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Discussion Paper:

Comparative analysis of the Claims Agreement, Intercompany Settlement Chart (Appendix to Rule 10), and the new *Direct Compensation for Property Damage Regulation*, AR 132/2021, which comes into effect on January 1, 2022 (the "New Regulation")

Author: G. (Guy) Valle

PARLEE McLAWS LLP

CALGARY

300 TD Canada Trust Tower
421-7 Avenue SW
Calgary, Alberta T2P 4K9
Ph: 403.294.7000
Fax: 403.265.8263

EDMONTON

1700 Enbridge Centre
10175-101 Street
Edmonton, Alberta T5J 0H3
Ph: 780.423.8500
Fax: 780.423.2870

I. INTRODUCTION

This paper discusses the new Alberta *Direct Compensation for Property Damage Regulation*, AR 132/2021 (the "New Regulation") and compares it with the existing IBC Claims Agreement ("Claims Agreement") and The Chart included in the Appendix to Rule 10, and references the Ontario *Fault Determination Rules*, RRO 1990, Regulation 668.

II. BRIEF CONCLUSION

1) The provisions of the New Regulation and the Claims Settlement are similar but have important distinctions. Insurance representatives handling physical damage, accident benefits and bodily injury claims should familiarize with the New Regulation, and how it will interact with other statutes and Regulations.

2) In the New Regulation, Alberta adopted most of the rules included in the Ontario *Fault Determination Rules*, RRO 1990, Regulation 668. There will be a period of time before legal disputes reach Alberta Courts and interpret the New Regulation.

3) This appears to be the first time a *Regulation* in Alberta defines "thoroughfare" and prescribes how fault in parking lots will be determined following a car accident.

4) Notably missing are specific rules with respect to traffic circles and "Innocent Third Parties", as referred to under Rule 7 of the Claims Agreement.

5) The New Regulation does not specifically address situations where an individual carries no insurance at all, but may have a valid physical damage claim, i.e., rear-end.

6) Insurance companies are now specifically required to determine the degree of fault in respect of car accidents.

7) There is no specific mention as to whether insurers will require a Final Release upon settling the property damage claim under the New Regulation, presumably because the insurer will be dealing with their insureds.

8) The New Regulation will not replace existing rules of the road. Rather, the New Regulation provides a set of rules for insurers to determine fault, not legal liability.

9) In case of unresolved disputes, the parties will be required to pursue a legal action against their own insurer through regular litigation.

III. THE IBC INTERCOMPANY SETTLEMENT CHART

First, a general overview of the Claims Agreement:

One of the objectives of the Intercompany Settlement Chart (the "Chart") is to expedite the settlement of physical damage automobile claims. The Chart applies to signatory insurance companies, but not to insureds. Pursuant to Rule 10 of the Claims Agreement, the Chart is applicable country wide except in Ontario where direct compensation property damage applies, and Quebec. The Chart only applies where motorists carry a valid automobile insurance policy, and only where the insurer was exercising a right of subrogation that did not exceed $50,000.

The damage has to result from vehicle-to-vehicle contact on a public thoroughfare or private property with the exception in Rule 7, Innocent Third Parties, although this rule was not included in the New Regulation.

One of the main principles of the Claims Agreement is stated in NOTES TO RULE 10, GENERAL, Section 2, as follows:

> In applying the Chart "the configuration of the vehicles at the moment of impact will be used to determinate the appropriate fact situation in the Intercompany claims chart and no external condition leading up to the moment of impact shall be considered".

IV. THE *DIRECT COMPENSATION FOR PROPERTY DAMAGE REGULATION*

Some of the differences and similarities between the Claims Agreement and the New Regulation, are the following:

1) Definitions

The New Regulation includes several new definitions, most notably, the following:

"Accident" is defined, as follows:

> **Interpretation**
>
> **1(1)** In this Regulation,
>
> (a) "accident" means an accident arising from the use or operation of an automobile and includes
>
> (i) an accident between two or more automobiles or parts of automobiles being detached without the involvement of the insured, and
>
> (ii) an accident between an automobile and the load of another vehicle;

The term "thoroughfare" is not defined in the *Traffic Safety Act*, RSA 2000 c R-6, or the *Use of Highway and Rules of the Road Regulation,* AR 304/2002. The Claims Agreement, NOTES TO RULE 8, defines “thoroughfare”, as follows:

> “(e) “thoroughfare” means any place or a structure intended for vehicular or pedestrian traffic or private property providing public access, for example a commercial parking lot. Private property includes government owned public parking lots, for example parking spaces provided at transit sites.”

Therefore, the term "thoroughfare" is now defined in the New Regulation, as follows:

> 1(1)(m) "thoroughfare" means a main road used for passage into, through or out of a parking lot".

