IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2(1) OF THE
***INSURANCE (VEHICLE) REGULATION*, BC Reg. 447/83**
and ***THE ARBITRATION ACT*, RSBC 1996 c.55**

BETWEEN:

S.A.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION DECISION

Counsel for the Claimant:	Joseph E. Murphy, Q.C. Michael Murphy
Counsel for the Respondent:	Dennis C. Quinlan, Q.C. Leilani Karr
Date of Hearing:	November 13, 2018
Place of Hearing:	Vancouver, British Columbia
Respondent's Supplementary Written Submission:	November 16, 2018
Claimant's Written Response Submission:	November 30, 2018
Arbitrator:	Donald W. Yule, Q.C.
Date of Award:	December 18, 2018

INTRODUCTION

1. The sole question in this arbitration is whether Workers' Compensation benefits paid to the Claimant are a deductible amount from his Underinsured Motorist Protection (UMP) compensation. The answer depends on whether the 2007 change to the *Insurance (Motor Vehicle) Act* applies to this claim. The change was brought into force effective June 1, 2007 by BC Reg. 166/2006 deposited June 14, 2006. Prior to June 1, 2007, Section 148.1(1) of the *Insurance (Motor Vehicle) Regulation* (the "Old Regulation") provided in the definition of "deductible amount" that an amount to which an insured was entitled under the *Workers' Compensation Act* was a deductible amount. The June 2007 change (the "New Regulation") provided that an amount to which an insured was entitled under the *Workers' Compensation Act* was a deductible amount unless the insured elected not to claim compensation under Section 10(2) of the *Workers' Compensation Act* and was not entitled to compensation under Section 10(5) of the *Act*, or the Workers' Compensation Board pursued its right of subrogation under Section 10(6) of the *Workers' Compensation Act* (emphasis added). In this case the Workers' Compensation Board (WCB) is pursuing its right of subrogation.

2. For the reasons set out below I have concluded that WCB benefits are not deductible from the Claimant's UMP compensation.

BACKGROUND FACTS

3. The issue was argued on the basis of an agreed statement of facts. The salient facts may be summarized chronologically as follows:

   A. The UMP claim arises out of a motor vehicle accident that occurred on November 8, 2004.

   B. The Claimant was sitting as an occupant in a parked truck owned by his employer. An uninsured motorist who was the subject of a high speed police

chase struck an oncoming vehicle head-on and one of those vehicles then collided with a parked struck. The uninsured motorist was killed in the accident.

C. The Claimant was an insured person for UMP purposes under the owner's policy of his employer. In addition the Claimant held a valid British Columbia driver's license which also provided UMP coverage.

D. The Claimant was seriously injured in the accident and became permanently disabled. For the purposes of the arbitration it was agreed that the gross value of his personal injury claim inclusive of costs and disbursements is at least $1m.

E. The Claimant had to share the $200,000 uninsured motorist limit with two other people injured in the accident.

F. On April 6, 2005 the Claimant submitted an application for WCB benefits but elected to pursue his tort claim. In April 2005 ICBC advised the Claimant's counsel that the at fault motorist was uninsured and that any amount to which the Claimant was entitled under the *Workers' Compensation Act* was a deductible amount under UMP.

G. In October 2006 the Claimant submitted an application under Section 257 of the *Workers' Compensation Act* for a determination of the employment status of himself, two police constables, an RCMP dispatcher and the Minister of Public Safety and Solicitor General (the "Minister").

H. In October 2006 the Claimant commenced an action against all of the above as well as the estate of the uninsured motorist.

I. On June 1, 2007 the amended the definition of "deductible amount" came into force.

J. In June 2008 WCAT issued a certificate that all of the Defendants, except the Minister were employees or employers.

K. In February 2009 and January 2010 the Claimant sought benefits from WCB notwithstanding his ongoing tort claim. WCB declined to pay any benefits except in strict compliance with Section 10(5) of the *Workers Compensation Act*.

L. ICBC made advance payments upon request in May 2011, December 2011, November 2012, June 2013, November 2013 and December 2015.

