeal in *Reinders v. Wilkinson*(76) confirms the principles that the proper measure of damages is the difference in the value of the vehicle immediately before and immediately after the act which damaged the vehicle and that the vehicle does not have to be sold for a loss to have been suffered. There has been no further judicial consideration of this case and the cases since that date neither contradict or apply this decision.

Range of Damages

From 1980 through 1995 the awards for accelerated depreciation range from $300.00 to $8,000.00, The average award is $3,000.00

The award for $300.00 was made with respect to a five year old Mercury LN 7 in *Gill v. Gordey*(77). This case was unusual in that it dealt with a relatively inexpensive older model vehicle.

The rest of the cases in which awards were granted for accelerated depreciation involved collector vehicles or newer luxury vehicles. Although there is some correlation between

the value of the vehicle and the size of the award, it is far from perfect. The vehicle in *Adirim et al v. McAlpine et al*(78) was a Rolls Royce Silver Shadow with $34,000.00 worth of repairs but only $2,500.00 was awarded. The Judge noted that in this case the cost of repairs reflected the value of the parts rather than the extent of damages.

There does not seem to be a notable increase over time in the size of the awards, which would correspond with the increase in new car prices or inflation. The highest award was granted in 1985 in *Turnbull v. Gammie*(79) and this was probably more related to the fact that the Plaintiff's expert evidence was not contradicted by a defense witness rather than the value of the vehicle in question.

Court Order Interest

The claim for accelerated depreciation is a special damage as opposed to a general damage. *(Martyn v. Hy's of Canada Ltd.*(80)*)* This means we *may* owe interest on the amount of settlement or award.

In *Phippen v. Shai et al*(81) the Plaintiff had not sold his vehicle and the Judge found that accelerated depreciation was a speculative loss that may or may not occur and was there fore a future loss and attracted no interest under the *Court Order Interest Act,* R.S.B.C. c. 76. The vehicle had not been sold and interest was also denied in *Verardi v. I.C.B.C.*(82) These cases would seem to contradict the principle that the Plaintiff had to have sold his vehicle to have suffered a loss.

In *Neufeld v. I.C.B.C. et al*(83) the Plaintiff traded-in his vehicle and the Judge awarded Court Order Interest from the date of the trade-in. This contradicts the principle that the time for assessment would be at the time of the loss (accident).

Costs

Costs are a factor that should be considered in evaluating a claim for accelerated depreciation. In *Rana Enterprises Ltd. v. Wheeler*(84) the Judge awarded double costs to the Plaintiff as the award exceeded his offer to settle.

In 1988 a Supreme Court of B.C. case, *Neufeld v. I.C.B.C. et al*(85), it was the Defendant's witness's evidence that the amount of loss would be the same regardless of the amount of repairs exceeded $2000.00. the Judge found this proposition difficult to accept and further that it was quite unreasonable of I.C.B.C. not to have acknowledged that a vehicle purchased for $15,700.00 that had $9,000.00 worth of repairs within months of purchase would have suffered substantial accelerated depreciation. He considered awarding solicitor client/costs to the Plaintiff but decided to award party and party costs only (meaning I.C.B.C. could have been ordered to pay increased court costs because the Judge thought that denying the accelerated depreciation claim was an unreasonable decision).

If you believe that you have an accelerated depreciation claim with no defenses or the owner decides to sue and you can not agree on the value of the accelerated depreciation, you should do a formal offer to settle in the amount that you, not the owner, think the claim is worth.

Tort Claims Only

Accelerated depreciation is allowed in tort only. It is not covered in a claim under one's "own damage" insurance and is not recoverable under s. 116 of the Regulations made pursuant to the *Insurance (Motor Vehicle) Act,* R.S.B.C. 1979, C 204. *(Squire v. I.C.B.C.*(86)*).*

Leased Vehicles & Accelerated Depreciation Claims

Review the lease agreement. It is important to determine what, if any financial interest, the lessee has in the vehicle. It is important to remember that many lease agreements are, in essence, a method by which a person can "rent" a vehicle on an on-going basis. As the lessor of the vehicle is truly the "owner" of the vehicle, that person or company will definitely have the "right" to sue for accelerated depreciation in tort if the lessee is not liable for the accident. Both the lessee and lessor may bring the action against the Corporation if the lessee has a provable financial interest in the leased vehicle. If the person who leases the vehicle is responsible for the accelerated depreciation as described within their lease contract and the lessee is at fault for the accident, there is no claim. This would be a matter for the lessee and the lessor to remedy between the parties. *Rana Enterprises Ltd. v. Wheeler*(87) is a case where the lessee has stopped making payments on a vehicle lease but attempts to put forward an accelerated depreciation claim (unsuccessful). They lost, because by stopping to make lease payments the court held they no longer had the right to sue for accelerated depreciation.

