

WAS LIMITING EXPERT REPORTS GOOD PUBLIC POLICY OR A GAMBIT TO AVOID INSOLVENCY AT ICBC?

Chief Justice Hinkson's ruling that the government's attempt to limit the number of expert reports in ICBC cases has brought new attention to the government's handling of the ICBC file generally.¹ The chief justice objected to the way the government proceeded; through a unilateral cabinet order rather than through a recommendation of the Rules Committee, or by a change in legislation.

The decision immediately led commentators to question whether the loss of the anticipated savings from the limitation on the number of reports will eliminate the government's small budget surplus forecast for the current year. This paper will review the financial aspects of the attempt to limit the number of expert reports, and the rationale for the limitation.

Limiting the Number of Expert Reports Part of a Series of Changes

When the NDP assumed office in July 2017, they were aware of the serious financial problems at ICBC. Attorney General David Eby, who was given responsibility for the public auto insurer, began reviewing the limited number of options for restoring ICBC to satisfactory financial health by increasing revenues or reducing expenditures.

In early September 2017, he announced a 6.4% rate increase for the Basic coverage and an annualized 9.6% for the Optional program.² The attorney general said that "ICBC is one of British Columbia's most important assets. That said, there are deep and profound issues at our public insurer that need to be addressed immediately in order to keep rates affordable for British Columbians in the long term," Eby said. "We need to take drastic action to fix ICBC's devastating current financial situation."³

This "drastic action" did not encompass moving to a no-fault insurance model to reduce claim costs or instituting mobile radar speed cameras to strengthen enforcement.

In early February 2018, the attorney general announced that the government would impose a legislated cap on the pain and suffering portion of settlements for minor injury claims. In addition to this hybrid-tort system financial limits on the no-fault accident benefits would be increased, and a new simplified claims dispute resolution process

¹ <https://www.bccourts.ca/jdb-txt/sc/19/18/2019BCSC1824.htm>

² ICBC was ordered to transfer \$470 million in Optional capital (equity) funding to the Basic program to prevent the minimum capital reserve from falling below the regulatory minimum. The Basic increase was later approved by the B.C. Utilities Commission.

³ <https://vancouversun.com/news/local-news/attorney-general-to-announce-changes-to-insurance-corp-of-b-c>

would be instituted for claims under \$50,000.⁴ ICBC estimated that the net reduction in claims costs would be approximately \$1.0 billion annually.

During 2017 and early 2018, the public auto insurer added additional claims adjudication staff to process more claims and control the growing cost of its unpaid claim liability. The attorney general also said that more oversight was needed to manage the billings of the auto repair industry in the province. Global News had presented a series of stories on various components of ICBC's costs.⁵

Given the wide-ranging review of various cost drivers at ICBC it was not surprising that the attorney general moved to reduce the number of expert witness reports being ordered by both claimants and ICBC defense lawyers to resolve injury claims.

The New Limits on Expert Reports

On 11 February 2019, the attorney general announced that using a cabinet order (OIC 40/19) effective immediately the government was limiting the number of expert reports based on the monetary severity of the claim. He said that this change would save ICBC \$400 million in the current year and some \$30 million annually. Attorney General Eby justified the caps as helping to control costs and preserve the adversarial claims adjudication system. "What we're trying to address are the excesses of the system that don't advance any interests. It doesn't advance any interest to have six-plus experts on a claim. It doesn't advance any interests to have a \$50,000 expense to resolve a \$100,000 claim."⁶

The limitation on expert reports was implemented by the government without the knowledge or approval of the supreme court rules committee. The Trial Lawyers Association immediately joined a court challenge to the unilateral change. In late March the government amended (OIC 131/19) the original order to delay the implementation until January 2020. Presumably, the government had been advised that the unilateral order for an immediate limitation would be overturned by the court.

The \$400 Million Savings Estimate

When the writer initially questioned ICBC as to the \$400 million savings estimate I was advised that approximately half was assumed to result from fewer reports and half from reduced claim payments. This month, when I asked for more detail, ICBC stated that the savings were \$449 million, and were booked in the previous fiscal year. Again, ICBC

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http://www.bcpolicy Perspectives.com/media/attachments/view/doc/commentary_icbc_feb_6_announcement_8_feb_2018/pdf/commentary_icbc_feb_6_announcement_8_feb_2018.pdf

⁵<https://globalnews.ca/news/4742271/icbc-is-spending-50-per-cent-more-on-vehicle-damage-than-in-2012-is-it-getting-value-for-money/>

⁶<https://vancouver Sun.com/news/politics/b-c-government-to-limit-medical-reports-in-icbc-claims-cases>

said that half of the expected savings were due to fewer reports being ordered and half was due to “artificial inflation of damages” through “excessive” use of the medical reports.⁷

The response raised two concerns. First, if the attorney general stated that the current practice of ordering multiple reports did not advance the interests of the claimants, why is ICBC assuming lower settlement payouts through the “artificial inflation” of the damages? This contradicts the attorney general’s rationale.

