BCICAC File No.: DCA-1242-UMP

IN THE MATTER OF AN ARBITRATION PURSUANT TO SECTION 148.2(1)
OF THE REVISED REGULATIONS TO THE
INSURANCE (VEHICLE) ACT, (B.C. Reg.447/83)

And

THE *COMMERCIAL ARBITRATION ACT*,
R.S.B.C. 1996 c. 55

BETWEEN:

GG

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION RE PRELIMINARY ISSUES

Donald W. Yule Q.C., Arbitrator
Date of Hearing: **September 23, 2010**
Place of Hearing: **Vancouver, British Columbia**
Date of Award: **October 27, 2010**

Counsel for the Claimant
Mr. Greg Samuels
Cross-Border Law Corporation
#204 – 1730 West 2nd Avenue
Vancouver, BC V6J 1H6

Counsel for the Respondent
Mr. Vincent R.K. Orchard, Q.C., and
Mr. Luke Dineley
Borden Ladner Gervais, LLP
Barristers & Solicitors
1200 – 200 Burrard Street
Vancouver, BC V7X 1T2

INTRODUCTION

1 In this arbitration the Claimant, GG (the "Claimant") seeks compensation from the Respondent, Insurance Corporation of British Columbia ("ICBC") under the Underinsured Motorist Protection ("UMP") provisions of Section 148.2 of the Regulations to the *Insurance (Vehicle) Act*, R.S.B.C. 1996 c. 231. The claim arises out of a motor vehicle accident in Washington State, U.S.A. on July 12, 2003. The parties have agreed to have determined two preliminary issues. The first issue is the "entitlement" issue, that is, whether the Claimant is entitled to proceed with an UMP claim in the circumstances that have transpired. If the Claimant is entitled to proceed with his UMP claim, then the second issue is whether ICBC is entitled to raise as a defence in the arbitration proceeding the Claimant's alleged contributory negligence for the accident.

BACKGROUND CIRCUMSTANCES

The Motor Vehicle Accident

2 The accident occurred on July 12, 2003. The Claimant was travelling north on State Highway 99 in Snohomish County, Washington, U.S.A. He was driving a 1993 Ford Explorer with three passengers, DO, SC and AL ("the passengers"). The accident occurred at the uncontrolled intersection of Highway 99 and 204th Street southwest, near Lynwood, Washington. The Claimant was proceeding in the far right (curb) lane of three northbound lanes. The other motorist, SK was driving a 2000 Honda Civic. She was proceeding south on Highway 99 in a left turn lane attempting to turn left to proceed east on 204th Street southwest. Traffic in the middle two northbound lanes was stopped. The SK vehicle turned into the path of the Claimant's vehicle and the collision occurred.

The Washington Lawsuit

3 The Claimant and the passengers all retained counsel to advance personal injury claims against the other motorist, SK. A complaint was filed on July 11, 2006 in the Superior Court of Washington for Snohomish County under Complaint No. 062096566. The complaint set out the factual circumstances of the collision in paragraphs 3.1-3.3. Paragraph 4.1 of the complaint alleged that SK's negligent operation of her vehicle was a direct and proximate cause of injury and damage to the Claimants. Paragraph 4.1 then set out a short list of alleged specific acts of negligence. An Answer to the Complaint was filed on December 13, 2007 by counsel for SK. The Answer admitted the factual allegations in paragraphs 3.1, 3.2 and 3.3 of the Complaint. With respect to section 4.1, the Answer stated that SK "acknowledges primary negligence for said accident, otherwise denies all allegations." An Amended Answer for SK dated August 27, 2008 stated, with respect to paragraph 4.1 of the Complaint that SK "acknowledges negligence and sole liability for said accident but denies the remaining allegations set forth therein." (emphasis added).

4 SK had an auto liability policy with AllState. Its limits were $25,000.00 per Claimant and $50,000.00 per accident. This meant that the Claimant and his passengers had access to no more than $50,000.00 in insurance monies on behalf of SK, which amount they would have to share, and no single Claimant could receive more than $25,000.00. In June, 2007, Mr. Samuels demanded that AllState pay its policy limits in settlement of the Washington Action which AllState subsequently offered to do.

Negotiations with ICBC

5 The UMP Regulations provide, *inter alia,* in section 148.2 (4)(b) that ICBC is not liable to pay compensation to an Insured who, without its consent and to its prejudice, settles or prosecutes to judgment an action against someone who may be liable to the Insured for his or her injury. Thus, on July 11, 2007, Mr. Samuels advised ICBC of AllState's policy limits

settlement offer with a view to obtaining ICBC's consent to accepting on some pro rata basis AllState's limits on behalf of all his clients (Exhibit 3 to the Statement of Claim). Some, although I think not all, the written communications between Mr. Samuels and different examiners at ICBC, are in evidence. Suffice it to say that ICBC considered that the Claimant may have been contributorily negligent for the accident and ICBC wished to have that issue determined in some forum on the merits. As noted previously, the Answer filed in the Washington Action for SK admitted negligence and did not assert contributory negligence against the Claimant. In the "without prejudice" negotiations that went back and forth, one proposal by ICBC was that it would consent to the four Claimants' accepting AllState's limits and would agree to proceed straight to an arbitration, provided it was agreed that the Claimant's alleged contributory negligence could be determined in the arbitration and provided that SK would cooperate by participating in the arbitration. On the other hand, Claimant's counsel invited ICBC to intervene in the Washington State Action if it wished to raise the contributory negligence issue. In the result, there was a stalemate. Claimant's counsel declined to agree to have the Claimant's possible contributory negligence become an issue in an UMP arbitration where the issue was not raised in the Washington action and ICBC declined to intervene in the Washington Action.

6 In an email from Claimant's counsel to ICBC dated February 22, 2008, (Exhibit 1 – Affidavit of MEC – Ex. B) counsel summarized a prior telephone conversation in part as follows:

> "You'll allow us to accept the policy limits settlement limits if we agree to a confidential arbitration where the arbitrator would be given the opportunity to decide liability issues including the question of (the Claimant's) contributory negligence, essentially waiving *Dahl v. Whitehill*. In exchange, we'll be allowed to accept the policy limits settlement.
>
> Otherwise, you say that I will be jeopardizing my client's UMP claims in that I have not yet obtained a judgment against an "underinsured" defendant as required by the regulations.
>
> Please correct anything with which you disagree."

7 During the negotiations, ICBC indicated that it was not raising the issue of the Claimant's contributory negligence with respect to the claims of the passengers, but only with respect to the Claimant's own UMP claim (Exhibit 1 – Exhibit B). (Had ICBC insisted that the Claimant was partly responsible for the accident, it would then have had to pay, on behalf of the Claimant, some portion of the passengers' injury claims attributable to the Claimant's degree of fault for the accident). The fact that contributory negligence was not being raised with respect to the passengers' claims led to negotiations and ultimately the settlement of the passengers' claims. The passengers, with ICBC'S consent, accepted on a pro rated basis, $30,000.00 from the AllState limits and their actions against SK were ultimately dismissed by consent. In addition, ICBC settled the UMP claims of the passengers by paying $8,000.00 as UMP compensation to one passenger and $4,500.00 as UMP compensation to each of the two remaining passengers. ICBC consented to the passengers' settlement with AllState in June 2008. ICBC settled the UMP claims of the passengers in February 2009 (Exhibit1 - Exhibit D, Exhibit G, Exhibit H).

Disposition of the Claimant's Claim

8 When ICBC consented to the settlement of the passengers' claims with AllState in June 2008, it expressly did not consent to the Claimant settling as well (Exhibit 1 – Exhibit "D"). Notwithstanding this refusal, and without further communication with ICBC, the Claimant proceeded to settle his claim against SK by accepting the remaining $20,000.00 of AllState's limits in exchange for a Full and Final Release of SK and the entering of a Consent Dismissal Order of the Washington Action (Exhibit 1- Exhibits "E" and "F"). As an additional term of the settlement, defence counsel for SK wrote a letter dated August 27, 2008 stipulating that SK "is 100% liable in this case." (Exhibit 3).

UMP Arbitration Proceedings

9 The Claimant commenced this UMP proceeding by filing the requisite notice on June 4, 2010

with the British Columbia International Commercial Arbitration Centre. A Statement of Claim was filed June 29, 2010. It alleges, *inter alia,* the following injuries: a mild traumatic brain injury, concussion with post concussion symptoms, multiple contusions and muscular-ligamentous injuries to the neck, back and right knee. It attaches as Exhibit 3 a Statutory Declaration of SK sworn October 10, 2007 with respect to her assets. The only asset of significance is a home and household furnishings estimated to be worth approximately $310,000.00. Also annexed is a letter dated December 11, 2007 from counsel for SK in Washington State to Claimant's counsel indicating the presence of a mortgage of $305,000.00 against SK's home and indicating a Snohomish County tax evaluation for 2008 for the home being only $291,200.00 i.e. less than the outstanding mortgage.

10 ICBC filed its Statement of Defence dated July 8, 2010, in the UMP proceeding. It denies the Claimant is entitled to any UMP compensation at all; hence, this preliminary hearing of entitlement issues.

Applicable UMP Regulations

11 I annex to this Decision a complete copy of Part 10, Division 2, of the Insurance (Vehicle) Regulation.

12 It is not disputed that the Claimant meets the definition of an "Insured" for UMP purposes.

13 The important parts of the Regulation for the purpose of this Hearing are the definition of Underinsured Motorist in section 148.1(1), the Insuring Agreement in section 148.1(2) the Requirement for Dispute Resolution by Arbitration in section 148.2(1) and the Restriction on Liability in section 148.2(4)(b).

14 "Underinsured motorist" is defined as follows:

"Underinsured motorist means an owner or operator of a vehicle who is legally liable for the injury or death of an Insured but is unable, when the injury or death occurs, to pay the full amount of damages recoverable by the insured or his personal representative in respect of the injury or death."

