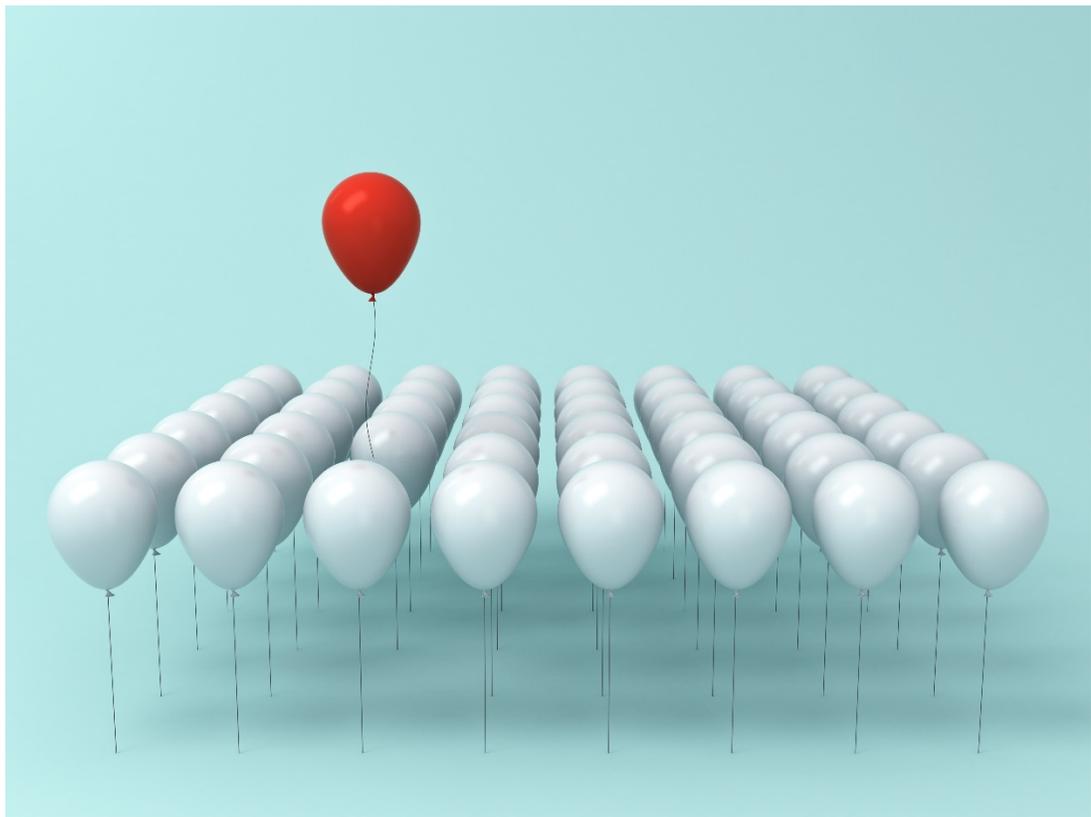


2018/19 Annual Report

Office of the ICBC Fairness Commissioner

Peter Burns, Q.C.
ICBC Fairness Commissioner



Published May 2019

2018/19 Annual Report of the ICBC Fairness Commissioner

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Introduction

The Annual Report of the ICBC Fairness Commissioner is a summary of activities in 2018/19. The report is a requirement of the Fairness Commissioner's Terms of Reference, outlined in Appendix D.

This report includes:

- The concept and elements of the Office of the ICBC Fairness Commissioner, with some examples of customer complaints and resolved cases
- Statistics from 2018/19 (12 month fiscal year: April 1, 2018 – March 31, 2019)
- Terms of Reference for the Fairness Commissioner

The ICBC Fairness Commissioner



Peter Burns, Q.C., was Professor of Law at the University of British Columbia, where he was Dean of Law from 1981 to 1992. He was appointed Queen's Counsel in 1984. His primary areas of teaching and research include criminal law, torts, international criminal law, and international human rights. He retired from the Faculty of Law in 2003, but continues to hold the rank of Dean Emeritus and Professor Emeritus.

He has also served on the BC Law Reform Commission and was a board member of the BC International Commercial Arbitration Centre for 10 years.

He has been a consultant to various branches of government, particularly in the fields of International Human Rights and Law Reform. He was appointed to the Board of Directors of the International Centre for Criminal Law Reform and Criminal Justice Policy (Vancouver) from 1982 to 2014, is a former President of the International Society for the Reform of Criminal Law, and was a member of the UN Organization Committee against Torture from 1987 to 2003, serving as Chair from 1988 to 2003.

He began his appointment as ICBC Fairness Commissioner in April 2005.

From the ICBC Fairness Commissioner

The value of a Fairness Commissioner's office as part of a statutory motor vehicle insurance corporation, with a monopoly over a portion of its business activities, is reflected in part in the number of cases that it deals with, as well as the decisions it renders and publicises.

In 2017/18 there were 227 cases while in 2018/19 there were 123. These cases do not reflect the complete picture, as 51 per cent of the cases in 2018/19 were resolved by the Insurance Corporation of British Columbia (ICBC) Customer Relations department and did not reach me for review. As well, I sometimes refer cases back to the Customer Relations department, with a view to having ICBC review its decision. Each year, several of these result in different decisions being reached by the Corporation, to the satisfaction of the customer concerned.

I am very pleased to report to the Board, again, that in the cases that I referred back for another review by ICBC the response was unreservedly positive. In each instance, appropriate changes to decisions or practices have been made and this has led to a better result for the customer.

Against the backdrop of the statistics of this report, one thing still stands out. The overwhelming majority of decisions taken by ICBC employees and agents in their dealings with the Corporation's customers are reasonable and fair. In those cases that I dealt with in 2018/19, two of them required a formal recommendation based upon a lack of fairness in the decision-making process or the reasonableness of the decision itself.

While the auto insurance system in B.C. has been facing extreme challenges in recent years, major reforms were introduced on April 1, 2019 and more coming on September 1, 2019. These changes will resolve some persistent areas of customer complaints that I have dealt with over the years. For example, I understand the issue of "dangling claims", where a claim that has not affected a customer for some time suddenly catches up with them, should be largely eliminated under the new scheme. However, no doubt, customers will raise new issues which are unforeseen at this time. I look forward to reviewing these matters if and when they arise.

I would like to express my appreciation to the staff of the Corporation. They have continued to be patient, instructive, and above all, cooperative, in pursuing the mission of the Fairness Commissioner's office. I would also like to acknowledge the excellent contribution to the Fairness Process made by my colleague, Elizabeth Edinger, who stood ready to act for me if I was unable to deal with particular cases.



Peter Burns, Q.C.
ICBC Fairness Commissioner

Mission Statement

To ensure customers affected by ICBC's products, services or decisions are treated fairly in terms of process and administration.

Role and Authority

The Fairness Commissioner's role is to investigate, conduct reviews, and make findings and recommendations to ICBC management and/or the Board of Directors regarding unresolved customer complaints. This includes all complaints in reference to the fairness of an ICBC decision, action or practice where ICBC itself has not satisfied the customer through its internal complaint resolution process.