We do not accept the amount set out in the lease contract as being the amount (if any) we owe for accelerated depreciation. The amount we owe (if any) is decided by using defenses 1 to 11 at the front of this paper. The time limit for the owner or person leasing the vehicle to bring their claim is two years from the date of loss, not two years from their lease agreement being over.

FAQS

Enhanced Care

Who is covered under Enhanced Care?
All British Columbians injured in a motor vehicle crash will have access to Enhanced Care coverage, regardless of responsibility.

Do customers need to do anything prior to May 1, 2021 to opt into Enhanced Care?
Customers will automatically be transitioned into Enhanced Care effective May 1, 2021.

I have heard the term "no-fault" in reference to Enhanced Care; what does that mean?
This means customers who are injured will have access to accident benefits, regardless of who was responsible for the crash.

What kind of savings can customers expect to see?
Customers can expect to save approximately 20%, on average, on their full ICBC coverage (Basic and Optional).

Will customers see a change in the way their vehicle is covered or repaired under Basic Vehicle Damage coverage?
Most customers won't notice any change in how their vehicle repairs are covered. When they are responsible the costs will come from their optional coverage if purchased and if they are not responsible the costs will be paid from their BVDC.

What does Basic Vehicle Damage coverage cover and not cover?
Basic Vehicle Damage coverage will cover repairs to your vehicle to the extent you are not responsible for the crash. Your optional collision coverage (if purchased) pays for the percentage of repair costs that you're responsible for.
Basic Vehicle Damage coverage provides the following:

- Repairs or replacement for your vehicle up to $200,000
- Loss of use coverage in addition to the $200,000 limit
- Towing and storage coverage in addition to the $200,000 limit

Situations in which Basic Vehicle Damage coverage would not apply:

- a crash that doesn't involve another vehicle;
- a crash occurring outside of BC (other jurisdictions laws apply);
- a crash involving an unidentified vehicle (Hit and Run);
- or if you are responsible for the crash

How is Basic Vehicle Damage coverage applied to content and cargo damaged in a crash?
BVDC does not provide coverage for contents (e.g. laptop) or cargo damaged in a crash. Like today, damage to contents and cargo are paid on the responsible motorist's Third Party Liability coverage.

What if I have a vehicle with a declared value over $200,000 and I don't carry collision coverage?
Basic Vehicle Damage coverage will cover any damage to your vehicle up to $200 000. Any cost of repair or replacement above this limit will be paid by a customer's collision coverage if purchased.

Are there any vehicles that are not eligible for collision coverage?
There is no change to vehicles excluded from our Collision coverage. Examples include, mobile cranes, logging machinery and crawlers.

Will courtesy vehicles be covered under Basic Vehicle Damage coverage?
Basic Vehicle Damage coverage will be part of the mandatory Basic Autoplan starting May 1st 2021. All vehicles licenced and insured with an ICBC certificate, including rental vehicles, in the province of British Columbia will carry Basic Vehicle Damage coverage.

What happens if a customer in a courtesy vehicle is responsible for the crash?
Basic Vehicle Damage coverage from the courtesy vehicle will not apply as the driver is responsible. This means the customer's optional coverages from the vehicle in the shop being repaired will respond to the damages and the customer's deductible will apply just like it is today.

Depreciation applies regardless of responsibility

With the introduction of BVDC, depreciation will now apply to all repairs when applicable, regardless of responsibility. Depreciation will continue to apply to major mechanical and electronic components, parts, convertible tops, and the vehicle's paint condition.

Accelerated Depreciation

ICBC will no longer pay for accelerated depreciation under any circumstances for crashes in BC.

- Similar to collision coverage, Basic Vehicle Damage coverage (BVDC) will not pay for accelerated depreciation.
- Accelerated depreciation may not be claimed even where the customer is not responsible.

https://www.icbc.com/partners/material-damage/Documents/md-bvdc-frequently-asked-questions.pdf