15 The Insuring Agreement is as follows:

Section 148.1(2) "Where death or injury of an insured is caused by an accident that

(a) arises out of the use or operation of a vehicle by an underinsured motorist, and

(b) occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America,

the corporation shall, subject to subsections (1), (5) and (6) and section 148.4, compensate the insured, or a person who has a claim in respect of the death of the insured, for any amount he is entitled to recover from the underinsured motorist as damages for the injury or death."

16 The requirement for Dispute Resolution by Arbitration in Section 148.2(1) is as follows:

"The determination as to whether an insured provided underinsured motorist protection under section 148.1 is entitled to compensation and, if so entitled, the amount of compensation, shall be made by agreement between the insured and the corporation, but any dispute as to whether the insured is entitled to compensation or as to the amount of compensation shall be submitted to arbitration under the *Commercial Arbitration Act*".

17 The Restriction on liability in Section 148.2(4)(b) is as follows:

S.148.2(4) The Corporation is not liable under section 148.1

(b) to an insured who, without the written consent of the corporation and to its

prejudice, settles or prosecutes to judgment an action against a person or organization that may be liable to the insured for injury or death.

Issue No. 1 – The Entitlement Issue

Summary of the Position of the Parties

18 ICBC's position is that the Claimant is not entitled to any UMP compensation for three reasons. The first is that the Claimant has not established the existence of any underinsured motorist. ICBC relies upon the decisions in the *Dahl v. Whitehill* (1996) 17 B.C.L.R. (3rd) (226) and *Beauchamp v. ICBC* (2005), B.C.C.A. (507). Second, because of the settlement and release of SK, ICBC says that the Claimant is not "legally entitled" to any "extra" compensation from SK. Third, by settling with SK without ICBC's consent, ICBC says it is thereby prejudiced and on that ground alone, based on section 148.2(4)(b), ICBC is entitled to refuse any compensation.

19 The Claimant's position is that "legal entitlement" has been conclusively established by the pleadings in the Washington Action in which SK has admitted "sole liability for the accident." ICBC has conceded that there is an "underinsured motorist" because it has settled the passengers' UMP claims arising out of this accident without requiring any contribution (from itself) for contributory negligence on the part of the Claimant. It is implicit in the settlement of the passengers' UMP claims that SK was legally liable for their damages and that SK could not pay any amount exceeding her insurance coverage. She could not even pay the exceedingly modest amounts of $4,500.00 and $8,000.00 which ICBC paid as UMP compensation. In any event, ICBC had a statutory declaration from SK and an explanatory letter from her solicitor evidencing her inability to pay any excess award. It would have been pointless for the Claimant to spend the time and incur the expense of proceeding to trial and judgment in the Washington Action, because liability was established on the pleadings; thus

there was no prospect of any issue of the Claimant's contributory negligence being judicially determined in the Washington Action where it was not even raised on the pleadings. Moreover, because the Regulations provide that for the purposes of determining UMP compensation, the law of British Columbia applies in arbitration to assess damages, a Washington judgment – apart from establishing an amount that SK could not pay – would be irrelevant for the purpose of determining, in the BC arbitration proceeding, the quantum of UMP compensation to which the Claimant was entitled.

DISCUSSION AND ANALYSIS

(a) No "Underinsured Motorist"

20 In simple terms, the scheme of the *Act* is that ICBC shall compensate an insured for any amount he is entitled to recover from an underinsured motorist as damages for the injury sustained. "Underinsured motorist" is defined to mean a motorist who is "legally liable" for the injuries of the Insured but is unable when the injury occurs to pay the full amount of damages recoverable by the Insured in respect of the injury. The entitlement to UMP compensation and the amount of compensation are to be determined by arbitration. Thus, the scheme of the *Act* seems to contemplate a prior judicial proceeding at which the tort feasor has been found legally liable for a sum that he is unable to pay.

21 ICBC relies upon the *Dahl* and *Beauchamp* decisions. In *Dahl v. Whitehill* (1996) 17 B.C.L.R. (3rd) 226 (BCSC-Hogarth, J.) the Plaintiff was injured in a motor vehicle accident whilst a passenger in a vehicle driven by the Defendant. The Defendant was impaired by alcohol. Having denied coverage to the driver, ICBC participated, as a Third Party, in the tort action brought by the Plaintiff. It was accepted that the claims of the Plaintiff and another would exceed the insurance policy limits of the driver. The Plaintiff and ICBC had agreed that there was to be an arbitration to determine the quantum to be paid to the Plaintiff. ICBC wished to argue in the arbitration that the Plaintiff was contributorily negligent for accepting

transportation from the driver knowing that the driver's ability was impaired by alcohol. The Plaintiff's position was that an arbitrator had no power to determine any issue of contributory negligence. The Parties applied in the tort action on an Agreed Statement of Facts for a determination of this issue.

22 The Court concluded that the issue of contributory negligence could not be heard in an UMP arbitration because the UMP arbitration was premature. Section 148.2(1) of the Regulation presumes before the application of the arbitration provision comes into effect that "an underinsured motorist" is the cause of the injuries for which compensation is claimed. (para. 7). An underinsured motorist is someone who is unable to pay the full damages awarded to the Insured. The amount of damages can only be determined after a trial or an assessment. Before any claim can be made under the UMP provisions, the final amount in the action must be determined, as until then, there is no underinsured motorist. (para. 13).

23 The *Dahl* decision was approved in *Beauchamp v. ICBC* (2005) B.C.C.A. 507. The circumstances in *Beauchamp* were unusual. The Insured brought a Petition in the Supreme Court of British Columbia seeking an order appointing an arbitrator to determine the Insured's entitlement to UMP compensation. It was proposed that the entitlement to coverage be determined by the arbitrator on the twin assumptions that judgment would be obtained against the tort feasor and that the tort feasor would be unable to satisfy the judgment. The Petition set out brief allegations concerning the circumstances of the accident (the Insured was a passenger in a vehicle driven by a Mr. Smith; Mr. Smith had stolen the vehicle from a car lot; Mr. Smith lost control of the vehicle and caused it to roll.) In support of the Petition was an affidavit from the Insured's solicitor swearing that the contents of the Petition were true. The source of the solicitor's knowledge was not disclosed and there was no affidavit from anyone with first hand knowledge of the material facts surrounding the accident.

24 At paragraph 7 of the Judgment, Chief Justice Finch, for the Court, stated thus:

> (7)"The basic idea of the Underinsured Motorist Protection ("UMP") scheme is to provide insurance coverage to persons who are injured or killed in a motor vehicle accident, where the person responsible for the accident is unable to pay the full amount of damages recoverable by the injured person (or by the deceased's personal representative). Under Section 148.1(2) ICBC's obligation to compensate does not arise until a person claiming to be entitled to UMP coverage can show that they are an "insured", and that the injuries, or death, resulted from an accident with an "underinsured motorist" that is someone who:
>
> (a) was the owner or operator of a vehicle;
> (b) "legally liable" for the injuries of the "insured";
> (c) is unable to pay the full amount of the claimant's damages.

25 In reversing a Master's decision, the Chambers Judge had held that ICBC could not be compelled to participate in an arbitration concerning UMP coverage until the prerequisites for such coverage had been established. The Master was clearly wrong in ordering an arbitration based on hypothetical or assumed facts which may never come into existence.

26 Chief Justice Finch, at paragraphs 23-24 concluded:

> 23. "Arbitration is not available until it is shown that the person claiming is an "insured", and is claiming in relation to an accident with an "underinsured" motorist". The definition of "underinsured motorist", set out above, contains three elements. A person falls within the definition if he or she: (1) is the owner of operator of a vehicle; (2) is legally liable for the injury or death of an Insured; and (3) is unable to pay the full amount of the Insured's damages.
>
> 24. Until those facts are either determined by judicial decision, or by admissions, there is no "underinsured motorist" and the arbitration provisions of the Regulations cannot be engaged."

27 In a recent arbitration decision, *Undisclosed v. ICBC* (28 August 2009, J.J. Camp,Q.C. Arbitrator) Mr. Camp summed up the UMP procedure as follows:

> "Where the parties cannot agree, ICBC can follow one of two courses of action. ICBC can either require that the Claimant(s) proceed to a tort trial to determine the prerequisites necessary for UMP arbitration, or they can agree that those prerequisites have been met and proceed to a UMP arbitration by consent" (para. 22).

28 Relying upon the foregoing caselaw, ICBC's position is aptly summarized at paragraphs 37 and 38 of its written submission as follows:

> "(37) The Claimant has not established the existence of an underinsured motorist. As a result, the Claimant is not entitled to UMP compensation and arbitration is not available to him under Section 148.2.
>
> (38) ICBC has not waived the requirement that the Claimant establish that the accident involved an underinsured motorist. The Claimant must establish that (SK) is legally liable for the alleged injuries of the Claimant and that (SK) is unable to pay the full amount of the Claimant's damages. The only way for the Claimant to establish these facts is to obtain a judgment in the underlying tort action." (emphasis added).

29 The circumstances in the present case are quite different from those in either *Dahl* or *Beauchamp*. In *Dahl*, ICBC was already participating in the underlying tort action as a Third Party and was able to have the issue of the Plaintiff's contributory negligence determined in the tort action. In *Beauchamp*, the entire issue of entitlement to UMP coverage was sought to be determined on the completely hypothetical assumption that there was an underinsured motorist. (The difficulty facing the Claimant in *Beauchamp* has likely been removed by the amendment to the Insurance (Vehicle) Regulation effective June 1, 2007 adding Section 148.2(1.1)).

