

**ICBC Filing re: Revenue Requirements Application for the 2013 Policy Year****CONFIDENTIAL****INSURANCE CORPORATION OF BRITISH COLUMBIA UNDERTAKING****HEARING DATE**

February 6, 2014

TRANSCRIPT REFERENCE

Volume 2:

- Page 198, line 7 to page 202, line 11
- Page 252, line 5 to page 259, line 18

ICBC REFERENCE

2013 RR AIC.UT.1C

REQUESTOR: AIC**QUESTION**

Provide claims data showing the claims that went to trial and include the final offer to settle the claim and the amount awarded at trial.

RESPONSE

The information on the attached spreadsheet provides ICBC's final offers before trial and judgments awarded for bodily injury claims by the year in which the judgment was received for the years 2009 to 2012 (data before 2009 is incomplete and therefore not included).

There are five reasons why the contents of this Undertaking should be kept confidential, with only the Commission having access to it. They are:

- (1) The imperative of protecting the confidentiality of information that can be tied to particular individuals (protection of privacy).
- (2) Protecting the sanctity of without prejudice communications.



- (3) The potential for harm to ICBC and its policyholders by virtue of disclosure of its negotiating strategy in a public forum.
- (4) Commercial harm to ICBC and its policyholders, and harm to the public generally, that could result from the misuse of the information out of context.
- (5) The data sample of cases that go to trial with a judgment rendered is so small, particularly relative to the total number of cases, that it does not produce statistically significant conclusions in any event.

ICBC elaborates on each of these points below.

Protection of Individual Participants

While Court judgments and total damages awarded are a matter of public record, information regarding offers to settle and plaintiffs' demands are not. As discussed in the response to information request 2013.1 RR AIC.2.2, if the information requested in this Undertaking were to be provided to members of the public, it would be a relatively simple task to compare award amounts in Court judgments to the award amounts provided in this Undertaking and ascertain the names of the parties involved. This raises privacy concerns. It should be noted that none of those individuals have been afforded any opportunity to address the Commission to raise any specific objections they might have.

Protecting the Sanctity of Settlement Communications

While some of the offers to settle are made formally and are part of the public record, the vast majority of these offers – whether by ICBC or the plaintiff – were made on a without prejudice basis, with the expectation of confidentiality. In fact, the whole premise of without prejudice communications is to ensure that parties are not discouraged from discussing settlement out of fear that their settlement offers could later be made public. Disclosure of this information in this proceeding, in a manner that allows specific offers to be linked to specific cases, undermines the public policy basis for without prejudice communications. The Commission should be concerned about the effect of publication on how settlement discussions are conducted in the future, and potential adverse effects that could have. Encouraging the early and fair settlement of claims without trial – which all stakeholders appear to support (including AIC) – requires that the sanctity of settlement discussions be respected.



Harm to ICBC and Customers from Disclosure of Negotiation Strategies

The disclosure of the information would cause direct harm to ICBC and its customers because it would make it possible to analyze court judgments against offers to glean information regarding ICBC's negotiating strategies (in addition, depending on the information contained in each judgment, it may also inadvertently disclose information about the tactics of particular plaintiff counsel, or additional insurers/defendants who are not parties to this proceeding and have not had the opportunity to express any concerns about it).

Harm to ICBC, Policyholders, and the Public Generally Through Misuse of Information Out of Context

The disclosure of the information regarding ICBC's offers in this format will cause harm to ICBC and its policyholders and the public generally, if the information is used out of context.

The information is not a complete picture and can be misinterpreted for several reasons:

- First, while this data compares ICBC's final offers to amounts awarded at trial, it does not provide a complete picture because plaintiffs' final demands before trial must be excluded. Offers and demands are provided on a "without prejudice" basis and cannot be released without written consent of the respective parties involved in litigation. While ICBC can consent to disclose the offers it makes on behalf of the defendant, ICBC's opinion is that it does not have the authority to do so with respect to plaintiff demands. Hence, the column containing plaintiff demands before trial has been redacted in the attached. To provide some sense as to the significance of this redacted information, the amount awarded at trial is on average 30 to 65% lower than the plaintiff's final demand. In other words, these cases are going to trial because there is a profound disagreement on significant issues, which is not evident when ICBC's offers are being examined in isolation.
- Second, the trial data presented is only partial trial results because claims for property damage, Small Claims Court actions, liability only trials, coverage issues, allegations of fraud, legal actions where one party did not provide an offer or a demand before trial, and those currently before the Court of Appeal are not included.



- Third, as stated in the responses to information requests 2013.1 RR AIC.1.1 and 2013.1 RR BCUC 154.4, there are many reasons why a matter may proceed to trial, some of which may be outside of ICBC's control. Multiple defendants, policy limit issues, excess insurance carrier involvement (where an excess insurance carrier decides on proceeding to trial), liability, and causation are some of the factors that can be outside of ICBC's control that may result in a matter proceeding to trial.

The harm to ICBC and its policyholders arises because the information could be taken out of context to suggest that people are better off going to trial than trying to settle their claims before trial. ICBC does not believe that the information bears that out, but the fact remains that the information presents circumstances where people are "beating ICBC's final offer" without also presenting that the fact that, for instance (a) they also got less (frequently much less) than they were demanding, (b) there were a variety of other factors at play, and (c) the plaintiffs may have been much worse off even in circumstances where they win due to the unrecoverable costs associated with going to trial and fees payable to lawyers. Leaving a misleading picture that can be used to promote litigation is harmful to ICBC and its policyholders when, in the vast majority of circumstances, it is in the interest of all involved to try to achieve a fair settlement rather than proceed through the litigation process.

The Probative Value of the Information is Very Limited

ICBC believes there is little probative value to the information sought by the AIC in the context of ICBC's 2013 Revenue Requirements Application. First, the factors identified above make it impossible to use the data to extract any meaningful conclusions about whether ICBC managed these litigated claims appropriately. Moreover, as stated in the information request process and in the Oral Hearing, the amount of trials represent less than 1% of the total number of bodily injury claims ICBC received in any given calendar year. Over 40,000 claims settle before trial every year, while approximately 200 to 250 go to trial. The sample size is so small that it would be impossible to draw any statistically significant conclusions about ICBC's claims handling approaches overall.



Conclusion

In summary, the potential for harm to ICBC, its policyholders, and non-participants in this proceeding from publication significantly outweighs any limited probative value of this information. For these reasons, ICBC submits that the attached information, if it must be produced, must remain confidential and be reviewed by the Commission alone.

