

## DRIVING OFFENCES AND ICBC

*Prepared by Gordon J. Kehler, lawyer,  
with the much appreciated assistance of Christopher J. Watson, lawyer  
MacKenzie Fujisawa LLP, Barristers & Solicitors*

### I. Introduction

In circumstances of motor vehicle accidents involving individuals alleged to have been incapable of proper care and control of the vehicle they were operating at the time of the accident, whether convicted or not, the Insurance Corporation of British Columbia (ICBC) can decide to find the driver in breach of their policy of insurance, having not only significant financial ramifications, but an effect on an individual's ability to obtain insurance and a drivers license.

### II. Establishing the Breach

Section 55(8) of the Insurance (Vehicle) Regulation to the *Insurance (Vehicle) Act* enunciates the circumstances of a driver's condition and the sections of the *Criminal Code* and *Motor Vehicle Act* under which a conviction will lead to ICBC deeming a driver in breach of the policy of insurance, including coverage for no fault benefits, own damage (including extension insurance and Road Star coverage) and indemnity for claims made, including defence costs. Section 55(8) of the Regulation is reproduced in its entirety at Appendix "A".

#### A. Notification

ICBC will generally notify a driver that coverage is an issue in one of three ways. The first is a letter that merely advises that ICBC is still "investigating this accident" and that there is "some indication" of a breach. It is important to note that the equivocation on the issue of denial **does not** act as an extension of the limitation period for own damage, a topic that will be covered in greater detail further along in this paper.

The second level of notification is a letter sent by registered mail to the driver's last address as recorded in the records of ICBC that advises of an unequivocal denial of coverage and states that the driver is in breach of their insurance coverage, that they will have to repay ICBC for all claims made against the driver and that ICBC will not provide a lawyer for the driver in any

actions brought against the driver. This letter of denial is not necessarily linked to the state of any criminal proceedings that might be ongoing, or concluded, but rather arises generally from ICBC's own internal review of the facts known to them.

The third form of denial, and the only one that ICBC is statutorily required to send, is a notice under s. 20 of the *Insurance (Vehicle) Act* that will include with it both a copy of the statutory declaration ICBC has received from someone making claim for injuries or loss arising from the accident, and a statutory notice (a copy of which is attached at Appendix "B") that the driver has 14 days to reply either denying the claim or arranging to satisfy the claim, failing which the Corporation may settle the claim and seek reimbursement. This is a form of notice that ICBC is statutorily required to make and it must be made in a timely manner:

"There is no discretion involved in the imperative nature of s. 20(3) of the *Act*. Nor, in my opinion, is there any discretion as to when the dictate must be carried out. It must be done promptly". (*Insurance Corporation of British Columbia v. Amin Hosseini* 2006, B.C.C.A. 4).

The significance of this form of notice is that it affects ICBC's ability to recover against the driver if not followed properly. The untested question is whether ICBC can collect where the breached driver does respond in the time and manner set out. If the driver does respond denying liability, can ICBC demand reimbursement?

## **B. Effect of Conviction**

Section 55(8)(b), (c), and (d) of the Regulation list the sections of the *Criminal Code* and *Motor Vehicle Act* that, if a driver is convicted under, are deemed to constitute a breach. The language of the section was amended on January 1, 2001, presumably in response to a number of decisions that found the wording of the section required there be evidence that the insured was incapable of proper control of the vehicle at the time of the accident, with the fact of a conviction alone being not sufficient for the purpose of finding the driver in breach. There have been no reported decisions on whether the amendment has the effect of deeming the driver in breach upon being convicted of one of the listed offences\*, however ICBC treats it as such. In light of the

---

\* Although the decision of Bennet, J. in *Dhiman* states "the test for incapacity is not met simply by a conviction for impaired driving or driving with over 80 milligrams of alcohol per 100 millilitres of blood or for failing to take a breath test," this decision involved no such conviction, the driver having pled to a non-listed offence of driving

significant amounts that can be involved in such matters, along with the complexity of the interplay between policy sections and statutory interpretation, it would be prudent to carefully consider the facts and law on this issue before recommending to a client that the amendment has the effect it is deemed to have by ICBC.