30 In the present case, while it is true that there is no judicial decision determining legal liability of SK for the accident, nor determining the full amount of the Claimant's damages, there are certain established relevant facts. First, SK has in her pleadings in the Washington State Action admitted sole liability for the accident. She has not asserted contributory negligence against the Claimant. The Washington State Court Civil Rules regarding pleadings and motions provide in Rule 8 *inter alia* that a party shall admit or deny the averments upon which the adverse party relies and that a party shall set forth affirmatively contributory negligence or any other matter constituting an avoidance or affirmative defence. It is submitted that under Washington State procedure if affirmative defences are not affirmatively pled, then they are deemed to have been waived and may not be considered as triable issues (*Makah Indian Tribe v. Clallam County)* 73 Washington 2nd 677, 440 P. 2nd 442 (1968). Moreover, ICBC has settled the UMP claims of the passengers for comparatively modest amounts. This suggests an acceptance that SK was legally liable for their injuries and that SK was unable to pay the full amount of their agreed upon damages.

31 The Claimant relies upon the statements at paragraphs 24 and 28 of the *Beauchamp* decision that the prerequisite facts may be established "by judicial decision, or by admissions". The Claimant says that the prerequisite facts in this case have been established by admissions. Legal liability for the Claimant's injuries has been established by the formal admissions of SK which are said to be determinative of liability under Washington State Rules. ICBC has admitted that SK is an underinsured motorist by virtue of paying the UMP claims of the passengers. In addition, ICBC has the evidence of the Statutory Declaration of SK and the explanatory letter of her solicitor providing evidence of an inability to pay damages. Thus the Claimant is now entitled to proceed to UMP arbitration. ICBC, on the other hand, says that the admissions referred to in the *Beauchamp* judgment are the admissions, or more accurately, the agreement of ICBC that the necessary prerequisites have been met, or waived,

entitling a Claimant to proceed to UMP arbitration. One must take care not to construe the words in Reasons for Judgment as though the Reasons for Judgment were a piece of legislation. In the context of the *Beauchamp* decision, I think that the admissions referred to were an agreement by ICBC that the necessary prerequisites to an UMP arbitration had been met or waived.

32 In my experience, in most cases involving a motor vehicle accident in a foreign jurisdiction, where third party liability limits as here, are exceedingly low, ICBC consents to a settlement for the limited insurance monies and agrees that the Claimant may proceed directly to an UMP arbitration. There is also invariably an agreement that the tort feasor is unable to pay the excess damages. That outcome is, of course, what did occur in this case with respect to the claims of the three passengers. That outcome did not occur here with respect to the Claimant's claim which I conclude on the evidence has to do with the issue of contributory negligence.

33 I accept that an UMP Insurer may have a bonafide interest in obtaining a resolution on the merits in some forum of alleged contributory negligence on the part of an UMP Claimant. If that issue is not raised in the tort action (which may be beyond the control of the UMP Insurer) and if it cannot be raised in the subsequent UMP arbitration (see the *Dahl* decision), then the issue never gets to be determined. That outcome is not fair to the UMP Insurer. However, if achieving a judicial determination of the Claimant's contributory negligence was ICBC's objective, then I have difficulty understanding the rationale for refusing consent to the Claimant settling with AllState and instead forcing the Claimant to proceed to judgment in the Washington State action. The first difficulty is this. ICBC had declined to seek to intervene in that action to raise the issue of contributory negligence itself. The issue was not raised by SK in her pleadings; on the contrary, she had admitted sole liability for the accident, and there is evidence to suggest that her pleadings were determinative of the issue. Thus, as ICBC's counsel acknowledged during the hearing, had the Claimant actually

proceeded to trial in Washington State, there would have been no hearing on the merits of liability at all, but merely an assessment of the Claimant's damages in accordance with Washington State law or waived.

34 A second difficulty is that, apart from establishing a sum of money that SK was not able to pay, the determination of the Claimant's quantum of damages under Washington State law was irrelevant to the determination of the amount of UMP compensation to which the Claimant was entitled. This is because under Section 148.2(6)(b) of the Regulation, the law of British Columbia applies in any arbitration proceedings to determine the measure of damages or the amount of compensation. The only point of forcing the Claimant to obtain judgment in Washington State would have been to satisfy the "technical" requirement that SK was unable to pay the amount of damages award. I say "technical" in this case because of the other existing evidence, namely, ICBC's settlement of the UMP claims of the passengers and the statutory declaration of SK. It is, of course, possible that by the time the Claimant obtained his judgment against SK, her financial circumstances might have changed (she might have won the State lottery) in which case she might have been able to satisfy the judgment against her and would not have been an "underinsured motorist". Such a possibility is pure speculation and the refusal of ICBC to accept SK as an underinsured motorist with respect to the claim of the Claimant seems tactical and artificial in view of its acceptance of SK as an underinsured motorist with respect to the UMP claims of the passengers.

35 Instead, ICBC could have consented to the claimant's settlement for the remaining AllState monies and applied in the arbitration to have the issue of contributory negligence determined. In neither situation would there have been a determination of the contributory negligence issue on the merits in the Washington action. ICBC either would, or would not, have been entitled to have the issue determined in the arbitration but its insured would have been saved the time and expense of a "wasted" trial in Washington. The claimant's counsel submitted

that ICBC's refusal to consent to a settlement was done in bad faith. I am mindful that UMP coverage is first party coverage; however, motivation of the parties is beyond my jurisdiction (*ICBC v. West*) unreported, Vancouver Registry Action No. A933469, October 4, 1993).

36 I agree, however, with ICBC's position that there is neither a waiver nor estoppel available here to assist the Claimant. ICBC never waived its right to require the Claimant to obtain a judgment against SK; in fact, it explicitly refused to consent to any settlement by him. In addition, the Claimant could not reasonably rely on ICBC's settlement of the UMP claims of the other passengers because the Claimant's counsel confirmed ICBC's position that the UMP claims would be jeopardized if no judgment was obtained (Exhibit 1-Exhibit B).

37 The essence of the dispute between the parties regarding the entitlement issue is whether there is a "third way" for a Claimant to establish the right to proceed to arbitration. ICBC says there are only two ways to establish that right, namely (1) an unsatisfied judgment against the tortfeasor or (2) the consent of ICBC. The Claimant says that there is a third way, namely, by admissions of the tortfeasor, both as to fault for the accident (legal liability and legal entitlement) and as to an inability to satisfy any damages that may be awarded. The third way is the approach in *Somersall v. Friedman* (2002 S.C.C. 59) which I address in the next section of this decision and where I conclude that it is founded on fundamentally different insuring provisions. I cannot construe *Dahl* and *Beauchamp* interpreting the BC UMP legislation as contemplating a third way of establishing entitlement to proceed to arbitration. I do not think the Court of Appeal in *Beauchamp* in its reference to "admissions" had in mind anything beyond the admission of the party to the proposed arbitration, namely ICBC. The Claimant asserts that in this case compelling him to obtain a judgment in the Washington State action is unfair, particularly having in mind the uselessness of an assessment of damages under Washington State law. I agree. However, in light of the legal authorities, I am constrained to conclude that the Claimant is not entitled to UMP compensation because he has not established the necessary prerequisites.

38 As I have concluded that the Claimant is not entitled to advance an UMP claim at arbitration, it is not necessary for me to address the other issues raised by counsel. In the event I am wrong, however, in my conclusion above, and in deference to the submissions made by counsel, and to avoid the possibility of further proceedings respecting the other issues, I will address my conclusions regarding the other issues that have been raised.

THE EFFECT OF THE RELEASE AND DISMISSAL OF THE ACTION

(a) Summary of the Position of the Parties

39 ICBC submits that with the entry of the Dismissal Order in the Washington Action SK is no longer "legally liable" to the Claimant and the Claimant is not "entitled to recover" any further damages from SK. In addition, the execution of a Full and Final Release in favour of SK means that there is no longer any "excess" damages arising from the accident that could be considered for compensation under UMP. The execution of a Full and Final Release should be treated as an acknowledgement by the Claimant that the consideration for the Release constituted full compensation for his injuries. ICBC relies primarily on the cases of *Kraeker v. ICBC* (1992) 93 DLR (4th) 431 (B.C.C.A.), *Fogarty v. Cooperators Group Limited.* (1990) I.L.R. 1-2545 (Alta. QB) and *Nielsen v. Cooperative General Insurance Company* (1997) AJ No. 1108 (Alta. CA). ICBC distinguishes the Supreme Court of Canada decision in *Somersall v. Friedman,* a decision which discussed many of the potentially conflicting authorities. (ICBC also relies upon *Stephanishin v. Becic* (1989) 62 D.L.R (4th) 360 B.C.C.A. at page 367. The issue was whether pre-judgment interest was payable by ICBC on UMP compensation in addition to the limit of UMP coverage. In *dicta* the Court stated:

> "In the case of underinsured motorist protection coverage the Insurance Corporation of British Columbia cannot be obliged to pay

> until damages have been awarded against an "underinsured" motorist"".

Where ICBC consents to an UMP arbitration, it will have to pay the compensation awarded and there will never have been any damages "awarded" against the underinsured motorist. I do not find the case of assistance to the questions at issue in the present arbitration).

40 In *Somersall*, the Supreme Court of Canada held that a Limits Agreement with the underinsured tort feasor, negotiated without the knowledge or consent of the UMP Insurer, did not bar the Claimant's direct action against his own UMP Insurer. The only requirements in the direct action were proof of fault on the part of the tort feasor and proof of the Claimant's damages.

41 The Claimant relies primarily on the *Somersall* decision. With respect to legal liability or legal entitlement, the Claimant submits that the admissions of SK in the Washington action are "as good as a judgment". There is no difference between the admission and a judgment. In addition, the settlement of the passengers' UMP claims amounts to an admission by ICBC of legal liability upon SK and legal entitlement of all the persons injured in the accident. With respect to the Release, the Claimant says that there is no difference between the Release in this case and the Limits Agreement in *Somersall*. Both would protect the tort feasor from having to pay further damages personally, but should not bar the advancement of the contractual claim against the UMP insurer.

