



THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

March 6, 2014

BY EMAIL Commission.Secretary@bcuc.com

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

**Attention: Erica Hamilton,
Commission Secretary**

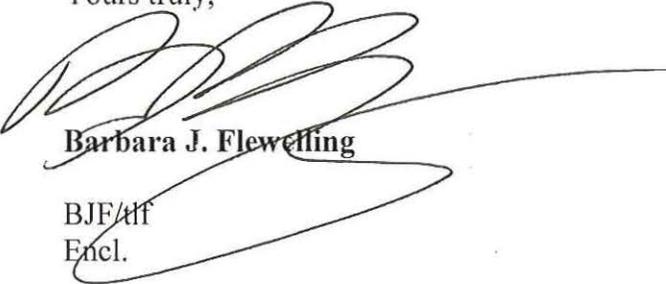
Dear Ms. Hamilton:

**Re: An Application by Insurance Corporation of British Columbia
for Approval of the Revenue Requirements**

I enclose for filing in the above proceeding the Final Submission of the Canadian Bar Association – BC Branch (Automobile Insurance Committee), dated March 6, 2014.

Six hard copies of the Final Submission will follow by courier.

Yours truly,



Barbara J. Flewelling

BJF/tlf
Encl.



**IN THE MATTER OF THE UTILITIES COMMISSION ACT
R.S.B.C. 1996, CHAPTER 473**

And

**Re: Insurance Corporation of British Columbia
2013 Revenue Requirements Application**

FINAL SUBMISSIONS OF
THE CANADIAN BAR ASSOCIATION - BC BRANCH
AUTOMOBILE INSURANCE COMMITTEE

I. INTRODUCTION

The Automobile Insurance Committee (the "AIC") of the Canadian Bar Association - British Columbia Branch (the "CBABC"), is an Intervenor in the Insurance Corporation of British Columbia's application to the B.C. Utilities Commission (the "BCUC") for a rate increase of 4.9%.

The CBABC - AIC offers a unique and potentially valuable perspective on the proposed rate increase given the broad mandate of our committee, which is:

- to concern itself with issues related to auto insurance, the practice of personal injury law and insurance;
- to identify issues of concern to the Bar in its relationship with ICBC and to liaise with ICBC, and other concerned agencies; and
- to investigate and make recommendations to the CBABC Executive regarding auto insurance, insurance law and personal injury law, and the Bar's relationship with ICBC, and other concerned agencies.

The CBABC - AIC is a province-wide committee composed of lawyers who practice personal injury law in British Columbia. Our goal in intervening and providing submissions in this application is to assist the BCUC in its consideration and analysis of the evidence put forward by ICBC in support of its application.

The CBABC takes no position with regard to the amount of the rate increase sought in this Application. Although the CBABC takes no position, we have identified a number of issues that may be worthy of consideration by the BCUC in assessing the application.

In its Final Submissions, the ICBC states that the proposed rate change is driven primarily by expected increases in bodily injury claims costs and increased representation rates, which is partially offset by forecasted investment income, new claims initiatives, and significant reductions in operating expenses.

The CBABC has questions about the evidentiary links made by the ICBC in this regard. Historically, ICBC's claims management policies have been a driving force behind increased claims costs, representation rates, and corresponding settlement amounts and judgments, as was seen in the recently abandoned low-velocity impact ("LVI") program.

Given the information that has been put forward by ICBC on this application, the CBABC believes it is a fair question to ask whether, and perhaps to what extent, ICBC's present and planned claims management policies remain a driver of increased claims costs. While the CBABC supports public automobile insurance and reasonable insurance premiums, it suggests that legal representation in bodily injury ("BI") litigation plays a crucial role in ensuring that injured people have fair, just and reasonable compensation.

In this regard, the CBABC believes that it is important to ensure that individuals involved within a claims process with the ICBC have access to legal information, advice, and/or representation as needed and, specifically, that the claims handling process within ICBC is carried out in a manner that ensures the timely and fair resolution of claims consistent with any given individual's legal rights.