### **C. Where No Conviction**

#### **1. The Law**

Section 55(8)(a) of the *Regulation* enunciates Breaches of Condition. More particularly, section 55(8)(a) states:

- (8) An insured shall be deemed to have breached a condition of section 49, Part 6 and Part 9 where
- (a) he is operating a vehicle while he is under the influence of intoxicating liquor or a drug or other intoxicating substance to such an extent that he is incapable of proper control of the vehicle.

#### **2. The Legal Test**

In *Caissie v. Insurance Corp. of British Columbia*, [1989] B.C.J. No. 1020, the British Columbia Court of Appeal followed *Schedeger v. Insurance Corp. of British Columbia*, [1982] I.L.R. 1-1562 and affirmed that the correct legal test in interpreting the regulation is:

Negligence on his part might be of such a nature and degree that, in conjunction with independent evidence of impairment, it might provide proof on a balance of probabilities that incapacity to exercise proper control in fact existed. The question here is whether the evidence demonstrates, on a balance of probabilities, that the negligent acts were of such a nature and degree as to be explainable only by compelling the inference that the influence of alcohol caused the negligent acts and that the effect of the alcohol was to render him incapable of proper control. This can be tested by asking whether the collision would have been avoided if the plaintiff had been sober.

In *Park v. Insurance Corporation of British Columbia* 1998 CanLII 3960 the issue was whether the plaintiff was operating a vehicle while under the influence of alcohol to such an extent that he was incapable of proper care and control of the vehicle. The court held that the test to be

---

without due care and attention, and as such, and in light of the comments above regarding the amendment to the wording of the regulation, this should be taken as obiter and viewed with caution.

applied was the one as set out in *Schedeger, supra* and subsequently approved by the Court of Appeal in *Caissie, supra*. The court in *Park, supra* held:

...I have to decide whether the plaintiff was at the time incapable of the proper control of his motor vehicle. Negligence on his part might be of such a nature and degree that, in conjunction with independent evidence of impairment, it might provide proof on a balance of probabilities that incapacity to exercise proper control in fact existed. The question here is whether the evidence demonstrates, on a balance of probabilities, that the negligent acts were of such a nature and degree as to be explainable only by compelling the inference that the influence of alcohol caused the negligent acts and that the effect of the alcohol was to render him incapable of proper control. This can be tested by asking whether the collision would have been avoided if the plaintiff had been sober.

Proof of impairment is insufficient. The evidence must establish incapacity to properly control the vehicle due to alcohol.

Note the following principles:

- Under s.55(8) I.C.B.C. has to prove a plaintiff is incapable of driving a motor vehicle. Every person who is under the influence of alcohol to the point of being incapable of proper control is certainly impaired, but it does not follow that every impaired driver is necessarily incapable of proper control (*Bauer v. Insurance Corp. of British Columbia* (1989), 32 B.C.L.R. (2d) 10).
- Evidence of an illegal level of alcohol in the blood, does not, of itself meet the standard of proof. The appropriate test is whether the accident would have been avoided if the insured had been sober (*Smissen v. Insurance Corp. of British Columbia*, 2004 BCSC 742).
- In order to succeed under this section, the onus is on I.C.B.C. to show that the evidence, on the balance of probabilities, is consistent not only with the driver's incapacity to maintain proper control due to the influence of alcohol, but is also consistent with no other reasonable explanation (*Kenik Trucking Ltd. V. Insurance Corp. of British Columbia*, [1972] 2 W.W.R. 681 (B.C.Co.Ct.) (decided under B.C. Reg.428/73)).

- In situations where there is no conviction under one of the stated sections, ICBC may still attempt to hold a driver in breach. Thus, where someone charged with an offence under one of the noted sections is found guilty (by plea or otherwise), or is acquitted outright, ICBC may still attempt to deny coverage. In those circumstances, the test is well settled that “the burden is on the insurer to establish that the driver was under the influence of intoxicating liquor to such an extent that she was incapable of proper control of the vehicle”. (*Patterson v. Insurance Corporation of British Columbia* (1996), 22 BCLR (3d) 342 (SC)). A good review of the law on the test for incapacity, including the burden on the insurer can be found in the decision of Bennet, J in *Dhiman v. ICBC*, 2007 BCSC 260 para. 24.

#### **D. Breathalyzer Results**

Breathalyzer results in of themselves are not sufficient for ICBC to prove the driver was incapable of proper control of the vehicle. The readings can generally be relied on by ICBC, regardless of whether they were obtained in breach of the *Canadian Charter of Rights and Freedoms*<sup>†</sup>, but the reliability of those readings must still be properly established. As such, where either the maintenance and calibration of the equipment, or the way in which the readings were obtained make the readings untrustworthy, the evidence can be excluded.