The New Regulation also includes an expanded definition of “centre line”, as follows:

> **1(1)(b)** "centre line" means, with respect to a highway, one or more of the following an accident arising from the use or operation of an automobile and includes
>
> (i) a single or double solid or broken line marked in the centre of the roadway;
>
> (ii) with respect to a roadway without a marked line,
>
> (A) subject to paragraph (B), the centre of the roadway measured from the curbs or, in the absence of curbs, from the edges of the roadway, or
>
> (B) where the edge or edges of the roadway are obstructed by parked automobiles, snowbanks or other objects, and 2-way traffic is possible without difficulty, the centre of the unobstructed portion of the roadway;
>
> (iii) if the highway has a greater number of lanes in one direction than in the opposite direction, the line marked in the roadway dividing the lanes for traffic travelling in opposite directions;

The Claims Agreement, NOTES TO RULE 10, GENERAL, 3, defines “centre line”, as follows:

> "The dotted lines used in the situations on the Chart are intended to indicate centre line or lane boundaries and do not imply passing zones.”

The New Regulation also includes a new definition of "intersection," which incidentally is different from the definition of “intersection” prescribed under s. 1(1)(g) of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002.

1) Duty to determine “fault” for an accident

Although Alberta insurers routinely investigate and settle claims, they do so mostly because of their contractual obligation under the automobile insurance policy. Now, section 2(1) of the New Regulation requires insurers to determine the degree of fault for the loss. It is important to note that the New Regulation refers to a requirement to determine "degree of fault" not "degree of liability".

Furthermore, s. 2(2) states that the degree of fault must be determined without reference to circumstances other than the rules in the New Regulation.

The Claims Agreement, NOTES TO RULE 10, GENERAL, 2, includes a similar provision stating that that in applying the Chart the configuration of the vehicles at the moment of impact is used to determinate the appropriate fact situation **"without consideration of external conditions leading up to the moment of impact."**

2) Figures or diagrams depicting the configuration of vehicles

The Chart is well known for incorporating several figures depicting the configuration of vehicles at the moment of impact. The New Regulation also incorporates comparable figures. However, s. 1(3) states that "the figures in this Regulation are illustrative only, do not have the force of law and are not an exhaustive depiction of every type of accident to which this Regulation applies."

3) Application of the rules in the New Regulation

With respect to how the New Regulation should be applied, s. 3(1) requires insurers to determine fault by considering the provision that "attributes the least degree of fault to the insured". In other words, the New Regulation appears to give the insured the benefit of the doubt whenever possible rather than assuming fault.

4) Situations where two rules apply

The Claims Agreement addresses situations where two rules apply in NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, section (f), as follows:

> "where two separate rules are both clearly operative and applicable for a given accident with each rule producing an opposite finding or responsibility and a dispute therefore arises as to which rule should have priority the subrogated claims of each insurer shall be resolved on a 50/50 basis. This includes swerving vehicles where there is no contact."

Also, NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, section (g), reads:

> "in unresolved disputes as to the facts due to lack of independent proof, the case will be settled 50/50".

Similarly, section 3(2) of the New Regulation states that where two provisions apply to an accident involving two automobiles and the insured would be 100% at fault under one provision and not at fault under another provision, the insured will be 50% at fault.

5) The "ordinary rules of law"

In cases where the accident is of a type to which the New Regulation does not apply, or there is insufficient information to determine the degree of fault, **s. 4** of the New Regulation states that the **"ordinary rules of law"** will apply. The reference to "ordinary rules of law" will likely lead us to the *Traffic Safety Act*, RSA 2000, c. T-6, and the *Use of Highway and Rules of the Road Regulation*, AR 304/2002.

As a result, insurers may have to resort to the *Use of Highway and Rules of the Road Regulation*, AR 304/2002, in cases involving rules, which existed in the Chart but no longer in the New Regulation, such as the "Innocent Third Parties" i.e. Rule 7, or traffic circles.

Similarly, the Claims Agreement has a court-made exclusion for cases that are too complex. In *Pawliuk v. So* (*Alberta*), [1985] ILR 1-1931, the court held that Rule 10 of the Claims Agreement was "not intended to apply to more complex situations than those contemplated in the Intercompany Settlement Chart… Rule 10 … appears to contemplate only the simplified fact situations in the Intercompany Settlement Chart."

V. THE FAULT CHART UNDER THE NEW REGULATION

1) Figures

The New Regulation (ss. 5 to 21) contains Figures depicting various collisions. The Figures are organized similar to the Intercompany Settlement Chart – Appendix to Rule 10. However, s. 1(3) of the New Regulation specifically states that "the figures in this Regulation are illustrative only, do not have the force of law and are not an exhaustive depiction of every type of accident to which this Regulation applies".

The Ontario *Fault Determination Rules*, RRO 1990, Regulation 668, which the Alberta New Regulation adopted almost in its entirety, adds commentaries to each Figure. However, Alberta chose not to include any commentary.

2) Automobiles travelling in the same direction in the same lane

Section 5 of the New Regulation is like Situation #1 of the Chart addressing rear end collisions and includes Figure 1 with 3 different configurations of vehicles and different points of contact.

