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Denis W. Boivin

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Résumé de l'article

Cet article fait un survol des cinq composantes du régime d'assurance automobile qui est disponible en Colombie-Britannique depuis mars 1974. Ce régime, connu sous le nom « Autoplan », offre à chaque personne assurée une assurance minimale contre la responsabilité civile (1), des bénéfices sans égard à la responsabilité (2) et une protection contre le risque de subir des dommages par la faute d'un automobiliste non assuré (3), sous assuré (4) ou à l'abri de poursuite judiciaire (5). L'article termine en décrivant les circonstances dans lesquelles le comportement de la personne assurée aura un impact sur ses droits de recouvrement.

# Automobile Insurance in British Columbia: Autoplan Turns Thirty

by Denis W. Boivin

## ABSTRACT

This article describes the five components of "Autoplan" insurance. This is the commercial name given to the universal automobile insurance regime that has been available in British Columbia since March of 1974. The minimum package comes with the following coverage: (1) third party liability insurance; (2) statutory accident benefits; (3) uninsured motorist protection; (4) underinsured motorist protection; and (5) inverse liability insurance. In closing, the article describes the main restrictions placed on recovery that relate to the conduct of the insured person.

**Keywords:** Insurance, automobile insurance, Autoplan, no-fault, public insurer, British Columbia, third party liability, statutory accident benefits, inverse liability insurance, property damage insurance, restrictions on liability, exclusions.

## RÉSUMÉ

Cet article fait un survol des cinq composantes du régime d'assurance automobile qui est disponible en Colombie-Britannique depuis mars 1974. Ce régime, connu sous le nom "Autoplan", offre à chaque personne assurée une assurance minimale contre la responsabilité civile (1), des bénéfices sans égard à la responsabilité (2) et une protection contre le risque de subir des dommages par la faute d'un automobiliste non assuré (3), sous assuré (4) ou à l'abri de poursuite judiciaire (5). L'article termine en décrivant les circonstances dans lesquelles le comportement de la personne assurée aura un impact sur ses droits de recouvrement.

**Mots clés :** Assurance, assurance automobile, Autoplan, assurance sans égard à la responsabilité, assureur public, Colombie-Britannique, assurance contre la responsabilité civile, bénéfices sans égard à la responsabilité, automobiliste à l'abri de poursuite, assurance contre les dommages matériels, limites à la responsabilité, exclusions.

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## Author:

Denis W. Boivin is an Associate Professor at the University of Ottawa, Faculty of Law, Common Law Section. The author teaches and publishes in the areas of Insurance Law, Remedies, and Torts. He has a particular interest in automobile insurance regimes.

## ■ INTRODUCTION

“Autoplan” is the commercial name of the universal automobile insurance regime that has operated in British Columbia for the past thirty years.<sup>1</sup> This plan is administered on a non-profit basis by a provincial crown corporation, the Insurance Corporation of British Columbia. This is not a typical insurer. ICBC sells and services automobile insurance on behalf of the government,<sup>2</sup> but it is also in the business of consumer education, accident prevention, and rehabilitation. The clients of ICBC consist of all licensed motor vehicle owners and drivers in the Province. They are the ones who finance the regime through premiums and licensing fees. However, they are not the only beneficiaries of Autoplan. ICBC provides services and compensation to all British Columbians irrespective of whether they own, lease, or drive a motor vehicle. Autoplan is more than a “statutory contract” between the government and some of its citizens;<sup>3</sup> it is a social contract that distributes the risks and responsibilities associated with automobiles throughout the Province.

One of the distinctive features of Autoplan is its “peaceful co-existence” with the law of civil obligations.<sup>4</sup> Across Canada, victims of legal wrongs may sue their wrongdoers for monetary compensation. Provided they establish fault and causation, victims have a right to be fully indemnified for their losses to the extent that this is possible with money. In some Canadian jurisdictions, universal automobile insurance has brought exceptions to this fundamental principle of civil liability. In Manitoba<sup>5</sup> and Québec,<sup>6</sup> there is no right to sue for personal injury or death following an automobile accident – this was also the case in Saskatchewan until recently.<sup>7</sup> Restrictions also exist in Ontario,<sup>8</sup> where accident victims may only sue under a pre-determined set of circumstances, that is, only if they meet a so-called “threshold”. On the other hand, British Columbians have not given up any freedom to litigate in exchange for their no-fault accident benefits. To be sure, changes have been made to the provincial tort system since the inception of Autoplan,<sup>9</sup> and some groups have called for greater reforms in this respect.<sup>10</sup> However, citizens of British Columbia enjoy the same access to the judicial system under Autoplan as they did before the regime was officially implemented on March 1, 1974. Still, the average annual premium for a private passenger vehicle is below one thousand dollars.<sup>11</sup>

“Basic Autoplan” is the main product sold by ICBC. This package provides the *minimum* coverage required by law for all motorists in the Province, although extended coverage may be purchased from ICBC or from private insurers. Basic Autoplan is supplied through a



conventional licensing process. Automobile owners and drivers must purchase insurance when they apply for and renew their respective licenses.<sup>12</sup> Simply put, without basic insurance one cannot obtain a legitimate motor-vehicle licence or driver's licence. This mode of delivery ensures that there are no properly licensed British Columbia vehicles or drivers that are also uninsured. You either have both a legitimate licence and a valid insurance certificate or neither of them. No system can guarantee 100 percent compliance. However, because insurance is built into the licensing process, the stakes are greater for those who fail to comply.<sup>13</sup> Stated somewhat differently, the process makes compliance simpler for the consumer.

