



**SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION
(BRITISH COLUMBIA BRANCH)**

TO THE

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

ON A

PROPOSAL

TO AMEND THE

INSURANCE (VEHICLE) ACT

Issued By:

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PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the “CBABC”) is to:

- enhance the professional and commercial interests of our members;
- provide personal and professional development and support for our members;
- protect the independence of the judiciary and the Bar;
- promote access to justice;
- promote fair justice systems and practical and effective law reform; and
- promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 38,000 members and the British Columbia Branch itself has over 6,900 members. Our members practice law in many different areas. The CBABC has established 77 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

The CBABC Automobile Insurance Committee prepared these submissions (the “Committee”). The Committee is a standing committee, specialized in matters related to auto insurance, the practice of personal injury law and insurance. The comments expressed in this submission reflect the views of the Committee only and are not necessarily the views of the CBABC as a whole.

Stuart Rennie, CBABC Legislation and Law Reform Officer, assisted the Committee.

EXECUTIVE SUMMARY

The Committee requests the BC government amend the definition of “highway” in section 1.1 of the *Insurance (Vehicle) Act* to include industrial roads, forest service roads and development roads in order to provide unidentified, uninsured, underinsured motorist protection insurance coverage for motorists driving in BC.

The Committee further requests the BC government to also amend section 148.1(1)(4) of the *Insurance (Vehicle) Regulation* (B.C. Reg. 447/83) under the *Insurance (Vehicle) Act* to clarify that underinsured motorist protection is available for hit and run accidents that occur not only on highways but also occur on industrial roads, forest service roads and development roads.

These amendments will return the state of motor vehicle insurance law to what it was before changes to the definition of “highway” in non-insurance related legislation inadvertently altered the insurance coverages that were deemed to satisfactorily meet the needs of the motoring public since the inception of the Insurance Corporation of British Columbia in 1973.

SUBMISSIONS

Introduction

On highways in BC, under the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the “Act”)¹ the Insurance Corporation of BC (“ICBC”) must administer a plan of universal compulsory vehicle insurance providing coverage as required by the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the “MVA”)² in order to provide unidentified, uninsured, underinsured motorist protection (“UMP”).

The Act provides up to \$200,000 insurance protection for personal injury and property damage as a result of hit-and-run and for uninsured motorists.

The Act also provides up to \$1 million of insurance protection for personal injury and property damage as a result of damage caused by underinsured motorists.

¹ Unofficial version at: http://www.bclaws.ca/civix/document/id/complete/statreg/96231_01.

² Unofficial version at: http://www.bclaws.ca/civix/document/id/complete/statreg/96318_00.

The Act permits motorists to purchase optional excess underinsured motorist protection insurance up to a total limit of \$2 million.

On Crown land, there is no requirement for insurance.

On forest service roads, a minimum insurance against liability to third parties in the amount of at least \$200,000 is required by section 12(1) of the Forest Service Road Use Regulation (B.C. Reg. 70/2004) under the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.3.⁴

This requirement for insurance coverage is consistent with the historical use of industry-based backroads in British Columbia, and the reasonable expectations of the public of having some measure of financial security should a collision and damage occur.

ICBC Insurance Protection Only For Hit-And-Run, Uninsured And UMP Accidents On A “Highway”

Sections 20 and 24 of the Act provide that insurance coverage is available to insured motorists who have a motor vehicle accident involving an uninsured or hit-and-run (unidentified driver) on a “highway”.

³ Unofficial version available at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/15_70_2004.

⁴ Unofficial version available at: http://www.bclaws.ca/civix/document/id/complete/statreg/70_2004.

Section 1.1 of the Act provides that, for Part 1 (Universal Compulsory Vehicle Insurance), "highway" means a highway as defined in the MVA. Part 1 covers sections 1.1 to 46.2.

The addition of "highway" in section 1.1 of the Act was first made in 1993 and put in force June 1, 2007.⁵ Prior to June 1, 2007, the definition for "highway" in the Act was, by implication, "highway" as defined in the MVA.