This provision is like s. 6 of the Ontario *Fault Determination Rules* with the following commentary:

> Text alternative: Diagram of three types of collisions. In the first type, automobile "A" is parallel to the road and is struck in the passenger side rear by the driver side front of automobile "B". In the second type, automobile "A" is not parallel to the road and is struck in the driver side rear by the driver side front of automobile "B". In the third type, automobile "A" is parallel to the road and is struck in the driver side rear by the passenger side of automobile "B", which is trying to pull past

> automobile "A ". This text alternative is provided for convenience only and does not form part of the official law."

Again, the New Regulation does not include any commentary to Figure 1, s. 5.

The different points of contact are addressed in the Claims Agreement in NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, Section (e):

> "liability is apportioned as shown regardless of whether point of contact is front, centre, or rear of either vehicle".

Furthermore, s. 5(3) of the New Regulation states that the rear-ended vehicle is not at fault if the collision occurs while turning left or right or while entering a "parking place" (i.e., parking lot) (s. 5(4)).

In other words, s. 5 re-affirms the well-established rule that a driver, who rear-ends another vehicle, is 100% at fault, save very few exceptions at common law.

3) Automobiles travelling in same direction and adjacent lanes

Section 6 of the New Regulation addresses side-swipe collisions.

In Situation #2 of the Intercompany Settlement Chart, where two vehicles are travelling same direction in adjacent lanes and change lanes, each driver is 50% at fault.

However, section 6(2) of the New Regulation incorporates the following interesting wording:

> **6(2)** "where neither automobile A nor automobile B are changing lanes when the accident occurs **and both automobiles are on or over the centre line when the accident occurs**, the driver of each automobile is 50% at fault for the accident". [Emphasis]

The words "on or over" could be interpreted that even though the vehicles may not be changing lanes, if the collision occurs while both vehicles are "on or over" the centre line, each driver is 50% at fault. In other words, a vehicle could be driving "on or over" the centre line even though the vehicle is not changing lanes. This provision might be an attempt to avoid protracted arguments as to who actually changed lanes. Instead, insurers should focus on whether the vehicle was "on or over" the centre line.

Figure 4: section 6(2) has two diagrams of vehicles like the ones included in s. 10 of the Ontario *Fault Determination Rules*. The second Figure is puzzling, as it might be confused with a traffic circle. The Ontario commentary reads:

> "Text alternative: Diagram containing two types of collisions involving 2 vehicles traveling in the same direction, in adjacent lanes. In the first type, automobile "A" and "B" are driving parallel and strike each other on the centre line along the sides of the automobiles. In the second type, automobile "A" and "B" are driving around a curve. Automobile "B" is on the inner lane of the curve and the front passenger side strikes the driver side of automobile "A" on the centre line. This text alternative is provided for convenience only and does not form part of the official law."

Unfortunately, traffic circles are not addressed in the New Regulation. Therefore, insurers will have to apply s. 40 of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002, which reads:

> **Traffic circles**
>
> **40** Unless otherwise directed by a traffic control device, a person driving a vehicle that is travelling in a traffic circle shall yield the right of way to any other vehicle that is in the circle and that is travelling to the left of that person's vehicle.

What if the location of the collision cannot be determined? Each driver is 50% at fault pursuant to s. 6(3) of the New Regulation.

This is the same as NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, Section (g), which reads:

> "In unresolved disputes as to the facts due to lack of independent proof, the case will be settled 50/50."

Finally, s. 6(4) of the New Regulation makes a driver 100% at fault if the collision occurs while changing lanes. Again, the difficulty in these types of collisions is gathering adequate evidence to prove the lane change.

4) Automobiles travelling in same direction and adjacent lanes – overtaking or passing

Section 7 of the New Regulation addresses collisions that occur while a vehicle is overtaking or passing another vehicle. If a collision occurs while a driver is turning left at an intersection, and another vehicle hits the left-turning driver's vehicle while overtaking it, the overtaking driver is 100% at fault, not the turning vehicle.

This is similar to situation 5(A) of the Intercompany Settlement Chart.

If the turning vehicle is turning left to enter a "parking place" or "private road" or "driveway" and vehicle B behind is overtaking it, then the turning vehicle is 75% at fault, and the overtaking vehicle is 25% at fault.

This is similar to Intercompany Settlement Chart, Situation 5(B).

The New Regulation adds a new situation under s. 7(4) in cases where the turning vehicle is entering a "parking place" or "private road" or "driveway" and the overtaking vehicle is passing one or more automobiles stopped behind the turning vehicle. In this case, the overtaking vehicle is 100% at fault.

For example, consider the situation where there is a line of vehicles waiting for vehicle "A" to turn onto a parking lot. One of the vehicles in line gets tired of waiting and decides to overtake the line of vehicles and collides with the turning vehicle. The impatient overtaking driver is 100% at fault.

5) Automobiles travelling in opposite directions

Section 8 addresses collisions between vehicles travelling in opposite directions and in adjacent lanes.

This rule is similar to Situation 3 in the Intercompany Settlement Chart.

