

**IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2
OF THE INSURANCE (VEHICLE) REGULATION,
B.C. Reg. 447/83 and the Arbitration Act [SBC 2020] c. 2**

BETWEEN:

MP

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

**Counsel for the Claimant,
MP**

**Donald C. McKay &
Robert Carfra**

**Counsel for the Respondent,
Insurance Corporation of British Columbia**

Lyle G. Harris, K.C.

Date of Hearing

March 16, 2023

Place of Hearing:

Vancouver, BC

Respondent's Argument delivered:

March 9, 2023

Claimant's Argument dated:

March 13, 2023

Respondent's Reply Argument delivered:

March 15, 2023

Arbitrator:

Dennis C. Quinlan, K.C.

Date of Award:

April 4, 2023

I. OVERVIEW

1. On January 2, 2015 the Claimant was injured while travelling in a motor vehicle that was hit from behind by another vehicle operated by LZ (the "Accident"). LZ was at fault for the Accident.
2. The motor vehicle liability insurance policy maintained by LZ (the "LZ Policy") was insufficient to satisfy the tort claims of the Claimant and other injured parties.
3. The Claimant reached an agreement with the liability insurer for LZ as to the value of her tort claim and pro rata share of his policy.
4. The Claimant, as an insured entitled to underinsured motorist protection ("UMP") in accordance with section 148.1 (2) of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the "Regulation"), then initiated the within arbitration pursuant to section 148.2 (1) of the Regulation and Arbitration Act [SCBC 2020] Chapter 2 (the "UMP Arbitration").
5. Unless otherwise indicated, all subsequent statutory references are to the Regulation.
6. The question before me arises from the Claimant having received wage loss disability benefits ("Benefits") from her private insurer Sun Life Assurance ("Sun Life").
7. As a contractual term of paying those Benefits, Sun Life asserted through the Claimant, a right of subrogation against LZ, which required the Claimant to pay Sun Life 75% of a defined amount recovered from LZ to a maximum of the benefits paid.
8. The Claimant ultimately paid Sun Life the sum of \$69,093.89 in satisfaction of Sun Life's subrogated interest.

9. The issue to be decided is whether the amount paid by the Claimant to Sun Life in satisfaction of Sun Life's subrogated interest is to be included in determining the deductible amount under section 148.1 (1) (i) as "...an amount paid or payable to the insured under any benefit or right or claim to indemnity.....".

10. On the facts of this arbitration, the issue becomes whether the deductible amount is \$101,364.00 as asserted by the Respondent, or \$32,270.11 as submitted by the Claimant, with the difference being the amount paid by the Claimant to Sun Life.

11. For the reasons below, I find that the amount paid to Sun Life by the Claimant in satisfaction of its subrogated interest is not to be included as a deductible amount. The deductible amount is therefore \$32,270.11.

II. BACKGROUND FACTS

12. The arbitration was efficiently conducted by way of an Agreed Statement of Facts, affidavit of the Claimant sworn March 13, 2023, certain excerpts from insurance records, and written and oral submissions.

13. The Claimant was born in Poland on February 26, 1980. At the time of the Accident she was working as an insurance broker in Victoria, B.C. earning \$37,800 per annum.

14. The insurance limits available under the LZ Policy were \$2,000,000. It was agreed those Policy limits were insufficient to satisfy the claims of all injured persons, resulting in the limits being tendered and accepted by those persons making a claim.

15. The Claimant did not return to work following the Accident. As a consequence, she applied for and received Benefits from Sun Life.

16. On September 15, 2015, the Claimant signed a document provided by Sun Life entitled Subrogation Acknowledgement which read in part:

Where benefits under this policy have been paid or may be payable to an Employee and the Employee has a right of action against a Third Party for recovery of loss of income which otherwise would have been earned by the Employee during the whole, or any part of the period that benefits are paid, or may be payable to the Employee under this policy,

1. any amount recovered by the Employee from the Third Party (including general damages, damages for loss of Income, interest and legal costs, whether recovered through settlement or trial), less the Employee's legal costs expended for such recovery, shall be deemed to be the Employee's Net Recovery from the Third Party;
2. the Employee shall pay to Sun Life an amount equal to 75% of his/her Net Recovery from the Third Party (to a maximum of the amounts paid to the Employee under this policy), such percentage of his/her Net Recovery to be held in trust by the Employee for Sun Life until payment is made to Sun Life;

Emphasis added

17. The parties agree that the reference to Third Party in the Subrogation Acknowledgment would include LZ.

18. In 2022 the Claimant reached an agreement with the liability insurer for LZ that the total quantum of her damages was \$1,342,845.96. She also agreed to accept the sum of \$450,000 as her pro-rata share of the LZ Policy.