Regarding UMP, section 148.1(1)(4) of the Insurance (Vehicle) Regulation (B.C. Reg. 447/83) under the Act provides that UMP is not available for a hit-and-run accident unless the hit and run accident occurs on a highway.⁶ The definition of "highway" for this Regulation is, by implication, section 1 of the MVA, since the section 1.1 definition of "highway" in the Act is limited to Part 1 (Universal Compulsory Vehicle Insurance) of the Act.

Section 1 of the MVA provides that "highway" includes:

- (a) every highway within the meaning of the Transportation Act,
- (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and

⁵ Section 4 of the *Insurance (Motor Vehicle) Amendment Act, 2003*, S.B.C. 2003, c. 94 (Bill 93) (in force June 1, 2007 (B.C. Reg. 166/2006))(http://leg.bc.ca/37th4th/3rd_read/gov93-3.htm). Section 4 added the new section 1.1 to the *Insurance (Vehicle) Act*, including the definition of "highway".

⁶ Unofficial version at: http://www.bclaws.ca/civix/document/id/complete/statreg/447_83_00.

(c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited, but does not include an industrial road;

Industrial Road

“Highway” in section 1 of the MVA excludes an industrial road. This exclusion of industrial roads was first added to the MVA in 2004 and in force May 13, 2004.⁷

Section 1 of the MVA defines “industrial road” to mean:

industrial road as defined in the Industrial Roads Act, and includes a forest service road as defined in the Forest Act and land designated as a development road under section 139 (1) of the Petroleum and Natural Gas Act.

Section 1 of the *Industrial Roads Act*, R.S.B.C. 1996, c. 189 provides that an "industrial road" means a road on Crown or private land used primarily for transportation by motor vehicle of:

- (a) natural resources, whether raw, processed or manufactured, or
 - (b) machinery, materials or personnel,
- and includes all bridges, wharves, log dumps and works forming a part of the road, but does not include

⁷ Section 15 of the *Highway (Industrial) Amendment Act*, 2004, S.B.C. 2004, c. 37 (Bill 46)(http://leg.bc.ca/37th5th/3rd_read/gov46-3.htm) amended “highway” in section 1 of the *Motor Vehicle Act* (in force on Royal Assent May 13, 2004).

- (c) a highway,
- (d) a forest service road as defined in the Forest Act,
- (e) land designated as a development road under section 139 (1) of the Petroleum and Natural Gas Act,
- (f) a privately owned road used by a farmer or resident for the person's own purposes,
- (g) a road used exclusively for the construction and maintenance of electric power lines, telephone lines or pipe lines,
- (h) roads and yards within manufacturing plants, industrial sites, storage yards, airports and construction sites, or
- (i) tote roads, cat roads and access roads;⁸

Forest Service Road

Section 1 of the *Forest Act*, R.S.B.C. 1996, c. 157 provides that "forest service road" means a road on Crown land that:

- (a) is declared a forest service road under section 115 (5),
- (b) is constructed or maintained by the minister under section 121,
- (c) was a forest service road under this definition as it was immediately before the coming into force of this paragraph, or
- (d) meets prescribed requirements[.]⁹

⁸ Unofficial version at: http://www.bclaws.ca/civix/document/id/complete/statreg/96189_01.

Development Road

A “development road” is defined by section 139(1) of *the Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361:

139 (1) The commission, subject to any terms or conditions the commission considers appropriate, may designate portions of unoccupied Crown land, whether or not they are in a location, to be a development road for the purposes of exploring for, developing or producing petroleum or natural gas or exploring for, developing or using a storage reservoir.¹⁰

In summary, the exclusion of “industrial road”, “forest service road” and “development road” from the definition of “highway” in the MVA means that any person involved in a motor vehicle accident with an hit-an-run (unidentified) or uninsured motorist on either a industrial road, forest service road or development road does not have any recourse for first party ICBC coverage under the Act, including UMP, because the accident did not occur on a “highway”.

Part 7 Accident Benefits

⁹ Unofficial version at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96157_00.

¹⁰ Unofficial version at: http://www.bclaws.ca/civix/document/id/complete/statreg/96361_01.