Section 8(2) states that if neither vehicle is changing lanes when the collision occurs and both automobiles are "on or over" the centre line, each driver is 50% at fault. Again, the focus should be on whether the vehicles were "on or over" the centre line.

When does a vehicle begin, and when does a vehicle end driving "on" the centre line, and begin/end driving "over" the centre line? In our view, the focus should be placed not on each preposition "on" or "over" separately, but on the entire phrase "on or over". That means the insurer only needs to establish any one of the conditions.

The second diagram in **Figure 9: s. 8(2),** is rather confusing. However, it likely depicts two vehicles sideswiping each other while simultaneously turning left from opposite directions.

Section 8(3) states that where the location on the roadway of the collision cannot be determined, both drivers will be 50% at fault.

Section 8(4) addresses the situation where only one vehicle is "over the centre line when the accident occurs." Here, there is no mention about the vehicle being "on" the centre line. In the case where the vehicle is "over" the centre line the driver is 100% at fault. Of course, the difficulty in this scenario would be proving that only one vehicle was "over" the centre line.

According to **s. 8(5)**, the vehicle turning left across the path of an oncoming vehicle is 100% at fault. This is in line with section 34(2) of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002, which reads:

> **34(2)** A person driving a vehicle shall not turn or attempt to turn the vehicle to the left across the path of an approaching vehicle unless the turn can be completed in safety.

Finally, **s. 8(6)** deals with the situation where a vehicle is exiting a parking lot and collides with another vehicle that was passing another vehicle. In this case, the vehicle exiting the parking lot is 100% at fault.

This is similar to the Claims Agreement, NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, Section (a), which states that when a driver fails to obey or leave a stop sign or a yield sign, the driver is 100% at fault. And, where no traffic sign exists, a yield sign is deemed to exist.

6) Automobile entering a highway from a parking place or private road or driveway

In essence, under **s. 9** if a driver enters a highway and causes an accident, the driver is 100% at fault. Simply put, a driver must ensure that it is safe to enter a highway. This is in line with section 36 of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002.

7) Automobile entering a controlled highway

According to **s. 1(1)(d)**, "controlled highway" means "a controlled highway, as defined in the *Highways Development and Protection Act*, SA 2004 c H-8", and **s. 12** of the *Highways Development and Protection Act* reads:

> **Controlled highways**
>
> **12(1)** All provincial highways are controlled highways. .
>
> **(2)** The Minister may designate any highway subject to the Minister's direction, control and management as a controlled highway.

Therefore, **s. 10** of the New Regulation makes the driver entering a controlled highway from an entrance lane 100% at fault. The term "entrance lane" is not defined. Therefore, a plain language definition would be used. By contrast, the wording in **s. 8** of the Ontario *Fault Determination Rules*, reads:

> **8.** If automobile "A" collides with automobile "B" on a controlled access road while automobile "B" is entering the road from an entrance lane, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

In addition, the commentary included in **s. 8** Diagram of the Ontario *Fault Determination Rules*. reads:

> "Text alternative: Diagram containing two collisions. In the collision at the top of the diagram, automobile "B" is entering a controlled access road from an entrance lane and is struck on the driver side by the front passenger side of automobile "A". In the collision at the bottom of the diagram, automobile "B" is entering a controlled access road from an entrance lane and the front passenger side strikes the rear driver side of automobile "A". This text alternative is provided for convenience only and does not form part of the official law."

For added context, this situation is regulated at length under **s. 36** of the Alberta *Use of Highway and Rules of the Road Regulation*, AR 304/2002.

8) Chain reaction accidents

The Claims Agreement, SPECIAL NOTES TO SITUATIONS ON CHART, Situation #1, addresses chain reactions and defines chain reaction, as follows:

> "a series of impacts between more than two occupied vehicles facing the same direction, whether moving or stationary, and in the same lane".

The Claims Agreement is very specific in apportioning liability amongst two or more vehicles in cases of chain reactions and provides a formula showing which insurer pays for rear and front-end damage, and percentage.

However, section 11 of the New Regulation does not go into detail. Rather, according to **s. 11(3)** the degree of fault is determined without reference to any other collision in the chain reaction and the last vehicle in line (i.e., Vehicle C) is 100% at fault.

S. 11(4) of the New Regulation specifically indicates that *if* the third vehicle in line (i.e., Vehicle C) is not stopped at the time of the collision, then, the first vehicle in line (Vehicle A) and the second vehicle in line (Vehicle B) are not at fault. Rather, the last vehicle in line (Vehicle C) is 100% at fault.

As a result, it appears that the last vehicle in line will be responsible to pay for all damages. Is the intent to avoid the argument that the middle vehicle (Vehicle B) is partly at fault in a lawsuit? It is not clear, as these rules are meant to address the settlement of vehicle damage claims only.

Curiously, **s. 9** of the Ontario *Fault Determination Rules* is different and shows the middle vehicle (Vehicle B), as 50% at fault for the accident in a chain reaction.

