

Whitelaw — Twining

**British Columbia's
No-Fault System & Implications
for Insurers**



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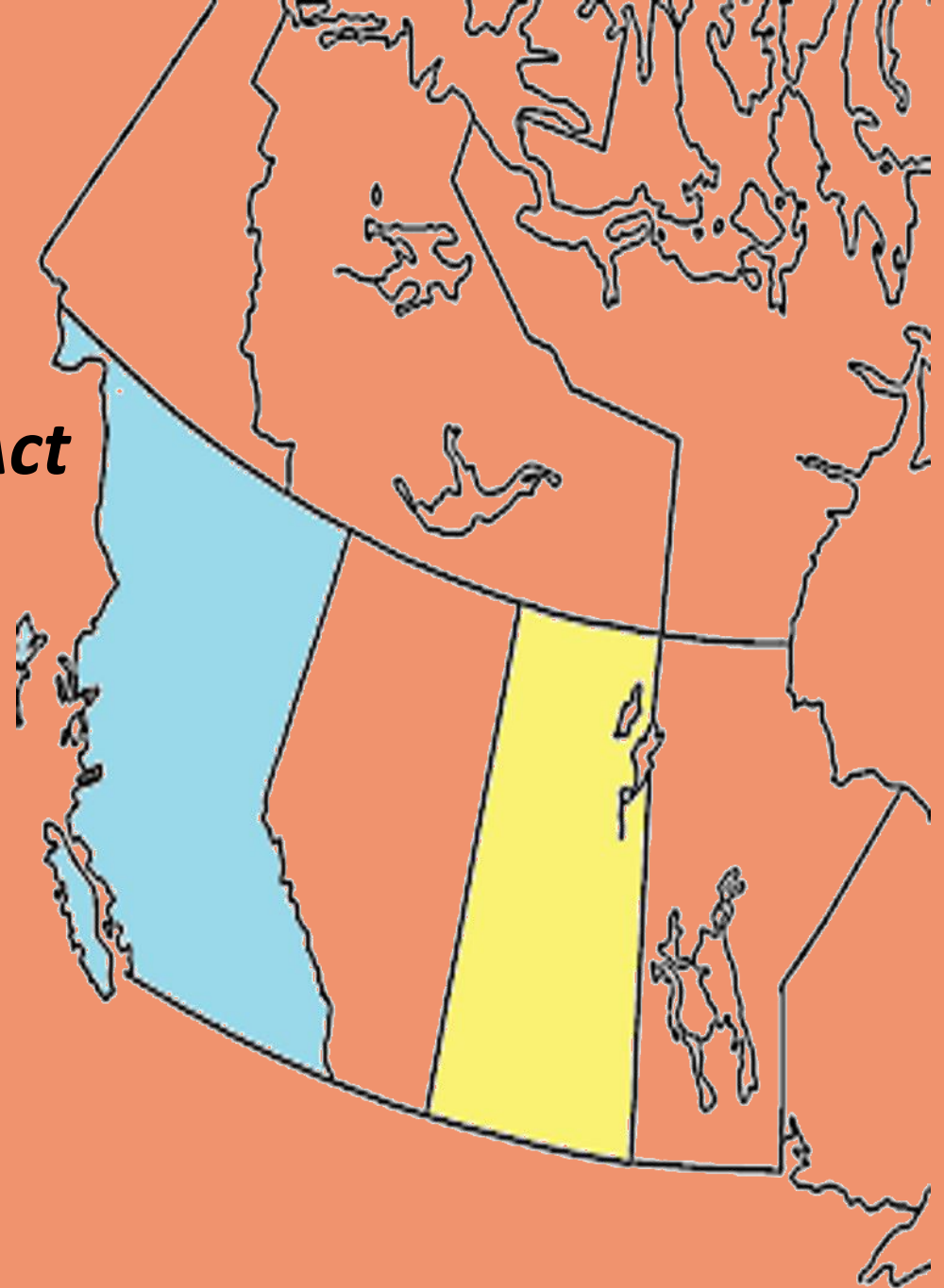
Overview of Today's Presentation