The second concern is that ICBC booked the \$449 million in savings in the 2018/19 fiscal year, even though management was aware that the implementation of the limitation on reports was delayed until January 2020. Why did ICBC assume the savings for last year, and why did its external auditor sign off on the year-end statements when this large discrepancy was included?

Did the Government Rush the Implementation of the Limit on Reports to Avoid Year-End Insolvency at ICBC?

The attorney general had been embarrassed by ICBC’s third quarter financial report, released on 7 February 2019, when the net losses far exceeded earlier predictions⁸ and the combined equity fell to minus \$119 million. ICBC was technically insolvent as liabilities exceeded assets. ICBC did not provide a year-end equity forecast but I estimated it could fall to minus \$300 million.⁹ This compared to a positive equity of some \$440 million originally forecast in the 2018/19 budget.

Following media reports of possible insolvency both the attorney general¹⁰ and Adam Grossman from ICBC used confusing logic to deny that ICBC was insolvent.¹¹

Yet Rob Shaw of the *Vancouver Sun* (11 February 2019) suggested that the immediate limitation on the number of expert reports was an attempt to avoid financial insolvency for the 2018/19 fiscal year. His piece, entitled “Sudden New Government Rules Aim to

7

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8

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9

http://www.bcpolicyperspectives.com/media/attachments/view/doc/commentary_icbc_q3_10_february_2019/pdf/commentary_icbc_q3_10_february_2019.pdf

¹⁰ <https://www.theglobeandmail.com/canada/british-columbia/article-bc-limits-use-of-auto-insurance-experts-in-court-cases-to-spur/>

11

http://www.bcpolicyperspectives.com/media/attachments/view/doc/comment_icbc_14_february_2019/pdf/comment_icbc_14_february_2019.pdf

Stave Off ICBC Insolvency” stated that ICBC was on the verge of insolvency and that the limits on expert reports was a last-ditch attempt to avoid a taxpayer bailout.¹²

With the recent information provided by ICBC it is possible to show that without the \$449 million booked as cost reductions as a result of the limits on the expert reports ICBC would have been insolvent as of 31 March 2019. Table 1 shows the savings by program.

Table 1 – Net Income Before and After the \$449 million Savings (\$=million)

	Pre-Adjustment	Adjustment	Reported
Net Income - Basic	(1,195)	327	(868)
Optional	(407)	122	(285)
Combined	(1,602)	449	(1,153)
Equity	(330)	449	119

Source: ICBC annual report 2018/19. Adjustment figures provided by Lindsay Matthews (VP-ICBC) on October 16, 2019.

It would seem that ICBC management left the \$449 million savings in the 2018/19 fiscal year to ensure that the equity would not fall into a negative position by year-end.

What Does the Chief Justice’s Decision Mean for ICBC’s Finances?

When discussing ICBC’s finances it is important to distinguish between one-time costs or savings in the provision for unpaid claims liability and ongoing increases or savings in current year claims costs. Unfortunately, too many commentators have combined the two concepts. Many assumed the \$449 million to be annual savings, when the annual savings are only some \$30 million. This misunderstanding confuses the public -- and some politicians too. The impact by fiscal year is also a source of confusion. For example, the attorney general was reported as saying that ICBC had budgeted some \$400 million in savings in the current (2019/20) fiscal year as a result of the limit on expert reports.¹³

ICBC has a number of options for dealing with the financial implications of the court decision. The first option is for the corporation to reverse the \$449 million assumed 2018/19 saving in the current year by increasing the provision for claims from prior years. This option would increase the current forecast net loss of \$50 million to approximately \$500 million, and reduce the forecast equity. This option would significantly reduce the government’s anticipated year-end surplus (although no actual cash transfer occurs).

¹² <https://vancouver.sun.com/news/politics/b-c-government-to-limit-medical-reports-in-icbc-claims-cases>

¹³ <https://www.theglobeandmail.com/canada/british-columbia/article-bc-supreme-court-rejects-provinces-effort-to-limit-use-of-experts/>

If the government announces that it will appeal the chief justice's decision, or that it will amend the Evidence Act to legislate a limit on the reports, it is likely that ICBC will not reverse the \$449 million savings booked in 2018/19. This will avoid any deterioration to Ms. James' three-year fiscal budget plan. Depending on the length of the appeal or the implementation period of the new legislation ICBC could be well into the 2020/21 fiscal year before the matter is put to rest.

In a few weeks ICBC will produce its second quarter report for the April to September period. We will have a better indication then as to whether the planned \$1.0 billion claims costs savings from the hybrid-tort model are likely to be realized. It is possible that the financial situation at ICBC may be far worse than the potential losses resulting from this reverse of what was probably an over optimistic estimate of saving from limiting expert reports.

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