The New Regulation is silent with respect to situations where the middle vehicle (Vehicle B) may have rear-ended the first vehicle in line (Vehicle A) first. As such, what if after a rear-end collision between Vehicle A and B, the Vehicle C comes along and strikes Vehicle B pushing it into the rear of Vehicle A again? Is this a chain reaction? There is no mention about Vehicle A or B being in motion or not, hence, the answer is not clear.

This situation could lead to two potential outcomes:

First, the last vehicle in line will be deemed 100% at fault, hence, pays 100% of all property damages without fully determining whether Vehicle A and B collided first.

Second, since there is no mention as to whether Vehicle A or B were in motion, this "last vehicle in line rule" might end up causing outcomes perceived as unfair for the last driver in line in cases where Vehicle A and B had already collided.

Finally, although the New Regulation does not specifically say so, the rear-end chain reaction provision is likely meant to apply to collisions involving 3 or more vehicles travelling in the same direction.

Note that **s. 9** of the Ontario *Fault Determination Rules* does state that a rear-end chain reaction applies to "three or more vehicles". In addition, the Ontario *Fault Determination Rules* apportions the degree of fault differently between the first vehicle in line (Vehicle A), the middle vehicle (Vehicle B) and the last vehicle in line (Vehicle C).

9) Pile-ups

This is a new provision, which was not contemplated as such in the Claims Agreement. Pile-up is defined under **s. 1(1)(j)** as "a series of 2 or more successive accidents among automobiles travelling in the same direction in adjacent lanes".

To determine fault, **s. 12(2)** simply states that when vehicles are involved in a pile-up, each driver is 50% at fault. What about the first vehicle in line, which might not have occasioned any damage? The New Regulation is silent on this.

The commentary in Ontario *Fault Determination Rules*, reads:

> "Text alternative: Diagram of a multiple pile up collision. Nine automobiles travelling in the same direction have collided with one another along a roadway. **The front automobile did not strike any automobiles but was struck in the side by the automobile behind it**. Other automobiles have struck the sides or rear of other automobiles. Some of the automobiles have been struck multiple times by different automobiles, and some have struck multiple automobiles. This text alternative is provided for convenience only and does not form part of the official law." [Emphasis]

The difference between a "chain reaction" and a "pile-up" may be broken down, as follows:

> Vehicles travelling in the same direction and lane, **one behind the other** = *chain reaction*
>
> Vehicles travelling in the same direction and lane, in **adjacent lanes** = *pile up*.

10) Intersections without traffic signs or traffic control signals

Section 13 of the New Regulation states that at an intersection, the vehicle that enters first is not at fault. If both vehicles enter "at the same time" (versus "at approximately the same time" per s. 34(1) of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002), the vehicle to the right has the right-of-way. If it cannot be determined which vehicle entered the intersection first, both vehicles are 50% at fault.

This provision is similar to Situation #7 of the Intercompany Settlement Chart.

11) Intersections with traffic signs

First, **ss. 14(1), 14(2)** of the New Regulation refer to "traffic sign." If a driver fails to obey a traffic sign, the driver is 100% at fault.

Second, **ss. 14(3), 14(4)** refer to "stop sign". If both drivers fail to obey a "stop sign" both drivers are 50% at fault. If it cannot be determined which driver failed to obey the "stop sign" (no mention of "traffic sign" here) both drivers are also 50% at fault.

Therefore, what are the potential consequences of referring to "traffic sign" under ss. 14(1), 14(2) and only to "stop sign" under ss. 14(3), 14(4)?

First, the New Regulation defines "traffic sign", as follows:

> **1(1)(o)** "traffic sign" means any warning signposts, signs, lines, marks or other devices placed, marked or erected for the purpose of regulating, warning or guiding traffic, but does not include a traffic control signal;

By contrast, the provision in the Ontario *Fault Determination Rules*, reads:

> **14. (1)** This section applies with respect to an incident that occurs at an intersection with traffic signs.
>
> **(2)** If the incident occurs when the driver of automobile "B" fails to obey a **stop sign, yield sign or a similar sign or flares or other signals on the ground**, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident. [Emphasis]

Therefore, insurers may be required to further interpret **ss. 14(3)** and **14(4)** of the New Regulation in conjunction with **ss. 14(1)** and **14(2)** to include other similar "traffic signs" in addition to "stop signs".

The Intercompany Settlement Chart, Situation #8, simply addressed collisions occurring at intersections equipped with a "stop sign."

12) Intersections with traffic control signals

"Traffic control signal" is defined, as follows:

> **1(1)(n)** "traffic control signal" means a manually, electrically or mechanically operated device by which traffic is alternately directed to stop and proceed;

If a driver fails to obey a "traffic control signal" **s. 15** states that the driver is 100% at fault. If it cannot be determined which driver failed to obey the "traffic control signal" then both drivers are 50% at fault. In addition, section 15(4) reads:

> **"15(4)** Where the traffic control signals at an intersection are inoperative or malfunctioning, the degree to which each driver is at fault for the accident must be determined in accordance with this Regulation as if the intersection was an intersection with an all-way stop sign."