It is important to be aware that despite the test established by the decisions of the court, ICBC policy is that a driver will be breached automatically for registering readings over .19.

#### **E. Limitation Periods**

There are a number of limitation periods that apply to a breach situation.

##### **1. Tort action**

An action in tort for personal injury must be commenced within **2 years** from date the right to do so arose (the date of the accident): *Limitation Act*, s. 3(2).

##### **2. Part 7 action**

---

<sup>†</sup> But see *Insurance Corporation of British Columbia v. Suska* 2008 BCSC 1204, for circumstances where ICBC and agents acting on its behalf can be held to be subject to the Charter and Charter remedies

An insured must commence an action, or give notice of an intention to commence an action, against ICBC for Part 7 benefits, within **2 years** from the date of the accident or where benefits have been paid within 2 years from the last benefit payment: *Insurance (Vehicle) Regulation*, s. 103.

### **3. Own Damage**

An action against ICBC for own damage must be commenced within **2 years** from the date of the occurrence of the damage: *Insurance (Vehicle) Regulation*, s. 145. The limitation period begins to run from the date of loss and not from the date of notice that a claim will be denied (*Totovic v. Insurance Corporation of British Columbia*, [1996] B.C.J. No. 443 (S.C.)).

### **4. Indemnity and defence**

ICBC is required to indemnify an insured for liability imposed on the insured for injury to another that occurs out of the use or operation of a vehicle described in the owner's certificate: *Insurance (Vehicle) Regulation*, s. 64.

ICBC is also required to defend actions against the insured on claims which, if proven, would fall within the policy coverage: *Insurance (Vehicle) Regulation*, s. 74(b).

Three limitation periods apply here. The driver will have the benefit of the longest of them all.

Section 17 of the *Insurance (Vehicle) Act* provides for two limitation periods:

#### **Limitation**

**17** An action or proceeding by an insured against the corporation in respect of benefits, insurance money or indemnification payable under the plan must be commenced within one year after the happening of the loss or damage or after the cause of action arose, or as the regulations may provide in the case of any coverage, but not afterwards.

Thus, the driver has one year either from the accident or from after his cause of action arose (this is discussed below) to commence an action against ICBC for indemnification.

A third limitation period arises under s. 76 of the *Insurance (Vehicle) Regulation*, which provides:

## **Limitation**

**76** No person shall commence an action to enforce a right under this Part, except within the limitation period fixed by the *Limitation Act*.

The policy of insurance being a contract, the limitation period is **6 years** from the date the cause of action arose.

Where more than one limitation period applies the driver may take advantage of the longest of the periods; ambiguities are strictly construed in favour of insureds: *Kremsner v. ICBC*, 2004 BCSC 130, para. 13.

The cause of action will be found to have arisen when ICBC unequivocally denied coverage to the driver: *see Kremsner*, supra, para. 7. The first level of notice discussed earlier is not, it is submitted, an unequivocal denial, or even a denial, of coverage. It merely states that ICBC is “still investigating this accident” and that there is “some indication” of a breach.

The second form of notice is an unequivocal denial of coverage. It will state that the driver is in breach of his insurance coverage, that he will have to repay ICBC for all claims, and that ICBC will not provide a lawyer. Thus, it is submitted, cause of action against ICBC commences the day the driver received ICBC’s letter.

There are other arguments to extend the limitation period even further. A driver could on good authority argue that the limitation period governing a claim for indemnity arises only after judgment against him and the extent of the claim has been otherwise determined: *see CED vol. 21*, title 84, para. 88. It is also possible to add ICBC as a party defendant after the limitation period expires: *Limitation Act*, s. 4(1).

## **III. Financial Consequences of Finding of Breach**

Section 93.1 of the *Insurance (Vehicle) Act* enunciates the “corporations collections remedy”. The section defines “fine indebtedness” and “vehicle indebtedness,” which is indebtedness that arises from a payment made by ICBC in relation to an accident under enumerated criminal code and *Motor Vehicle Act* sections. Section 96.1 is attached in its entirety at Appendix C.

Where a person is liable to ICBC in such situations, ICBC may, in addition to attempting to collect the debt in a court of competent jurisdiction, refuse application for insurance, cancel an owner's certificate issued in the debtor's name, and cancel any driver certificate issued in the debtor's name.