- + Summary of Changes
- + Structure of the No Fault System
- + Highlights from the Regulations
- + Cross-Jurisdictional Issues and Scenarios

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Changes to the *Insurance (Vehicle) Act*

- + Applies to accidents occurring on or after May 1, 2021
- + Number of interest groups attempted to lobby government not to enact the legislation
- + By and large the legislation is cut and pasted from Saskatchewan's no-fault legislation from which we can discern how the legislation is likely to impact BC's insurance landscape



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What Does the Act Say?

- + Removes the right of people injured in motor vehicle accidents to pursue litigation (almost complete bar) – s. 115
- + Bodily Injury Compensation
 - + **Health care/rehabilitation benefits:** lifetime limit of not less than \$7.5 million per accident (no official cap yet) – s. 128
 - + **Income loss:** capped at a gross income earning of \$100,000 for 2021/2022 – to increase thereafter – s. 2(2) of Income Regulation
 - + **Permanent Impairment:** Essentially general damages – cap of \$264,430 for catastrophic injury
- + Basic property damage: limited recovery, reduced by liability of insured

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Who is entitled to BC accident benefits?

- + S. 118 and s. 119 of *Insurance (Vehicle) Act*
 - + Residents of BC at the time of the accident who sustain bodily injury from an auto accident anywhere in Canada or the US
 - + By and large, non-residents who are injured in an automobile accident within British Columbia
 - + Non-residents injured in an automobile accident outside of British Columbia but within Canada or the US who are named in a BC owner's certificate, and are also the operators, occupants of, or struck by, a vehicle registered in British Columbia

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Priority if multiple insurers

- + S. 62.1 of *Insurance (Vehicle) Regulation*
- + Basic rule: insurance that applies to the vehicle involved in the collision is primary and insurance available to the injured person by some other means is generally excess
 - + Generally, same as Alberta

Dispute Resolution

- + Property Claims: By arbitration – Division 5 of the Basic Vehicle Damage Coverage Regulation
 - + 2 year limitation period to commence arbitration
 - + 2 years after arbitration award is rendered to commence an action
- + Accident Benefits:
 - + *Civil Resolution Tribunal Act* s. 133 – jurisdiction of accident benefits disputes under the *Insurance (Vehicle) Act*
 - + S. 167 of *Insurance (Vehicle) Act* - dispute resolution process can be prescribed (so far regulations silent)
 - + Part 10 of the *Enhanced Accident Benefits Regulation* sets out process for making a claim for accident benefits
 - + *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348
 - + Authority over accident benefits disputes remains

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How It's Supposed to Work:

- + Complete bar on litigation for bodily injury claims with a few enumerated exceptions (i.e. those entities that can still be sued) – s. 115 and s. 116:
 - + Vehicles and vehicle part manufacturers and retailers;
 - + Garages; and
 - + Establishments who over-serve patrons that are later involved in accidents, as well as the drunk drivers themselves.
- + Recovery through litigation is limited to non-pecuniary, punitive, exemplary, or similar non-compensatory damages
- + BUT, ICBC can recover from enumerated exceptions for enhanced accident benefits paid out (s. 168)

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Commencing an Action Against Enumerated Exceptions for Bodily Injury:

- + Liability is several if more than 1 party is found liable
- + 2-year limitation period
- + Notable absences from the above exemption list (i.e. entities that cannot be sued):
 - + Municipalities
 - + Road contractors
 - + Construction companies; and
 - + Flagging operators

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Reduced Risk for Industries:

- + The changes would bar claims for bodily injury against municipalities, contractors, and road maintainers/builders for:
 - + Deficient lighting
 - + Poor/deficient line painting
 - + Tree/shrub maintenance related MVAs
 - + Road design or maintenance issues, including de-icing, salting, sanding, etc.
 - + Improper signage
 - + Transit accidents
 - + Dislodged manhole coverings
 - + Dangerous crosswalks
 - + Poor Traffic Management
- + ICBC and out of province insurers subsume all of these liabilities (i.e. indemnity related costs) within the no fault regime

