

ICBC WATCHDOG HAS LEASH SHORTENED; BUT DECLINES TO VOLUNTARILY FOREGO HOLDING MONOPOLY INSURER TO ACCOUNT

How much independence should the government allow the BC Utilities Commission (BCUC) to exercise in overseeing the operation of the monopoly Basic insurance program operated by ICBC?

This question has been entwined with the operation of the public auto insurer since the BCUC was given the authority to regulate the Basic insurance program in the early 2000s.¹

Because there are over 3.5 million drivers – and a significant component of the economy is dependent on the \$7.4 billion expended on the sale of insurance, claims adjudication, injury rehabilitation and the repair of vehicles – questions about the operation of ICBC can become politicized very quickly.

In theory, having the independent body oversee the finances of the Basic program was supposed to eliminate political influence over ICBC rate-setting through an open inquiry process and by using an industry standard methodology to review changes to the rates. However, in practice the government has continued to use its authority to issue directives to erode the discretion of the BCUC to oversee ICBC's monopoly insurance.

Independent Review of 2014

After facing criticism for issuing prescriptive directions to the BCUC respecting the finances of BC Hydro and ICBC the government commissioned a report to review the role of the BCUC with respect to oversight of BC Hydro and ICBC. The 2014 report (released in February of 2015) recommended that the government set broad policy directions but leave the BCUC the authority to regulate the two Crown corporations.²

The Liberal government did not loosen the cabinet directives. The NDP government did restore most of the BCUC's authority to regulate BC Hydro, but only after the auditor general had qualified the government's financial statements.³ This was because the

¹ See

https://www.bcpolicyperspectives.com/media/attachments/view/doc/article_bc_studies_icbc_2013/pdf/article_bc_studies_icbc_2013.pdf p. 109.

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https://www.bcpolicyperspectives.com/media/attachments/view/doc/occasional_paper_no_15_bcuc_independence_27_october_2016_7/pdf/occasional_paper_no_15_bcuc_independence_27_october_2016_7.pdf

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https://www.bcpolicyperspectives.com/media/attachments/view/doc/commentary_auditor_general_removes_qualification_19_july_2019/pdf/commentary_auditor_general_removes_qualification_19_july_2019.pdf

accounting system at BC Hydro was not conforming to public sector accounting standards and the deferral accounts were not overseen by an independent third-party regulator.

BCUC's Authority to Regulate ICBC Still Limited

While the government has loosened its control over the BCUC with respect to BC Hydro, it has tightened the restrictions on the nominally independent regulator regarding ICBC. In recent years the government ordered the Commission to fix rate increases at levels that would result in operating losses, which rapidly depleted the policyholders' capital reserves. The Commission was prohibited from increasing the rates to rebuild the reserves.

This reluctance to restore the Commission's authority to regulate the Basic insurance program may have been due to the government's priority of moving from a tort-based liability scheme to a no-fault/enhanced care model to reduce costs and premiums. In 2020, the government enacted legislative changes to introduce a no-fault liability scheme modeled on the system in Manitoba. This intricate legislative and regulatory scheme would justify the December 2020 cabinet order to the BCUC requiring its approval approve the no-fault/enhanced care rate changes which enabled the launch of the new model on 1 May 2021.⁴

The large effort involved in moving to a new liability model does not justify or explain government's decision to order the Commission to approve the COVID-19 one-time rebate, which the government announced on 2 February 2021. The announcement material stated that the rebate was subject to the approval of the BCUC. The government considered the rebate as an election campaign pledge, and some 10 days later issued a directive to the BCUC to approve the rebate.⁵

Once again, the government eroded the regulator's discretion to oversee ICBC's monopoly program by politicalizing the regulatory process. By ordering the BCUC to approve the rate rebate the government and ICBC avoided pesky questions about the current year forecast, and whether the rebate was appropriate given the weak financial condition of our public auto insurer.⁶ This weakened ICBC's already minimal requirement to be accountable to the public.

⁴ See OIC 633/20.

⁵ https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0074_2021 and https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0073_2021

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https://www.bcpolicyperspectives.com/media/attachments/view/doc/commentary_is_icbc_rebate_affordable_10_february_2021/pdf/commentary_is_icbc_rebate_affordable_10_february_2021.pdf

BCUC Declines to Voluntarily Restrict Oversight

Despite the steady erosion of its discretionary authority to regulate the Basic program, the BCUC still retains the authority to approve annual rate adjustments. These requests generally span a 12-month policy year and generate a significant number of questions from BCUC staff and interveners.

In its 15 December 2020 request to the BCUC to approve the rate change for the forthcoming 23-month “policy year” ICBC asked the Commission to voluntarily restrict its ability to hold ICBC to account. In an unusual move, ICBC asked the BCUC to exclude all questions (known as information requests) from its staff and the interveners that did not specifically relate to the calculation of the Basic rates period May 2021 to March 2023.

In other words, all questions about past and current year service levels (such as the number of policies sold, or the number of claims received) or performance measures (such as changes to the frequency or severity of injury or property damage claims) would be excluded. Deferring these “compliance” questions to a potential future round of questions or some future application, ICBC asserted, would improve the efficiency of the process.

The ICBC proposal was discussed at a workshop held on 18 February 2021. All the interveners were opposed to the proposed limitation, and it was clear during the discussion that ICBC did not have clear notion of how the limitation would result in a more efficient review, unless the review process abandoned any “compliance” questions entirely. After a short period to consider the various positions the BCUC panel hearing the matter rejected ICBC’s request.⁷

What prompted the ICBC management to advance such a unique proposal? It must be remembered that the government had ordered the BCUC to approve the 2020 rate request without an independent review of any kind. Perhaps the ICBC management believed that a limited review was almost as efficient as no review at all, if efficiency equates to avoiding the cost entailed in being accountable to the BCUC.⁸

Ensuring that ICBC remains accountable for performance of the monopoly program in the current and prior years is a fundamental component of the role of the BCUC.

⁷ https://www.bcuc.com/Documents/Transcripts/2021/DOC_61059_2021-02-18-Transcript-Volume1-Workshop.pdf p. 121.

⁸ However, the concern for cost savings seems misplaced when ICBC had committed \$2.8 million for a media campaign to prompt the benefits of the no-fault/enhanced care model for its compulsory monopoly Basic insurance program, see <https://thebreaker.news/news/icbc-dumpster-spin/>

Finding the Balance

The government has invested significant political capital in restructuring ICBC by abandoning the tort liability model in favour of the no-fault/enhanced care model. To lessen potential areas of conflict it has further restricted the discretion of the nominally independent regulator through a variety of cabinet orders.

The government's reliance on cabinet orders, rather than accept a decision of the regulator, is ironic given what David Eby, the former minister responsible, said about the need for a statutory amendment to prohibit any future government from appropriating ICBC's Optional equity. "The reason for passing this law is to ensure that they [a future government] couldn't change it quietly by regulation or a direction to the utility commission through order in council; something like that. Instead, it would have to be a very public debate on the floor of the legislature before money could be taken out."⁹

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⁹ Vaughn Palmer 4 March 2020 <https://vancouversun.com/opinion/columnists/vaughn-palmer-eby-plays-icbc-card-in-changing-rules-for-diverting-future-surpluses#:~:text=from%20our%20team,-.Vaughn%20Palmer%3A%20Eby%20plays%20ICBC%20card%20in%20changing%20rules%20for,%241.2%20billion%20taken%20from%20ICBC.%E2%80%9D&text=%E2%80%9CICBC%20has%20surplus%20cash%2C%E2%80%9D,then%2DFinance%20Minister%20Colin%20Hansen>