The Office of the Fairness Commissioner's jurisdiction deals with fairness of process or administration. The Commissioner does not have jurisdiction to deal with disputes that relate solely to the amount of a final payment or the assessment of liability. In these matters, customers have a right to a Claims Assessment Review when disputing liability decisions or an Arbitration Process with respect to vehicle damage. The Commissioner does retain jurisdiction to deal with any concerns about fairness.

The Fairness Commissioner has the power to insist on the production of any documents or other information from ICBC, which is considered necessary to conduct an investigation and, if necessary, take evidence under oath or otherwise from the customer or a representative of ICBC.

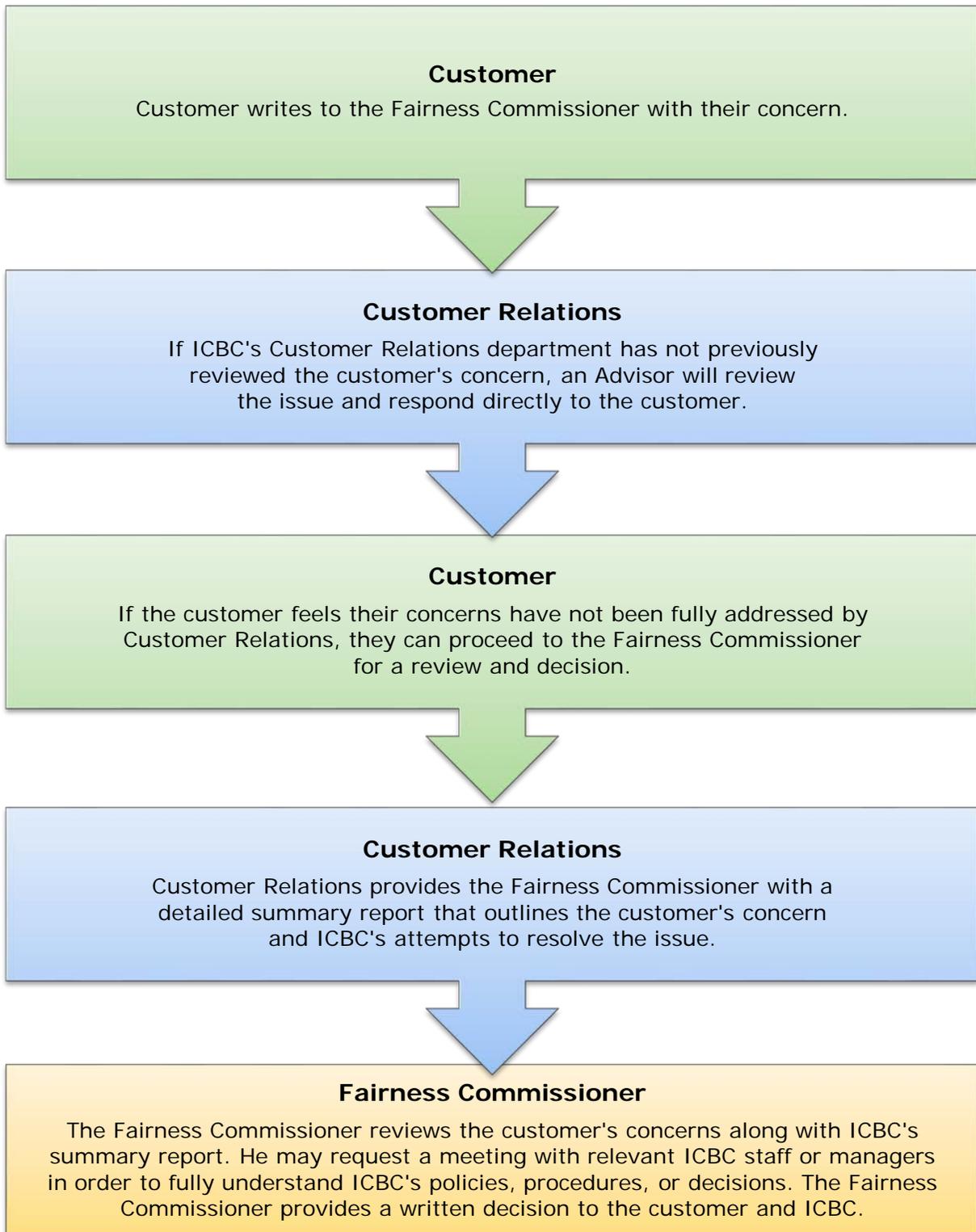
The Fairness Commissioner must be:

- **Totally independent**, in particular, the Commissioner is independent of ICBC and any prior decisions that may have been made by ICBC
- **Impartial** in all respects
- **Accessible** to the public in writing and online
- **Responsive** to those who write

Upon completion of a review, the Fairness Commissioner may:

- Refer the matter back to ICBC for reconsideration.
- Make a recommendation to ICBC that the complaint be resolved in such manner as appropriate. Should ICBC reject the Fairness Commissioner's recommendation, the Commissioner is empowered to take the matter directly to the Board of Directors of ICBC. If the Board rejects the recommendation, the Fairness Commissioner is empowered to take that matter to the public through the press where appropriate.
- Dismiss the complaint if the Commissioner finds no unfairness on the part of ICBC or its employees.

The Fairness Process



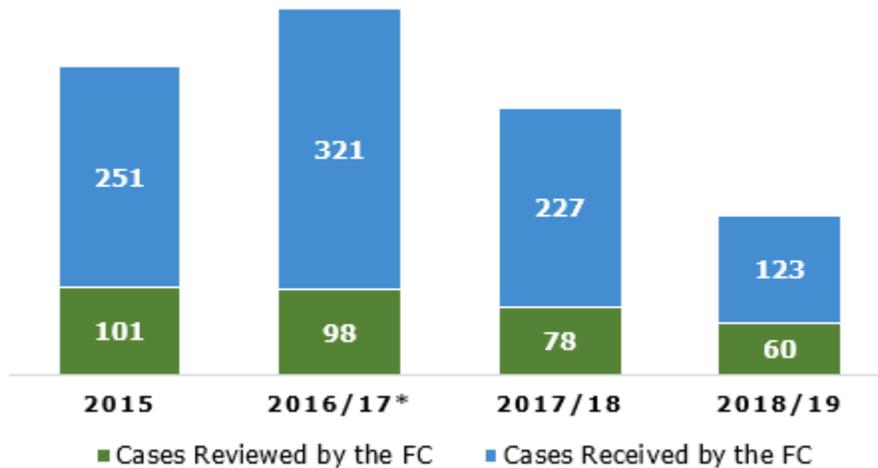
Highlights of 2018/19

The Fairness Commissioner received 123 complaints and reviewed 60 of them in 2018/19, compared to receiving 227 complaints of which 78 were reviewed in 2017/18.

- Of the 123 complaints to the Fairness Commissioner 51 per cent, or 63 files, were successfully resolved with Customer Relations.
- Customer Relations has consistently resolved half of the files without the involvement of the Fairness Commissioner.
- The Fairness Commissioner made two recommendations to ICBC in 2018/19. This compares to zero in 2017/18.