Sub-section 4 establishes the procedure ICBC must follow to take any of the steps noted above and include mailing to the debtor, at the debtors' last address known to the Corporation, a written demand for payment of the indebtedness, providing the debtor 30 days after the date of mailing to pay the indebtedness or make arrangements satisfactory to ICBC for payment of the indebtedness.

Where ICBC has cancelled or suspended a driver's certificate issued in the debtor's name, it will generally result in that individual being unable to obtain a drivers license in any other jurisdiction in Canada or the United States, as such information is shared between jurisdictions.

#### **IV. Conclusion**

As can be seen, the effect of ICBC finding a driver in breach as a result of an accident related to a driving offence often has not only significant financial consequences to a driver, but also can severely limit or eliminate an individual's ability to obtain insurance and a drivers licence, not only in British Columbia, but in most, if not all Canadian and American jurisdictions. The effect of a conviction under one of the enumerated sections of the *Criminal Code* and *Motor Vehicle Act* more easily allow ICBC to exercise its rights of denial and collections steps, but that alone is not determinative. The procedures to be followed are complex and, it is submitted, not fully settled. It is rather surprising that in light of the significant financial consequences to individuals, as well as the potential effect on one's ability to obtain a drivers license (which in of itself can have significant financial consequences) that there are not more instances of challenges to the steps routinely taken by ICBC to find drivers in breach and enforce the financial consequences of such a finding.

## APPENDIX “A”

### *Insurance (Vehicle) Act*

## INSURANCE (VEHICLE) REGULATION

[includes amendments up to B.C. Reg. 341/2007, November 8, 2007]

### Part 5 — Conditions of Certificate

#### Breach of conditions

55 (8) An insured shall be deemed to have breached a condition of section 49 and Part 6 where

(a) the insured is operating a vehicle while the insured is under the influence of intoxicating liquor or a drug or other intoxicating substance to such an extent that he is incapable of proper control of the vehicle,

(b) the insured is convicted of

(i) a motor vehicle related *Criminal Code* (Canada) offence,

(ii) an offence under section 95 or 102 of the *Motor Vehicle Act*, or

(iii) an offence under a provision of the law of another jurisdiction in Canada or the United States of America that is similar to a provision mentioned in subparagraph (i) or (ii),

(c) the insured is convicted of an offence under section 253 (b) of the *Criminal Code* (Canada), section 224 of the *Motor Vehicle Act* or a provision of another jurisdiction in Canada or the United States that is similar to either of those sections and the accident in respect of which the insured's claim is made occurred during the insured's commission of the offence and while the insured was operating a vehicle,  
or

(d) the insured is convicted of an offence under section 254 (5) of the *Criminal Code* (Canada), section 226 of the *Motor Vehicle Act* or a provision of the law of another jurisdiction in Canada or the United States of America that is similar to either of those sections and the accident in respect of which the insured's claim is made

occurred within the 2 hours preceding the insured's commission of the offence and while the insured was operating a vehicle.

(9) In subsection (8):

**"convicted"** includes being

(a) convicted under the *Young Offenders Act* (Canada) for contravening a provision mentioned in the definition of "motor vehicle related *Criminal Code* (Canada) offence" or section 253 (b) or 254 (5) of the *Criminal Code*, and

(b) convicted or the subject of a similar result in a jurisdiction of the United States of America under a law similar to the *Young Offenders Act* (Canada) for contravening a provision of the law of that jurisdiction that is mentioned in subsection (8) (b) (iii), (c) or (d);

**"motor vehicle related *Criminal Code* offence"** means an offence under section 220, 221, 249, 252, 253 (a), 255 (2) or (3) or 259 (4) of the *Criminal Code* (Canada) committed while operating or having care or control of a vehicle or that was committed by means of a vehicle.

## APPENDIX "B"

### STATUTORY NOTICE

#### Section 20 Uninsured Motorist Claims Division

[Claim No.] [Location Code] [Resource Name] [Resource Number] [Telephone Number]

#### Statutory Notice

Under Section 20 'Uninsured Vehicles' of the *Insurance (Vehicle) Act*

Date Mailed: [month, day, year]

To: [name]

and: [name]

**Take notice** than on the [month, day, year], the Insurance Corporation of British Columbia received a Statutory Declaration executed by [name] (a photocopy of which is attached) applying for payment of damages arising from bodily injury to or death of a person or loss of or damage to property caused by or arising out of your ownership or your operation of an uninsured motor vehicle displaying a [province or state] number plate [licence number] on a highway in the province on the [month, day, year] at or near [location], B.C.