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Practical Implications:

- + Possible dramatic reduction in risk profile for several industries and Local Governments that are not in the enumerated exceptions
- + Opportunity for the underwriting community to relook at industries traditionally viewed as too risky in BC
- + Reduced litigation costs for ICBC and out of province insurers
- + Reduction in litigation support assistance required by many insureds (doc production requests, discovery preparation and attendance ...)

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**Summary of Highlights From
the New Regulations Relating
to the No-Fault Benefits
Scheme**

Basic Vehicle Damage Coverage Regulation – Effective May 1, 2021

- + Recovery for loss of use and repair costs of vehicle
- + This regulation contains provisions on the prescribed classes of people who are exempt from the general rule under s. 172
 - + Section 6 – Persons against whom action may be commenced or maintained
 - + Section 10 –The value of indemnification must be reduced based on fault
 - + Section 26 –Indemnification not paid or reduced

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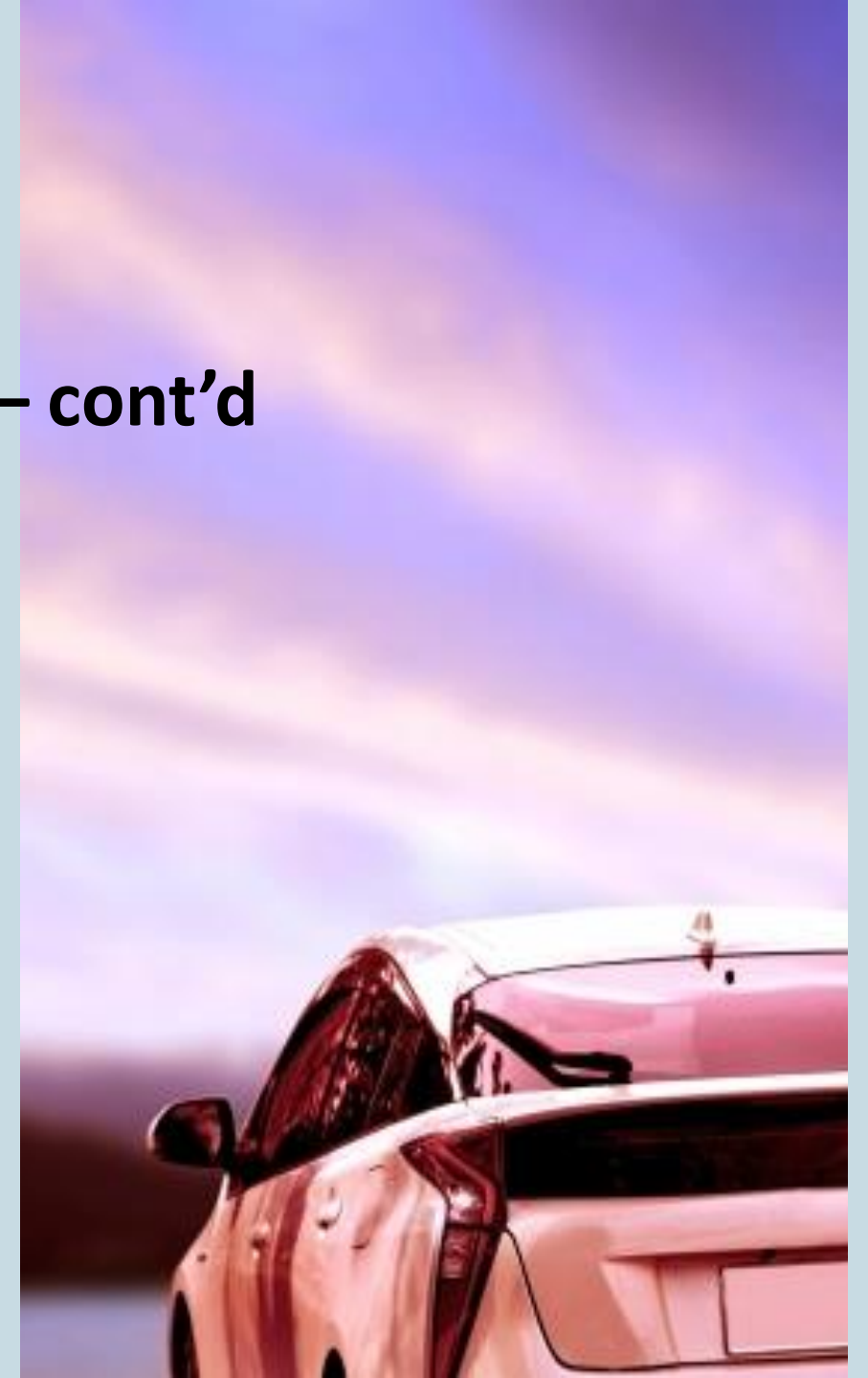
Enhanced Accident Benefits Regulation – Effective May 1, 2021

