

MOVE TO NO-FAULT AUTO INSURANCE ACHIEVES GOVERNMENT'S AFFORDABILITY OBJECTIVE

For the last five years successive governments in this province have been dealing with a financial crisis at our public auto insurer. In the run-up to the 2017 election the Liberal approach was to cap the annual increase in premiums while avoiding any major reductions in coverage/claims costs. The result was a sharp decline in the policyholders' capital (equity) reserve.

The NDP continued the limitation on rate increases but attempted to reduce or eliminate the operating deficit by limiting pain and suffering claims for those with broadly defined minor injuries. Indications are that this hybrid-tort liability model, combined with a reduction in damage claims costs, appears to have ended the serious operating losses. But the new model resulted in a complex claim determination system for minor injuries while doing nothing to reduce the growing cost of most litigated (and more expensive) injury claims.

During the last five years provincial politicians rejected a switch to the lower cost and more efficient no-fault model which has been successfully operating in Saskatchewan, Manitoba and Quebec for many years. Todd Stone, the Liberal minister for ICBC, called the no-fault model "goofy."¹ Upon taking the toxic ICBC file for the NDP government David Eby quickly rejected the notion of a switch from the full tort model to the no-fault system, opting instead for a hybrid-tort model similar to the scheme in Alberta.

Then, on 6 February 2020 Premier John Horgan and minister responsible David Eby announced that as of May 2021 ICBC will indeed switch to a no-fault (care based) liability model.² The government made a courageous decision to abandon the hybrid tort model, (which was just implemented effective April 2019), and join Saskatchewan, Manitoba and Quebec in providing the more affordable no-fault scheme.

This paper will review some of the possible reasons for the change.

What is No-Fault?

In simple terms the no-fault model provides coverage for those injured in an auto collision regardless of liability; the at-fault driver receives the same care benefits as the

¹ <https://vancouversun.com/news/politics/icbc-officials-spent-years-pushing-goofy-ideas-former-minister>

² <https://vancouversun.com/news/local-news/live-b-c-to-switch-to-no-fault-auto-insurance-trim-rates-20-per-cent-in-2021> and <https://vancouversun.com/news/politics/b-c-s-new-insurance-system-mirrors-manitobas> and <https://www.icbc.com/about-icbc/newsroom/Pages/2020-feb06.aspx>

innocent party. Modelled on the Manitoba system, the announced system will increase the no-fault financial maximum benefit for medical costs, wage loss and other benefits from \$300,000 to a lifetime \$7.5 million.³ In exchange for the large increase in the financial care benefits (and the provision of additional benefits⁴) the no-fault model prohibits the innocent injured party from suing for general damages (known as pain and suffering). The determination of the level and duration of care will be undertaken by medical professionals, not by claims administrators employed by ICBC. Payments are made for actual costs rather than a lump-sum payment under the current system.

The Journey to No-Fault

When the NDP formed government in July 2017 they were immediately faced with a rapidly deteriorating financial crisis at ICBC. B.C. was the only province that still operated under a full tort liability model where the innocent party (or parties) could sue for out-of-pocket costs, future potential earnings and pain and suffering. Government limits on rate increases meant that rapid increases in injury claims costs were not being matched by off-setting increases in premium revenue. The result were huge operating losses which rapidly depleted ICBC's once healthy capital reserves to the point that ICBC barely avoided insolvency in FY2018/19.

Attorney General David Eby was tasked with repairing the damage, but he rejected a switch to the no-fault model. Instead, he focused on reducing the "out of control" legal costs associated with the adversarial tort model.⁵ Two years ago the government announced that injury claims costs would be reduced by \$1.0 billion through a \$5,500 cap on pain and suffering payments for "minor" injuries.⁶ This change to a hybrid-tort scheme was based on the Alberta model, and also required disputes of up to \$50,000 to be referred to an appointed panel rather than the courts.

A second major change occurred on 1 September 2019, when ICBC implemented a new revenue neutral formula for calculating premiums. ICBC and the government argued that the new formula was fairer because a minority (higher-risk) of policyholders would pay more while a majority (lower-risk) of policyholders would pay less. The government immediately faced significant public criticism as young policyholders were now faced with huge increases in their premiums. Mirroring private insurers, the new formula classed those with little driving experience as higher risk, which was a marked departure from the previous model where risk was based on actual at-fault crashes.

Minister Eby was also embarrassed by an October 2019 decision of the chief justice of the supreme court which negated a March 2019 cabinet-ordered limit on the number of

³ From 1991 to 2019 the maximum Part 7 benefits were \$150,000. Over time rising costs forced many injured parties to sue in order to recoup their out of pocket costs.

⁴ <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/crown-corporations/enhanced-care-coverage-intentions-paper.pdf>

⁵ <https://vancouversun.com/opinion/op-ed/david-eby-reducing-legal-costs-is-critical-to-the-financial-health-of-icbc>

⁶ The hybrid-tort model took effect on 1 April 2019.

expert reports. This order was made at the end of the 2018/19 fiscal year and allowed ICBC to reduce its unpaid claim liability by some \$400 million (one time).⁷ This adjustment allowed ICBC to avoid a technical insolvency for that year. The Trial Lawyers Association of BC had launched a court action opposing the cap on pain and suffering awards for minor injuries, and the decision of the chief justice may have resulted in the government becoming concerned about an unfavourable court decision on the hybrid-tort model about the time when it would be seeking re-election.