A further concern is the operation of Part 7 of the Insurance (Vehicle) Regulation (B.C. Reg. 447/83) under the Act. In Part 7, section 78(f), defines an “insured” as “a resident of the Province who is entitled to bring an action for injury or death under section 20 or 24 of the Act”. If a collision occurs on an industrial road, forest service road or a development road, an injured person who did not otherwise meet the definition of insured under sections 78(a) to (e) would not be able to access Part 7 benefits. Part 7 benefits are “no-fault” benefits and are included in every basic insurance policy. They are designed to provide financial assistance to an injured insured by providing disability benefits, homemaking benefits as well as medical and rehabilitation benefits. Funding for equipment and assistive devices such as wheelchairs, prosthetics, nursing and occupational therapy services are but a few of the benefits provided by this coverage. Being denied access to this coverage not only has the potential to cause severe financial hardship, the inability to obtain timely and appropriate medical and para-medical care would undoubtedly have a significant and negative impact upon the recovery, rehabilitation and quality of life in cases involving severe injury.

PROPOSAL: AMEND “HIGHWAY” IN THE ACT TO INCLUDE INDUSTRIAL, FOREST SERVICE AND DEVELOPMENT ROADS

The Committee proposes that the government amend section 1.1 of the Act in the definition of "highway" to include industrial, forest service and development roads to provide for UMP. The Committee further proposes that the government amend section

148.1(1)(4) of the Insurance (Vehicle) Regulation (B.C. Reg. 447/83) under the Act to ensure that UMP applies to these roads.

Resource Roads Are Extensive in BC and Commonly Used by the Public

Resource roads include industrial roads, forest service roads and development roads.

There are over 400,000 kilometres of resource roads in BC.¹¹ That is the longer than the distance from the Earth to the Moon.¹²

A diverse range of BC motorists commonly use these resource roads. These motorists include:

- rural British Columbians;
- commercial operators;
- forestry company staff;
- delivery vehicles;
- mining and land surveying personnel; and
- recreational users.

The Province of British Columbia invites the world to use its industry-based road networks as public roads, allowing access to all of the tourism opportunities that make BC a wilderness adventure destination. Industry-based roads are an integral part of

¹¹ Forest Practices Board. December 2005. Access Management in British Columbia: Issues and Opportunities. http://www.fpb.gov.bc.ca/SR23_Access_Management_in_BC_Issues_and_Opportunities.htm?_taxonomyid=176.

¹² The distance from the Earth to the Moon is 378,000 kilometres, see NASA (<http://nssdc.gsfc.nasa.gov/planetary/factsheet/moonfact.html>).

many BC citizen's lives and have historically been of significant benefit to all who would access BC's back country.

We do not know the statistics for accidents on resource roads, since ICBC does not publish such data.¹³

Resource Roads Are Dangerous To The General Public

Resource roads are dangerous to the general public.

The BC Forest Safety Council regularly publishes a Resource Road User Safety Guide offering safety guidelines for those using resource roads.¹⁴ Resource road hazards

include:

- excessive speed;
- high traffic volumes;
- excessive smoke, fog or dust;
- passing on narrow roads;
- freezing rain and snow;
- failure to follow traffic control procedures; and
- wildlife.¹⁵

¹³ See Quick Statistics where "Fatal victims: Excludes victims on roads where the Motor Vehicle Act does not apply, such as forest-service roads, industrial roads, private driveways and off-road snowmobile crashes." (page 3+) (September 2013)(<http://www.icbc.com/about-icbc/newsroom/Documents/fatal-victims.pdf>).

¹⁴ Available at: <http://www.bcforgsafe.org/files/BCFSC%20Resource%20Road%20User%20Safety%20Guide%20Version%201.3%20July%205%202012.pdf>.

The BC Forest Safety Council advises:

We urge all resource road users to exercise extreme caution when venturing out.

Expect the unexpected.¹⁶

In 2011, the independent Forest Practices Board did an audit on forestry service roads.

In that audit, the Forest Practices Board found:

The Board agrees with the BC Forest Safety Council, which advises that tourist and recreational forest road users need to be made aware that varying degrees of maintenance are being done on many of these roads. The Board joins the Safety Council in urging people to exercise extreme caution when driving on all forest roads, whether those roads are still in active use as industrial roads, are inactive wilderness roads, or have been deactivated.

While wilderness roads pose hazards due to natural aging of man-made structures and less frequent maintenance, well-maintained industrial forest roads can also pose hazards to the public in the form of large industrial vehicle traffic.