(b) **Review of the Authorities**

42 I start with Re ***Barton v. Aitchison*** (1982) 139 D.L.R. (3rd) 627 Ont. CA.
Barton was injured in a motor vehicle accident caused by the fault of Aitchison. Barton had a policy of automobile insurance which included uninsured motorist coverage with the Royal Insurance Group. Aitchison had a policy of automobile liability insurance with the Pitts

Insurance Company which was in receivership. The definition of "uninsured automobile" included an automobile with respect to which neither the owner nor driver had "applicable and collectible bodily injury liability insurance." It was estimated that between 50-70 cents on the dollar would ultimately likely be paid to Claimants such as Barton but any payment would have to await the winding up of Pitts Insurance Company. The parties sought a determination by originating notice as to whether Barton could proceed with a claim against the Royal. The uninsured motorist coverage provided that the determination as to whether the person insured was legally entitled to recover damages, and if so entitled, the amount the damages should be determined, among other remedies,

> "(c) by a court of competent jurisdiction in Ontario in an action brought against the Insurer by the person insured under the contract, and unless the determination has been previously made in a contested action by a court of competent jurisdiction in Ontario, the Insurer may include in its defence the determination of liability and the amount thereof."

The Motions Court Judge concluded that Barton could sue the Royal at once for the whole of the claim subject to the right of the Royal to defend on damages and liability. In upholding that decision and dismissing the appeal, the Court of Appeal at page 632 said as follows:

> "In reviewing this clause (the clause permitting a direct action) the motions court judge concluded that it clearly contemplated an action against the insurer in the position of the appellants before action against the wrongdoer because otherwise there would be no need for the provision entitling the insurer to defend questions of liability and damages. He coupled this view of (this clause) with his interpretation of the word "collectible" and concluded that the Bartons could sue the appellants now. With this conclusion we also agree. To force the Bartons to await the results of the liquidation could mean a delay of many years. This would frustrate the purpose of this remedial legislation we are considering, which, as Mr. Justice Grange noted, is to alleviate the plight of motorists injured by drivers of uninsured automobiles."

43 ***Johnson v. Wunderlich*** (1986) 34 D.L.R. (4th) 120 (Ont.CA)

Lionel Johnson was injured and David Johnson was killed in a motor vehicle accident alleged to be the fault of Wunderlich. An Action was commenced against Wunderlich within time. Wunderlich's vehicle was uninsured. Johnson was insured with Commercial Union under an auto policy that included uninsured motorist coverage. More than two years after the date of the accident Johnson added Commercial Union as a party defendant. At trial, Commercial Union argued that the action against it should be dismissed as statute barred. The terms of the uninsured automobile coverage provided that issues of legal entitlement to recover damages and the amount of damages should be determined either by agreement, by arbitration, or

> "(c) by a court of competent jurisdiction in Ontario in an action brought against the insurer by the person insured under the contract, and unless the determination has been previously made in a contested action by a court of competent jurisdiction in Ontario, the Insurer may include in its defence the determination of liability and the amount thereof."

The terms of the uninsured automobile coverage also provided that an action against the Insurer must be commenced within two years "from the date on which the cause of action against the Insurer arose." The prime issue therefore was when did the cause of action against Commercial Union arise. The Trial Judge held that the cause action arose on the date of the accident and that the action against Commercial Union was time barred. The Court of Appeal reversed and allowed the action to proceed. The Court held (majority) that time ran from when the Claimant knew or ought to have known that the other vehicle was uninsured or (minority) that time ran from a denial of the claim by the Insurer. In rejecting a limitation period starting to run from the date of the accident, Morden, J.A. stated at page 127:

> "Before addressing the arguments further I should say something about the scheme envisaged by Reg. 535. With some slight reservation, I think that it was open to the appellants to sue the respondent directly for recovery on their claim on the uninsured automobile coverage. I interpret the basic provision in s.4(1)(*c*) of the Schedule as recognizing this. It is true that the basic provision in

> s. 4(1)(*c*) does not go to the length of stating expressly that the insured person may *recover* from the insurer the amount to which he or she is entitled under the policy, in addition to obtaining a "determination" of the liability of the uninsured driver and the amount of damages, but it makes sense to regard the direct action against the insurer as encompassing this. In this respect the final words of s. (4)(1)(*c*) "and ... the insurer may include in its defence the determination of liability and the amount thereof", are relevant. They indicate that issues other than liability and damages may be raised in the action (possibly, for example, whether the plaintiff is an "insured person" or the alleged tortfeasor is uninsured) and, hence, that the direct action is one way of recovering on the uninsured motorist coverage."

At page 129 Morden, J.A. also states:

> "The words : "legally entitled to recover" do not import a requirement that this issue must have received a prior judicial determination but, rather, simply that the person insured must establish that the uninsured or unidentified owner or driver is at fault and the amount of the damages (citations omitted)".

44 ***Beausoleil v. Canadian General Insurance Company*** (1992) 92 D.L.R. (4th) 152 (Ont. CA)

Beausoleil was injured in a motor vehicle accident in Massachusetts. He sued the other motorist within time in Massachusetts but had not yet proceeded to judgment. It was agreed, however, that under Massachusetts law, the maximum Beausoleil could recover in that action was $50,000.00. Beausoleil was insured by an underinsured motorist Endorsement SEF 42 issued in Ontario by Traders General Insurance Company. Traders disputed Beausoleil's right to commence an action against them prior to obtaining judgment and exhausting collection remedies against the other motorist in Massachusetts. The motion judge agreed with Traders and held that the direct action was premature. The Appeal Court reversed and allowed the action to proceed. The SEF 42 Endorsement provided that the determination of legal liability and the amount of damages should be determined either by agreement, by

arbitration or by a court of competent jurisdiction in Ontario. The Chambers Judge had relied heavily on two prior cases, P*eltier v. Guitard* (1984) 5 D.L.R. (4th) 89 and *Corrigan v. Employers Insurance of Wausau a Mutual Co* (1984) 13 D.L.R. (4th) 305, in both of which it was held that the obligation of the insurer under the underinsurance Endorsement arose only after the insured had obtained judgment against the underinsured motorist and had exhausted all remedies for collection. In the Court of Appeal, Grange, J.A. for the Court concluded that the motion judge's decision was simply not in accord with the wording of the Endorsement. At page 156 Grange, J.A. stated as follows:

> "Let us first look at the words of the Endorsement. I think it is fundamental to bear in mind that the Endorsement is entitled "Underinsured Motorist Endorsement", that is, that the problem it is concerned with is the insured's being involved in an accident with an underinsured motorist. The concern is not that the other motorist might be impecunious or unidentifiable or for any other reason the insured might not be able to be recompensed. The sole concern is that state of the tortfeasor's insurance. The responsible citizen insures himself for the amount he considers adequate and expects other motorists to do the same. He obtains the special Endorsement (and pays the additional premium) to insure himself against the eventuality of an injury caused by an irresponsible motorist who has not so conducted himself. I think that principle is apparent throughout the Endorsement."

At page 157 Grange, J.A. also states:

> "The insuring agreement refers to the amount such person is 'legally entitled to recover'; it does not require a judgment and most certainly does not require that the insured exhaust his remedies under that judgment."

Thus the Court concluded that the Policy provision contemplated an action against the Insurer for the amount of the underinsurance before judgment had been obtained against the tortfeasor. This was not an unreasonable result because the Endorsement was designed to give relief to a motorist who has the misfortune to be injured by the fault of an underinsured driver. No where did the Endorsement require the Insured to exhaust his remedies against

the tortfeasor.

45 ***Chambo v. Musseau*** (1993) 106 D.L.R. (4th) 757 (Ont. CA)

Chambo was injured in a motor vehicle accident allegedly caused by the fault of an uninsured motorist Musseau. Four days after the expiry of the two-year limitation period for suing Musseau, Chambo commenced an action against Musseau and his own Insurer, Economical Mutual. Musseau was never served, could not be found, and never defended. Economical Mutual applied to strike out the claim against it because, having missed the limitation period against Musseau, Chambo could not establish legal liability on the part of Musseau. Chambo's uninsured motorist coverage provided the same alternatives for determining legal liability and the quantum of damages, namely, by agreement, by arbitration, or by a court of competent jurisdiction in Ontario. In a judgment of the Court, Osborne, J.A., based on a review of the relevant legislation and the *Johnson v. Wunderlich* decision, concluded that an Insured could sue the Insurer for payment under the uninsured motorist coverage after gaining a judgment against the underinsured tortfeasor, or, the insured could commence an action against the Insurer before judgment in a direct action. It made no difference whether the Insurer and the tortfeasor were sued in the same action or whether the Insurer alone was named as a defendant. Nor did it matter if the Insurer were added as a defendant after the commencement of the action against the tortfeasor. If the uninsured owner/driver and the Insurer were both sued, the cause of action asserted against the tortfeasor was different from the cause of action asserted against the Insurer. The former was in negligence; the latter was for payment under a contract, albeit one imposed by statute. Thus, different limitation periods applied. In a direct action against the Insurer, the words "legally entitled to recover damages" required the insured person to establish only that the uninsured tortfeasor was at fault and the quantum of the insured person's damages. The Court noted at page 766 that if Economical Mutual's position were correct, it would mean that in all cases of a "direct action", an insured person would have to sue the tortfeasor or be faced with a contention that she was not legally entitled to recover damages because her claim was barred by her failure

to sue the tortfeaser within the *Highway Traffic Act* limitation period. This would make it impossible for an insured person to succeed in a direct action in which the uninsured motorist coverage insurer alone was named as a defendant. In the result, the Chambers Judge's decision was reversed and the direct action against Economical Mutual was allowed to proceed.