Basic Autoplan comes with five types of coverage that apply throughout Canada and the United States: (1) third party liability insurance;<sup>14</sup> (2) statutory accident benefits;<sup>15</sup> (3) *uninsured* motorist protection;<sup>16</sup> (4) *underinsured* motorist protection;<sup>17</sup> and (5) inverse liability insurance.<sup>18</sup> In the following article, I will review the extent of coverage provided by each component.

Property damage insurance will not be discussed in this article. With the exception of the limited coverage provided by inverse liability insurance, property damage insurance is not part of the basic package offered by Autoplan. Hence, unlike their counterparts in Saskatchewan<sup>19</sup> and Manitoba<sup>20</sup> who are required to purchase first party property damage coverage from their respective public insurers, British Columbia owners are free to assume any risk of damage to their vehicles and equipment. Alternatively, they can purchase supplemental insurance to meet their individual needs. ICBC offers a variety of optional coverages for property damage including collision, comprehensive, and specified perils.<sup>21</sup> Generally speaking, "collision insurance" covers repairs to the insured's vehicle as a result of a collision with another object even if the insured is at fault; "comprehensive insurance" covers various types of losses that are not the result of a collision; "specified perils insurance" covers losses caused by specific risks such as fire, theft, attempted theft, and earthquake.<sup>22</sup> Property damage insurance can also be purchased in the private market.

## ■ **THIRD PARTY LIABILITY INSURANCE**

### □ **Coverage**

Third party liability insurance protects the owner of a vehicle from the legal consequences of his or her negligence. Namely, where an owner is liable to another person for personal injury, death, or

property damage as a result of the “use or operation” of his or her vehicle, ICBC will indemnify the owner with respect to said liability up to a maximum of \$200,000.<sup>23</sup> For owners of commercial vehicles in excess of 5,000 kg, buses, taxis, and limousines the maximum coverage is \$1 million; two million for commercial vehicles used for the transportation of dangerous goods.<sup>24</sup> Third party coverage is triggered whether the accident happens in Canada or the United States, and it extends to members of the owner’s household and individuals who operate the owner’s vehicle with his or her consent.<sup>25</sup> Where the owner is not an individual, coverage extends to officers, employees, and partners of the owner for whose regular use of the vehicle is provided in the owner’s certificate, as well as members of their respective households who use the vehicle with the consent of the owner.<sup>26</sup> Third party coverage is also extended to passengers who, by operating any part of the vehicle, cause injury or death to someone who is not in the same vehicle, or damage to property that is not carried in the same vehicle.<sup>27</sup>

Motorists can purchase supplemental liability coverage directly from ICBC or from private insurers.<sup>28</sup> Since the Autoplan regime does not restrict access to the tort system, for neither personal injury nor property damage, extended liability insurance has become a *de facto* requirement for most British Columbians. Arguably, the \$50,000 minimum provided by the original Autoplan covered the majority of claims arising out of the use or operation of an automobile. However, the current limit does not even cover the non-pecuniary losses of a seriously injured victim; not to mention the costs of caring for this person and of replacing his or her lost wages. Indeed, the Supreme Court noted that the upper limit for non-pecuniary damages for personal injury stood at \$240,000 in 1995,<sup>29</sup> compared to the \$100,000 ceiling set by the same court in 1978.<sup>30</sup> On January 15, 2003, the Ontario Superior Court set the ceiling at \$280,000.<sup>31</sup> Given this rate of inflation, it is not surprising that most British Columbia drivers purchase some form of extended third party liability coverage.<sup>32</sup>

## **Priority of Payment**

The *IMV Regulation* provides a priority scheme for the distribution of third party coverage, whether basic or extended.<sup>33</sup> Claims arising out of death or injury have priority over claims arising from property damage to the extent of 90% of the limit. Conversely, claims arising out of damage to property have priority over claims arising out of personal injury or death to the extent of 10% of the limit. Assume that D is liable for having caused severe injuries to P



in an automobile crash, and that the victim's damages are assessed at \$500,000. Assume that P has also suffered property losses in the amount of \$40,000 – her vehicle was wrecked in the accident. Under Basic Autoplan, ICBC's duty to indemnify is limited to \$180,000 for personal injury and \$20,000 for damage to property. The victim would need to recover the balance from the wrongdoer personally. If D purchased extended coverage from ICBC, with a combined limit of \$500,000, the insurer's duty to indemnify would be raised to \$460,000 and \$40,000 respectively.

### **Additional Payments**

In addition to indemnifying the insured up to the prescribed limit, basic liability coverage requires ICBC to make the following payments.<sup>34</sup> First, the public insurer must reimburse the insured for the costs of any emergency medical aid and equipment that is required as a result of the accident for which the insured is liable. Second, ICBC must pay that proportion of legal costs taxed against the insured that an offer to settle from ICBC bears to the final judgment. Third, ICBC must pay pre- and post-judgment interest on the part of the judgment that is within the prescribed limit of liability. Fourth, when the insured has extended liability insurance with one or more insurers other than ICBC, the latter must contribute to the legal costs taxed against the insured in proportion to the insurers' respective liabilities.