¹⁵ *Supra* at page 1.

¹⁶ See http://www.bcforestsafe.org/forestry_trucksafe/tools_roadusers.html (Spring 2013).
See http://www.bcforestsafe.org/forestry_trucksafe/tools_roadusers.html (Spring 2013).

Members of the public travelling on these roads should expect the unexpected, and be prepared.¹⁷

Harmonize Rules for Resource Roads with Public Highways

In 2011, the government issued a Discussion Paper proposing enacting a Natural Resource Road Act.¹⁸ In that Discussion Paper, the government recognized that rules for resource roads and public highways should be aligned, including requirements for licensing and insurance under the MVA.¹⁹

The Public Wants Insurance for Users of Resource Roads

The public and stakeholder response to the Discussion Paper had many calls for mandatory motor vehicle insurance for motorists using resource roads.²⁰ Comments included:

The legal and insurance position of licensed drivers in registered vehicles should not be compromised by the actions of unlicensed vehicles and/or drivers.”²¹

¹⁷ Road and Bridge Maintenance Obligations within the Three Forest Districts, Coast Forest Region (April 2011), http://www.fpb.gov.bc.ca/SIR31_Road_and_Bridge_Maintenance_Obligations.pdf at page 1.

¹⁸ Available at: <http://www.for.gov.bc.ca/mof/nrra/Discussion-Paper.pdf>.

¹⁹ *Supra* at page 6.

²⁰ Summary of Public and Stakeholder Feedback (February 2012) http://www.for.gov.bc.ca/mof/nrra/Summary-of-Public-and-Stakeholder-Feedback_Feb21.pdf.

If there is a crash, and the vehicle is not insured, the consequences should include fines, restitution, and even jail time.²²

I would reduce speed limits on all resource roads. All drivers should carry insurance.²³

Now insurance and drivers licence should be necessary for liability and safety of shared users. A full sized vehicle can kill people and cause a lot of damage so it is imperative that insurance is provided by all parties.²⁴

Proposal Clarifies Case Law

The Proposal affects substantive law by expanding UMP for motorists currently driving on resource roads such as industrial, forest service and development roads in BC. The proposal would decrease the need for BC courts to interpret insurance claims for personal injury and property damage involving motorists driving on industrial, forest service and development roads.

²¹ *Supra* at page 14.

²² *Supra* at page 15.

²³ *Supra* at page 15.

²⁴ *Supra* at page 37.

To date, the only published decision in BC to consider whether or not a resource road is a highway or not regarding an uninsured motorist personal injury claim under the Act is *Pierre v. Miller*, 2010 BCSC 812 (CanLII).²⁵

In *Pierre*, Mr. Justice Meiklem of the BC Supreme Court found that a forestry service road is not a highway despite the fact that there is common public and community use of the road and this public use does not detract from its properties as a forest service road as statutorily defined. Both ICBC and the plaintiff “experienced difficulty in obtaining evidence from the pertinent government ministries regarding whether the part of the road in question was a “highway” or “forest service road””. To date, no other case has cited *Pierre*.

Prior to the 2004 exclusion of “industrial road” in the MVA’s definition of “highway”, the leading case on point in BC is the *Insurance Corp. of British Columbia v. Routley*, 1995 CanLII 2716 (BCCA).²⁶

In *Routley*, a majority of the BC Court of Appeal held that an abandoned railway right-of-way used by the general public for the passage of vehicles was a “highway”. In *Routley*, the BC Court of Appeal held that “highway” be given a plain meaning and that a highway is no more than a strip of land used for motor vehicle travel by the public.²⁷

²⁵ See <http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc812/2010bcsc812.html>.

²⁶ See <http://www.canlii.org/en/bc/bcca/doc/1995/1995canlii2716/1995canlii2716.html>.

²⁷ *Supra*, at paras. 11, 16-19, 27.

Unlike *Pierre*, in *Routley*, there was no difficulty in obtaining evidence from the government to satisfy the statutory definition of “highway”. *Routley* has never been overruled. *Routley* has been mentioned in recent cases.²⁸

It will be an odd, and presumably unintended, incongruity by the Legislature to allow an insured, who is driving upon a bare strip of land that has become a “highway” (through public usage), to be entitled to unidentified or uninsured motorist coverage or UMP as what occurred in *Routley* but an insured driving on an resource road would be excluded as what occurred in *Pierre*. The results are inconsistent and unfair.