46 ***Craig v. AllState Insurance Co. of Canada*** (2002) 214 D.L.R. (4th) 103 (Ont. CA)

The infant, Craig, was injured when the tricycle he was riding was struck by a school bus in Florida. Florida Legislation limited recovery against the School Board and its driver to $100,000.00 per claimant, which sum was paid to Craig. Craig was insured under an SEF 44 Endorsement in an Ontario Standard Auto Policy issued by AllState. Craig commenced an action in Ontario against AllState seeking indemnification under the Endorsement for the difference between the $1 million limits of his policy and the US settlement amount. Among the issues considered were whether Criag was "legally entitled to recover" more than the US settlement amount and whether the Florida defendants met the definition of "inadequately insured motorists". Despite the statutory "cap" on the damages that the School Board was obligated to pay, the School Board did have an insurance policy that provided coverage for motor vehicle accidents with limits of $1 million. In a judgment of the Court, Cronk, J.A. concluded that Craig was not barred from advancing an underinsured motorist's claim against AllState. Prior authority in a series of cases involving underinsured or uninsured motorists coverage provisions in insurance regulations or policies had held that the words "legally entitled to recover damages" required only that an insured person establish only the quantum of his or her damages and that the uninsured or underinsured tortfeasor was at fault. Thus, an Ontario insured had a direct right of action under the SEF 44 Endorsement without a prior judicial determination of liability against the tortfeasor and without first exhausting all remedies against the tortfeasor. The Court further concluded that injured plaintiffs had been permitted to sue their own Insurers directly on underinsured or uninsured motorist coverage

where their claims against the responsible tortfeasor had been restricted by a limitation on recovery or precluded by the policy provisions or expiry of a limitation period. Limitation on the ability of an injured motorist to recover damages from a tortfeasor or its Insurer was not the equivalent of a statutory bar to an action, a statutory or contractual immunity from suit provision or other absolute disentitlement to sue or seek relief through the Courts. The Florida sovereign immunity defence was not absolute. The Florida statute permitted actions to recover damages in tort for personal injury against the School Board. It was to be contrasted to the type of no-fault insurance legislation in the Province of Quebec.

47 There is another line of cases which includes *Kraeker, Fogarty, and Nielsen* on which ICBC primarily relies. *Kraeker* is a BC Court of Appeal decision interpreting S.111(3) (now Regulation s. 148.2(6)) of the BC UMP provisions. The section generally provides that where the accident occurs outside British Columbia, then the law of the place of the accident shall apply to determine if the insured is legally entitled to recover damages, and if so, the degree to which he is entitled and the law of British Columbia shall apply to determine the measure of damages recoverable. In *Kraeker*, a fatal accident occurred in the State of Washington. Under Washington law, the estate of a deceased person was entitled to cover damages for loss of future earning capacity but that claim was not available under the *Family Compensation Act* of British Columbia. The Administrator of the estate of the deceased Kraeker, brought a Petition in the Supreme Court of British Columbia, seeking a declaration as to the construction of S.111(3). In a decision of the Court, Goldie, J.A. at page 434 concluded as follows:

> "I think it clear the intention of s.111(3) was to provide compensation to a British Columbia resident which would neither fluctuate according to the substantive law of damages of the place of the accident nor depart too greatly from that which would be received if the accident had taken place in British Columbia. I cannot read into the words in clause (a) of s. 111(3) "... is legally entitled to recover damages..." the adoption of the substantive law of another jurisdiction by which the measure of damages is to be assessed or the codification of a tort common law conflict rule. I think "legally

> entitled to recover damages" means "has a right of action for damages". Nor do I think the succeeding clause in clause (a) relates to quantum. These directions are confined to the issues of the legal liability of the wrong doer and the contributory negligence, if any, of the insured."

48 In *Fogarty,* Fogarty was injured in a motor vehicle accident allegedly caused by the fault of another motorist, Gentry. Fogarty's solicitors missed the limitation period for bringing the action against the estate of Gentry, although other persons injured in the same accident had brought their actions within time. An agreement was entered into between the Estate of Gentry and all of the plaintiffs, including Fogarty, whereby the insurance proceeds available to the Gentry estate were distributed in full to all of the plaintiffs, except Fogarty, and Fogarty agreed to a dismissal of his (out-of-time) action against Gentry. Fogarty was insured under an auto policy issued by the Cooperators which included an SEF 42 Endorsement. The Endorsement required Cooperators to indemnify Fogarty for an amount that Fogarty was legally entitled to recover from an underinsured motorist. The determination of legal liability and the amount of damages was to be determined either by agreement between the insured person and the Insurer or by arbitration. The SEF 42 Endorsement did not include a "direct action" option. Cooperators applied for a summary judgment dismissing Fogarty's action on the basis that the effect of the consent judgment dismissing the Gentry action meant that Fogarty was no longer able to demonstrate that he would be legally entitled to recover from Gentry. Relying on the *Johnson v. Wunderlich* case supra, Fogarty argued that although the limitation period was missed, he was entitled to assert that the liability of Gentry continued to exist but Fogarty's claim was simply unenforceable. The amount of recovery from the action against the law firm whom he alleged missed the limitation period, would be the amount Fogarty would have received in a pro-rata distribution of insurance proceeds available to Gentry, and coverage under the SEF 42 Endorsement should be available to pay any further deficiency. Gallant, J. concluded that the effect of the Consent Dismissal Order was to foreclose Fogarty's opportunity to prove by arbitration, or otherwise, that he was legally entitled to recover damages from Gentry. At page 9908, the Court said:

> "I am respectfully of the view that once there has been a final judicial decision dealing with the matter of liability of the tortfeasor owner/operator vis á vis the insured, it is no longer reasonably possible to refer that judicially determined matter for agreement or arbitration under section 4 of SEF No. 42. In the case at bar, the insured, having consented to judgment – which judgment was entered – dismissing the liability claim of the insured against the tortfeasor owner and driver, the insured has therefore foreclosed its opportunity to prove by arbitration or otherwise that the plaintiff is "legally entitled to recover from the owner operator" under SEF No. 42".

49 ***Nielsen* v. *Cooperators General*** is a very brief two paragraph decision of the Alberta Court of Appeal. Nielsen was injured in a motor vehicle accident in Arizona. She released the tortfeasor in return for payment of his very low insurance limits. Nielsen sued her SEF 44 Insurer, Cooperators General in Alberta. In upholding a lower court decision dismissing her action, the Court of Appeal concluded that "by signing a release, (Nielsen) has eliminated any excess. The release limits the amount she is "legally entitled to recover."

The *Somersall* Case

50 ***Somersall*** considers or comments on all of the cases referred to above except *Craig*. The Somersalls were injured in a motor vehicle accident alleged to be solely the fault of Friedman. The Somersalls sued Friedman within time but settled their action against him on the basis of a "Limits Agreement". The Agreement provided that Friedman would admit liability for the accident at trial; that the Somersalls would not claim against Friedman or his Insurer in excess of Friedman's policy limit of $200,000.00; and that Friedman's Insurer would make an advance payment of $50,000.00. The Limits Agreement was entered into without the knowledge or consent of Scottish & York Insurance Company, who insured the Somersalls under an SEF 44 Endorsement. Scottish & York was added to the action against Friedman after the Limits Agreement had been entered into. The Insuring Agreement of the SEF 44 Endorsement provided that Scottish & York would indemnify an eligible claimant for the amount that such "eligible claimant" was "legally entitled to recover" from an "inadequately insured motorist" as compensatory damages for bodily injury arising out of an

automobile accident. The determination of whether the insured was legally entitled to recover damages, and if so, the amount of the damages was to be determined by agreement, or by arbitration, or by a court of competent jurisdiction in Ontario. The limit of Scottish & York's liability was the amount by which its limit of Family Protection coverage (here $1 million) exceeded the total of all limits of motor vehicle liability insurance of the inadequately insured motorist. The amount payable under the Endorsement was excess to any amount actually recovered by the eligible claimant from any source and excess to any amounts the eligible claimant was entitled to recover from *inter alia* the Insurers of the inadequately insured motorist. The Endorsement contained an express limitation period for commencing action against the SEF 44 Insurer.

51 Spiegel, J. at first instance held that the Limits Agreement rendered the Somersalls no longer "legally entitled to recover" damages beyond those already paid pursuant to the Agreement and, accordingly, dismissed the action against Scottish & York. The Ontario Court of Appeal unanimously reversed the decision relying on the principle, stated in *Johnson* and repeated in *Chombo*, that only fault and the quantum of damages were required to be proved by the insured in a direct action against the Insurer. The Court of Appeal distinguished the *Fogerty* and *Nielsen* cases from Alberta on the basis that the Alberta provisions did not allow a determination of liability and damages by a court of competent jurisdiction but only by resort to arbitration failing agreement between the insured and the Insurer. The Supreme Court of Canada rendered a split decision. The majority held that the Limits Agreement, like a missed limitation period, did not bar a direct action. The relevant time for the determination of legal entitlement was the time of the accident. The minority held that the time to determine legal entitlement was the time the claim against the SEF 44 Insurer was made and further, that by entering into the Limits Agreement, the Somersalls had irrevocably prejudiced Scottish & York's rights of subrogation against Friedman. The majority judgment (at paragraph 24) finds that the reduction of the Insured's obligation to a mere showing that

she was "legally entitled to recover" and the availability of the direct action under S. 4(1)(*c*) of Regulation 535, by design, result in a truncation of the process of proving a claim against the tortfeasor. There would be no practical purpose in having a direct action at all, otherwise, because an actual judicial determination of fault and damages and the corresponding award would then be the de facto requirement for recovery. *Chambo*, like *Johnson*, simply recognizes the trade offs inherent in their relationship created by SEF 44. At paragraph 30-32, the majority conclude that the relevant time for the determination of legal entitlement is the time of the accident because that is the moment in time when the insurer becomes obligated to make a payment. The obligation of the insurer comes into being at the same time as the obligation of the tortfeasor to pay damages. For that reason, missed limitation periods, or releases or limits agreements do not affect the claimant's legal entitlement against the tortfeasor.