Statistics of 2018/19

Number of applications received and number of cases reviewed by the Fairness Commissioner from 2015 to 2018/19



*2016/17 was a 15 month fiscal year

Case Resolution Details from 2015 to 2018/19

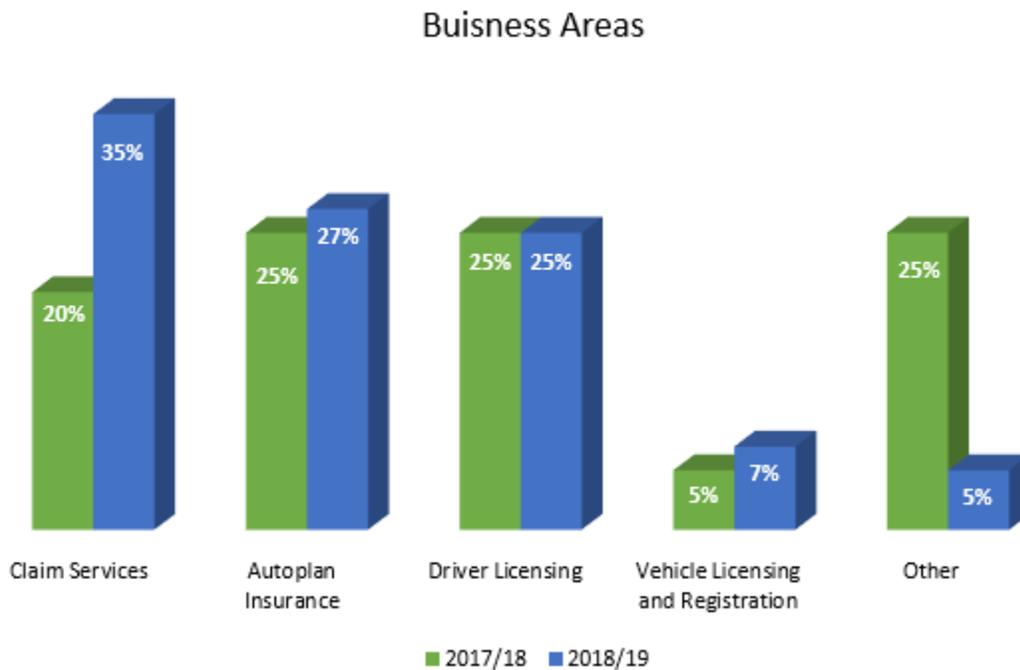
Total Cases Reviewed by the Fairness Commissioner	2015		2016/17 (15 month fiscal year**)		2017/18		2018/19	
	101		98		78		60	
Determination of no unfairness	93	92%	92	94%	71	91%	56	93%
Outside FC jurisdiction	5	5%	1	1%	6	8%	2	3%
Customer withdrew concern	0	0%	1	1%	1	1%	0	0%
FC facilitated resolution	0	0%	0	0%	0	0%	0	0%
Recommendation by FC*	3	3%	4	4%	0	0%	2	4%

*All recommendations accepted and implemented

**2016/17 was a 15 month fiscal year

Topics of Complaint by Business Area

The following chart provides a view of 2018/19 closed files. Note: *percentages may not sum to 100% due to rounding.*



* Included in "Other" are the following: Service Quality, Road Safety, Finance and Not ICBC

APPENDIX A

Select Cases from the Fairness Commissioner



The following seven cases are samples which correspond to the top four business areas displayed in Topics of Complaint by Business Area.

Case 1: Claims

Denied hit and run application, claim deemed a collision as damage not consistent with another vehicle.

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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September 18, 2018



Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your application for a Fairness Review of the decision of ICBC to not treat the damage to your car, sustained on April 8, 2018, as a hit-and-run claim.

In reaching my decision I have taken into account the submissions you make in your review application, together with submissions you have made to ICBC over time, as well as the map and photographs of damage to your vehicle that you provided. I have also had the assistance of a file prepared by ICBC for the purpose of this review, which contains, among other things, a full chronology of the relevant events, and an earlier decision of my own which deals with the same broad issue that your case raises.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

At the outset, it is useful to remind ourselves about the procedure involved in a fairness review. The burden of establishing unfairness rests with the customer upon the balance of probabilities.

I will not attempt to belabour the facts, since they have been quite clearly set out in the letter to you, dated June 25, 2018, from Ms. [REDACTED], Customer Relations Advisor. The evidence of damage to your vehicle was assessed by two estimators and their conclusions were reviewed by two Material Damage Managers. The conclusion was that the damage was probably caused not by another vehicle but by contact with a concrete post or other concrete object. Accordingly, the Corporation felt that you could not recover under your hit-and-run policy but would be required to bring an insurance claim under your collision coverage. You have consistently declined to do this. Reading the whole of the file and particularly the various submissions that you have made over time it appears to me that you are concerned that the conclusion reached by the Corporation implies that you are a liar in making the claim that you did.

But, my reading of the file does not lead to this conclusion. All that the Corporation is claiming is that on the facts placed before it, you have not demonstrated on the balance of probabilities that another vehicle struck your own. You raise any number of possible scenarios in support of your position but they are essentially hypothetical and not consistent with the physical evidence. But, in no way does this mean that by raising this evidence the Corporation believes that you are lying to it. I see nothing in the file to support this.

In any event, you have not demonstrated any procedural error by the Corporation and, at the end of the day, I am not persuaded that you have demonstrated that the Corporation's decision is manifestly unreasonable.

As a result, I do not propose to make a recommendation to the Board of the Corporation that would affect your present circumstances. You could, of course, take the matter to the Office of the Provincial Ombudsperson, which has a wider jurisdiction than my own, or even to the courts of this province.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9
Fax: 604-443-4562

Please ensure you include your name, return address and signature (for identification purposes) with your request.

Your request will be handled as per the guidelines outlined in the *Freedom of Information and Protection of Privacy Act of British Columbia*.

Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Doug Cooper, Customer Relations and Review Services, ICBC

Case 2: Claims
Vehicle assessed as repairable versus a write-off (total loss)

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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May 8, 2018

[REDACTED]

Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your online application, dated April 16, 2018, for a Fairness Review of the way in which ICBC concluded that your vehicle which was damaged on March 13, 2018, whilst it was parked should be repaired.

In reaching my decision I have taken into account the submissions you make in your review application, as well as the contents of a file prepared for the purpose of this review by the Corporation, which includes, among other things, a full chronology of the relevant events, and comprehensive correspondence between you and ICBC.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

The burden of establishing unfairness rests with the customer upon the balance of probabilities. In your case you argued that your vehicle should have been written off and that you should have been paid a settlement in excess of \$33,000. But, since the damage to your vehicle was estimated to be about \$9,000 the Corporation had taken the position that your vehicle should be repaired and not written off. This position was completely in accord with the Corporation's standard policy and procedures and also with the provisions of your policy of insurance. You have since agreed to have your vehicle repaired. My conclusion is that in this regard the Corporation's position could not be regarded as unfair to you. You are being treated by ICBC in exactly the same way as it does all its customers in your situation.

You also raised the issue of accelerated depreciation, which is not normally part of the compensation package that ICBC extends to its customers. In this respect you refer to a decision of the B.C. Supreme Court, and ICBC has agreed to review the matter once the repairs have been made to your vehicle. This appears to me to be entirely reasonable and I do not, at this stage, regard you to have demonstrated unfairness so far as the issue of accelerated depreciation is concerned.