The proposed return of uninsured and unidentified motorist coverage and UMP to motor vehicle accidents that occur on resource roads is consistent with the historical application of the Act and the reasonable expectations of the motoring public.

A specific example may be of assistance in appreciating the incongruity of the present legislative scheme. British Columbia offers beautiful wilderness destinations such as Wilson Lake, northwest of Harrison Mills/Harrison Hotsprings:

²⁸ *Redan v. Saul & Ostrander*, 2001 BCSC 448 (CanLII)(<http://www.canlii.org/en/bc/bcsc/doc/2001/2001bcsc448/2001bcsc448.pdf>), *ICBC v. Bruneau*, 2000 BCSC 786 (CanLII)(<http://www.canlii.org/en/bc/bcsc/doc/2000/2000bcsc786/2000bcsc786.pdf>), *Moss v. Wilson*, 2007 NLTD 31 (CanLII)(<http://www.canlii.org/en/nl/nlsctd/doc/2007/2007nlttd31/2007nlttd31.pdf>), *Buckle v. Stevens*, 1996 CanLII 11688 (NL SCTD)(<http://www.canlii.org/en/nl/nlsctd/doc/1996/1996canlii11688/1996canlii11688.pdf>).



Wilson Lake

As the legislation presently stands, full insurance coverage exists on the recreational trail used to access the lake, such as this:



Wilson Lake Recreation Site trail, accessed from the Chehalis Forest Service Road (Chilliwack Forest District)

But such coverage is not in place for the 30 kilometres of maintained and well-travelled forest service road that must be navigated to get to the head of this trail.

Proposal Would Enhance Public Safety And Protection

The Proposal would benefit the over 3 million license holders in BC, who hold over 2.8 million insurance policies by offering increased UMP insurance protection.²⁹

The Proposal would enhance public safety and protection, making resource roads less dangerous, more safe and easier to use in these ways:

- making fair and just, insurance protection for all motorists, whether on public highways or on resource roads;
- having insurance protection, including accident benefits, for motorists using resource roads against losses and medical expenses caused by hit-and-run (unidentified) and uninsured motorists in motor vehicle accidents;
- permitting motorists to purchase optional excess underinsure motorist protection so they, not the government, pay for any loss from motor vehicle accidents by hit-and-run (unidentified) and uninsured motorists;
- increasing public safety on resource roads with increased insurance coverage;
- harmonizing rules of resource roads with public highways regarding insurance;

²⁹ ICBC, “Quick Statistics” (September 2013)(<http://www.icbc.com/about-icbc/newsroom/Documents/quick-statistics.pdf>).

- removing the inconsistency that insurance is required for forest service roads by the Forest Service Road Use Regulation (B.C. Reg. 70/2004) but not for industrial roads or development roads; and
- having a technical and limited amendment to the Act at no cost to government.

SUMMARY OF RECOMMENDATIONS

In these Submissions, the Special Committee has made the following recommendations:

1. The Committee requests the BC government amend the definition of “highway” in section 1.1 of the *Insurance (Vehicle) Act* to include industrial roads, forest service roads and development roads in order to provide unidentified, uninsured, underinsured motorist protection insurance coverage for motorists driving in BC.
2. The Committee further requests the BC government to also amend section 148.1(1)(4) of the Insurance (Vehicle) Regulation (B.C. Reg. 447/83) under the *Insurance (Vehicle) Act* to clarify that underinsured motorist protection is available for hit and run accidents that occur not only on highways but also occur on industrial roads, forest service roads and development roads.

CONCLUSION

The Committee is pleased to make these submissions in this important area of law needing effective and efficient law reform.

We look forward to discussing these important matters. Communications in this regard can be directed to

:

BARBARA FLEWELLING

Chair, CBABC Automobile Insurance Committee

Barbara Flewelling Law Corporation
205-560 Johnson St
Victoria, BC V8W 3C6
Telephone: (250) 361-3328
Email: flewelling@flewellinglaw.ca