M. In a decision dated February 22, 2012 the Claimant's tort action was dismissed against all the Defendants with the exception of the uninsured motorist and the Minister. The Minister appealed the decision. In June 2013 the British Columbia Court of Appeal held that the claim could not be continued against the Minister. In the result the only remaining Defendant was the uninsured motorist.

N. The Claimant's pro rata share of the uninsured motorist limits were insufficient to satisfy his personal injury claim.

O. In February 2017 the trial of the tort action against the uninsured motorist was adjourned and the parties agreed to proceed with an UMP arbitration.

P. In February 2018 the Claimant reelected to claim WCB benefits. The reelection was approved and WorkSafe BC became subrogated to the Claimant's tort and UMP claims.

4. So long as the Minister remained a Defendant in the tort action there remained the possibility that the Claimant could recover full compensation in the tort action (without having to resort to his UMP claim) on the basis that, if the Minister were at fault to any degree, then the Minister would be jointly and severally liable with the uninsured motorist for all of the Claimant's damages.

THE LEGISLATION

5. I set out below the relevant legislation.

Calculation of UMP Compensation

6. Section 148.1(5) which did not change in June 2007 sets out how UMP compensation is to be calculated and the statutory requirement to reduce compensation by the sum of the applicable deductible amounts.

> "Section 148.1(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
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> (a) prejudgment interest under the *Court Order Interest Act* or similar legislation of another jurisdiction;
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> (b) post-judgment interest under the *Interest Act* (Canada) or similar legislation of another jurisdiction, and
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> (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,
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> (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.

THE OLD LEGISLATION

7. Section 148.1(1) of the Old Regulation included the following definition of "deductible amount":

> "In this Section:
>
> "deductible amount" means an amount
>
> (f) to which the insured is entitled under the *Workers' Compensation Act* or a similar law of the jurisdiction in which the accident occurs"

THE NEW REGULATION

8. Section 148.1(1) of the New Regulation includes the following definition of "deductible amount":

> "In this section:
>
> "deductible amount" means an amount
>
> (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*".

THE TRANSITIONAL PROVISION

9. The *Insurance (Motor Vehicle) Amendment Act*, 2003 contained certain transitional provisions. One of those transitional provisions was Section 81 which provided as follows:

> "81(1) The *Insurance (Motor Vehicle) Act* and the regulations under that Act as they read before the coming into force of this Act apply to
>
> (a) Insurance under that Act that took effect before the coming into force of this Act,
>
> (b) claims under that insurance, and
>
> (c) insureds and the corporation in relation to that insurance.

10. These transitional provisions were also brought into force effective June 1, 2007 by BC Reg. 166/2006 deposited June 14, 2006.

11. In addition, Section 1.2 in Part 1 (Universal Compulsory Vehicle Insurance), Section 58 in Part 4 (Optional Insurance Contracts) and Section 74 in Part 5 (General Provisions) of the *Insurance (Vehicle) Act* as amended contain quasi transitional provisions. Section 1.2 of the *Insurance (Vehicle) Act* provides as follows:

> "Application of this Part

1.2 This Part applies to

(a) insurance under the plan that takes effect on or after the date this Act comes into force,

(b) claims under that insurance, and

(c) insureds and the corporations in relation to that insurance."

12. Mandatory UMP coverage is not provided under Part 1 of the *Insurance (Vehicle) Act*.

13. Section 58 of the *Insurance (Vehicle) Act* provides as follows:

"Application of this Part

58. This Part applies to

(a) optional insurance contracts that are made or renewed in British Columbia and that take effect on or after the date this Act comes into force,

(b) claims under those contracts, and

(c) insureds and insurers in relation to those contracts."

14. Mandatory UMP coverage is not provided in Part 4 of the *Act*.

15. Section 74 of the *Insurance (Vehicle) Act* provides that:

"Application of this Part

74. Without limiting Parts 1 and 4, this Part applies to:

(a) insurance under the plan and optional insurance contracts that

(i) is obtained or renewed in British Columbia, and

(ii) takes effect on or after the date this section comes into force,

(b) claims under that insurance, and

(c) insureds and insurers in relation to that insurance."