19. In consideration for the above, the Claimant released LZ from all claims and causes of action. The form of release executed by the Claimant (the "Release") was part of the evidence before me.

20. The Claimant agreed that the payment of \$450,000 was a deductible amount pursuant to subsection (g) as an amount paid under a certificate, policy or plan of insurance providing legal liability indemnity to LZ.
21. At the time of settlement with the liability insurer for LZ, the Claimant had received Benefits totalling \$101,364.
22. On or about August 24, 2022, the Claimant after factoring in legal fees, agreed to pay Sun Life the sum of \$69,093.89 in satisfaction of its subrogated interest.
23. The payment by the Claimant to Sun Life was sourced from her \$450,000 pro-rata share of the LZ Policy.
24. Paragraph 23 of the Agreed Statement of Facts captured the essence of the dispute between the Claimant and Respondent:

23. While conceding that the balance of the Sun Life past payments and the amount claimed for legal fees, qualify as “deductible amounts” the Claimant disputes that the amount paid to Sun Life of \$69,093.89 for settlement of its subrogation claim is a “deductible amount”.

III. POSITION OF THE PARTIES

(a) Respondent

25. The Respondent describes the issue as “whether the subrogation claimant’s payment (sic) of an amount to Sun Life reduces the “deductible amount” of the Sun Life payments?”
26. The Respondent submits the answer to the above question is “no” and in support, the Respondent puts forward a two pronged argument.

27. First it submits that any subrogation interest of Sun Life was extinguished upon the Claimant executing the Release in favour of LZ.
28. The Respondent argues that the extinguishment of Sun Life's subrogated interest applied not only to future claims, but also to the \$450,000 payment which the Claimant received in exchange for the Release.
29. Second the Respondent asserts that "....if a subrogation claim does exist, it does not reduce the "deductible amount" of the payments to Sun Life".
30. In written argument, the Respondent states that the Respondent's payment to Sun Life of \$69,093.89 was made under a mistake of law, which in oral argument was expanded to mean the Claimant should have refused to make payment to Sun Life given the extinguishment of the subrogated interest.
31. In support, the Respondent relies upon a statement made in *Montgomery v. ICBC*, November 30, 1999 (Arbitrator Yule).
32. In its Reply argument, the Respondent relied upon principles of statutory interpretation. It submitted the decision raised by the Claimant of *S. A. (Re)*, 2020 BCSC 1323 which addressed the concept of double deduction in a subrogation scenario, had no application to the facts at hand as the issues were different.
33. The Respondent asserts that the wording in subsection (i) "paid or payable to the insured under any benefit or right or claim to indemnity...." is clear and should be interpreted based upon the plain meaning of the words used and within the context of the enabling legislation.
34. Simply put it submits Sun Life paid \$101,364 as Benefits to the Claimant, and it was this payment that is the deductible amount under subsection (i). Any matters of repayment are as between the Claimant and Sun Life, and play no role in the determination of deductible amount under subsection (i).

35. The Respondent submits it is notable that while the legislature saw fit to amend the Regulation in 2007 so as to limit the deductibility of Workers Compensation benefits under subsection (f) to certain specified circumstances, no similar amendment was made to subsection (i). As such subsection (i) should be interpreted based upon the words used and without importment of any limitation.

(b) Claimant

36. The Claimant begins its submissions by stating that UMP legislation was aimed at providing compensation to persons who were injured by an underinsured motorist, through the provision of mandatory UMP coverage.

37. In addition to the mandatory coverage, additional UMP coverage could be purchased for an additional premium to provide additional protection.

38. Additional UMP coverage was purchased by the Claimant.

39. The Claimant acknowledges that UMP coverage is a fund of last resort in that if a person injured in an accident is fortunate enough to receive payments from another source such as a private insurer, the Regulation allows the Respondent to deduct the value of those payments from the UMP coverage otherwise payable.