### **Duties of the Parties**

Third party insurance is not unconditional. The *IVM Regulation* provides a number of restrictions on indemnity with respect to accidents involving combinations of vehicles,<sup>35</sup> trailers,<sup>36</sup> attached equipment,<sup>37</sup> property owned, leased or cared for by the insured,<sup>38</sup> and punitive damages.<sup>39</sup> Furthermore, insureds have two general obligations to meet in order to benefit from the minimum coverage: a duty to notify the insurer and a duty to cooperate with the insurer.<sup>40</sup> In particular, they must give written notice of any accident involving themselves or their vehicles in which personal injury, death, or property damage is the result. Notice must also be given of any claim made in respect of the accident, of any document received in relation to said claim, and of any other insurance providing liability coverage. Insureds must also cooperate with ICBC in the investigation, settlement, and defence of any claim or action brought against them. Specifically, they must refrain from settling the matter to the prejudice of ICBC and allow the insurer to inspect their vehicles and

equipment. In return for notice and cooperation, ICBC has the duty to defend the insured at its expense in any claim covered by Basic Autoplan's third party coverage.<sup>41</sup> Along with this, the public insurer has a corresponding right to control the civil proceedings.<sup>42</sup> Namely, ICBC is entitled to appoint and instruct counsel, admit liability on behalf of the insured, participate in out-of-court negotiations, and settle the matter.

## ■ **STATUTORY ACCIDENT BENEFITS**

### □ **Irrespective of Liability**

With the exception of statutory accident benefits, Basic Autoplan is largely based on fault. The coverage discussed in sections Third Party Liability Insurance, *Uninsured Motorist Protection*, *Underinsured Motorist Protection* and *Inverse Liability Insurance* of this article is predicated on someone having a cause of action with respect to a motor vehicle accident. Unless the insured is a victim of wrongdoing or a wrongdoer him or herself, the coverage discussed in these sections is without signification. Stated somewhat differently, third party liability, uninsured protection, underinsured protection, and inverse liability do not provide alternatives to compensation under the tort system. Rather, this insurance compliments tort law by guaranteeing a minimum source of compensation to those who have a legal claim. Having said this, not all automobile crashes are the result of negligence. And not all victims of wrongdoing have the money, time, and energy required to pursue a legal claim to the end.

Statutory accident benefits address this reality. They are distributed irrespective of liability when an insured is injured or killed in an automobile accident. The benefits are paid quickly and cover most expenditures associated with an automobile crash. Each benefit has a ceiling, but the victim has the right to sue the wrongdoer(s) in order to achieve full indemnification.

### □ **Coverage**

The class of beneficiaries is the broadest under this part of Basic Autoplan. The following individuals are entitled to make a claim for accident benefits:

- 1) licensed British Columbia owners, drivers, and members of their respective households;
- 2) occupants riding in a vehicle licensed in British Columbia;

- 3) cyclists and pedestrians who collide with a licensed British Columbia vehicle; and
- 4) residents of the Province who could make a claim for uninsured motorist protection under section 20 or 24 of the *IMV Act*.<sup>43</sup>

This group of beneficiaries is insured against injury and death, provided the loss is caused by an automobile accident “that arises out of the use or operation of a vehicle” and that occurs somewhere in Canada, the United States, or on a vessel travelling between the two countries.<sup>44</sup> A previous version of the *IMV Regulation* included “ownership” as one of the factors that might contribute to the accident. However, following the Supreme Court of Canada decision in *Amos v. Insurance Corporation of British Columbia*,<sup>45</sup> this word was struck out by regulation.<sup>46</sup> In *Amos*, a driver was attacked by a gang of six men while driving his van through an intersection. He was shot, but somehow managed to manoeuvre his vehicle away from immediate danger. Overturning the judgments of both British Columbia courts, the Supreme Court held that his serious and permanent injuries were caused by the “ownership, use or operation” of his motor vehicle. According to the Court, the inclusion of the words “ownership” and “use” in section 79(1) of the *IMV Regulation* indicated a legislative intent to establish broader coverage than for incidents arising from the “operation” of a vehicle.<sup>47</sup> In particular, the Court adopted a two-part test to determine coverage under section 79(1). First, did the accident result from the ordinary and well-known activities to which automobiles are put? Second, was there some causal relationship between the insured’s injuries and the ownership, use, or operation of his or her vehicle? Adopting a liberal interpretation, both questions were answered in the affirmative. This said, one may wonder whether the Court would arrive at the same conclusion under the current wording of section 79(1). In *Amos*, the Court highlighted the fact that the original version of section 79(1) adopted in 1974 did *not* contain the word “ownership”; hence its inclusion in 1985 was evidence of the legislature’s intent to broaden the coverage of Autoplan. To follow the logic of the Court, the specific exclusion of this term in 1997 could be evidence of the opposite.

Generally speaking, the accident benefits available under Basic Autoplan fall into three categories: (1) disability benefits; (2) health care benefits; and (3) benefits arising on death.