16. Mandatory UMP coverage is not provided under Part 5 of the *Insurance (Vehicle) Act*.

THE *INTERPRETATION ACT*

17. The *Interpretation Act*, RSBC 1996, c.238 contains transitional provisions where an Act is repealed and another Act substituted for it. Technically, the *Insurance (Motor Vehicle) Act* was repealed and the *Insurance (Vehicle) Act* was substituted for it. (*Aryes v. Doe*, 2009 BCCA 552 at paragraph 8)

18. Section 36(1) of the *Interpretation Act* provides as follows:

36.1 If an enactment (the "former enactment") is repealed and another enactment (the "new enactment") is substituted for it,

...

(b) every proceeding commenced under the former enactment must be continued under and in conformity with the new

enactment so far as it may be done consistently with the new enactment;

...

(d) When a penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjusted after the repeal must be reduced or mitigated accordingly."

19. The *Interpretation Act* also provides in Section 8 as follows:

"Section 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

REGULATION SECTION 106

20. As some of the prior decisions that are central to the submissions in this case involve loss that is excluded from coverage under Section 106 of the *Regulation* with respect to uninsured motorist claims and hit and run or unidentified motorist claims, it is important to note that identical changes were made effective June 1, 2007 to Section 106(1)(a) of the *Regulation*. The old Regulation provided as follows:

"106(1) In this section "insured claim" means any benefit, right to indemnity or claim to indemnity accruing to a claimant and includes a benefit or right or a claim

(a) Under the *Workers' Compensation Act* or a similar law or plan of another jurisdiction, ...

(2) No amount shall be paid by the corporation under Section 20 or 24 of the Act in respect of that part of a claim that is paid or payable as an insured claim."

21. The New Regulation (post-June 1, 2007) provides as follows:

"106(1) In this section, "insured claim" means any benefit, compensation similar to benefits, right to indemnity or claim to indemnity accruing to a person entitled to benefits, compensation or indemnity or to the personal representative or guardian of the person, and includes a benefit, compensation, right or a claim

(a) under the *Workers' Compensation Act* or a similar law or plan of another jurisdiction, 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 the Act, or

(ii) the Workers' Compensation Board pursues its right of subrogation under Section 10(6) of the *Workers' Compensation Act* ..."

(2) No amount shall be paid by the corporation under Section 20 or 24 of the Act in respect of that part of a claim that is paid or payable as an insured claim."

SUBMISSION OF THE CLAIMANT

22. The Claimant advances three principal submissions as to why the Old Regulation which required a deduction of WCB benefits should not apply in this case.

23. The first submission is the purpose of the Regulation change. It was designed to avoid the very outcome that the Respondent says should apply. The "harm" or "evil" that the New Regulation was designed to address was the prospect of a "double deduction" of WCB benefits. The deductible amounts set out in Regulation Section 148.1(1) were designed to prevent double recovery by a Claimant. In the case of WCB entitlement, the result was a "double deduction". How the "double deduction" would occur is described in the Claimant's initial written submission at paragraph 9 as follows:

> "This deduction, which was to ensure that an injured person did not get paid twice, in fact had the effect of deducting the WCB benefits twice. If an injured person/worker had a claim worth $1 million and he received or was entitled to receive WCB benefits valued at $500K, the $1 million UMP coverage would be reduced by $500K with ICBC then paying $500K on the UMP claim. If the insured had received WCB benefits, the $500K would be paid to WCB which would apply this against the benefits paid, with the worker receiving nothing. If the worker did not claim benefits from WCB, the same deduction would be made and the $1 million UMP coverage would result in a payment to the injured person of $500K."

24. It is accordingly unfair and unjust to apply this deduction to the Claimant's UMP compensation more than 11 years after the Regulation was changed to prevent the deduction.

25. The Claimant's second submission is based on prior decisions involving the same change respecting WCB benefits with respect to uninsured motorist and hit and run claims. The

decisions are *Hicks v. PTGF et al* (2011 BCSC 226) and *Ayres v. John Doe* (2008 BCSC 48; 2009 BCCA 552). In *Hicks*, the court found that the New Regulation applied because it was not until Hicks filed the CL42 Statutory Declaration that ICBC was in a position where it might pay an uninsured motorist claim.