Perceived Benefits of the New Model

Reduce Rates

The government and ICBC estimate that the change to the no-fault/care model will result in a net reduction in costs which will reduce the price of Basic and Optional insurance by 20% (or \$400 on average per policy). The government messaging suggests that most of the net savings will be generated by dramatic reductions in the cost of legal representation. This is an over-simplification.

As shown in Table 1, about half of the savings result from greatly reduced plaintiff and defense legal costs (including expert reports and other disbursements), while half results from the prohibition on claims for pain and suffering. The significant reduction in both legal costs and in payments for pain and suffering allows for the redirection of the savings to enhanced benefits and to lowering the cost of auto insurance.

TABLE 1 COST COMPARISON—2020 (\$=billion)

	Current	No-Fault	Difference
No-Fault Benefits	0.70	1.90	1.20
Injury Claims-Pecuniary	1.30	0.13	(1.17)
Total Injury Payments	2.00	2.03	0.03
Pain and Suffering	0.94	0.09	(0.85)
Legal Costs	0.96	0.10	(0.86)
TOTAL	3.90	2.22	(1.68)

Source: <https://news.gov.bc.ca/files/New-Model-Launch.pdf> Pdf 34/36.

The 6 February 2020 background material suggested that once implemented the average premium would drop from \$1,900/year to \$1,500/year; well below the average for the private insurer jurisdictions of Alberta and Ontario.⁸ The reduced rates,

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http://www.bcpolicyperspectives.com/media/attachments/view/doc/commentary_icbc_400_million_27_october_2019/pdf/commentary_icbc_400_million_27_october_2019.pdf

⁸ <https://news.gov.bc.ca/files/New-Model-Launch.pdf> p. 28. The lower rate is still well below that enjoyed by policyholders in Saskatchewan and Manitoba.

including a refund cheque for those who renewed prior to May 2021, will achieve the government's affordability objective and will be an important plank in the government's re-election platform.

The no-fault approach will also lower the premiums paid to brokers for Optional sales, lower the payment to the province for the 4.4% insurance sales tax, and should result in less claims adjudication staff at ICBC. None of these savings were discussed in the background material provided on February 6th.

Eliminates Adversarial System

The current claims adjudication model places ICBC in a difficult position as it must adjudicate on the nature of the injury, including defending its position in court. The no-fault system eliminates the adversarial approach in favour of one that focuses on providing the necessary care and rehabilitation. Having ICBC staff adopt this new customer care-based philosophy will be the key to achieving the government's objective of rebuilding the public's trust in its public insurer.

The move to a no-fault model eliminates the risk that a supreme court justice might rule against the hybrid-tort model, thereby creating confusion at a time when the government may be seeking re-election. If such an adverse ruling were to happen it is highly likely that the hybrid model would be upheld on appeal (as happened in Alberta), but moving to the no-fault model eliminates this potential risk.

No-Fault May Eliminate Private Insurers

The recent serious financial losses, and the high cost of auto insurance in this province, encouraged the private insurers (through the Insurance Bureau of Canada) and other advocates of the private insurers to launch a sustained media campaign to eliminate ICBC's monopoly over the compulsory Basic insurance. The change to a no-fault model should result in fewer injury claims and other cost savings, which will reduce the combined cost of Basic and Optional coverage.⁹

The adoption of the no-fault care-based model will likely mean the end of private auto insurers competing for the Optional injury liability market (although the material damage market will still be open for competition). A no-fault enhanced care model practically eliminates the current distinction between the compulsory Basic injury liability coverage and the Optional coverage. Under the current system a \$200,000 third-party coverage is mandatory, but most policyholders purchase additional Optional coverage for more loss protection. Under the no-fault model both the at-fault party and all other injured parties will receive benefits up to a maximum \$7.5 million lifetime

⁹ In addition to the reduction in net claims costs ICBC should require fewer claims FTEs, lower commission costs and lower taxes paid to the province.

limit. Starting in May 2021, Optional coverage may be required to for liability protection when the policyholder drives in a tort jurisdiction and is subject to being sued, but generally the shift to no-fault will mean the loss of business for the private auto insurers in B.C.¹⁰

Premium Reduction Greater for Young Drivers

An important benefit from prorating the savings from the lower cost no-fault system is that the government mitigates some of the negative public opinion generated by the large financial impacts of the 1 September 2019 rate redesign on inexperienced (younger) policyholders.

The planned 20% reduction will result in much higher savings for those who are paying high premiums. ICBC provided an example of a policyholder with only one year of experience in Burnaby who would have paid an astounding \$7,850, and will now pay \$1,570 less. A policyholder with six years experience would see their premium drop from \$4,300 to \$3,440.¹¹

The government deserves credit for taking the difficult decision to adopt a care-based no-fault liability model for auto insurance in B.C. The details of the new model await a rate design application to the B.C. Utilities Commission, but it seems that the public is generally supportive of any move which lowers the cost of auto insurance and focusses on providing enhanced care for the injured.

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¹⁰ Manitoba Public Insurance shows that none of its Optional costs are for injury claims; see <https://www.mpi.mb.ca/Pages/where-do-your-premium-dollars-go.aspx>

¹¹ <https://news.gov.bc.ca/files/New-Model-Launch.pdf> Pdf 19/36.