This submission will highlight pertinent evidence respecting the issues raised in this proceeding and provide a discussion and analysis for the consideration of the BCUC in its review of ICBC's application.

II. THE STATUTORY FRAMEWORK

The ICBC makes its application pursuant to the *Insurance Corporation Act* and the *Utilities Commission Act*.

III. THE EVIDENCE

(All references to page numbers relate to the transcript of proceedings in:

ICBC Revenue Requirements, February 6, 2014 Volume 2)

A. Claims Management Strategies:

Claims costs are the most significant factor in determining ICBC's Basic Insurance rates.....Bodily Injury claims account for more than 70% of the Basic Insurance claims costs and are growing at a faster rate than other costs.

ICBC is building on best practices and continuing to refine its approach to managing claims costs.

Enhancing the effectiveness and efficiency in claims business processes, including building upon best practices and improving analytics, can help mitigate pressures on bodily injury claims costs.

With increased pressure on Basic insurance rates due to increasing bodily injury claims costs, ICBC has refocused its efforts with a comprehensive response to the factors that affect bodily injury claims costs. To address those factors that are within ICBC's influence or

control, existing programs are refined and new initiatives are developed **within ICBC's claims cost management strategies**.

Pressures driving increasing bodily injury claims costs include the change in the bodily injury frequency trend which has emerged in recent years, higher rates of legal representation associated with the recent acceleration of legal representation rates, and more claimants with legal representation from the outset of the claim process or obtaining legal representation early in the claim process. ICBC is concerned about increasing bodily injury claims costs and their impact on Basic insurance rates, and has implemented further initiatives to address additional pressures.

The **management of claims costs** is a key corporate priority for ICBC.

ICBC Revenue Requirements Application
Chapter 6, paragraphs 1, 2, 13, 65, 66, 68
Adopted as true by Ms. Taylor and Mr. Wilson
(Emphasis added)

The vast majority of the costs of providing Basic insurance relate to processing and paying out claims (referred to as claims costs). **ICBC continues to experience increasing bodily injury claims costs and this is the primary driver of Basic insurance rates**. ICBC expects that some of the costs due to the rising trend in bodily injury claims costs will be offset by income earned on investments. ICBC has also had some success in containing costs through measures under its control, including reducing operating expenses **and continuing to refine its approach to managing claims costs**.

ICBC Revenue Requirements Application, Chapter 2, p 2.1
Adopted as true by Ms. Taylor and Mr. Wilson
(emphasis added)

B. The Current Overall Picture:

- There is an increasing inventory of unsettled cases (p. 165)
- There are more unsettled BI claims that are increasing the inventory (p. 165)
- There has been a significant reduction in number of BI cases settled after mediation being initiated (p. 166)
- In recent years, there has been an increase in the number of BI cases that went to trial and number of judgments particularly between 2011 and 2012. In 2011, 181 trials were run. This increased to 254 in 2012. (p. 166; p. 184)
- ICBC accepts that legal costs and expenses increase as a case gets closer to trial - including experts fees, legal fees, court fees, etc. (p. 194-195)

C. ICBC's Current Claims Cost Management Strategy:

1. More management focus is part of the claims handling strategy:

- Adjusters are tracked and monitored for their representation rate
- Adjusters' performance is monitored or measured by tracking:
 - productivity
 - average severity
 - closure rates
 - representation rates
 - customer satisfaction
- Adjusters are subject to file reviews
- Adjusters are subject to more key performance indicators and measures since 2007 (p. 167 – 169)

2. Decreasing Settlement Authorities and Increasing Management:

Adjusters' and examiners' settlement authorities have been reducing over several years. (p. 172 & 174)

Two levels of management approval within ICBC are now required to increase an adjuster's authority level. (p. 174)

Authorities are assessed through rigorous performance management reviews, evaluating areas like productivity, representation rate, diary, customer satisfaction, quality of settlement, and investigation. (p. 175)

Management approval is required if a proposed settlement is above the adjuster's authority (if within the manager's authority – otherwise another level of management needs to be involved).