#### **Disability Benefits**

Disability benefits are payable when a motor vehicle accident totally disables an insured from working in a position for which he or



she is reasonably suited.<sup>48</sup> The disability must occur within twenty days of the crash and the insured must be employed at that time. The amount of the benefit is either \$300 per week or 75% of the average weekly gross income of the insured, whichever is the lesser. The benefits are payable for the duration of the disability or 104 weeks, whichever comes first. If the insured is also covered by the provincial *Workers Compensation Act*<sup>49</sup> or the federal *Employment Insurance Act*,<sup>50</sup> as a result of the accident, the insured is not entitled to any accident benefits under Autoplan, except to the extent that the latter are more generous than the former.<sup>51</sup> Furthermore, if the insured is entitled to other disability benefits from an employer or pursuant to any insurance policy or statutory scheme, ICBC is not liable unless said benefits are less than 75% of the average weekly gross income of the insured – in which case ICBC will either pay the benefit described above or the weekly net lost earnings of the insured, whichever is less.<sup>52</sup>

Basic Autoplan also provides disability benefits for homemakers who, within twenty days of the automobile accident, become incapable of regularly performing most of their household tasks.<sup>53</sup> They are entitled to hire a replacement homemaker at the expense of ICBC, up to a maximum of \$145 per week. The benefits are payable for the duration of the disability or 104 weeks, whichever comes first.

There is a waiting period for disability benefits payable to homemakers *and* workers: no benefits are payable for the first seven days of their disability and unless their disability lasts more than seven days.<sup>54</sup> Furthermore, there are special provisions for extending both types of benefits beyond the 104 week period.<sup>55</sup> Unless the insured has already reached 65 years of age at the end of this period, ICBC will continue making disability payments for the duration of the disability or until the insured reaches 65, whichever period is the shortest. These payments will be reduced by any amounts received from the Canada or Québec pension plans.

## □ **Health Care Benefits**

Generally speaking, two types of health care benefits are available under Basic Autoplan: medical benefits and rehabilitation benefits. Insured are entitled to compensation for medical expenses as a matter of right, provided the expenditures are “necessary” as a result of the injury.<sup>56</sup> In addition, insured may claim compensation for rehabilitation expenses, except that ICBC has the discretion to assess whether such expenditures are “likely to promote” rehabilitation.<sup>57</sup>

This second category includes funds to purchase a specially equipped automobile, to make the insured's residence accessible, and for the costs of attendant care. The maximum liability of ICBC with respect to health care benefits is \$150,000 per insured, per accident.<sup>58</sup> What's more, ICBC is not liable for any expense that is recoverable under an alternative plan, statute, or policy.<sup>59</sup> In other words, Autoplan is strictly complementary or secondary insurance for the costs of health care; any other insurance is primary, whether private or public.

## **Benefits Arising on Death**

Four types of benefits are payable when the death of an insured is caused by a motor vehicle accident. First, ICBC will reimburse funeral expenses up to a maximum of \$2,500.<sup>60</sup> Second, ICBC will pay a single death benefit provided the deceased is survived by a spouse, dependent child, dependent parent, or parent, when the deceased is a dependent child.<sup>61</sup> The amount of the benefit will vary from \$500 to \$5,000, depending on the age and status of the deceased at the time of the accident.<sup>62</sup> Third, ICBC will pay a supplemental death benefit of \$1,000 to each surviving dependant of the deceased, other than the first.<sup>63</sup> Hence, supplemental benefits are not payable if the deceased is survived by only a spouse or only one dependent. Fourth, ICBC will pay a survivor's benefit to the spouse and to each dependent of the deceased.<sup>64</sup> This benefit will be paid for the period of 104 weeks after the death of the insured, although payments terminate on the death of all survivors. The amount of the benefit will be \$145 a week for the first survivor and \$35 a week for each additional survivor.<sup>65</sup>

There is a sixty day rule that applies to death benefits, supplemental benefits, and survivor's benefits.<sup>66</sup> According to this rule, the beneficiary must survive the deceased by at least sixty days in order to be entitled to any one of these benefits. Furthermore, if the deceased was the "head of the household" and he or she died in a common disaster along with a spouse or dependent, supplemental benefits and survivor's benefits are payable only with respect to the death of the "head of the household".<sup>67</sup>

## **UNINSURED MOTORIST PROTECTION**

### **Accidents in British Columbia**

Liability insurance is mandatory throughout North America. Yet there is no guarantee that every motorist one encounters on the



road has access to valid third party coverage. Nor is it guaranteed that every motorist involved in an accident will stay on the scene long enough for insurance certificates to be exchanged. Basic Autoplan covers each of these risks. All residents of British Columbia, whether or not they own or drive a licensed vehicle, are automatically covered for up to \$200,000 inclusive of interests and costs if their property is damaged or they are injured or killed by the fault of an uninsured or unidentified driver on a highway within the Province.<sup>68</sup> In essence, this coverage provides backing to the tort system. Without some assurance of compensation,<sup>69</sup> the right to sue preserved by Autoplan would be symbolic. ICBC provides substance to the right by guaranteeing that a minimum portion of the judgment will be paid, irrespective of whether an insured wrongdoer can be identified. The victim need only join ICBC as a nominal defendant and let the insurer worry about seeking reimbursement from the wrongdoer.<sup>70</sup>

#### **Accidents Outside of British Columbia**

With respect to accidents that occur outside of British Columbia, most provinces have special funds to compensate victims of uninsured or unidentified drivers. They are typically called “unsatisfied judgment funds”. These funds apply to non residents such as visitors from British Columbia. However, unsatisfied judgment funds do not exist in the Yukon, Northwest Territories, and Nunavut. Nor do they exist in many of the United States of America. In order to fill this gap in coverage, Basic Autoplan extends uninsured motorist protection to accidents that happen within one of these jurisdictions and that cause death or personal injury.<sup>71</sup> Coverage is limited to the lesser of \$200,000 and the compulsory third party liability limit that applies in said jurisdiction, inclusive of interests and costs.<sup>72</sup> Moreover, coverage is limited to properly licensed British Columbia owners and drivers as well as members of their respective households.<sup>73</sup> In essence, British Columbia policyholders and their families are given liability coverage on a first party basis, commensurate with the coverage they are required to carry for their own neighbours.