What is an "All-Way" stop sign?

The "All-Way" stop sign is not defined in the *Traffic Safety Act*, RSA 2000 c R-6, or the *Use of Highway and Rules of the Road Regulation*, AR 304/2002. The following comments were

obtained from a paper issued by Alberta Transportation titled "Stop Sign Recommended Practices" issued in December 2003 and revised in January 2010 and March 2012.[1]

- "the purpose of introducing All-Way Stop control is to optimize operation of an intersection
- The advantage is not only improved traffic progression but also improved safety at an intersection.
- Introducing All-Way stop control often helps to reduce the number and severity of certain types of collisions (e.g., Angle, Entered when Unsafe collisions).
- Introducing All-Way control at an intersection is not without its disadvantages.
- Under the All-Way traffic control scheme, delays are introduced for all drivers and certain types of collisions such as Rear End may increase.
- Generally, All-Way stop control should be considered in the following situations: as a measure of controlling delays on the approaches (as defined in the Traffic Warrant, below); as an interim measure, where traffic control signals are warranted but cannot be implemented immediately; during a transition period when the traffic control scheme changes (e.g., a transfer of right-of-way from a non-controlled roadway to a stop-controlled roadway).

The twin provision in the Ontario *Fault Determination Rules*, read:

> 15. (4) If the traffic signals at the intersection are inoperative, the degree of fault of the drivers shall be determined as if the intersection were an all-way stop intersection.

Therefore, assuming the All-Way stop sign is meant to control traffic in all directions, in cases where the traffic control signals at an intersection are inoperative or malfunctioning, the degree of fault would probably have to be determined following **s. 13** of the New Regulation. That is, the vehicle that enters the intersection first is not at fault, and if both vehicles enter "at the same time", the vehicle to the right has the right-of-way. If it cannot be determined which vehicle entered the intersection first, both drivers are 50% at fault.

Similarly, the Claims Agreement, NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, Section (a) states that "where no signs exist, a yield the right of way sign is deemed to exist at the exit of a laneway or driveway." Section (c) refers to 3-way and 4-way stop signs and the right of way.

Further, section (d) refers to not obeying a police officer's signal, amongst other things.

13) Parking lots

Until now, collisions occurring in parking lots were governed by the Alberta rules of the road. As a result, the vehicle to the right had the right-of-way regardless of the configuration of the parking

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[1] https://open.alberta.ca/dataset/d347c8f9-c800-4f3a-afbf-95f546c729fa/resource/b74494df-cf14-4711-8269-fc884d520719/download/trans-stop-sign-2012-03.pdf accessed on July 7, 2021

lot. This led to rather unfair circumstances in cases where the driver to the right was cutting across parking stalls.

Under the Claims Agreement, **Rule 8 – Commercial Parking Lots and Shopping Plazas**, addressed these collisions by first figuring out which driver was travelling in the "main thoroughfare".

NOTES TO RULE 8(e) defined "thoroughfare", as follows:

> "Thoroughfare" means any place or structure intended for vehicular or pedestrian traffic on private property providing public access, for example a commercial parking lot. Private property includes government owned public parking lots, for example parking spaces provided at transit sites."

Therefore, it was important for insurers to determine which vehicle was travelling in the main thoroughfare, as the driver to the right may not always have the right of way.

What about the New Regulation?

Now the New Regulation determines the degree of fault for collisions occurring in parking lots similarly to the Claims Agreement.

According to **s. 16** the "thoroughfare" has to be considered, "as if the thoroughfare were a highway". A driver travelling on a thoroughfare is not at fault. Rather, the driver entering the thoroughfare from a feeder lane is 100% at fault (**s. 16(3)**). "Feeder lane" means a road in a parking lot other than a thoroughfare (**s. 1(1)(e)**).

If a driver enters the thoroughfare or feeder lane from a "parking space" and fails to yield the right of way to the driver travelling on the thoroughfare or feeder lane, the driver is 100% at fault. The key here is that the driver is "entering". (**s. 16(4)**).

If the collision occurs at an intersection in the parking lot, which is controlled by a traffic sign, then, the fault is determined according to **s. 14** (Intersection with traffic signs). If the intersection has no traffic sign, then, the fault is determined according to **s. 13** (Intersection without traffic signs or traffic control signals). Finally, if, as sometimes happens, the thoroughfare or feeder lane cannot be determined. In these cases, **s. 16(5)** states that the fault is determined according to **s. 13** (Intersection without traffic signs or traffic control signals).

As a side note, **s. 16** of the Ontario *Fault Determination Rules* regulates "Rules for Automobiles in Parking Lots" almost identically.

14) Parked automobiles

Section 16 of the New Regulation makes a driver that hits a parked vehicle 100% at fault. This is similar to the Claims Agreement, NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, Section (d).

However, like Rule 17 of the Ontario *Fault Determination Rules*, the Alberta New Regulation adds a new provision under **s. 17(2)** making the "driver" of an "illegally parked, stopped or standing

vehicle" 100% at fault if the accident occurs "outside of an urban area." The Ontario *Fault Determination Rules* read "outside a city".