3. Decreasing Levels of Management Authorities Coupled with Little or No Direct Contact with Customers:

ICBC Managers' authorities have also been decreasing over the years. (p. 175)

ICBC Management doesn't have direct contact with the claimant or customer. (p. 175)

The ICBC committees that the adjuster is required to go to for authority do not typically have direct contact with the injured person. (p. 176)

The lower the adjuster's authority, the more often they have to seek management approval to settle a case. (p. 179)

Prior to a mediation being held, adjusters are given an authority level by a manager or a committee and cannot exceed that. (p. 181)

4. Lower Claims Employee Engagement Scores:

Employee engagement scores in the claims department have decreased from 53% in 2006 to 20% in 2012. The increased management focus contributes to this decrease (i.e. would affect how adjusters and managers would answer the scores in the Hewitt survey). (p. 219)

If adjusters are not making fair, just and reasonable offers of settlement to people who have been injured that could be a factor that is driving legal representation rates. (p. 222)

D. The Discontinued LVI Claims Cost Management Strategy:

It may be instructive to review and compare the claims cost management policies in this recently abandoned program with the existing and planned policies being implemented by the ICBC.

1. Increased Management Focus and Reduced Authorities:

There was a committee process as well as increased management focus and review; (p. 229)

Injured people who fell within this program were advised there would be no payment for anything; including no fault accident benefits or losses flowing from their injury; (p. 230)

The LVI Program was adjusted over the years following a class action lawsuit and an investigation/report by the Ombudsman. Eventually the no fault accident benefits were paid but the injured person was advised to go to trial and obtain a judgment if they wanted compensation for their losses and injuries; (p. 230)

2. Increased Number of Trials and Jury Trials:

ICBC's policy was to issue jury notices on the LVI cases that were set for trial. This resulted in increased costs associated with experts and jury fees; (p. 231)

Increasingly judges and juries, after hearing all the evidence, awarded compensation to injured people; (p. 232)

3. Increased Customer Dissatisfaction and Increased Rate of Legal Representation:

ICBC found that LVI claims had a greater rate of legal representation than on any other category of BI claims including those with significant vehicle impact or injury; (p. 233)

Mr. Wilson, Director of Claims Programs at ICBC, agreed that

“...the effect of the committee-based process was often to delay the determination of whether a claimant's injury claim would be accepted by ICBC. It also was creating friction between the claimant and their adjuster because it took the decision-making and accountability away from the adjuster, shifted it to someone that was not in direct contact with the claimant. These shortcomings could intuitively have a negative impact on representation rates.”

(BCUC RR1 154.4 and transcript p. 234 & 235)
(emphasis added)

4. Increased BI Severities:

Mr. Wilson agreed that the claims management policy under the LVI program resulted in increased representation rates, litigation costs and increased BI severities. (p. 235)

E. The Need to Examine Claims Cost Management Policies:

ICBC's management was amenable to direction from outside ICBC in relation to its LVI claims management policies and they made some changes to the program over the years. (p. 238 - 239)

In general, ICBC agrees that it would be helpful for management to consider how claims management policies are influencing customers' dissatisfaction and how those policies may be increasing BI severities. (p. 251)

IV. DISCUSSION AND ANALYSIS

A. ICBC's claims management policies and their effects on costs, representation rates, and file resolution

It is undoubted that ICBC plays an important role in providing insurance services to its customers. However, ICBC policies may contribute to increased costs and the proposed need for higher insurance rates. These policies are worthy of review and consideration by the BCUC on this application.

Despite marketing strategies to the contrary, ICBC claims handling policies are often construed by claimants as taking an 'us' versus 'them' approach. For example, the LVI Program, recently discontinued by ICBC, acknowledged by Mr. Wilson, ICBC's representative to likely be a contributor to higher degrees of legal representation for injured persons.