**And further take notice** that if within 14 days after receipt by you of this notice, which notice you are deemed to have received on the eighth day after mailing of the notice by the Corporation, you do not reply to the Corporation, either denying liability for the incident described in the attached Application or making arrangements satisfactory to the Corporation for the disposition or settlement of the demand contained in or presented by the Application, the Corporation may settle with or consent to judgment in favour of any applicant or the Corporation may take such other action as is authorized by section 20 of the *Insurance (Vehicle) Act*, including paying all or part of a settlement or judgment, and upon further notice to you, the Corporation may demand reimbursement from you of the payments with interest thereon or the Corporation may take such other action as may be necessary to recover the amounts of the payments.

**Insurance Corporation of British  
Columbia:**

---

Per

---

Return Address

---

c.c. Applicant

(e) a fee that is prescribed under the *Motor Vehicle Act*, and that has not been paid, for

- (i) the registration of a motor vehicle or trailer,
- (ii) a licence or permit for a motor vehicle or trailer, or
- (iii) a driver's licence, and

(f) indebtedness to the government because of a failure to pay a fine, or a victim's surcharge levy within the meaning of the *Victims of Crime Act*, imposed as a result of a conviction under

- (i) a motor vehicle related *Criminal Code* offence, within the meaning of the *Motor Vehicle Act*,
- (ii) the *Motor Vehicle Act*,
- (iii) the *Commercial Transport Act*,
- (iv) the *Motor Fuel Tax Act*,
- (v) the *Highway Act* or the *Transportation Act*,
- (vi) the *Passenger Transportation Act*, or
- (vii) the *Motor Vehicle (All Terrain) Act*
- (viii) [Repealed 2007-14-140.]

(2) Subject to subsection (4) but despite any other provision of this Act or the regulations, if a person is indebted to the government or the corporation for a vehicle indebtedness, the corporation may do one or more of the following for so long as any part of the vehicle indebtedness remains outstanding:

- (a) recover the vehicle indebtedness by action against the debtor in a court of competent jurisdiction;
- (b) refuse any application made by the debtor for insurance;
- (c) cancel any owner's certificate issued in the debtor's name or any universal compulsory vehicle insurance issued in the debtor's name;
- (d) issue an owner's certificate or provide universal compulsory vehicle insurance to the debtor with a term of more than 90 days but less than one year;

(e) cancel any driver's certificate issued in the debtor's name;

(f) issue a driver's certificate to the debtor with a term of more than 90 days but less than 5 years.

(3) Subject to subsection (4) but despite any other provision of this Act or the regulations, if a person is required to reimburse the corporation under section 90 (12) of the *Motor Vehicle Act*, the corporation may exercise one or more of the rights referred to in subsection (2) (a), (b), (d) or (f) of this section for so long as any part of that indebtedness remains outstanding.

(4) Despite subsections (2) and (3), the corporation must not exercise a right referred to in subsection (2) (b), (c), (d), (e) or (f) unless

(a) the indebtedness is a fine indebtedness,

(b) the corporation has a judgment in its favour in relation to the indebtedness in respect of which it intends to exercise one or more of those rights, or

(c) the corporation mails to the debtor, at the debtor's last address according to the corporation's records, a written demand for payment of that indebtedness together with a notice of any action the corporation intends to take under this section, and the debtor does not, within 30 days after the date of mailing, pay the indebtedness or make arrangements satisfactory to the corporation for payment of the indebtedness.

(5) If money is owed by a debtor to the corporation or the government for a vehicle indebtedness, to the corporation for a reimbursement required under section 90 (12) of the *Motor Vehicle Act* or to the corporation for any other reason, the corporation may deduct the amount of the indebtedness from any insurance money, other than benefits as defined in section 83 (1) of this Act, payable by the corporation to the debtor, whether or not the corporation has provided a demand to the debtor under subsection (4) (c) of this section.

(6) Nothing in this section limits or qualifies any other collection remedy or right available to the corporation or the government under this or any other enactment in relation to any indebtedness, including a vehicle indebtedness, owing by any person to the corporation or to the government.