40. This structure was designed to prevent the injured person from receiving compensation twice; that is once from the private insurer and once from UMP coverage. The Claimant acknowledges this is a fair result intended by the legislation.

41. The Claimant agrees that while she received benefits totalling \$101,364 from Sun Life, \$69,093.89 of that amount was repaid to Sun Life following receipt of the \$450,000 tort settlement.

42. In the Claimant's submission, the value of the Benefits remaining after repayment was \$32,270.11 and it is this amount that should be deducted under subsection (i).

43. She submits that to allow the Respondent to deduct both the \$450,000 tort settlement and Benefits of \$101,364, would be to ignore the repayment by the Claimant to Sun Life in respect to its subrogated interest, and result in a double deduction in favour of the Respondent.

44. The Claimant submits that such double deduction was not intended by the legislation and would be unreasonable, inequitable and illogical as those words were used in *Rizzo v. Rizzo Shoes Ltd. (Re)*, 1998 CanLii 837 (SCC) and an absurdity as described in *S.A. (Re)*, 2020 BCSC 1323.

IV. SUMMARY OF UMP COMPENSATION SCHEME

45. In British Columbia there was until May 1, 2021, a statutory automobile insurance scheme that was both compulsory and optional. The pre May 1, 2021 scheme applies to the Accident.

46. The public policy underlying the legislative scheme was identified by Madam Justice Garson in *Niedermeyer v. Charlton*, 2014 BCCA 165 at para. 90:

[90] The public policy embraced by the legislative scheme is to provide a universal, compulsory insurance program as part of the legislature's efforts to ensure safety on the roads and access to compensation for those who suffer losses when those measures fail.

Emphasis added

47. UMP is a statutory form of first party insurance which provides compensation to an insured person in the event that an at-fault motorist has insufficient or no liability insurance or other assets with which to pay a judgment.

48. As stated in *K.P. On Her Own Behalf and As The Litigation Guardian N.P., An Infant v. ICBC* (Arbitration Award April 30, 2019, Arbitrator Yule) at para. 48, the legislation is benefit-conferring, to be interpreted in a broad and generous manner.

49. UMP compensation is a fund of “last resort” in that compensation is payable only after all listed deductible amounts set out in section 148.1 (1) have been taken into account: *S.A.* at para. 25.

50. Section 148.1 (1) pertaining to “deductible amount” is attached as Schedule A hereto.

51. The intent of the legislation and purpose of deductible amounts is aptly described in *Hossen-Najad v. ICBC*, (Arbitration Award December 21, 2000, Arbitrator Yule) at para. 67 and repeated in *K.P.* at para. 51:

“....the purpose of having deductible amounts in s. 148.1 may not be explicitly to avoid double compensation, which is a rationale behind the s. 25 deduction. The rationale for deductible amounts in the UMP compensation scheme is to insure that a claimant exhausts all other potential sources of benefit before accessing this fund of last resort. But the fundamental rationale is the same. The deductions exist to avoid the possibility of the claimant receiving more payment than is intended, or excess recovery.....In the UMP scheme, because it is intended to be a fund of last resort, the claimant must obtain recovery from all other listed sources, which benefits are deducted, so that the total amount received from all sources does not exceed the limit of UMP coverage.”

Emphasis added

52. The interaction between the amount of UMP coverage and deductible amounts is illustrated in section 148.1 (5) which provides that the liability of the

Corporation shall not exceed the limit of coverage set out in Schedule 3 minus the sum of the applicable deductible amounts.

53. In respect to assertions that a particular deductible amount applies, the onus of proof is on the Respondent: *K.P.* at para.11.

V. ANALYSIS

54. I will address the arguments made by the Respondent in the order set out in paragraphs 25 to 35 herein.

55. First the Respondent submits that the subrogation interest of Sun Life was extinguished upon the Claimant executing the Release of LZ. As there was no subrogation interest, no payment should have been made by the Claimant to Sun Life.

56. No legal authority was provided in support of this proposition.

57. In my view, such submission does not reflect the concept of subrogation and does not take into account the terms of the Subrogation Acknowledgement which the Claimant agreed to.