Under the LVI program, if ICBC assessed material damage to a claimant's vehicle below a particular limit, it would refuse to negotiate settlement with an injured claimant unless there were objective signs of injury. The LVI policy unfortunately lead injured claimants into litigation, despite claimants' possible willingness to resolve their claims, often minor, on a nominal basis and with perhaps less legal expense on the part of ICBC. Despite judgments of both levels of court negatively commenting on ICBC's LVI policy, ICBC did not discontinue the policy until recently.

The LVI program had the highest rate of representation when compared to all other categories of bodily injury claims, including significant injury or impact (2013.2 RR BCUC 200.2). This suggests that claimants will seek legal representation when ICBC does not compensate claimants in accordance with their entitlement under no fault Part 7 accident benefits and tort law.

In light of the availability of case authorities and information on heads of damage available online, claimants are now more educated on the worth of their claims compared to any other time in history. In light of the availability of information in today's age, claimants may be more inclined to view ICBC's initial offers with skepticism, leading them to retain counsel and the resulting consequences of protracted litigation.

Given the nature of its role and its expertise, the CBABC submits that ICBC is able to take the lead by streamlining litigation more effectively. The BCUC should consider the steps being taken by ICBC to internally reduce claims costs. It goes without saying that litigation costs inevitably rise when unwarranted steps in litigation are taken. For example, proceeding to discoveries, conducting numerous strategy meetings, and scheduling case planning conferences may not be necessarily useful or efficient in every case.

It is the experience of the CBABC that many cases can be settled at the 'front end' of litigation rather than the 'back end' if tasks are instructed and risk is assessed in a flexible

fashion. For example, production of every possible document is not necessary to resolve a claim.

ICBC's file handling processes can be more effectively reformed to achieve greater value. ICBC's claims policies mean that file loads are being transitioned to other adjusters. As a result, new adjusters assume conduct of new file loads, while abandoning their existing file loads to other adjusters. Newly assigned adjusters have weaker understanding of the case, not having had a 'historical relationship' with the files. Accordingly, litigation costs increase, cases take longer to settle, claimant satisfaction may be negatively impacted by longer file resolution times, and there may be a corresponding issue with staff morale by increasing workloads and reduced autonomy.

ICBC may need to effectively utilize alternate dispute resolution ("ADR") strategies. Statistics reveal that the use of mediations have decreased in recent years. The cost of mediation is often cited as a concern, despite mediation being effective in resolving files. Other ADR tools, including arbitration and settlement conferences, need to be more effectively applied with a view to reducing litigation costs. In any event, ICBC should be required to provide an assessment of the impact of these positions in terms of the increasing claims costs that are now directly correlated to the rate hike request.

The data suggests that the percentage of total cost of bodily injury exposures settled through trial as opposed to the total cost of bodily injury exposures settled after mediation is significantly higher. For example, in 2011, the total costs of litigation comprised 40% of total bodily injury claims costs for claims resolved after trial as opposed to 20% for claims settled during the year subsequent to the initiation of mediation. The rates were 38% for trials as opposed to 20% for mediated claims in 2012. (see 2013.1 RR AIC.1.3-Attachment A).

Despite lower litigation costs for settled claims, the number of claims settled in the year after mediation dropped dramatically from 2011 to 2012 (3539 to 2733) while the number of exposures settled through trial rose dramatically (165 to 303). One may question whether ICBC is making reasonable efforts to resolve claims prior to trial, through the use of mediation or other ADR strategies. The CBABC is not able to comment further on this issue, as it was not provided with the data relating to the last pre-trial offer as compared to the award at trial.

ICBC, in practice, may need to exercise better practices in utilizing all Rules of Court to streamline management of files. For example, the use of joint experts is not typically utilized, despite its practicality in streamlining costs and obtaining impartial expert opinions. The use of judicial Settlement Conferences is perhaps another under-utilized procedure that could impact ICBC's claims costs.