#### **Duties of the Insured**

Uninsured motorist protection comes with a number of responsibilities. With respect to accidents occurring within British Columbia and involving an unidentified motorist, the insured must have made “all reasonable efforts” to ascertain the identity of the unknown driver and owner.<sup>74</sup> Whether or not efforts are reasonable will depend



on the circumstances surrounding the accident. The insured must be aware that he or she was involved in an accident and must be in a condition to be capable of doing something to identify the person responsible.<sup>75</sup> For example, in *Reid v. ICBC*,<sup>76</sup> the insured and the other driver agreed that the former should move his vehicle off the road. The insured attended his injured wife and did not notice the other driver leaving the scene. The Court held that the disappearance was an “unexpected act of irresponsibility” and that the insured acted reasonably in attending his wife. On the other hand, in *Becker v. ICBC*,<sup>77</sup> the Court agreed with ICBC that reasonable efforts were not made. The insured was allegedly injured by an unidentified motorist and placed a newspaper add to thank the people that helped him, but made no efforts to find witnesses to the incident. For this, he relied exclusively on the police investigation. Yet he waited fourteen months before asking for any feedback. When damage to property is involved, the owner must also make a police report within 48 hours of discovering the damage.<sup>78</sup>

With respect to accidents occurring outside of the Province and involving an unidentified motorist, the insured must report the accident within 24 hours to the authorities of the jurisdiction where the accident occurred.<sup>79</sup>

## ■ **UNDERINSURED MOTORIST PROTECTION**

### □ **Coverage**

Despite the prevalence of extended liability insurance, there is always a risk that one’s neighbour is not as prepared as oneself for the full impact of the tort system. Underinsured motorist protection covers this risk, giving each insured access to a \$1 million compensation fund. Underinsured motorist protection covers (1) owners, (2) lessees, and (3) drivers who are properly licensed in British Columbia, (4) members of their respective households, (5) occupants of vehicles licensed in British Columbia, and (6) for the purpose of compensation, the personal representative of any of the preceding.<sup>80</sup> These individuals are covered against the risk of being injured or killed in a motor vehicle accident caused by the fault of an underinsured motorist, that is, an owner or operator who is unable to pay the full amount of compensatory damages recoverable at law.<sup>81</sup> This coverage applies whether the accident happened in Canada, the United States, or on a vessel between both countries. Coverage does not attach to vehicles licensed for use as buses, taxis, or limousines<sup>82</sup>

although their occupants may be covered on a basis other than ownership. Furthermore, underinsured motorist coverage does not apply if the accident happens in a jurisdiction where the right to sue for injury or death is barred by law; nor does it apply if the insured settles the matter with the wrongdoer without the consent of ICBC and to its prejudice.<sup>83</sup>

## □ **Extent of Liability**

In the event of death or injury, ICBC will pay the insured the difference between the liability of the wrongdoer, on the one hand, and the total of what is recovered from the wrongdoer and recoverable elsewhere, on the other. The maximum liability of the public insurer is \$1 million, including interests and costs.<sup>84</sup> In particular, to determine the liability of ICBC, the following benefits must be deducted from the damages recoverable or from the \$1 million limit, whichever is least: (1) benefits payable pursuant to *uninsured* motorist protection provided by Autoplan or by a similar scheme; (2) accident benefits payable under Autoplan or a similar scheme; (3) damages paid by the wrongdoer in cash or bond; (4) benefits payable under a provincial Workers Compensation Act, the federal *Employment Insurance Act*<sup>85</sup> and the Canada Pension Plan; (5) benefits payable under a first or third party insurance policy covering the same incident; and (6) any indemnity payable to the insured.<sup>86</sup> These amounts must be deducted, even if the insured did something to disqualify him or herself from receiving any one of the benefits.<sup>87</sup>

## ■ **INVERSE LIABILITY INSURANCE**

Inverse liability coverage is a counterpart to third party liability coverage. Pursuant to the former, Basic Autoplan insures owners<sup>88</sup> against the risk of not being allowed to sue for damages to their vehicles and equipment. The right to sue for damage to property exists in British Columbia. However, this right does not exist in every North American jurisdiction where Autoplan policyholders may venture with their automobiles. If damages occur in the parts of Canada or the United States where the law restricts the right to sue, ICBC will indemnify the insured in an amount equal to the damages he or she would have recovered, but for the laws of said jurisdiction.<sup>89</sup> For example, assume that an owner covered by Basic Autoplan has an accident in Québec and that both drivers are equally responsible. In this scenario, ICBC would pay 50% of either the cost

of repairing the vehicle, the declared value of the vehicle, or the actual cash value of the vehicle, whichever is lower.<sup>90</sup> Inverse liability coverage applies even when the owner has property damage insurance with ICBC or with another insurer. In this case, ICBC's liability under Basic Autoplan would be limited to the portion of the deductible that the other driver would be liable for.<sup>91</sup>

## ■ RESTRICTIONS ON RECOVERY

The coverage provided by Basic Autoplan is not unconditional. There are a number of circumstances that may effect an insured's entitlement to coverage under one or many parts of the regime. The following is a non-exhaustive list of the main restrictions placed on recovery. Some apply to more than one component of Basic Autoplan ("General Restrictions"), while others are specific to one part. In this section, I have identified only factors that concern the conduct of the insured, that is, circumstances that are somehow under the control of the insured. There are also exclusions and limits that do not concern the insured personally – for the most part, these other restrictions have been identified in the previous sections.<sup>92</sup>

It is important to note that innocent third parties who have legal claims against an insured are entitled to his or her liability coverage, notwithstanding the conduct of the insured.<sup>93</sup> In other words, ICBC may still be liable to a third party even though its liability to the insured has been removed due to the conduct of the latter. ICBC must pay the third party, up to the limit of the coverage, but then the insurer may seek reimbursement from the insured.