The following questions arise:

What if the "illegally parked, stopped or standing vehicle" is unoccupied? Will the degree of fault revert to the owner of the vehicle? Or the named insured? Or the last known driver's personal automobile insurance?

How will insurers determine "urban area"?

According to **s. 31(1)(e)** of the *Municipal Government Act*, RSA 2000 c M-26, "'urban municipality' means a city, town, village or summer." Also, the Government of Alberta has published an extensive **List of Urban and Rural Communities in Alberta (2016 Census)**,[2] which might become part of the insurers' arsenal in resolving these types of losses.

15) Driver fails to obey sign or direction

Under the Claims Agreement, these situations are addressed in NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, Section (a):

> "a driver who fails to obey or is leaving a stop sign or yield sign is 100% liable …".

Also, section (d):

> "the driver of a vehicle failing to obey a police officer's signal, … in each case 100% liable".

Section 18 of the New Regulation essentially states that if a collision occurs because one driver fails to obey a direction given by a "peace officer" or fails to obey a sign prohibiting entry, overtaking, passing or turning, that driver is 100% at fault.

Who is a "Peace Officer"?

Pursuant to **s. 1(f)** of the *Peace Officers Act*, RSA 2006 c P-3.5, a "peace officer" is a person who is appointed as "peace officer." The qualifications are listed under **s. 5** of the *Peace Officers (Ministerial) Regulation*, AR 312/2006.

The Alberta Government Peace Officers Overview website,[3] explains that Peace Officers "help ensure our communities are safe and secure places where we can live, work and raise families. They perform a number of duties from enforcing various laws to providing security in public facilities…"

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[2] https://open.alberta.ca/dataset/899c9cca-8ce7-40d2-8d2d-c9c369884d9a/resource/035d1e0d-595b-43aa-8d57-d7e3f7e11625/download/listofurbanandruralcommunitiesinalberta.pdf Accessed on July 8, 2021

[3] https://www.alberta.ca/peace-officers-overview.aspx Accessed July 8, 2021

Pursuant to **s. 1(j)** of the *Police Act*, RSA 2000 c P-17, defines "peace officer" as "…a person employed for the purposes of preserving and maintaining the public peace." Therefore, a police officer is likely a "peace officer".

16) Backing up or making U-turns

These situations are addressed in the Claims Agreement, NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, Section (d):

> "the driver of a vehicle … backing up, making a U-turn … in each case 100% liable".

Section 19 of the New Regulation also makes a driver who is backing up or making a U-turn 100% at-fault. This provision is like Rule 19 of the Ontario *Fault Determination Rules*.

17) Open doors

The Claims Agreement, NOTES TO ALL CIRCUMSTANCES IN THE CLAIMS AGREEMENT, Section (b), reads:

> "a driver is 100% liable if the open door of his vehicle causes damage to another vehicle".

Section 20 of the New Regulation also prescribes that if the driver or passenger of a vehicle opens a door or leaves the door open causing a collision, the driver of the automobile is 100% at fault.

However, **s. 20(2)** adds a new provision prescribing that a driver or passenger of a vehicle may not be at fault if they open or leave the door open **"in a manner that is reasonably safe and does not constitute a hazard to moving traffic."**

This provision may be a reason for concern and will likely require additional investigation on the part of the insurer. Presumably, **s. 20(2)** might be contemplating situations where a driver or passenger opens or leaves the door to load groceries, construction materials, storing a stroller or bicycle, or while buckling up a child on their child seat.

Note that **s. 86** of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002, appears to contemplate this possibility, as follows:

> **Opening vehicle doors**
>
> 86(1) A person shall not open a door of a vehicle **unless** it is reasonably safe to do so. [Emphasis]
>
> (2) A person shall not leave a door open on a vehicle where it may constitute a hazard to moving traffic.

Curiously, this "open door" provision is not included in the Ontario *Fault Determination Rules*.

Under the Claims Agreement, the fault determination was made simply based on whether the door was open or not. Now, insurers will likely need to carefully examine and assess the actions of the driver or passenger that led to the opening of the door before making a fault determination.

18) Driving offences

Naturally, the Claims Agreement did not mention anything about driving offences. The Chart applies on to signatory insurers, and not to insureds.

However, the New Regulation makes no provision for new driving offences. Rather, **s. 21** states that the degree to which drivers are each at fault for an accident must be determined in accordance with the ordinary rules of law and not in accordance with the New Regulation. But if one of the seven situations listed under **s. 21(2)** were to occur i.e., driving while impaired, the driver would be charged with a driving offence.

19) Voluntary payments, prescribed classes of contracts and permitted indemnification

The voluntary payment **s. 22** opens the door for an at fault driver to repay the claim to the insurance company for damages resulting out of property damage. However, this voluntary payment does not mean that that the insurer has a "back door" right of subrogation against the at fault driver. Presumably, this voluntary repayment is a way for an at fault driver to avoid having their premiums increased.