Decision-making relating to settlement, obtaining approval for routine tasks and proceeding to trial needs to be streamlined. ICBC decision-making involves multiple players and levels of management, many of whom have limited knowledge of the file and likely no or little direct contact with the injured claimant.

ICBC needs to be accountable to its employees and its employees need to be accountable to ICBC. In practice, claims adjusters' work overload and ICBC management policy (reduced authorities, need for committee approval, and need for multiple levels of management approval) can only be seen as impediments to ready and achievable file resolution.

Mr. Wilson acknowledged that the LVI program "creat[ed] friction between the claimant and their adjuster because it took the decision-making and accountability away from the adjuster". (BCUC RR1 154.5, transcript p. 234) It is reasonable to question whether the current policy of reduced level of authority given to adjusters coupled with increased management focus will lead to the same friction over time and lead to similarly increased levels of legal representation. ICBC has agreed that it would be helpful for management to consider how claims management policies are influencing customer dissatisfaction and how those policies may be increasing BI severities (p. 251). Management may wish to consider whether reduced levels of authority results in customer dissatisfaction.

B. Legal representation in ICBC litigation plays a crucial role in ensuring that injured people have fair, just and reasonable compensation

It is the CBABC's position that legal representation is generally invaluable to claimants dealing in all areas of law, including personal injury litigation.

Lawyers provide a valuable and important service to their clients, as well as society. Those retained by injured parties safeguard and protect claimants' interests; advocate positions on behalf of their clients; and offer guidance to persons who are often ill-suited to deal with litigation.

Claimants may be seeking out legal representation with increasing frequency, despite the cost, because lawyers add value. If lawyers did not add value, it is inevitable that claimants would be amenable to dealing with ICBC directly.

In the CBABC's view, it should be highlighted that lawyers often play an important role in litigating claims efficiently and effectively.

Rather than viewing legal representation as leading to a negative effect on the financial bottom line, ICBC should perhaps investigate and provide the BCUC with information as to why claimants are seeking increased legal representation. Are there internal ICBC claims policies that lead claimants to seek out legal representation? What can ICBC do to better avoid increasing litigation costs? How can ICBC further build a relationship of trust and goodwill with its customers? How can ICBC shape and amend its internal claims management policies to avoid future insurance rate hikes?

It is the CBABC's position that ICBC should be asked to provide simple and clear answers to these questions and, in the process, win the trust of its customers and thereby avoid increased costs of insurance. As matters currently stand, the CBABC submits that ICBC may not have put an appropriate level of information before the BCUC with respect to the above-noted

issues that potentially impact on ICBC's claims costs. When these costs are being cited by ICBC as the main driver of its need for a rate increase, it becomes important, in the CBABC's submission, for ICBC to provide the BCUC with a comprehensive record on which to consider the reasonableness of its request. Responding to the issues raised herein by the CBABC will go a way towards establishing that claims costs are indeed a legitimate and important driver of the need for the requested rate hike.

V. CONCLUSION

ICBC is seeking a rate increase of 4.9%. They assert that the need for this increase is due to increased claims costs and, in particular, increased BI severities and increased rates of legal representation. ICBC has stated that claims cost management is a priority.

The current claims cost management policies bear a striking resemblance to those in place during the LVI program: reduced authority and autonomy for adjusters, increased management and committee involvement in decision making and increased friction between adjusters and customers. The result of the policies in place during the LVI program was the highest rate of legal representation than among any other class of claim, including those with more severe injury. It was recently abandoned by ICBC.

Legal representation plays a crucial role in ensuring that people who have been injured and, indeed, all parties, are treated fairly and justly.

The CBABC takes no position with regard to the amount of increase sought by ICBC. However, the CBABC asks that the BCUC consider the role that ICBC's claims management policies may be playing in higher claims costs that ICBC associates with increased BI severities and increased rates of representation. Claims management policies have wide reaching consequences including employee satisfaction, customer satisfaction and, in particular, claims costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

MARCH 6, 2014
Date


Barbara J. Flewelling
CBABC
Automobile Insurantee Committee