There is the outstanding matter of you filing in provincial court a claim against ICBC with respect to your claim. Technically, if you file a legal action I lose jurisdiction to consider the matter. But, you withdrew your legal claim and, even though I probably technically lost jurisdiction on the date that you filed that claim, I thought it useful to deal with the other two issues so that you have guidance in the matter in the future.

Where does this take us? My opinion is that you have not demonstrated that ICBC has dealt with you unfairly and I do not propose to make a recommendation to the Board that would alter your present circumstances.

Of course, you could take your case to the Office of the Provincial Ombudsperson, which has a wider jurisdiction than my own.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9

Fax: 604-443-4562

Please ensure you include your name, return address and signature (for identification purposes) with your request.

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Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Casey Riddle, Customer Relations and Review Services, ICBC

Case 3: Driver's Licensing
Failure to successfully complete multiple Class 5 road tests.

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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June 27, 2018

[REDACTED]

Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your online application, dated June 6, 2018, for a Fairness Review of the decision of ICBC to fail you on the Class 5 driver's licence road test that you took on May 28, 2018, at the [REDACTED] Driver Licensing office. This was your fifth attempt to pass the Class 5 road test.

In reaching my decision I have taken into account the submissions you make in your review application, together with material contained in a file for the purpose of this review by the Corporation that includes, among other things, the pertinent statutory provisions and some earlier decisions of my own dealing with the same issue.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a

recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

The facts of your case are not complicated. They are quite clearly set out in the email letter, dated June 14, 2018, to you from Mr. [REDACTED], Customer Relations Advisor.

We must bear in mind that the burden of establishing unfairness rests upon the customer on the balance of probabilities. What then is the gist of your argument that you have been dealt with unfairly? Reading your complaint it appears to be that you doubt the “credibility and integrity of the driving examiner” and that there is a structural infelicity based upon “an unfair nexus between the driving schools and the ICBC driving examiners”.

As to the first basis of your complaint, I find that I am completely unpersuaded by it. The examiner set out three reasons why you failed your test and this was reviewed by ICBC when you complained. There was found to be no apparent error on the part of the examiner in your case.

As to your second argument, you do not produce any evidence to support your allegation that there is a structural deficiency on the part of ICBC’s driver examination system because of a special relationship between the driving schools and the Corporation.

One must bear in mind that the whole thrust of the examination system is to ensure that the safety of road users in this province is maintained by demanding a minimum quality of driving skills on the part of drivers who are granted a Class 5 licence. In my opinion you have not demonstrated any evidence of unfairness in your case. There is no procedural irregularity that you have demonstrated, and you have been treated in exactly the same way as all Class 5 licence applicants are dealt with. The decision to deny you a Class 5 licence was, in my view, not manifestly unreasonable.

In the circumstances I am unable to conclude that you have demonstrated unfairness on the part of the Corporation either through procedural irregularity or the decision itself being manifestly unfair. Accordingly, I do not propose to make a recommendation to the Board of the Corporation that would affect your present circumstances.

However, you may take your case to the Office of the Provincial Ombudsperson, which has a wider jurisdiction than my own.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9

Fax: 604-443-4562

Please ensure you include your name, return address and signature (for identification purposes) with your request.

Your request will be handled as per the guidelines outlined in the *Freedom of Information and Protection of Privacy Act of British Columbia*.

Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns", with a long, sweeping horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Casey Riddle, Customer Relations and Review Services, ICBC

Case 4: Driver Licensing

Request denied to hold both a valid B.C. driver's licence and a valid California driver's license when driving a motor vehicle in B.C.

Appendix A

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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October 16, 2018

[REDACTED]

Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your online application, dated September 15, 2018, for a Fairness Review of the decision of ICBC that you cannot hold both a B.C. driver's licence and a California driver's licence whilst driving a motor vehicle in this province.

In reaching my decision I have taken into account the submissions you make in your review application together with the various pieces of correspondence that you have had with the Corporation over time. I have also had the assistance of a file prepared for the purpose of this review by the Corporation that contains, among other things, a complete outline of the relevant events and copies of the pertinent statutory provisions

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt

with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

The facts of your case are quite clear and not uncommon. You are a [REDACTED] working out of San Diego and you travel from that city at least once a month and spend time in British Columbia. You would like to retain your B.C. driver's licence and your California driver's licence because your job in California requires you to hold a driver's licence from that state. You had been permitted to do this by ICBC in 2008 but now ICBC's Licensing Department has not approved renewal of your B.C. driver's licence. It is a sorry fact that since the terrible events involving the twin towers, all countries have tightened their security relating to drivers' licences. Drivers' licences are used as a primary means of identification as well as the device for enabling one to drive on the roads of the state or province concerned. Consequently, British Columbia now rigidly enforces section 25(5) of the *Motor Vehicle Act* which states "at the same time that he or she has a driver's licence issued under this Act, a person must not have a driver's licence issued by another jurisdiction or have another driver's licence previously issued under this Act."

The Corporation has no discretion relating to this provision and must apply it literally. Accordingly, if you wish to retain your California driver's licence you must give up your B.C. driver's licence in this province. But, this does not mean that you must also give up driving in this province. You can use your California driver's licence in this respect, as long as you do not reside in this province for six months or more.

In several earlier fairness applications I have ruled that the literal application of Section 25(5) is not unfair.

I am advised by the Corporation that you have the required identification documentation to complete insurance and registration transactions with ICBC and that you will be permitted to drive in B.C. with your California driver's licence as a "visitor" for up to six months at a time. Each time you leave/return to British Columbia the six month time limit re-starts. As well, I am advised that you can order a driver's abstract from ICBC.com to provide to California as confirmation that your passenger Class 5 licence is also a motor cycle Class 6 licence. ICBC and California have a reciprocal licensing agreement in place that covers this matter.

In these circumstances I am unable to conclude that you have demonstrated that you have been dealt with unfairly by ICBC. Accordingly, I do not propose to make a recommendation to the Board of the Corporation that would alter your present circumstances. Of course, you could take the matter to the Office of the Provincial Ombudsperson, which has a wider jurisdiction than my own.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9

Fax: 604-443-4562

Appendix A

Please ensure you include your name, return address and signature (for identification purposes) with your request.

Your request will be handled as per the guidelines outlined in the *Freedom of Information and Protection of Privacy Act of British Columbia*

Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Doug Cooper, Customer Relations and Review Services, ICBC

Case 5: Insurance

Request denied for a backdated cancellation insurance policy refund.

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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May 23, 2018

[REDACTED]

Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your online application, dated April 26, 2018, for a Fairness Review of the decision by ICBC not to grant you a backdated refund relating to the premium you paid over your motor vehicle located in this province during the time that you were in [REDACTED] and not using it.

In reaching my decision I have taken into account the submissions that you make in your review application, as well as the contents of a file prepared by the Corporation for the purpose of this review, which contains among other things a full chronology of the relevant events, a copy of the statutory provisions that relate to cancellation of coverage, and an earlier decision of my own that deals with the same issue that you raise.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the

Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

The facts of your case are very clearly outlined in the online letter to you, dated April 26, 2018, from Ms. [REDACTED], Customer Relations Advisor.