### □ General Restrictions

- 1) If the insured knowingly misrepresents or omits a material fact in a license application or an insurance claim, the insured forfeits his or her right to any benefit under Autoplan. The same is true with respect to someone who commits a fraud under the *IMV Act*, and with respect to individuals who claim through the insured, on behalf of the insured, or as dependents of the insured.<sup>94</sup> ICBC may relieve a person from forfeiture if this result would appear inequitable,<sup>95</sup> and relief must be given in the event of death or permanent incapacity.<sup>96</sup>
- 2) If the dominant cause of any injury or death is the use of any weapon, ICBC is not liable under Autoplan to the victim, to



the person using the weapon, or to a spouse, child, parent, or personal representative of either.<sup>97</sup> (This is another amendment that was made following the Amos decision.)

- 3) ICBC is not liable to an insured for third party liability coverage, underinsured motorist protection, and statutory accident benefits, if the insured is operating a vehicle that he or she is not authorized or qualified to operate, for an illicit trade or transportation, to escape the police, or in a race.<sup>98</sup>

### **Third Party Liability Coverage**

- 4) According to the *IMV Regulation*,<sup>99</sup> ICBC is not liable to an insured under third party liability insurance (basic and extended), if the insured was operating a vehicle under the influence of alcohol or drugs to such an extent that the insured is incapable of proper control. ICBC is also not liable to an insured convicted of a *Criminal Code*<sup>100</sup> motor vehicle offence, an offence under section 95 (driving while prohibited) or 102 (driving while prohibited by court order or operation of law) of the *Motor Vehicle Act*,<sup>101</sup> or an offence under either the *Criminal Code* or the *Motor Vehicle Act* of driving with more than 80 milligrams of alcohol in blood or failing to give a blood sample.

### **Statutory Accident Benefits**

- 5) ICBC will not be liable to an insured for accident benefits if the injury or death for which the insured is claiming benefits was caused by an intentional act of violence committed by the insured.<sup>102</sup>
- 6) ICBC is not liable to pay statutory accident benefits in respect of the injury or death of a person: (1) who is an occupant of an unlicensed vehicle; (2) who commits suicide or attempts to commit suicide; (3) who is an occupant of a vehicle being used for illicit trade or transport; (4) whose injury or death is the result of sickness or disease, rather than the result of an automobile accident; and (5) who refuses to the prejudice of ICBC to be examined by a health care professional.<sup>103</sup>
- 7) Disability benefits and health care benefits may be terminated where an insured refuses, after due notice, to undergo treatment or to complete a program that his or her medical practitioner and ICBC believe is likely to relieve the disability or assist in rehabilitation.<sup>104</sup>

- 8) Death benefits, supplemental death benefits, and survivor's benefits may be withheld until the insured claiming said benefits allows an autopsy of the deceased, at the expense of ICBC.<sup>105</sup>

## **Uninsured Motorist Protection**

- 9) Uninsured motorist coverage does not apply to an insured who suffers injury, death, or damage to property while operating or occupying a vehicle he or she knows or ought to have known is being operated without the consent of the owner.<sup>106</sup>

## **Underinsured Motorist Protection**

- 10) Likewise, underinsured motorist coverage does not apply to an insured who is operating or occupying an unlicensed vehicle or a vehicle he or she knew, or ought to have known, was being operated without the consent of the owner.<sup>107</sup>

## **Notes**

1. Autoplan is the creation of two pieces of legislation and their respective regulations: (1) the *Automobile Insurance Act*, S.B.C. 1973, c. 6 – now entitled the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 [hereinafter *IMV Act*]; (2) the *Insurance Corporation of British Columbia Act*, S.B.C. 1973, c. 44 – now entitled the *Insurance Corporation Act*, R.S.B.C. 1996, c. 228 [hereinafter *ICBC Act*].

2. ICBC administers Autoplan as an agent of the BC government: *ICBC Act, ibid.*, s. 13.

3. In *Fredrickson v. Insurance Corporation of British Columbia* (1986), 17 C.C.L.I. 194, affirmed [1988] 1 S.C.R. 1089, the British Columbia Court of Appeal suggested that the Autoplan regime constituted a “statutory contract” between the government (through ICBC) and Autoplan policy holders.

4. The expression “peaceful coexistence” is borrowed from Justice Allen Linden’s writings on the subject of automobile insurance. See e.g. A.M. Linden, “Is Tort Law Relevant to the Automobile Accident Compensation Problem?” (1969) 47 *Tex. L. Rev.* 1012; A.M. Linden, *Canadian Tort Law*, 4<sup>th</sup> ed. (Toronto: Butterworth, 1988).

5. *The Manitoba Public Insurance Corporation Act*, R.S.M. 1987, c. P215, s. 72.

