COMMENTARY **ICBC**

WILL THE BC UTILITIES COMMISSION BE PERMITTED TO DECIDE IF ICBC'S WINDFALL SAVINGS ARE REBATED TO POLICYHOLDERS?

"It will probably take politicians a while to get used to not telling ICBC what to do all the time…." Liberal finance minister Kevin Falcon 27 May 2003 when introducing legislation to have the BC Utilities Commission set ICBC's Basic rates.

In 2003, the Legislature authorized the BC Utilities Commission (BCUC) to regulate ICBC's compulsory Basic insurance, including the approval of annual rate changes. It was not long before the Campbell and Clark governments began to erode that independence through cabinet directives. And the current NDP administration has maintained the previous government's generally dismissive attitude toward the notion of an independent third-party determining the price of auto insurance.

In the current discussion about whether ICBC should rebate some or all of its windfall claims savings to policyholders the role of the BCUC has been all be forgotten. Various interest groups and the Liberal opposition have been encouraging the government to order ICBC to lower its Basic and Optional premiums to reflect expected lower claims costs.[1] Some form of rebate would conform to what many private auto insurers are providing to their policyholders as the COVID-19 social isolation and economic contraction has reduced the number of vehicles on the road, and the number of crashes.

The current discussion seems to assume that ICBC is just a department of the government, where cabinet (or the minister responsible) has the discretion to order the Crown corporation to do its bidding unhindered. However, in 2003 the Legislature gave the BCUC the authority to oversee the compulsory Basic program, and to set the capitalization levels as well as the annual rates.[2]

The Erosion of BCUC's Independence

Relying on an independent third-party to review and set prices, or to approve major capital projects, allows the government to avoid the responsibility of what can often be difficult decisions. However, this theory often breaks down when the appointed regulator makes decisions that may be contrary to the policies or objectives of the party

[1] "This is the moment where ICBC and government should be offering rebates or at the very least clawbacks from the rates we are paying presently," BC Liberal ICBC critic Jas Johal said. https://globalnews.ca/news/6790991/icbc-cancellation-fees-coronavirus/ and The Canadian Taxpayers Federation has been calling on the province to provide a rebate to drivers; see https://globalnews.ca/news/6829291/icbc-cancellation-replating-fees-coronavirus/ and https://theorca.ca/visiting-pod/icbc-should-lower-rates-during-covid-19/

[2] http://www.bcpolicyperspectives.com/media/attachments/view/doc/article_bc_studies_icbc_2013/pdf/article_bc_studies_icbc_2013.pdf p. 109.

in power. This is especially true when the regulated utility is a Crown corporation, as the finer points of the distribution of authority quickly disappear when the customers are also electors (or corporate donors).

The government was aware of the potential for issues under adjudication of the BCUC to become highly political. The Commission's governing legislation included a provision that allowed the government to issue special directions to ensure that government policy was respected by the Commission. The Liberal and NDP governments have become adept at using the notwithstanding clause to make the BCUC an agent of cabinet.[3]

BCUC's independence to oversee ICBC's compulsory Basic insurance was seriously compromised in 2013 when the government imposed a "rate smoothing" scheme that limited annual rate increases, resulting in large operating losses. Between 2014/15 and 2018/19 the cumulative Basic operating loss was $2.6 billion. These losses, combined with the cumulative Optional loss of $743 million, completely drained ICBC's capital reserves.

The NDP continued the "rate smoothing" restrictions on the BCUC's authority for the October 2017 annual rate increase (6.4%) and the April 2019 annual increase (6.3%).[4] Following the example set by the Liberal government, the new administration interfered with the BCUC's review of ICBC's 2017 rate increase and ordered the Commission to make a decision within a few days of the order.[5] The pre-emptive approach was again in evidence when the government ordered the Commission to make a decision on the sweeping changes to the Basic rate design within a very limited timeframe and with very limited information on impacts.[6]

The BCUC has had practically no role in determining the new hybrid tort ($5,500 cap on pain and suffering awards for some injury claims) liability model which was implemented on 1 April 2019. This new model required legislative changes to ICBC's legislation, therefore it is appropriate that this was a government initiative. On 6 February 2020, the government announced another major change; the hybrid-tort would be replaced by a no-fault model on 1 May 2021, and the 2020 rates would be frozen at the 2019 level.

What was not announced during the 6 February public briefing was that the government ordered the BCUC to approve the zero-rate increase for 2020 without any justification or normal review process.[7] No explanation was given for this order.

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http://www.bcpolicyperspectives.com/media/attachments/view/doc/occasional_paper_no_15_bcuc_independence_27_october_2016_2/pdf/occasional_paper_no_15_bcuc_independence_27_october_2016_2.pdf

4 Restrictions on adjusting the capital reserve were also maintained by the new government.

5 See OIC 602/17 of December 2017.

6 OIC 459/18 of August 2018. The new formula dramatically increased rates for young drivers and others deemed to be higher risk.

7 OIC 47/20 of 6 February 2020.

Why is the Rate Rebate a Political Decision?

While Attorney-General Eby has indicated that any government decision on a rate rebate is subject to the approval of the BCUC. But rather than adhere to past practice where the Commission rubber stamps of a cabinet decision, why not let the Commission make the decision in accordance with its legislated authority?

The Commission is required to set premium rates based on the Cost of Service Model (CSM) where the premium revenue, plus investment income and other income should equal the forecasted claims costs and other expenditures.

The Commission should be required to balance the benefit to current policyholders of a rebate based on lower forecasted claims costs against the benefit to future policyholders of partially rebuilding the capital reserves that were destroyed between 2014/15 and 2018/19.[8]

Perhaps the government is concerned that the BCUC review process is not responsive and timely enough to provide those suffering with economic loss the certainty of some financial relief.[9] The belief that a rebate to policyholders should be based on economic need (say as the result of job loss due to the economic shut-down caused by COVID-19) is contrary to the COS model, and completely distorts the rate-setting philosophy used by most monopoly regulators.

The NDP government seemed willing to allow the BCUC to rule on its request to freeze BC Hydro's rates for 2019. The Commission found that the election promise of a rate freeze was without justification. It also sought the Commission's recommendation on whether to proceed with the Site C dam. Why not begin the process of de-politicizing the rate setting at ICBC by referring the question of a potential rebate to the statutory regulator?

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The writer is a retired senior BC government public servant whose paper describing the BC government's manipulation of the finances of BC Hydro from 2008 to 2014 was published by *BC Studies* in November 2016. *BC Studies* published his paper on the 40-year financial history of ICBC in 2013. He has been an intervener in the BC Utilities Commission's recent reviews of both ICBC's and BC Hydro's rate requests.

[8] Destroyed by political decisions to maintain the costly tort liability model, but suppressing the required rate increases to match rising costs of claims.

[9] The BCUC rate review process can be extremely lengthy; the review of BC Hydro's rate increase for 2019 and 2020 began in February 2019 and is still underway. BC Hydro's reply to intervener arguments is due on 27 May 2020; https://www.bcuc.com/ApplicationView.aspx?ApplicationId=664