Under the statutory provisions there are three requirements for cancellation of a policy. In your case, prior to leaving for [REDACTED] you satisfied only two of the three requirements. You did not include in your cancellation request a written application for such cancellation. What then is your basis for arguing that ICBC is behaving unfairly in not granting you the backdated refund that you request? The thrust of your argument seems to me to be that you had completed two of the three statutory requirements and that you were clearly out of the country during the relevant period and it would be manifestly unreasonable and therefore unfair not to grant your request for a backdated refund.

Unfortunately, this argument does not take into account the fact that while you were in [REDACTED] coverage remained over your vehicle, even though you were not using it. The Corporation remained legally responsible for the coverage that was contained in your policy. As I have decided in a number of cases in the past, it is not manifestly unreasonable for ICBC to regard the policy as remaining in force until all the legal requirements for cancellation have been met. The corollary to this is that the customer remains responsible for the financial consequences of maintaining the policy during the period concerned. If you were misled by the Autoplan broker, this is a matter to take up with the broker.

The rationale for ICBC taking the position that it has was explained to you on more than one occasion. The decision itself was reviewed and upheld by the Corporation. Given that you are being dealt with in exactly the same way that all other customers of the Corporation in your circumstances are dealt with, I am unable to conclude that you are being treated unfairly by ICBC.

Accordingly, I do not propose to make a recommendation to the Board of the Corporation that would affect the circumstances of your case. Your policy was cancelled on the day following the Corporation receiving a written cancellation request.

However, you could take the matter to the Office of the Provincial Ombudsperson, which has a wider jurisdiction than my own, or to the courts of this province.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9

Fax: 604-443-4562

Please ensure you include your name, return address and signature (for identification purposes) with your request.

Your request will be handled as per the guidelines outlined in the *Freedom of Information and Protection of Privacy Act of British Columbia*.

Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Casey Riddle, Customer Relations and Review Services, ICBC

Case 6: Insurance
Review of placement on the claim-rated scale.

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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THIS DOCUMENT IS SUBJECT TO A CONFIDENTIALITY AGREEMENT BETWEEN ICBC AND THE COMPLAINANT AND MUST NOT BE DISCLOSED TO ANY PERSON OR LISTED IN ANY LIST OF DOCUMENTS IN A LEGAL PROCEEDING.

June 20, 2018

[REDACTED]

Dear [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your online application, dated May 28, 2018, for a Fairness Review of your placement on the Claim-Rated Scale (CRS) pertaining to your 2015 Ford Explorer.

In reaching my decision I have taken into account the submissions that you make in your review application, as well as the contents of a file prepared by the Corporation for the purpose of this review that includes, among other things, a full chronology of the relevant events, the pertinent statutory provisions that apply to your case, the relevant description of the Premium Impact Calculator, and two earlier decisions of my own dealing with dangling claims.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

There is no need for a restatement of the facts in your case. As they are understood by ICBC, they are quite clearly set out in the letter to you, dated May 22, 2018, from Ms. [REDACTED], Customer Relations Advisor. You say that there was no reference to the effect of dangling claims on the CRS when you consulted the Premium Impact Calculator and as a consequence you did not factor these in and your insurance was considerably more than it would have been had you paid for the damage to your Ford Explorer yourself.

In your review application you say that ICBC would not give you a quote over the phone, but instead made you use the Premium Impact Calculator. Of course, no employee of the Corporation can make you do anything you do not wish to. It may have been suggested that you refer to the Premium Impact Calculator, but I place no weight on your interpretation of it being a requirement.

Looking at the language in the web page dealing with the Premium Impact Calculator it is clear that it is merely a helpful device to assist you to estimate your CRS level. It also states explicitly that the exact amount can only be determined when you renew your insurance policy or take out a new one. You could have gone to an Autoplan agent and obtained an accurate estimate of it. Your argument that you were not aware of the effect of the dangling claims over your policy relating to your 2015 Ford Explorer is not particularly compelling. The information is found in the ICBC web pages and any Autoplan broker could have informed you as to this.

Where does this take us? I must conclude that you have not demonstrated on the balance of probabilities that you have been treated unfairly by ICBC. They have dealt with your case in exactly the same way as they do with everyone in your position. In my view, you have not demonstrated any procedural irregularity in the way in which ICBC has handled your case, or that its CRS decision is manifestly unreasonable.

In the circumstances, I do not propose to make a recommendation to the Board of the Corporation that would affect your current situation.

Of course, you could take your case to the matter to the Office of the Provincial Ombudsperson, which has a wider jurisdiction than my own, or even to the courts of this province.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9
Fax: 604-443-4562

Please ensure you include your name, return address and signature (for identification purposes) with your request.

Your request will be handled as per the guidelines outlined in the *Freedom of Information and Protection of Privacy Act of British Columbia*

Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Peter Burns, Q.C.
Fairness Commissioner

cc: Casey Riddle, Customer Relations and Review Services, ICBC

Case 7: Finance
Failure to keep up with premium payments.

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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June 12, 2018

[REDACTED]

Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your online application, dated May 23, 2018 for a Fairness Review of the way in which your insurance over your Toyota Prius and your Yamaha motorcycle was dealt with by the Corporation.

In reaching my decision I have taken into account the submissions you make in your review application together with the contents of a file prepared by ICBC for the purpose of this review that contains, among other things, a full chronology of the relevant events, a copy of a former decision of my own dealing with the same issue that your case raises, and the relevant statutory provisions.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

I will not go over the facts of your case, they are quite clearly set out in the letter to you, dated May 3, 2018, from Ms. [REDACTED], Customer Relations Advisor. The burden rests with the customer to establish unfairness on the balance of probabilities.

What then is your claim that you have been dealt with unfairly by ICBC? It seems to me to be based upon the argument that you did not know because you had not been put upon notice that if your payments went into default the credit reporting agency would be notified.

You argue that you had not received any specific notice of this consequence of failing to keep up with your premium payments. But, as is pointed out by Ms. [REDACTED] in her letter to you the obligation is cast upon the customer, by statute, to notify the Corporation of any change of address within 10 days. You failed to do this and, as a consequence, notifications from the Corporation did not reach you. The fact that you were unaware of this requirement is not enough to satisfy your argument that you have been dealt with unfairly. Apart from the common sense of the situation, the starting point is based upon the precept that ignorance of the law is no excuse. In your case you were dealt with in exactly the same way as the Corporation deals with all its customers in your circumstances. It is true, that you paid off your indebtedness to the Corporation and ICBC notified the credit reporting agency of this.

In these circumstances can it be said that you were being dealt with unfairly? I conclude that it cannot. I can find no procedural error committed by the Corporation in its dealings with you, nor can I conclude that you have demonstrated that the decisions of ICBC were manifestly unreasonable.

Accordingly, I do not propose to make a recommendation to the Board of the Corporation that would affect your present circumstances.

Of course, you could take your case to the Office of the Provincial Ombudsperson, which has a much wider jurisdiction than my own.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9
Fax: 604-443-4562

Please ensure you include your name, return address and signature (for identification purposes) with your request.