52 With respect to the decisions in *Kraeker, Fogarty,* and *Nielsen*, the majority at paragraph 33 states as follows:

> "I must, then, reject the view very briefly expressed in the case of *Nielsen, supra* that a release of the tortfeasor in exchange for his small insurance limit eliminated any excess the insured was "legally entitled to recover" under the SEF 44. Similarly, I cannot agree with the conclusion in *Kraeker Estate v. ICBC* (citation omitted). In my view, leaving aside the differences between the provinces' standard forms, the determination in each case does not examine in adequate depth the mutual obligations created by the SEF 44. Without expressing any opinion as to its correctness, I would also distinguish the case of *Fogerty, supra*. That case involved a claim under the SEF 42 where a judgment had already been issued as between the insured and the tortfeasor, finding that the tortfeasor was not liable. I agree with the Court of Appeal that, since the Alberta SEF 42 does not provide for judicial determination of liability and quantum of damages, the nature of the "legally entitled to recover" requirement was not dealt with in *Fogarty* in a way relevant to this context."

53 Finally, at paragraph 41, the majority decision concludes that the Limits Agreement has no bearing at all on the right of the Somersalls against Friedman at the time of the accident because the Limits Agreement did not exist at the time of the accident. It would however, be useful as evidence in the Somersalls' favour regarding the fault of Friedman, because an admission of fault by Friedman was part of the agreement reached.

54 The dissenting judgment notes at paragraph 80 that the outcome would likely be different under similar "inadequately insured" motorist policies in at least two other provinces, British Columbia and Alberta, citing the *Kraeker Estate* and *Nielsen* decisions. In the minority view, while the SEF 44 provision clearly authorizes direct action against the insurer without first proceeding to judgment against the tortfeasor, the right of the insurer to contest liability and the amount thereof includes the defence that the insured is not legally entitled to recover any further amount from the tortfeasor at the time the insurance claim is made. Thus, at the date of the Somersalls' claim against Scottish & York, the Somersalls had voluntarily parted with their ability to recover from Friedman the sum claimed, i.e. their alleged loss in excess of $200,000.00 and they had therefore no "legal entitlement".

DISCUSSION AND ANALYIS

55 I have engaged in a possibly unduly detailed review of the Ontario line of cases culminating in *Somersall* in the Supreme Court of Canada dealing with underinsured motorist coverage, but I think that the detailed analysis does clearly demonstrate how closely tied the reasoning and outcome of the Ontario cases are to the particular provisions of the SEF 42 and 44 Endorsements. There are fundamental differences between the ICBC UMP Regulations in Part 10, Division 2 and the SEF 42 and 44 Endorsements. Foremost among the differences is the availability of the direct action in Ontario which is wholly absent from Part 10, Division 2 of the ICBC Regulation. It is the necessity of giving effect to the "direct action" entitlement

of a claimant that has resulted, in my view, in the conclusions (a) that it is not necessary for a claimant to obtain judgment against an underinsured motorist; (b) that a claimant only needs to establish fault on the part of the tortfeasor and to prove damages; and (c) that missing a limitation period against the tortfeasor or releasing or entering into a Limits Agreement with a tortfeasor does not eliminate the legal entitlement of claimants to access their own UMP coverage. Even the focus of the majority in the Supreme Court of Canada in *Somersall* on the time at which legal entitlement is to be determined is dictated by the time when the insurer's legal obligation in a potential direct action to indemnify is created.

56 There is a second fundamental difference between the SEF 42 and 44 Endorsements and Part 10, Division 2 of the ICBC Regulation. Under the SEF 42 and 44 Endorsements, an inadequately insured motorist is defined as an identified owner or driver of an automobile with respect to which the total motor vehicle liability insurance of the owner and driver is less than the limit of Family Protection coverage (*Craig supra* at page 115). Moreover, the insurer's maximum liability is the amount by which the limit of Family Protection coverage exceeds the total of the limits of motor vehicle liability insurance of the inadequately insured motorist. There is no reference to an inability to pay damages on the part of the inadequately insured motorist. This point was noted by Mr. Justice Grange in *Beausoleil* at page 156. While it is true that any amount actually recovered from the inadequately insured motorist reduces the compensation payable by the insurer, the determination of whether there is an inadequately insured motorist is based on comparing the limits of two insurance policies, namely the third party liability limits of the tortfeasor and the limit of the claimant's Family Protection endorsement. On the other hand, Part 10, Division 2 of the ICBC Regulation puts into the very definition of an underinsured motorist, the requirement that the motorist be "unable when the injury or death occurs to pay the full amount of damages recoverable by the insured."

57 I note that in the *Somersall* case, the majority declined to express any opinion on the correctness of the *Fogerty* decision but agreed with the Ontario Court of Appeal conclusion that since the Alberta SEF 42 Endorsement did not provide for the "direct action" against the insurer, the discussion of the "legally entitle to recover" requirement in *Fogerty* was not relevant to the analysis in *Somersall*. The minority judgment appears to conclude that the *Kraeker Estate* and *Nielsen* decisions were correctly decided.

58 I will refer briefly to two additional decisions. The first is ***Petrasso v. State Farm Insurance Company*** (2010) ONSC3085, a case decided after the Supreme Court of Canada decision in *Somersall*. Petrasso was injured in a motor vehicle accident that occurred in California. Farmers Insurance insured the other at fault motorist but its policy limits were $15,000.00. Petrasso settled her claim against the other motorist and executed a full and final release of her claim in consideration of a payment of $5,000.00. Petrasso then commenced an action against her own Insurer, State Farm, whose policy included a Family Protection endorsement. State Farm argued that by settling her claim for less than the other motorist's liability insurance monies, Petrasso was no longer legally entitled to recover anything. Alternatively, State Farm argued that the effect of the settlement was to deem that the amount received as consideration was full compensation for the injuries sustained. Petrasso submitted that she should be able to prove her claim for damages in the action against State Farm but that the full $15,000.00 available under the Farmers' policy could be deducted from the compensation payable by State Farm. Relying upon the *Somersall* decision, the Court in *Petrasso* allowed the action to proceed concluding that the plaintiff's settlement should not operate to "redefine" the tortfeasor as not being inadequately insured and permit State Farm to avoid an excess claim for that reason. The decision is clearly founded on the direct action available under the Family Protection Endorsement.

59 Finally, in ***Birtles v. Dominion of Canada General Insurance Co.*** (1986) 18 C.C.L.I. 206

(Alta. CA) Birtles was injured in a motor vehicle accident when his automobile was in collision with a truck. It was alleged that the truck had been engaged in a game of bumper tag with a second truck. The liability insurer of the second truck denied coverage on the basis that the truck was either stolen or being operated without consent. The liability limits on the second truck were unknown. The first truck was also insured although its limits were not known. The identity of the driver of the first truck was uncertain. Birtles brought an action against his own Insurer under the SEF 42 Endorsement seeking a declaration of entitlement for damages caused by the owners and operators of the two trucks on the basis they were either uninsured or underinsured. Birtles subsequently brought an action for damages against the owner and driver of the first truck, the owner and possible driver of the second truck and the Administrator of the Alberta Motor Vehicle Accident Claims Fund. The SEF 42 Endorsement at the time provided that the determination of legal liability to recover damages and the amount of damages was to be made by agreement between the insured and the Insurer or by arbitration. There was no entitlement to a "direct action." The Court at page 215 noted that important differences existed between the wordings used in the SEF 42 Endorsement in Alberta and other provinces, particularly, Ontario. Dominion of Canada applied to strike out the lawsuit, or alternatively, to stay it on the ground that there was no cause of action under the Endorsement until after Birtles obtained final judgment against the wrongdoers and discovered that the judgment debtors were either uninsured or underinsured. Birtles conceded that the insurance lawsuit should be stayed pending final determination of the tort lawsuit but contended that he had to sue his Insurer because of a one-year limitation provision in the Endorsement. The Endorsement contained a limitation for actions against the insurer of one year from the date the cause of action arose. The Court was highly critical of the wording of the Endorsement because of the confusion it created. Part of the confusion arose from the presence of both a limitation period for commencing an action and a provision for binding arbitration in the absence of agreement. The Court did consider the expression "legally entitled to recover" in the Insuring Agreement of the SEF 42 Endorsement. At page 220, the Court stated:

> "Accordingly, in my view, it is not a condition precedent that the insured person must in all cases obtain judgment against the wrongdoer before his right to claim against his own insurer arises under the endorsement. His right to claim might arise earlier, but would require a convincing case of liability and want of any or adequate insurance coverage by the wrongdoer.
>
> While this is so, one must recognize that as a practical matter the occasions would be relatively rare when the insured person's cause of action might arise under the endorsement against his own insurer before be obtains final judgment against the wrongdoer. Normally he would not know the existence of, or details of, the wrongdoer's insurance until the collection stage following final judgment. He could not compel discovery about the wrongdoer's insurance before final judgment. For these reasons his cause of action (and the commencement of the limitation period) would not normally arise before final judgment was obtained.
>
> On the facts of this case (*Birtles*) did not demonstrate that he has as yet any cause of action against his own insurer under the endorsement. Assuming he is faultless in the accident and that the wrongdoers are liable, there is no evidence demonstrating that the wrongdoers are underinsured or uninsured and accordingly the appellant's action against his insurer is premature."

60 *Birtles* then, is authority for the proposition that under the particular wording of the Alberta SEF 42 Endorsement at the time it was possible to proceed with an action against the SEF 42 Insurer without having previously obtained judgment against the wrongdoer. I decline to follow the *Birtles* analysis for the following reasons:

(d) I consider the *Beauchamp* decision of the BC Court of Appeal binding;

(e) The SEF 42 Endorsement considered in *Birtles* is fundamentally different from the UMP provisions

in Part 10, Division 2, of the ICBC Regulation. In particular, in the SEF 42 Endorsement there was no incorporation of the requirement of an inability to pay damages in the description of an underinsured or inadequately insured motorist, whereas that requirement is incorporated in the definition of an underinsured motorist in the ICBC Regulation;

(f) The SEF 42 Endorsement was inherently confusing, particularly respecting the availability of an action versus arbitration;

(g) The issue was when the cause of action arose, and the narrow conclusion was that an action was premature because there was no evidence of underinsurance or lack of insurance.