6. *Loi sur l'assurance automobile*, L.R.Q., c. A-25, s. 83.57.

7. *Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35, ss. 102 and 103. In 2002, the province of Saskatchewan decided to change to auto choice insurance from the pure no-fault system which had been in place for years. The press releases issued on behalf of the provincial government touted the change as a new era in Saskatchewan’s automobile insurance industry, now allowing motorists the final say as to how they wish to be insured. The Minister of Crown Incorporations justified the change from pure no-fault to choice insurance by proposing “the new tort coverage will be available January

1st, 2003 to meet the needs of those people in the province who want an alternative to no fault insurance." See NDP Caucus, *Choice in Auto Insurance*, Saskatchewan provincial government press release, <http://www.ndpcaucus.sk.ca/news/read.php3/326.html>, May 2002.

8. *Insurance Act*, R.S.O. 1990, c. I.8, ss. 266 (for accidents occurring between October 23, 1989 and December 31, 1993), 267.1 (for accidents occurring between January 1, 1994 and October 31, 1996) and 267.5 (for accidents occurring after November 1, 1996).

9. The most important change was the repeal of the collateral source rule, which allows plaintiffs to recover damages for losses that are covered by first party insurance. Under Autoplan, victims must account for the statutory accident benefits received in determining the amount of damages that will be awarded in tort. See *IMV Act*, *supra* note 1, s. 25(2). Other tort reforms were implemented in the 1997 *Traffic Safety Statutes Amendment Act*, S.B.C. 1997, c. 43. These newer amendments deal primarily with insurance fraud, structured settlements, and alternate dispute resolution.

10. In the late 1970s, the Automobile Accident Compensation Committee conducted an extensive review of Autoplan in order to find ways to cut its operating costs. The 1983 Report of the Committee recommended a strong threshold no-fault system, similar to the one currently in place in the State of Michigan. See *Report by the Automobile Accident Compensation Committee* (Queen's Printer: Vancouver, 1983). Another significant review of Autoplan was conducted in 1996-1997 by the KPMG Consulting Group. It recommended, *inter alia*, that restrictions be placed on the right of persons to sue for non pecuniary damages. Neither of these reforms were implemented. See generally N.D. Weatherston, D.A. Hunter & J.S. Cormack, "Quo Vadis Automobile Accident Injury Compensation in British Columbia? A Review of the Past, Present and Possible Future" (1998) *Cahiers de droit* 87 at 99-101.

11. This estimate is based on figures supplied by ICBC in their annual reports. These reports are accessible online at <http://www.icbc.com>. In the Annual Report 2001, figures show that the average premium from 1997 to 2001 was below \$900. This Web site also explains that the average rate for private passenger vehicles increased by 3.9 per cent in 2003.

12. *IMV Act*, *supra* note 1, ss. 33, 36, 37 and 38. See also *Revised Regulation (1984) Under the Insurance (Motor Vehicle) Act*, B.C. Reg. 447/83, ss. 3-10 (owner's insurance) and 42-51 (driver's insurance) [hereinafter *IMV Regulation*].

13. Commits an offence, the person who drives a motor vehicle without the appropriate licence and insurance: *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, ss. 13 (driving without a licence) and 24 (driving without insurance).

14. *IMV Regulation*, *supra* note 12, Part 6, ss. 63-77.

15. *Ibid.*, Part 7, ss. 78-104.

16. *Ibid.*, Part 10, Division 1, s. 148. See also *IMV Act*, *supra* note 1, ss. 20 and 24.

17. *IMV Regulation*, *ibid.*, Part 10, Division 2, ss. 148.1-148.7.

18. *Ibid.*, Part 10, Division 1, s. 147.

19. *Automobile Accident Insurance Act*, *supra* note 7, ss. 36-39.

20. *Automobile Insurance Coverage Regulation*, Man. Reg. 290/88R, ss. 50-51.

21. *IMV Regulation*, *supra* note 12, Part 9, Division 2, ss. 113-146.

22. See generally C. Brown & J. Menezes, *Insurance Law in Canada*, vol. 2 (Toronto: Carswell, 2002) c. 17 at 38-50.

23. *IMV Regulation*, *supra* note 12, ss. 63(a), 64 and 67; Schedule 3, ss. 1(2). Where the owner is deceased, third party coverage extends to the deceased's personal representative or to someone having custody of the vehicle with the personal represen-



tative's consent: *ibid.*, s. 63(c). Note that the word "ownership" was included in the original version of section 63, but was struck out by amendment in 1997: B.C. Reg., 328/97, s. 5. For a discussion of the potential implications of this change, see *infra* notes 44-47 and accompanying text.

24. *Ibid.*, Schedule 3, s. 1(5).

25. *Ibid.*, s. 63(b).

26. *Ibid.*, s. 63(d).

27. *Ibid.*, s. 66.

28. *Ibid.*, Part 9, Division 1, s. 109.

29. *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674.

30. *Andrews v. Grand and Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

31. *Crawford (Litigation Guardian of) v. Penney*, [2003] O.J. No. 89 (S.C.).

32. See Weatherston, Hunter & Cormack, *supra* note 10 at 103. The authors note that, in 1998, the average limit of liability insurance carried by an owner was \$1.5 million.

33. *IMV Regulation*, *supra* note 12, s. 68(1) (basic coverage) and 68(2) (extended coverage).

34. *Ibid.*, s. 69.