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Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Casey Riddle, Customer Relations and Review Services, ICBC

APPENDIX B

Examples of Non-Jurisdictional Cases



The following two cases are examples from 2018/19 that were outside of the Fairness Commissioner's jurisdiction for review as per Section 2 of the Terms of Reference.

Case 1: Driver Licensing
Requirements for activation of an Enhanced Driver's Licence (EDL)

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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October 16, 2018



Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your application for a Fairness Review relating to what you perceive to be shortcomings in the way in which Enhanced Drivers' Licences are validated by ICBC.

In reaching my decision I have taken into account the very extensive correspondence that you have had with the Corporation relating to this matter, as well as the submissions you make in your review application. I have also had the assistance of a file prepared by the Corporation for the purpose of this review, that contains, among other things, a full chronology of the relevant events, the pertinent practices that relate to the EDL and a copy of the instructions given to customers relating to the activation of an EDL.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

At the outset one must recall that the burden of establishing unfairness rests with the customer upon the balance of probabilities. The facts of your case are relatively clear for the most part, but for the crucial part are somewhat opaque. Very simply, you applied for and received an EDL to assist your travel into and back from the United States. You were granted an EDL but it was rejected in August, 2018, when you attempted to use it at the border. The rejection appears to be based upon the fact that you had not validated it within the period that you were required to do so. You requested a duplicate EDL card which cost you \$27.

Because of the aggravation that you had sustained ICBC gave you a cheque in the amount of \$27, the cost of the duplicate card. The point of departure between you and ICBC relating to the outline of events is with reference to your validation of your EDL. You were "almost" certain that you had activated the licence within the required time but this did not show up on the record. Since there is nothing on the record, ICBC cannot be sure that you did activate your licence in a timely manner or did not. You, however, take the view that ICBC should build into its validation process a system that notifies customers that the activation period is nearing its end in cases where such validation has not occurred. You argue that this would be a simple and cheap part of an amended process and that it is unfair to you that it was not available in your case. ICBC, on the other hand, points out that the current practice is contained in a 2009 Memorandum of Understanding signed between the Government of Canada and the Province of British Columbia and that the card activation model was put in place to meet the Canada Border Services Agency requirements.

In these circumstances can it be said that ICBC has dealt with you unfairly? There can be no argument that ICBC has discriminated against you. They have dealt with you in exactly the same way they do with all EDL customers. Has there been a procedural error on the part of ICBC? You have not alleged it, nor have you demonstrated such. Accordingly, we can put these matters aside and focus on whether ICBC's current practice is manifestly unreasonable and therefore unfair.

The first thing to note is that the present practice appears to work for everyone other than yourself. This, I suspect, reflects the fact that customers are well aware of the appropriate validation time and take care to observe it. Your memory in terms of your validation is an open matter. Memory is a very fickle feature of the human condition. But, if there was a glitch in the design of the online validation process, it is odd that yours is the only one that has surfaced to date.

It may be that an amendment to the design of the system could be made to remind customers that the period for validation is nearing an end. Whether or not it would be costly and what effects it would have upon the existing system I do not know. But, I am not persuaded that the present system which places the onus upon the customer to ensure validation is manifestly unreasonable.

In these circumstances I am unable to conclude that you have demonstrated upon the balance of probabilities that you have been dealt with by ICBC unfairly. Accordingly, I do not propose to make a recommendation to the Board of the Corporation to change its present practice.

Of course, you could take the matter to the Office of the Provincial Ombudsperson, which has a wider jurisdiction than my own.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

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North Vancouver BC V7M 3H9

Fax: 604-443-4562

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Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Doug Cooper, Customer Relations and Review Services, ICBC

Case 2: Claims
Application for review does not meet the criteria for cases that involve "an unresolved customer complaint"

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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January 18, 2019



Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your request for a Fairness Review of the decision of ICBC not to accede to your request for coverage relating to the damage sustained to a customer's vehicle whilst it was being test driven after repair. This collision was without fault on the part of your employee who was test driving the car. I have noted the submissions you make in your review application, contained in an undated letter to this office, and also the replies you make to ICBC's response, contained in an email dated December 13, 2018

In reaching my decision I have taken into account the various submissions that you have made, together with a file prepared by the Corporation for the purpose of this review which contains, among other things, a chronology of the relevant events, the pertinent provisions of the *Sale of Goods Act* and a copy of an opinion from corporate counsel concluding that the *Sale of Goods Act* has no application in this case.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation

is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

At the outset it is useful to reiterate that the burden of establishing unfairness in a case such as this rests with the customer upon the balance of probabilities. Reading the file closely it is clear that there is no real difference between you and the Corporation concerning the relevant facts. The difference relates to the consequences of those facts once established. ICBC takes the position that the only persons with whom it had insurance contracts were the owner of the vehicle that you made the repairs on and the driver of the other vehicle that caused the damage to it leading to its write-off. The only other contractual relationship appears to be that between you or your company and Mrs. [REDACTED], the owner of the vehicle that you had repaired and was written off. Accordingly, ICBC takes the position that it has no contractual duty to you in the circumstances.

You, on the other hand, maintain that you should be compensated for the work and costs involved in repairing the vehicle before its write-off. You argue that the Corporation should have added the cost of repairs, etc., to the global amount of the total loss experienced by Ms. [REDACTED] and used that amount to pay you out or have Ms. [REDACTED] pay you out. This argument implies to me that you understand that ICBC has no contractual obligation to you in this respect and that only Ms. [REDACTED] does. You say that you would be uncomfortable in pursuing her in contract because she did not receive the repaired vehicle in the condition that it should have been in at the end of the day. This, of course, is a choice that you make, not a choice that ICBC makes. The decision to pursue Ms. [REDACTED] for the cost of repairs is yours alone.

Your argument about the application of the *Sale of Goods Act* was clearly listened to by the Corporation and rejected. This rejection was supported by an opinion of legal counsel. At the end of the day I am left perplexed as to the real basis of your argument that you have been unfairly dealt with by the Corporation. In your reply to the letter notifying you of the result by ICBC you say that you disagree with the conclusion reached because, *inter alia*, “some of the premises that the conclusion is based on you do not find satisfactory” and you believe that there have been “administrative issues regarding this case, and also believe there is regress under the Third Party Policy of the at-fault driver.” I am afraid that since you do not explain what you mean by these statements I am unable to either put them in context or really to understand to what you are referring.

Finally, I am persuaded that I have no jurisdiction in this case at all. I am only able to deal with cases that involve “unresolved customer complaints” as contained in my terms of reference attached to my annual report. In this case I am unable to see how you could be described as bringing forward a case involving an unresolved customer complaint. You and your company are not customers of ICBC for the purpose of my review jurisdiction. Ms. [REDACTED], and the third

party at-fault driver, are such customers but you are not. Accordingly, I conclude that I have no jurisdiction in this case.

In the result, I do not propose to make a recommendation to the Board of the Corporation that would affect your present situation.

Of course, you could take the matter to the Office of the Provincial Ombudsperson, which has a wider jurisdiction than my own. Or you could take the matter to the courts of this province.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9

Fax: 604-443-4562

Please ensure you include your name, return address and signature (for identification purposes) with your request.