- + This regulation sets out the details regarding insureds' entitlement to and calculation of the enhanced no-fault benefits under the new no-fault benefits scheme
 - + Part 3 - Exclusions for certain prescribed criminal defences, applicable to adults and youths, whether in Canada or the US

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Enhanced Accident Benefits Regulation – cont'd

- + Part 5: Health care, Rehabilitation and Related Benefits
- + Part 6: Family and Caregiver Benefits
- + Part 7: Death Benefits – up to \$500,000
- + Part 8: Expenses- catastrophic injuries up to \$1,229,910



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Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation – Effective May 1, 2021

- + This regulation sets out the income replacement benefit to which an insured is entitled under Division 6 of Part 10 of the Act
- + The maximum yearly insurable income for the period of May 1, 2021 to March 31, 2022 is \$100,000 (section 2(2) of the regulation)
- + The regulation sets out in detail the calculation of the income replacement benefit


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Permanent Impairment Regulation – Effective May 1, 2021

- + This regulation sets out the compensation structure for permanent impairment compensation to which an insured is entitled to under section 129 of the Act, which involves (s. 3 of regulation)
- + If the insured sustains a catastrophic injury, the permanent impairment compensation is \$264,430 (s. 8 of regulation)
- + If the permanent impairment is not a catastrophic injury, there is a prescribed formula for calculating the permanent impairment compensation to which the insured is entitled

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**Cross-Jurisdictional Issues &
Scenarios:
*Alberta & British Columbia***

A faded, warm-toned background image showing a family of three (two adults and a child) standing in a grassy field. A dog is sitting in the foreground. To the right, the rear of a car with its trunk open is visible. The scene is set against a bright, hazy sky, suggesting a sunset or sunrise.

Implications for Alberta Automobile Insurers:

- + Conflicts of Law Considerations
 - + Location of the accident governs
- + Possible Knock-for-Knock agreement
- + Cross-jurisdictional scenario examples

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Setting Up Defence

- + S. 33 of the *Alberta Insurance Act* – Alberta insurers who issue Alberta insurance policies must not set up any defence to a claim in another province or territory that would be unavailable:
 - + Under an auto policy issued in that province or territory OR
 - + under a scheme of no-fault insurance that has been established by statute in the other province or territory

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What is an Unallowable Defence in BC?

- + Anything that would result in a restriction or limitation on coverage that would otherwise be available in BC
 - + Limit on maximum accident benefits payable
 - + Bases to void the Alberta auto policy that are unavailable in BC
 - + Differences in limitation periods
 - + Unavailability of types of coverage that are statutorily provided in BC (e.g. property damage coverage)

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What Happens When an Alberta-Insured Driver is At Fault for an Accident that takes place in British Columbia?