61 Accordingly, I am constrained to find that in the absence of the agreement of ICBC that claimant may do so and still proceed to an arbitration of his UMP claim, the entry of a Consent Dismissal Order in the Washington action and the provision of a Full and Final Release of SK mean that the claimant is no longer legally entitled to recover damages from SK and there is no "excess" damages that could be the subject of an UMP claim. Hence, the claimant is not entitled to advance an UMP claim now.

SETTLEMENT OF THE WASHINGTON ACTION WITHOUT CONSENT AND TO THE PREJUDICE OF ICBC

62 Section 148.2(4)(b) Regulations provides that:

"(4) The Corporation is not liable under section 148.1

(b) to an insured who, without the written consent of the Corporation and to its prejudice, settles or prosecutes to judgment an action

> against a person or organization that may be liable to the ensured for injury or death."

63 It is not in dispute that the claimant settled the Washington action without ICBC's consent. The sole issue is whether ICBC has been prejudiced by the settlement. ICBC asserts that it has been prejudiced in multiple ways. First, ICBC cannot pursue third party claims against any other parties who could potentially be liable for the claimant's injuries. Second, if ICBC is not able to raise the issue of contributory negligence in an arbitration, then it has lost the possibility of having that issue determined on the merits. Third, the settlement has deprived ICBC of an opportunity to obtain factual information that may have constituted a defence to the claimant's claim for compensation.

64 It is true that with the disposition of the Washington action ICBC is no longer able to pursue third party claims against others. Potential third parties suggested in argument were the manufacturer of the airbags in the claimant's vehicle or the manufacturer of the claimant's vehicle who installed the airbags. It is asserted that the airbags deployed in the accident and "may have contributed" to the claimant's injuries. There is no evidence that the airbags deployed improperly. Nor is there any evidence that their deployment caused any injury to the claimant. In my view, such hypothetical and wholly speculative possibilities do not constitute prejudice.

65 It is also true that the resolution of the Washington action eliminated ICBC's ability to have the claimant's alleged contributory negligence determined in that action. However, the claimant's alleged contributory negligence was not going to be determined in the Washington action. The issue had not been pled. SK had admitted sole liability for the accident. ICBC had declined an invitation to intervene in the Washington action to raise the issue, for whatever benefit the offer may have afforded. The settlement did not deprive ICBC of a judicial determination that it otherwise would have obtained.

66 It is also true that the disposition of the Washington action deprived ICBC of the opportunity

to obtain factual information about circumstances of the accident and about the claimant's injuries, losses and personal circumstances. Examples mentioned in argument are witness statements, evidence of SK and medical examinations of the claimant. This is evidence that presumably would have been obtained by counsel for SK. Information regarding the circumstances of the accident, going to the issue of the claimant's alleged contributory negligence would not be prejudicial to ICBC because I have previously concluded that the issue of contributory negligence was not going to be determined in the Washington State action. If an arbitration were to proceed, ICBC will have an opportunity to obtain for itself information concerning the claimant's injuries and personal circumstances as part of the pre-hearing procedure. Where ICBC is not the liability insurer of the tortfeasor, and has not had its appointed counsel defending the underlying tort claim, it is hard to imagine claimant's counsel refusing to agree to have the claimant examined under oath in the arbitration proceeding and if consent were refused, it is harder still to imagine that an arbitrator would not exercise his or her discretion and order an examination under oath. With respect to medical examinations, it is not at all clear that SK's Insurer would have commissioned independent medical examinations. It had, after all, offered its policy limits, and SK, based on her statutory declaration, had very minimal assets. If an arbitration proceeds, ICBC will have access to all of the claimant's clinical medical records and may be able to have its own independent medical examinations. Again, I am not satisfied that the speculative loss of potential medical examinations constitutes prejudice to ICBC.

67 In summary, I conclude that ICBC has not been prejudiced by the settlement of the Washington State action and ICBC is not entitled to deny the claimant's claim based on a breach of Section128.2(4)(b).

ISSUE No. 2 – THE CONTRIBUTORY NEGLIGENCE ISSUE [1]

Summary of the Position of the Parties

68 ICBC says that Sections 148.2(1) and in particular Section 148.2(6) provide authority for an issue of contributory negligence to be determined at arbitration. Section 148.2(6) provides that where an accident happens outside British Columbia, the law of the place where the injury was suffered is applied "in any arbitration proceedings arising out of a difference between the insured and the Corporation as to whether the insured is legally entitled to recover damages or the degree to which he is entitled." A contributory negligence defence is a dispute over the degree to which the claimant is entitled to recover damages (see *Kraeker* at page 434) ICBC further asserts that *Dahl v. Whitehill* is not authority for the proposition that contributory negligence cannot be raised in an UMP arbitration. *Dahl* simply held that arbitration was premature until there had been a judgment in the underlying action. That judgment would have resolved any issue of contributory negligence. Nevertheless, *Dahl* does not address the circumstance in which an issue of contributory negligence has not been judicially determined in an underlying tort action because of the settlement of that action by the claimant without ICBC's consent. ICBC further asserts that there has been no judicial decision regarding liability by a court of competent jurisdiction. SK merely filed pleadings admitting liability. Pleadings are not a judicial decision. Thus, where there has never been a judicial decision on the merits, ICBC says it is entitled to have the issue of contributory negligence determined in the arbitration. Contributory negligence arguments have been advanced and decided in prior UMP arbitrations at least where the parties have consented to the issue being heard (*SPW v. ICBC*, Arbitration, December 10, 2007).

---

1 I note that at least with respect to an underlying tort action commenced in British Columbia where ICBC is not the liability insurer of the tortfeasor, this issue will not arise in the future as a result of the amendments to Part 10, Division 2 of the Regulation effective June 1, 2007 adding subsections (11) and (12) to section 148.1, and permitting ICBC to apply to add itself as a party to an underlying tort action.

69 The claimant says rightly that issues of liability, including contributory negligence, must be determined according to Washington State law. Under Washington State law by filing pleadings admitting liability and not alleging contributory negligence, SK has precluded any further hearing in the Washington action on contributory negligence so that liability has been conclusively determined to lie solely with SK. Accordingly, ICBC ought not to be allowed to relitigate that issue in the arbitration.

DISCUSSION AND ANALYSIS

70 Consideration of this issue proceeds on the assumptions that SK has made the admissions she did in her pleadings, that the claimant has settled with SK and a Consent Dismissal Order has been entered in the Washington State action, and that the claimant is nonetheless entitled to proceed with his UMP arbitration claim. These assumptions are, of course, inconsistent with my interpretation of the *Dahl* and *Whitehill* decisions.

71 As I have noted previously, the scheme of UMP compensation in British Columbia, in the absence of agreement between ICBC and a claimant, is premised upon there being an underlying tort judgment. Sections 148.2(1) and (6) cannot mean that either party can arbitrarily and unilaterally have any issue relating to legal entitlement to recover damages determined in an arbitration because in those instances where there is a judgment in the underlying tort action, legal entitlement to recover damages will have been judicially decided. Section 148.2(6) must at least be intended to give an arbitrator authority to determine issues of legal entitlement including contributory negligence where there is an agreement by the parties that the issue should be determined in the arbitration. Absent the presence of collusion or fraud in obtaining a judgment in a foreign jurisdiction, I think that the scheme of UMP compensation presumes that for accidents in foreign jurisdictions, issues of legal liability including contributory negligence are conclusively determined in a judgment of the foreign court. I do not think that Section 148.2(6) entitles either a claimant or ICBC to

"relitigate" an issue of liability or contributory negligence where there has been a judicial determination on the merits of the issue in a tort action in the jurisdiction where the accident occurred. For example, if the judgment of a foreign court found a claimant 50% contributorily negligent, I do not think it is open to either party in an arbitration to argue for a different apportionment. I further think that the scheme of the UMP provisions is premised on the assumption that the tortfeasor will raise all appropriate available defences in the underlying tort action, and accordingly, a decision in the underlying tort action on liability, absent factors such as collusion or fraud, will be conclusive. There are other defences that may theoretically be available to a tortfeasor, such as *volenti* and *ex turpi causa*, in addition to contributory negligence. I do not think a claimant who has succeeded in obtaining a judgment after trial in a foreign jurisdiction where such potential defences were not alleged, is exposed to having such defences raised for the first time in a subsequent UMP arbitration. If the claimant here is entitled to pursue his UMP claim, notwithstanding the entered Consent Dismissal Order in the Washington action, it seems to me that the actual Order cannot be regarded as determinative of anything and is virtually irrelevant. In that circumstance, I think Section 148.2(6) permits ICBC to raise the issue of contributory negligence, although whether the issue could be heard on its merits would be subject to a full argument on the issue of whether, under Washington law which is determinative as to issues of liability, formal admissions of fault in the pleadings constitute a conclusive determination of liability.

CONCLUSION

72 In summary, I conclude as follows:

1. The claimant is not entitled to advance an UMP claim because:

   (a) he has not established the prerequisite of an underinsured motorist in the manner required;

   (b) by fully releasing SK and entering a Consent Dismissal Order in the Washington action, there is

no further legal liability of SK nor a legal entitlement of the claimant, nor any extra or additional loss;

2. ICBC was not prejudiced by the claimant's settlement with SK and the claimant did not thereby breach Section 148.2(4)(b) of the Regulations;

3. If my conclusion under item #1 is incorrect, then I would allow ICBC to raise the allegation of alleged contributory negligence against the claimant in the arbitration, subject to full legal argument regarding the legal effect under Washington State law of SK's formal admissions.

Dated at Vancouver this 27th day of October, 2010.

