IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2 (1) OF THE REVISED REGULATIONS TO THE *INSURANCE (MOTOR VEHICLE) ACT*
BC REG. 447/83

AND

THE COMMERCIAL ARBITRATION ACT,
RSBC 1996, c. 55

BETWEEN:

BL

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION ON APPLICATION OF ARBITRATOR, MARK TWEEDY

Counsel for the Claimant: Mark Belanger

Counsel for the Respondent: Guy Brown, QC

Date of Decision: May 16, 2016

A. Introduction

[1] This proceeding is a claim by the Claimant BL ("BL") against the Respondent ("ICBC") for benefits pursuant to the *Under Insured Motorist Protection Regulations* of the *Insurance (Motor Vehicle) Act* ("the Regulations").

B. The nature of this Application

[2] ICBC applies for an order that BL produce copies of all documents in his possession or control, including any release, that relate to the settlement of the action he brought against KF for injuries he sustained in a collision which occurred in Washington state on May 15, 2009.

C. History

[3] The history of this matter is of some import to this Application. BL commenced this proceeding by a Notice to Arbitrate, delivered on May 29, 2015. A Statement of Claim was delivered on September 20, 2015. Both the Notice to Arbitrate and the Statement of Claim pleaded a without prejudice settlement offer which Mr. AS made on behalf of ICBC to BL's counsel. BL alleged that the offer constituted *de facto* consent for him to settle the Washington state action.

[4] Both the Notice to Arbitrate and the Statement of Claim contain a paragraph which pleads that the Washington state action has been settled and that the settlement did not "prejudice" the Respondent as contemplated by section 148 of the Regulations.

[5] On or about December 2, 2015, ICBC brought an Application to strike the paragraphs in the Notice to Arbitrate and Statement of Claim which I referred to above. ICBC argued that that these pleadings improperly disclose "a communication created for and communicated in the course of settlement negotiations which is subject to settlement privilege".

[6] BL agreed that the two paragraphs referencing the settlement offer disclosed a settlement privilege, but said that their disclosure ought to be permitted as an exception to the general rule that such communications ought not to be disclosed. He argued that the paragraphs constitute an exception to the general rule on the grounds that public policy and interest demanded disclosure of the otherwise privileged communications. It was said that disclosure, in this instance, is required to ensure fairness between ICBC and its insured, BL.

[7] In a Decision February 16, 2016 decision, I decided that there was no public policy or interest which dictated that Mr. AS' settlement offer should not remain privileged. Therefore, I ordered that the two paragraphs in the Notice to Arbitrate and Statement of Claim be struck.

[8] On or about March 8, 2016, ICBC brought an Application to dismiss these proceedings, on the basis that the Claimant had not established a right to proceed with an Arbitration pursuant to s. 148.1 (2) of the *Insurance (Vehicle) Regulation.* ICBC says that the regulation requires either that the Claimant had an unsatisfied judgment against the tortfeasor or that had its consent to settle, and that neither was present in this case. ICBC says that the law governing this case is set out "conclusively" by the Court of Appeal in *Beauchamp v. ICBC,* 2005 BCCA 507, as applied by Arbitrator Donald W. Yule, QC, in *GG v. ICBC* (arbitration, 27 October 2010).

[9] On or about May 2, 2016, BL's Counsel delivered a Response to ICBC's Application to strike this proceeding. It advances a number of positions and arguments. Pertinent to this matter however is the argument that because there was no liability issue in the Washington state proceeding, this case is distinguishable from *Beauchamp* and *GG.*

D. The position of the parties in this Application

[10 ICBC says that because BL takes the position that liability was not an issue in the Washington state action, there is a factual dispute because that position directly contradicts the pleading which the Defendant filed in the Washington state action. Further, ICBC says that the usual rules relating to settlement privilege do not apply because BL describes and relies upon the settlement in the pleadings he filed in this proceeding.

[11] BL opposes ICBC's Application. He says that the settlement documentation is subject to settlement privilege. He relies on the decision of the BC Court of Appeal in *Middlekamp v. Fraser Valley Real Estate Board* (1992) 71 BCLR (2d) 776. He says that there is no fraud or *bona fide* public interest present that "trumps" settlement privilege.

[12] BL also says that the position ICBC now takes is "completely contrary" to the position it took regarding striking the two paragraphs regarding the settlement offer which Mr. AS made.

[13] Finally, BL says that the various steps which ICBC took in this proceeding have resulted in it attorning to the "jurisdiction of this Tribunal", and that the Application to dismiss the Arbitration should be dismissed. This seems to me an argument that is unrelated to the Application to compel production of settlement documentation, but is one I will address on ICBC's pending Application to dismiss the Arbitration proceedings.

E. Analysis

[14] In my view, given BL's pleadings and the legislative scheme, the fact of the settlement, and documents relating to the settlement of the Claimant's case are relevant to the issues in this proceeding. Indeed, any award that might ultimately be made in this proceeding would have to take into account the settlement amount in the Washington state proceeding, as BL is not entitled to double recovery.

[15] I do not believe that the position ICBC advances on this Application is contrary to the position it took on the Application to strike the paragraphs which disclosed the settlement offer which Mr. AS made. ICBC did not plead that the offer was made and then seek to claim privilege over it, Indeed, the Application proceeded on the sole basis of whether the public policy and interest exception applied, allowing BL to plead and rely upon Mr. AS's statements.

[16] In this case, BL refers to the settlement in his pleading. That there was a settlement at all is an integral part of his claim against ICBC. I do not view those facts as being in any way similar BL pleading a settlement offer made by ICBC.

[17] I also note the BL's position that this case is distinguishable from *Beauchamp* and *GG,* because there is no liability issue in this case. In my opinion, there must be evidence before me of that distinction if I am to eventually rule upon it.

F. Decision

[18] It is my view that ICBC is entitled to an Order that the BL produce copies of all documents in his possession or control, including any release, that relate to the settlement of the Washington state action. I specifically do not include in this order counsel's work product. Rather, I restrict the Order to documents relating to the settlement of the Washington state action *per se.*

Mark Tweedy
Arbitrator