35. *Ibid.*, s. 70.

36. *Ibid.*, s. 71.

37. *Ibid.*, s. 72.

38. *Ibid.*, s. 72.1.

39. *Ibid.*, s. 56(1)(c).

40. *Ibid.*, s. 73(1). According to section 73(2), ICBC is not liable to an insured who breaches one of these duties to the prejudice of the insurer.

41. *Ibid.*, s. 74.

42. *Ibid.*, s. 74.1.

43. *Ibid.*, s. 78.

44. *Ibid.*, s. 79 [emphasis added].

45. [1995] 3 S.C.R. 405 [Amos].

46. B.C. Reg. 328/97, s. 6: "Section 79(1) is amended by striking out 'ownership'". This amendment was made effective October 1, 1997. The same amendment was made with respect to third party liability coverage: *supra* note 23.

47. *Supra* note 45 at par. 13-16.

48. *Supra* note 12, s. 80; Schedule 3, s. 2(a).

49. R.S.B.C. 1996, c. 492.

50. S.C. 1996, c. 23.

51. *IMV Regulation*, *supra* note 12, ss. 82 and 83.

52. *Ibid.*, s. 81.

53. *Ibid.*, s. 84; Schedule 3, s. 2(b).

54. *Ibid.*, s. 85.

55. *Ibid.*, s. 86.

56. *Ibid.*, s. 88(1).

57. *Ibid.*, s. 88(2).
58. *Ibid.*, Schedule 3, s. 3.
59. *Ibid.*, s. 88(6).
60. *Ibid.*, s. 91; Schedule 3, s. 4.
61. *Ibid.*, s. 92.
62. *Ibid.*, Schedule 3, s. 5.
63. *Ibid.*, s. 93(1); Schedule 3, s. 6.
64. *Ibid.*, s. 93(2).
65. *Ibid.*, Schedule 3, ss. 7 and 8.
66. *Ibid.*, s. 95(1). ICBC has the discretion to waive this requirement: s. 95(3).
67. *Ibid.*, s. 95(2).
68. Coverage for uninsured motorists is provided by *IMV Act*, *supra* note 1, s. 20. Coverage for unidentified motorists is provided by section 24 of the same act. The limit applicable to both coverage is prescribed by section 105 of the *IMV Regulation*, *supra* note 12.
69. Uninsured motorist protection does not apply to punitive damages and other non-compensatory damages. See *IMV Regulation*, *ibid.*, s. 56(1)(c).
70. When a claim is paid pursuant to uninsured motorist protection, ICBC has the right to seek reimbursement from the wrongdoer. See *IMV Act*, *supra* note 1, ss. 20(11)-(15) (uninsured motorist) and ss. 24(9)-(11) (unidentified motorist).
71. *IMV Regulation*, *supra* note 1, ss. 148(2) and 148(4). Coverage is not extended to property damage, although the owner may have access to his or her own property insurance or inverse liability coverage, depending on the circumstances.
72. *Ibid.*, s. 148(3).
73. *Ibid.*, s. 148(1). In the event of death, coverage extends to the insured's personal representative.
74. *IMV Act*, *supra* note 1, s. 24(5).
75. Brown & Menezes, *supra* note 22 at 17-36.
76. (1994), 26 C.C.L.I. (2d) 255 (B.C.C.A.).
77. [2002] B.C.S.C. 1106.
78. *IMV Regulation*, *supra* note 12, s. 107(1).
79. *Ibid.*, s. 148(5).
80. *Ibid.*, s. 148.1(1).
81. *Ibid.*, s. 148.1(2). Underinsured motorist coverage does not apply to punitive damages and other non-compensatory damages: *ibid.*, s. 56(1)(c).
82. *Ibid.*, s. 148.4.
83. *Ibid.*, s. 148.2(4).
84. *Ibid.*, s. 148.1(5); Schedule 3, s. 13.
85. S.C. 1996, c. 23.
86. *IMV Regulation*, *supra* note 12, s. 148.1(1).
87. *Ibid.*, s. 148.2(5).
88. Inverse liability also covers the personal representative of the owner, if the latter is deceased, and the person who leases the vehicle: *ibid.*, ss. 113 and 147(1).
89. *Ibid.*, s. 147(2).

90. *Ibid.*, s. 147(3).
91. *Ibid.*, s. 147(4).
92. See also s. 56 of the *IMV Regulation*, *ibid.*, for general exclusions with respect to nuclear energy hazards, war, insurrection, rebellion, revolution, and punitive damages.
93. *IMV Act*, *supra* note 1, s. 21.
94. *Ibid.*, s. 19(1). But see text accompanying note 90, *ibid.*
95. *Ibid.*, s. 19(2).
96. *Ibid.*, s. 19(3).
97. *Ibid.*, s. 19.1.
98. *IMV Regulation*, *supra* note 12, ss. 55(3) and (6).
99. *Ibid.*, s. 55(6) and (8). But see text accompanying note 93, *supra*.
100. R.S.C. 1985, c. C-46.
101. *Supra* note 13.
102. *Supra* note 12, ss. 55(6) and (7.1).
103. *Ibid.*, ss. 96 and 99.
104. *Ibid.*, s. 90.
105. *Ibid.*, s. 100.
106. *IMV Act*, *supra* note 1, s. 19.2. See also *IMV Regulation*, ss. 107(2) and 148(4).
107. *IMV Regulation*, *ibid.*, s. 148.1(3).