Donald W. Yule
Arbitrator

(a) with respect to an accident with an unidentified vehicle, reports the accident within 24 hours after its occurrence to a policeman, peace officer, judicial officer or the administrator of any law respecting motor vehicles,

(b) within 28 days after the occurrence, files with the corporation a statement under oath that the insured has a cause of action arising out of the accident against the owner or driver of an unidentified or uninsured vehicle and setting out the facts in support of that statement, and

(c) on the request of the corporation, allows the corporation to inspect the motor vehicle the insured occupied at the time of the occurrence.

(6) Where an insured makes a claim under this section and against a person who is insured under Part 6, any payment made under this section shall be deducted from any amount the insured is entitled to recover from that person under Part 6.

(7) Any benefits paid to an insured under Part 7 or under legislation of another jurisdiction providing similar benefits shall be deducted from any amount payable to the insured under this section.

(7.1) No compensation shall be paid under this section in respect of that part of claim that is paid or payable as an insured claim as defined in section 106 (1).

(8) The determination as to whether an insured is legally entitled to recover damages and, if so entitled, the amount of the damages, shall be made by agreement between the insured and the corporation, but any dispute as to whether the insured is legally entitled to recover damages or as to the amount of damages shall be submitted to arbitration under the *Commercial Arbitration Act*.

(9) Section 148.2 (6) applies in respect of compensation provided under this section.

[am. B.C. Regs. 335/84, s. 34; 379/85, s. 49; 449/88, s. 28; 438/92, s. 17; 379/93, s. 9; 441/98, s. 12; 470/99, s. 3; 166/2006, s. 72.]

Division 2 – Underinsured Motorist Protection

Underinsured motorist protection

148.1 (1) In this section:

"assigned corporate driver" means a person assigned by the owner or lessee named in an owner's certificate to be the principal driver of a vehicle described in the owner's certificate if

(a) the owner or lessee is not an individual, and

(b) the assigned vehicle is a taxable benefit to the assigned person under the *Income Tax Act* (Canada);

"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) paid or payable under section 148,

(c) paid or payable under Part 7 or under legislation of another jurisdiction that provides compensation similar to benefits,

(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;

"insured" means

(a) an occupant of a motor vehicle described in the owner's certificate,

(b) a person who is

(i) named as the owner or lessee in the owner's certificate where that person is an individual,

(i.1) an assigned corporate driver, or

(ii) a member of the household of a person described in subparagraph (i) or (i.1),

(b.1) a person who is

(i) an insured as defined in section 42 and who is not in default of premium payable under section 45, or

(ii) a member of the household of an insured described in subparagraph (i), or

(c) a person who, in the jurisdiction in which the accident occurred, is entitled to maintain an action against the underinsured motorist for damages because of the death of a person described in paragraph (a), (b) or (b.1),

and, for the purpose of the payment of compensation under this Division, includes the personal representative of a deceased insured;

"underinsured motorist" means an owner or operator of a vehicle who is legally liable for the injury or death of an insured but is unable, when the injury or death occurs, to pay the full amount of damages recoverable by the insured or his personal representative in respect of the injury or death.

(2) Where death or injury of an insured is caused by an accident that

(a) arises out of the use or operation of a vehicle by an underinsured motorist, and

(b) occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America,

the corporation shall, subject to subsections (1), (5) and (6) and section 148.4, compensate the insured, or a person who has a claim in respect of the death of the insured, for any amount he is entitled to recover from the underinsured motorist as damages for the injury or death.

(3) No coverage is provided under underinsured motorist protection to an insured who is

(a) the occupant of a vehicle that is in fact not licensed under the *Motor Vehicle Act*, the *Commercial Transport Act* or similar legislation of another jurisdiction, unless the insured has reasonable grounds to believe the vehicle is licensed,

(b) an operator of, or a passenger in or on, a vehicle that the operator or passenger knew or ought to have known was being operated without the consent of the owner, or

(c) the occupant of a vehicle which is exempt under section 43 or 44 of the Act, whether or not the vehicle is operated by a person named in a driver's certificate.

(4) Underinsured motorist protection does not apply to a hit and run accident unless

(a) the hit and run accident occurs on a highway, and

(b) where the hit and run accident occurs in the Yukon, Northwest Territories or United States of America, there is actual physical contact between the insured or the vehicle occupied by the insured and the unidentified vehicle.

(5) The liability of the corporation under this Division for payment under an owner's certificate or driver's certificate of all claims arising out of the same occurrence, including a claim for

(a) prejudgment interest under the *Court Order Interest Act* or similar legislation of another jurisdiction,

(b) post-judgment interest under the *Interest Act* (Canada) or similar legislation of another jurisdiction, and

(c) costs awarded by a court or an arbitrator,

shall not exceed

(d) the total amount of damages awarded in respect of the accident to all persons insured under that owner's certificate or driver's certificate,

(e) the amount determined under section 148.2 (1), or

(f) the applicable amount set out in section 13 of Schedule 3,

whichever is least, minus the sum of the applicable deductible amounts.

(6) Sections 73 to 76 apply in respect of underinsured motorist protection.

(7) Where more than one certificate provides underinsured motorist protection to an insured, the insured shall be compensated only under one such certificate.

(8) Where, in the event of a claim, an insured has access to underinsured motorist protection coverage under both an owner's certificate and a driver's certificate, the insured shall be compensated under the owner's certificate.

(9) Where, in the event of a claim, an insured has access to underinsured motorist protection coverage or similar insurance protection under vehicle insurance in another jurisdiction, the benefits of that coverage are primary and any benefits provided under this Division are available only to the extent that the amount of benefits provided by the certificate exceeds the amount of benefits provided by the primary insurance.

(10) An insured, or the personal representative of an insured, who, before the corporation settles a claim for injury or death of the insured arising out of the operation of a vehicle by an underinsured motorist, commences an action against the underinsured motorist, shall immediately serve the corporation with a copy of the originating process in the action.

(11) If an insured commences an action in British Columbia against a person who may be an underinsured motorist, the corporation may apply to the court to be added as a party to that action.

(12) If the laws of British Columbia applied to an action referred to in subsection (11), a judgment in the action by a court in British Columbia is binding on the corporation and on an arbitrator under section 148.2, whether or not the corporation makes an application under subsection (11).

[en. B.C. Reg. 324/91, s. 35; am. B.C. Regs. 379/93, s. 10; 271/97; 424/97, s. 4; 470/99, s. 4; 452/2003, s. 5; 166/2006, s. 73.]

Restrictions on liability

148.2 (1) Subject to subsection (1.1), the determination as to whether an insured provided underinsured motorist protection under section 148.1 is entitled to compensation and, if so entitled, the amount of compensation, shall be made by agreement between the insured and the corporation, but any dispute as to whether the insured is entitled to compensation or as to the amount of compensation shall be submitted to arbitration under the *Commercial Arbitration Act*.

(1.1) A dispute about whether a person is an insured under this Division may be submitted to arbitration under the *Commercial Arbitration Act* regardless of whether there has been a determination that the injury or death of the person was caused by the use or operation of a vehicle by an underinsured motorist.

(2) Notwithstanding subsection (1), section 11 (1) (c) of the *Commercial Arbitration Act* does not apply in respect of an order for costs of an arbitration.

(2.1) An arbitrator who adjudicates a dispute under this section must publish the reasons for the decision by forwarding a copy of the reasons, with personal information that would identify the parties deleted, to the corporation for publication on its website.

(3) An arbitrator may make an order as to costs of an arbitration only on a party and party basis.

(4) The corporation is not liable under section 148.1

(a) in respect of an accident occurring in a jurisdiction of Canada or the United States of America in which the right to sue and recover damages for injury or death caused by a vehicle accident is barred by law, or

(b) to an insured who, without the written consent of the corporation and to its prejudice, settles or prosecutes to judgment an action against a person or organization that may be liable to the insured for injury or death.

(4.1) The corporation is deemed to have provided consent under subsection (4) (b) if it does not respond within 90 days to a written request for consent that is sent by registered mail addressed to the claim office dealing with the insured's claim.

(5) Where an insured has breached a condition under section 55 or has done or omitted to do anything and, as a result of the breach, action or omission, the insured disqualifies himself from receiving one or more of the amounts referred to in the definition of "deductible amount" in section 148.1 (1), the insured's claim under his underinsured motorist protection shall be reduced by the amount that the insured would, but for the breach, action or omission, have been entitled to.

(6) Subject to subsection (1), where an accident for which a claim is made under section 148.1 occurs in another jurisdiction,

(a) the law of the place where the insured suffered the injury for which the claim is made shall, whether or not death results from that injury, be applied

(i) to determine if the insured is legally entitled to recover damages and, if he is, the degree to which he is so entitled, and

(ii) in any arbitration proceedings arising out of a difference between the insured and the corporation as to whether the insured is legally entitled to recover damages or the degree to which he is so entitled, and

(b) the law of the Province shall be applied

(i) to determine the measure of any damages recoverable by the insured and to assess the amount of compensation payable to the insured, and

(ii) in any arbitration proceedings arising out of a difference between the insured and the corporation respecting the measure of any damages or the amount of compensation.

[en. B.C. Reg. 324/91, s. 35; am. B.C. Regs. 166/2006, s. 74; 212/2007.]

Underinsured motorist protection for other certificate holders

148.3 Where the underinsured motorist protection relates to a garage vehicle certificate, protection is extended to an officer or employee of the garage service operator who, in the course of his duties or employment, is an occupant of a customer's vehicle while the vehicle is being operated by its owner or is in the care, custody or control of the garage service operator.

[en. B.C. Reg. 324/91, s. 35; am. B.C. Regs. 441/98, s. 13; 166/2006, s. 24; 46/2007, Sch. 2, s. 1.]

Excluded vehicles

148.4 Coverage under this Division shall not apply to an owner's certificate issued to a vehicle while such vehicle is being used as a bus, taxi or limousine use vehicle.

[en. B.C. Reg. 324/91, s. 35.]

148.5 and **148.6** Repealed. [B.C. Reg. 452/2003, s. 6.]

148.7 Repealed. [B.C. Reg. 166/2006, s. 75.]