- + **Litigation by injured party allowed?** No
- + **Who pays injured party?** ICBC pays no fault benefits to British Columbia resident
- + **Recovery by ICBC?** Limited circumstances (depends on s. 168). No blanket recovery against out of province insurers.
- + **Recovery by ICBC for property damage?** Section 178(2): Likely no, unless there is an unusual, or non-standard vehicle involved, criminal circumstances, consent concerns, misrepresentations, etc. (long list). For ordinary vehicles, analysis turns on whether the vehicle is a “licensed vehicle” under s. 170
 - + Includes a vehicle licensed in a jurisdiction described in Section 118 – Canada and US



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What Happens When an Alberta-Insured Driver is Injured While in British Columbia?

- + **Litigation by injured party allowed?** No
- + **Who pays injured party?** Alberta insurer pays no fault benefits to Alberta resident, but in accordance with British Columbia legislation
 - + Part 2A of the *Automobile Accident Insurance Benefits Regulation*
 - + the PAU and the BC/Alberta Insurance Acts
- + **Recovery for vehicle damage by Alberta insurer?** Section 178(5): No, unless ICBC could otherwise recover against the owner of the vehicle (specific circumstances)

What Happens When a Passenger is Injured in an Accident in BC?

- + **Litigation by injured party allowed?** No
- + **Who pays injured party?** Insurer for the vehicle in which the passenger was located is primary, passenger's own insurer is excess; benefits payable are BC no fault benefits
- + **Entitlement for Non-Residents:**
 - + S. 119(2)(a)(iii) – passengers of a BC vehicle
 - + S. 119(2)(a)(v)(A) – passengers of a non- BC vehicle ** accident benefits can be reduced by fault of the passenger

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What Happens When a Pedestrian is Injured in an Accident in BC?

- + **Litigation by injured party allowed?** No
- + **Who pays injured party?** Insurer for the vehicle that strikes the pedestrian is primary, pedestrian's own insurer is excess; benefits payable are BC no fault benefits
- + **Entitlement for Non-Residents:**
 - + S. 119(2)(a)(iv) – pedestrians struck by a BC vehicle
 - + S. 119(2)(a)(v)(B) – pedestrian struck by a non- BC vehicle ** accident benefits can be reduced by fault of the pedestrian

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What Happens When an Alberta-Insured Driver is At Fault for an Accident in Alberta Involving a BC Resident?

- + **Litigation by injured party allowed?** Yes (claim would be filed in Alberta)
- + **Who pays injured party?** ICBC pays its insured BC resident no fault benefits; injured British Columbian can bring tort claim against Alberta driver
- + **Recovery by ICBC for no fault payments?** ICBC probably cannot recover against Alberta driver for the no fault benefits paid to its insured
 - + *Alberta Insurance Act* s 570(4)(a) and 570(6)
 - + *Vujicic v MacEachern (Estate)*, 2021 ABQB 9

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What Happens When an Alberta-Insured Driver is Injured by an ICBC-Insured Driver in Alberta?

- + **Litigation by injured party allowed?** Yes (claim would be filed in Alberta)
- + **Who pays injured party?** Alberta insurer pays Alberta no fault benefits, injured party can claim in tort against British Columbian driver (ICBC will respond in most contexts)
 - + ICBC basic third party liability limits: \$200,000 plus costs
 - + Option for BC residents to purchase extended third party liability coverage
 - + \$1 million mandatory for certain types of vehicles (buses, taxis, heavy commercial vehicles)

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Alberta-Insured Driver is At Fault for an Accident in British Columbia and the Injured Person Uses British Columbia Medical Services:

- + British Columbia *Health Care Costs Recovery Act* remains
 - + Government can recover costs from out of province driver/insurer
 - + S. 8(2): Government can commence its own action
 - + S. 10: Duty of insurer to report claim
 - + S. 13: Obligation to notify in the event of a settlement

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Questions?



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Thank you.

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