58. The Court of Appeal recently addressed subrogation in *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2021 BCCA 164 at paras. 39 and 40:

[39] Subrogation is a doctrine that overcomes the lack of privity between an innocent third party who has paid compensation to the victim of a tort and the tortfeasor. It was described by this Court in *Riley v. Ritsco*, 2018 BCCA 366 as follows:

[110]Subrogation....allows an innocent third party who pays compensation to a victim, to stand in the shoes of the victim in recovering from the wrongdoer the amounts paid. The doctrine can operate in various ways. Depending on the contractual language and on statutory provisions, an insurer who has a right

to a subrogated claim may be entitled to sue a tortfeasor directly, or may have a right to have the victim sue and hold proceeds for the insurer's benefit. In no case, however, will a right of subrogation, without further contractual rights, entitle an insurer to recover more from the victim than the victim is able to recover from the tortfeasor.

[40] Subrogation shifts the financial burden of compensating the victim of a tort from the third-party to the tortfeasor without influencing the plaintiff's overall entitlement: *Somersall v. Friedman*, 2002 SCC 59 at para. 50.

Emphasis added

59. The underscored words in *Riley* reflect precisely the contractual requirement imposed upon the Claimant by the Subrogation Acknowledgment namely ".....to pay to Sun Life an amount equal to 75% of his/her Net Recovery from the Third Party.....such percentage to be held in trust by the Employee for Sun Life until payment is made to Sun Life.

60. Ironically had the Claimant proceeded in the manner suggested by the Respondent, the Claimant faced the prospect of having her Benefits terminated resulting in the Respondent losing the benefit of future deductible amounts.

61. In short, the Claimant's UMP entitlement and the Respondent's legal liability would potentially have increased under the scenario advanced by the Respondent.

62. It goes without saying that any claim post-release by the Claimant and necessarily any post-release subrogated interest of Sun Life was extinguished upon delivery of the Release.

63. However I see no basis for the Respondent's assertion that any such extinguishment would apply to the settlement amount of \$450,000 provided in

consideration of the Release, particularly given the terms of the Subrogation Acknowledgement.

64. The Respondent's second argument is that if a subrogation claim did exist, it did not reduce the deductible amount.

65. The Respondent submits that the payment of \$69,093.89 was made under a mistake of law in that the Claimant ought to have refused payment to Sun Life because the subrogation interest was extinguished.

66. I consider this submission to be a restatement of the first argument.

67. Having already found against the Respondent on the extinguishment issue, I do not accept the restatement submission.

68. The Respondent relies upon the statement in *Montgomery* at para. 100 where the Arbitrator stated as a summary conclusion that "...Canada Life's subrogated interest...[did] not affect the deductibility of benefits under UMP..."

69. In *Montgomery* the reason Canada Life's subrogated interest did not affect the determination of deductible amounts was because no Canada Life benefits were payable as a result of an integration clause.

70. In my view, the Arbitrator's statement in isolation does not stand for the proposition asserted by the Respondent.

71. The Respondent then in its Reply Submission raised a statutory interpretation argument.

72. The essence of the Respondent's submission is that Sun Life paid the Claimant \$101,364 in Benefits. Subsection (i) speaks of benefits paid to the insured with no limitation, such that \$101,364 is the correct deductible amount.

73. The answer to that argument in my view is found in the submission of Mr. McKay on behalf of the Claimant. In his words, "...the Benefits were paid, held in trust, and then repaid. If repaid, then they were not paid for the purpose of subsection (i)".

74. From the Claimant's perspective, she actually received \$450,000 in settlement of her tort claim and \$32,270.11 in Benefits, the latter amount taking into account the \$69,093.89 paid back to Sun Life.

75. From Sun Life's perspective, it paid \$101,364 but was then repaid \$69,093.89, leaving an actual payment of \$32,270.11.

76. Whether one characterizes the scenarios as double deduction by the Respondent, repayment of Benefits by the Claimant or net amount received by the Claimant, the result is the same. She was paid and received \$450,000 plus \$32,270.11. It is those sums which reflect the deductible amounts under subsections (g) and (i).

77. In summary, one cannot ignore the fact there was a repayment of Benefits by the Claimant to Sun Life from the \$450,000 received in settlement of the tort claim. The interpretation urged by the Respondent does not reflect what actually occurred and in my view is not an interpretation that was intended by the legislature in the drafting of subsection (i).