Your request will be handled as per the guidelines outlined in the *Freedom of Information and Protection of Privacy Act of British Columbia*.

Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Doug Cooper, Customer Relations and Review Services, ICBC

APPENDIX C

Cases requiring a Fairness Commissioner Recommendation



In 2018/19, the Fairness Commissioner made a written recommendation in two cases that ICBC accepted and implemented.

Case 1: Insurance

Business decision to allow a backdated cancellation regarding an estate case.

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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October 25, 2018

[REDACTED]

Dear Mr. [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your application for a Fairness Review of the decision by ICBC to not backdate the cancellation of the insurance policy over your deceased brother's motor vehicles to the date of his death. This meant that the policies continued for some three months after your brother's death together with the costs involved in that.

ICBC'S position is based upon the literal language of the regulatory scheme that deals with such cancellations, whereas, intuitively ICBC's position appears very difficult to justify. I asked ICBC to reconsider its view and I am pleased to advise you that the Corporation is making a business decision in your brother's case and is in the process of writing off the debt that his estate would otherwise owe the Corporation. In short, your brother's estate will not owe ICBC anything respecting his vehicle insurance with the Corporation.

Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Doug Cooper, Customer Relations and Review Services, ICBC

Case 2: Driver Licensing
Errors regarding ICBC's assessment of a Class 3 road test.

*Office of the ICBC Fairness Commissioner
151 West Esplanade
North Vancouver, B.C.
V7M 3H9*

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September 24, 2018

[REDACTED]

Dear [REDACTED]:

Re: Application for ICBC Fairness Commissioner's Review: File No. C [REDACTED]

I acknowledge receipt of your application, dated July 24, 2018, for a Fairness Review of the decision by ICBC to fail you on your driving test which you took on June 22, 2018, relating to a class 3 road licence application.

In reaching my decision I have taken into account the submissions you make in your review application, together with the contents of a file prepared for the purpose of this review by ICBC which includes, among other things, a full chronology of the relevant events, the road test form completed by your licence examiner, the relevant provisions that ICBC supplies relating to rules of the road, particularly right of way at intersections, and two earlier decisions of my own that deal with the same general issue as your own.

At this stage it would be useful to outline my jurisdiction and to underscore some features of it. My terms of reference limit my review to matters of process. I can interfere with decisions of the Corporation and make recommendations for change if I conclude that a customer has been dealt with in a discriminatory manner, or that the way in which the decision reached by the Corporation is in some way irregular leading to unfairness in the result. What I cannot do is make a recommendation for change to the Corporation merely because I would have reached a different conclusion, or that the customer does not agree with it.

My jurisdiction is concerned with procedural fairness. For example, has the Corporation taken the pertinent facts into account, listened to the arguments made by the customer, and communicated its decision and the reasons for it once it has been made? At the end of the day, is the Corporation's decision manifestly unreasonable in the circumstances of the case?

The facts of your case, at least as they are understood to be by ICBC, are set out in the letter to you, dated July 31, 2018, from [REDACTED], Customer Relations Advisor. You dispute one crucial fact and I will return to this later.

At the outset it is useful to be clear as to where the burden of proof in this review lies. The customer must demonstrate upon the balance of probabilities that he or she has been treated unfairly by ICBC. The Customer must demonstrate a procedural failure on the part of the Corporation or that the decision reached by ICBC is manifestly unreasonable. In most of the cases such as this they reduce to a "he says/she says" issue. In such instances it is very difficult for the customer to demonstrate unfairness on the part of the Corporation.

The one departure between yourself and the Corporation relates to the colour or colours of the light when you entered and left the intersection. In this respect your case differs from the bulk of those I deal with. You say that you entered the intersection when the lights had been stale green and they changed upon your entry to amber. You proceeded to go through the amber light to take the right turn due to the driving condition that you found yourself in. You point to a small car immediately behind you travelling at some speed as a rationale for proceeding through the amber light rather than stopping your vehicle.

You were failed on your driving test because your instructor concluded that you "cut off dump truck. Ran amber truck honking at him".

When you met the examiner and the licensing manager the examiner clarified what he had written on the test results by saying that the light was not amber but in fact red upon entry and that his note of it being amber was "a clerical error". As well, the licensing manager did not think it would be useful to attempt to find "an impartial witness days later for any event that didn't result in anything taking place such as a collision or anything else".

He also advised the Customer Relations reviewer that "in order for me to consider overturning any test results, I would need to believe with certainty that from a road safety standpoint, the customer entered the intersection on an amber. I cannot say without doubt that happened, and so to protect our goal of road safety, I have supported the disqualification mark from this road test". You, in fact, by advertising, did locate a witness to the events and his recollection of events confirms your own.

Where does this take us? There has clearly been a procedural failure on the part of the driving examiner in this case. He reported the lights to be amber wherein upon subsequent reflection he concluded they were red. This alteration of a most crucial fact is clearly prejudicial to you. To characterize the distinction between amber and red in the examiner's report as "a clerical error" is, in my opinion, merely an attempt to minimize the inexactitude of the report itself. Given that it

was the basis for failing you I find it difficult to see how it could be characterized as merely a clerical error.

As well, the licensing manager's decision not to seek witnesses because he could not envisage finding an impartial witness days after any event that didn't result in a collision or something else occurring I do not find very convincing. You found such a witness whose impartiality has not been denigrated by the Corporation and that witness confirmed your version of the facts. I agree that road safety is the most important factor in granting a licence of any sort, but the licensing manager's view that he would only consider overturning any test results if he believed with certainty that from a road safety standpoint an examiner had made an error, in my view, reflects a standard that is too high. He/she may need to be satisfied as to the very high probability of an error by an examiner but my view is that certainty does not have to be demonstrable in determining whether a customer has been dealt with unfairly.

Where does this take us? In my opinion this is one of those very rare cases where the customer has demonstrated upon the balance of probabilities that he has been treated unfairly for two reasons. The first is that there was a procedural failure on the part of the driving examiner when he marked the reason for not passing you was that you made a turn on an amber light. This should have led to an analysis of the safety merits of proceeding or stopping before a decision relating to failing you took place. Secondly, I think that the manager's decision not to overturn the examiner's conclusion was manifestly unreasonable in two respects. It placed too high a standard that was required to be met by the examinee in persuading the manager to reach that result, and the manager should have attempted to obtain witness statements before rejecting the review application by you. The witness statement that you procured supported your version of the events, had the licensing manager had that statement at the time of his review of the events may have led to a different result in your case. I do not find his rationale for not doing so to be very compelling.

The long and the short of it is that I do find procedural error on the part of the Corporation in dealing with your case and that you have demonstrated on the balance of probabilities that they led to a wrong result. Accordingly, I propose to make a recommendation to the Board of the Corporation that its decision to deny you a class 3 driving licence be reversed. I am fortified in this conclusion in noting that there was no actual danger to other road users manifested by your driving test results, even if another vehicle used its horn at you at the time.

Following receipt of this decision, should you wish to receive a copy of the ICBC report that was sent to me, please mail or fax your request to:

ICBC Privacy & Freedom of Information
151 West Esplanade
North Vancouver BC V7M 3H9
Fax: 604-443-4562

Please ensure you include your name, return address and signature (for identification purposes) with your request.