Whether or not the insurer will be "required" to accept a voluntary payment is not clear.

20) Right of indemnification

First, the amendment to **s. 585.1(7)(c)** of the *Insurance Act*, RSA 2000, c. I-3, states that an insurance company has no right of indemnification from, or right of subrogation against any person for payments made to the insurer's insured under this section, **except as permitted by the *Regulation***.

A word of caution: the *Insurance Act* and the New Regulation appear use the terms "indemnification" and "subrogation" interchangeably or as synonyms, as follows:

> **"**(c) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to the insurer's insured under this section."

Some of the exceptions include **s. 23** of the New Regulation, which prescribes that employees of garage businesses or car dealerships have a right of indemnification to their degree of fault. Also, **s. 24** states that an insurer may have a right to be "indemnified" by the person leasing, renting a vehicle, or by a tow truck company towing a vehicle.

21) Permitted indemnification — loss of or damage to contents

The Alberta Standard Policy Form No. 1 excludes personal contents damaged or lost in a collision and they are generally covered under the driver's homeowner's insurance policy. The automobile insurance policy, however, covers the vehicle and its equipment. However,

following the recent changes to the SPF-1, which came into effect on May 1, 2021, there is a long list of items under Exclusions (1)(e), which are now excluded, as equipment of the vehicle.

That said, **s. 25** of the New Regulation gives the insurer a right of recovery for some of the items that the automobile insurer might end up covering but only above $20,000 (**s. 25(1)** *Regulation*).

The question here is what might be some of the situations in which the automobile insurer might end up covering "the contents of which suffer loss of use or damage in an amount greater than $20 000 as a result of an accident,…" (**s. 25(2)** *Regulation*). Does it include the contents covered under the driver's homeowner's policy, i.e., while moving, or in transit? The answer is not yet clear.

VI. CONCLUSION

Some final observations:

a) Although the Intercompany Settlement Chart will continue to apply to signatory companies in several provinces, Rule 10 will likely read that this Rule applies country-wide, except as and when section 263 (Direct Compensation Property Damage) of the Ontario *Insurance Act* or the Quebec Direct Compensation Agreement, **"and the Alberta *Direct Compensation for Property Damage Regulation*"** applies.

b) Similarly, the Intercompany Settlement Chart (Appendix to Rule 10) will likely modify situation #5 to add section (i) except Ontario **"and Alberta."**

c) The New Regulation does not include any alternative dispute resolution process to resolve disputes, such as arbitration. Therefore, the New Regulation opens the door for new litigation. Section **585.1(5)** of the *Insurance Act*, RSA 2000, c. I-3, states that if an insured is not satisfied with the degree of fault, the insured may bring an action against the insurance company and that action must be determined in accordance with the ordinary rules of law. As a result, insurance companies should continue to investigate claims thoroughly and gather sufficient and adequate evidence to support their decisions in case these claims end up in Court. This includes obtaining recorded statements from insureds, third parties, and witnesses, gathering police reports, diagrams, photographs, and where appropriate, inspecting the scene of collision. However, if a dispute arises because the insured is not satisfied with the quantum, then, the dispute should still be resolved through the dispute resolution mechanism contemplated under **s. 519** of the *Insurance Act*, RSA 2000, c. I-3.

d) It is important to keep in mind that although the insurance companies will be dealing with their own insureds, they will be attempting to resolve "third party claims", which they would otherwise have pursued against the at fault driver's insurer. Nevertheless, insurers will need to keep in mind their duty to act in good faith with respect to their own insureds.

PARLEE McLAWS LLP

G. (Guy) Valle

Associate

Contact Information

780.423.8640
780.423.2870
gvalle@parlee.com

Education

University of Alberta (NCA, 2020)
Fellowship and Chartered Insurance Professional (FCIP, 2008)
Canadian Risk Management (CRM, 2008)
Chartered and Insurance Professional (CIP, 2004)
Universidad José Simeón Cañas UCA (B. Law, 1996)

Call Date

Alberta, 2021

Service Areas

- Insurance Litigation
- Large Loss
- Wills & Estates

Experience

Guy started his professional career working for major insurance companies, brokers, and government agencies, both as an in-house adjuster and independent adjuster, investigating, adjusting, and settling a variety of claims including catastrophic injury, CGL, Occupiers' liability, condominium, large property losses, and negotiating structured settlements. This experience helped him gain an in-depth understanding of what matters to clients, namely finding practical solutions to complex problems, which he achieves by thoroughly reviewing the file and crafting the negotiation strategy early on. Guy takes proactive steps and, having pursued training on Alternative Dispute Resolution, he focuses on interests rather than positions. Guy completed his articles with Parlee in 2020 and joined the rm in 2021, as an Associate lawyer. He has gained trial experience in the Provincial Court of Alberta, and in the Court of Queen's Bench of Alberta. Guy has actively participated in mediations and Judicial Dispute Resolutions (JDRs).

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