78. As described in *Hossenl-Njad*, the intent of the UMP compensation scheme was to avoid double recovery. Equally however, the legislative intent in my view was to avoid double deduction. A Claimant is entitled to no more than what the UMP coverage provides, but also no less.

79. Such approach is consistent with the statutory interpretation principles outlined in *Rizzo* requiring a consideration of the object, overarching purpose and intention of benefit conferring legislation.

80. I wish to make two last points.

81. First the Respondent made the valid point that in 2007, the Legislature thought it necessary to amend the wording of subsection (f) in respect to deduction of Workers Compensation benefits involving subrogation rights, so as to largely eliminate their characterization as a deductible amount, but enacted no similar amendment in respect to subsection (i).

82. Mr. Harris, counsel for the Respondent, submits this was intentional such that subsection (i) should be read so as to provide that the full amount of any benefits paid would be a deductible amount, regardless of any subrogation clause and/or subsequent repayment.

83. Mr. McKay in response, submitted there was no difficulty with the present wording of subsection (i) and thus no need for change.

84. Having considered this issue, I agree with Mr. McKay. The wording of subsection (i) references benefits paid which in my view creates no confusion or unfairness requiring of an amendment. As illustrated by my finding herein, and so long as there is a bona fide repayment, it is a straightforward issue to determine what was paid so as to constitute a deductible amount.

85. Last, reference was made in this arbitration to the decision of **S.A. (Re)**. That decision while involving some of the issues in this arbitration, was significantly complicated by a number of additional issues, including a statutory subrogation clause (Workers Compensation), legislation which changed significantly after the date of the relevant accident, transitional sections which addressed which legislation was to apply, and perhaps most importantly, no repayment of benefits as occurred here.

86. While there are helpful general principles referred to in **S.A. (Re)**, I do not find it necessary to rely upon the result in **S.A. (Re)** in coming to my decision herein.

VI. CONCLUSION

87. In answering the question put before me, I find that the amount of \$69,093.89 paid by the Claimant to Sun Life is not included as a deductible amount under subsection (i).
88. Assuming the total Benefits paid to the Claimant before repayment were \$101,364, the deductible amount under subsection (i) is \$32,270.11.
89. Unless there are issues I am not aware of, the Claimant is entitled to her costs on a party and party basis in accordance with section 148.2(3). I understand agreement may have been reached between the parties as to the manner in which costs are to be dealt with.
90. However should either party wish to make submissions, a telephone conference can be arranged to discuss how best to proceed.

Dated: April 4, 2023

Dennis Quinlan

Arbitrator – Dennis C. Quinlan, K.C.

Shedule "A"

Insurance (Vehicle) Regulation, B.C. Reg. 447/83

Underinsured motorist protection

148.1 (1) In this section:

...

"deductible amount" means an amount

(a) paid or payable by the corporation under section 20 or 24 of the Act, or recoverable by the insured from a similar fund in the jurisdiction in which the accident occurs,

(b) Repealed. [B.C. Reg. 117/2021, App. 6, s. 20 (a).]

(c) paid or payable under Part 7 or under legislation of another jurisdiction that provides compensation similar to benefits, other than under the Memorial Grant Program for First Responders,

(d) paid directly by the underinsured motorist as damages,

(e) paid or payable from a cash deposit or bond given in place of proof of financial responsibility,

(f) to which the insured is entitled under the Workers Compensation Act or a similar law of the jurisdiction in which the accident occurs, unless

(i) the insured elects not to claim compensation under section 10 (2) of the Workers Compensation Act and the insured is not entitled to compensation under section 10 (5) of that Act, or

(ii) the Workers' Compensation Board pursues its right of subrogation under section 10 (6) of the Workers Compensation Act,

(f.1) to which the insured is entitled under the Employment Insurance Act (Canada),

(f.2) to which the insured is entitled under the Canada Pension Plan,

(g) paid or payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist,

(h) paid or payable under vehicle insurance, wherever issued and in effect, providing underinsured motorist protection for the same occurrence for which underinsured motorist protection is provided under this section,

(i) paid or payable to the insured under any benefit or right or claim to indemnity, or

(j) paid or able to be paid by any other person who is legally liable for the insured's damages;