Your request will be handled as per the guidelines outlined in the *Freedom of Information and Protection of Privacy Act of British Columbia*.

Yours truly,

A handwritten signature in black ink, appearing to read "Peter Burns". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Burns, Q.C.
Fairness Commissioner

cc: Doug Cooper, Customer Relations and Review Services, ICBC

APPENDIX D

Terms of Reference for the ICBC Fairness Commissioner



STATEMENT OF PURPOSE

1. ICBC is a publicly owned and customer driven organization. As such, it recognizes the value of having a process to independently review the fairness of its actions. To achieve this goal, the Fairness Commissioner will review and make recommendations with respect to unresolved customer complaints that relate to the fairness of the process leading to a decision or action, but without duplicating existing internal or external dispute resolution processes. An important component of a fairness review is that it be completed in a timely manner. Accordingly, the Fairness Commissioner's review should be thorough but straightforward enough that recommendations may be made without undue delay.

SCOPE

2. An "unresolved customer complaint" is:
 - a. a complaint about the fairness of an ICBC decision, action or practice as it has been applied to a customer;
 - b. made in writing (with the assistance of ICBC staff if necessary) by an ICBC customer, where "customer" includes those who are directly affected by an ICBC decision, act or failure to act in any of its lines of business, and in which the customer agrees to the terms set out in section 9 b) of these Terms of Reference; and
 - c. not resolved to the customer's satisfaction after a reasonable effort by the customer to address their complaint through ICBC's internal complaint resolution processes including ICBC's Customer Relations department but does not include:
 - i. complaints by suppliers, brokers or employees of ICBC that arise from their contract or employment with ICBC;
 - ii. complaints or disputes that relate solely or primarily to the amount of a final payment, claim settlement or assessment of liability;
 - iii. complaints concerning the disposition of a violation ticket issued by a peace officer employed by ICBC, or the conduct of a peace officer employed by ICBC;
 - iv. complaints that relate to decisions made by or are at the discretion of the Board;
 - v. a matter that is referred to a court, a statutory tribunal or to arbitration; a court decision, a decision of a statutory tribunal or the result of an arbitration;
 - vi. complaints concerning the advice or conduct of lawyers; and
 - vii. matters that fall within the principal jurisdiction of statutory decision makers such as the Human Rights Tribunal.

CONDUCT OF REVIEW

3. Upon receiving an unresolved customer complaint for review, the Commissioner may do any of the following:
 - a. Refer the matter to the appropriate department of ICBC with or without recommendations;
 - b. Recommend that ICBC's Manager, Customer Relations conduct an investigation;
 - c. Facilitate a resolution of the complaints with the complainant and the appropriate ICBC personnel;
 - d. Recommend that the complaint proceed to mediation or arbitration;
 - e. Seek the assistance of the Executive or Board of Directors of ICBC;

- f. Conduct an investigation of the complaint;
 - g. Group together complaints of a similar nature and conduct a single review of the issue or issues raised by such complaints; and
 - h. With the consent of ICBC and the complainant, act as mediator with respect to the complaint, in which case the Commissioner may no longer continue to conduct an investigation or review or make any findings or recommendations with respect to the complaint.
4. If the Commissioner requires any documents or information from ICBC that the Commissioner considers might assist in the conduct of an investigation, ICBC will promptly make every reasonable effort to provide the required documents or information to the Commissioner, subject to the *Freedom of Information and Protection of Privacy Act* and any other law governing the disclosure of personal information.
 5. Any party that may be adversely affected by an investigation or recommendation must be given timely notification and an adequate and appropriate opportunity to respond to any issues raised and any possible findings or recommendations before they are finalized or published. Without limiting the previous sentence, if the Commissioner intends to recommend a remedy that has not been suggested by the parties the Commissioner will give both parties the opportunity to respond to the proposed remedy before making any findings or recommendations.
 6. If the Commissioner considers it appropriate, evidence may be taken from the complainant or a representative of ICBC under oath or affirmation, either verbally or in writing, but no person may be compelled to give such evidence.

COMPLETION OF REVIEW

7. At any stage in the review of an unresolved customer complaint the Commissioner may:
 - a. Recommend that an ICBC action or decision be reconsidered
 - b. Recommend that an exception be made to an ICBC policy or procedure, having regard to the impact that making such an exception may have on other customers
 - c. Recommend that an ICBC policy or procedure be studied or reviewed by the Board of Directors of ICBC, or that new policies or procedures be adopted to address customer needs
 - d. Make a report to the Executive or Board of Directors of ICBC with respect to the findings of an investigation; and
 - e. Determine that no further action or investigation is required

If the Commissioner makes a report or recommendation, the Commissioner must concurrently state in writing the reasons for the recommendation, including a description of the procedural unfairness that led to the recommendation or report. If ICBC declines to follow a recommendation, it must state to the Commissioner, in writing, its reasons for doing so.

8. ICBC will designate a member of its senior executive to act as ICBC's liaison with the Commissioner. The Commissioner may bring any concerns with respect to the implementation of a recommendation to the attention of the executive liaison.

CONFIDENTIALITY

9. Recognizing that any unresolved customer complaint could later become the subject of litigation, and information or documents received in the course of reviewing an unresolved customer complaint should not lose any claim of privilege which may attach to them:
 - a. The Commissioner, his/her staff and any individuals, including legal counsel, retained by the Commissioner to assist him/her in performing his/her duties will:
 - i. Maintain the confidentiality of all information and documents provided to the Commissioner;
 - ii. Not disclose to any person, including the other party, any information or documents provided to the Commissioner by ICBC or the complainant without the consent of the party who provided the information or document having been obtained in advance;
 - iii. If appropriate, obtain a written agreement from ICBC or the complainant that any confidential information or documents shared with them will be kept in strict confidence and not disclosed to any other person unless required by law; and
 - iv. Not refer to any information or documents in any correspondence, report or recommendations without the consent of the party who provided the information or document having been obtained in advance.
 - b. ICBC agrees, and the complainant will agree when making the unresolved customer complaint, that they will not request the Commissioner, his/her staff and any individuals, including legal counsel, retained by the Commissioner to assist him/her in performing his/her duties be compelled as a witness in court or in any proceedings of a judicial nature in respect of anything coming to the Commissioner's knowledge as a result of anything done pursuant to these Terms of Reference.

REPORTING

10. The Commissioner shall prepare an annual report for the Board of Directors and shall deliver that report to the Governance Committee of the Board. The Commissioner shall appear before the Governance Committee to discuss the report and shall also appear before that Committee or the Board at any other time the Committee or the Board may request or the Commissioner considers necessary, with respect to:
 - a. The activities of the Commissioner;
 - b. The adequacy of ICBC's responses to the Commissioner's investigations and recommendations, including a discussion of the number of his/her recommendations that were not accepted by ICBC and the explanations given by ICBC for declining to adopt them; and
 - c. Circumstances that the Commissioner believes require the Board's review of a specific policy or procedure.
11. After reporting to the Board and permitting the Board an opportunity to respond within a period of time that he/she considers reasonable, the Commissioner may, subject to Article 7 of these Terms of Reference, make a public report in respect of the matters set out in Article 10.