26. In *Ayres* the Plaintiff was injured in a hit and run accident. The court both at trial and on appeal held that the New Regulation applied because, until a claimant obtained judgment against the Corporation as nominal defendant and the time limited for appeal had expired, the Corporation had no obligation to pay. Thus the Regulation in effect at the date when the Corporation had an obligation to pay applied to determine the amount of the payment obligation. I shall discuss these decisions together with those relied on by the Respondent in more detail below. The Claimant submits that these cases stand for the proposition that the Regulation in force on the date that the Respondent is authorized to pay a claim must be applied. The Respondent's obligation to pay an UMP claim does not arise until there is an "underinsured motorist" as defined and there is no other tortfeasor liable to pay the claimant's full compensation in tort. It was not until (a) the WCAT decision in June 2008, or (b) February 2012 when the tort action was dismissed against all the Defendants except the Minister and the uninsured motorist or (c) June 2013 when the Court of Appeal dismissed the claim against the Minister, that the UMP claim may have become payable. All of these dates are after the New Regulation came into force.

27. The Claimant's third submission is that the overall purpose of the universal compulsory auto insurance scheme in British Columbia is a far more important factor than the wording of the statutory auto insurance contract and both the contract and the transitional provisions of the *Insurance (Motor Vehicle) Amendment Act*, 2003 must be applied in a manner consistent with the overall statutory scheme. The Claimant relies particularly on *Niedermeyer v. Charlton* (2014 BCCA 165), *Felix v. ICBC* (2015 BCCA 394) and *Symons v. ICBC* (2016 BCCA 2007) as examples of circumstances in which the overriding principle of a universal compulsory and benefit conferring auto insurance scheme will determine coverage notwithstanding contractual wording. In *Niedermeyer* the court struck down on public policy grounds a term in a written signed Release that

purported to release a tour operator from liability for injury suffered by the plaintiff while being transported on a bus away from a recreational activity at Whistler. In *Felix*, the court again referred to the context of the legislative scheme to provide a universal compulsory insurance program and access to compensation for those who suffer losses from motor vehicle accidents in concluding that a passenger who grabbed the steering wheel of a vehicle resulting in a collision was an "insured" whose "use" of the vehicle caused the accident.

28. In *Symons*, the issue was whether the insured was entitled to disability benefits after two years following the accident. The insured was initially disabled and received benefits. On the two year anniversary of the accident however the insured was not disabled but was working. Subsequently the insured became disabled again, which disability was found to be caused by the initial accident. The court concluded that the claimant was entitled to further disability benefits on considering the legislative intent to provide universal compulsory vehicle insurance and that the Regulation in question was benefits conferring legislation.

SUBMISSION OF THE RESPONDENT

29. The Respondent submits simply that the Regulation change in June 2007 was prospective and did not affect the existing contractual rights of the Respondent. In support of this submission the Respondent advances three principal arguments. The first argument is that the transitional provisions accompanying the legislative change expressly provide in Section 81(1) that the prior *Insurance (Motor Vehicle) Act* and *Regulations* would apply to insurance that took effect before the legislative change, and to claims under that insurance, and to insureds and the Corporation in relation to that insurance. This transitional provision was Section 81(1) of the *Insurance (Motor Vehicle) Amendment Act*, 2003 brought into force effective June 1, 2007 by BC Reg. 166/2006, deposited June 14, 2006.

30. Alternatively, the Respondent submits that the court in *Buxton v. Tang* (2007 BCSC 1101), in considering the same legislative change under Regulation Section 106(1)(a), concluded that the change was "substantive" and "prospective". In that case, the Old Regulation applied and the WCB benefits were deductible by ICBC as an "insured claim".

31. The Respondent's second submission is that *Kovacs v. ICBC* (1994) BCJ No. 225 (SC) is a case directly on point. The case involved an UMP claim and a change to the list of "deductible amounts". After the insurance policy providing UMP coverage was issued to the insured, but before the motor vehicle accident, a new deductible amount, namely Section 110(1)(i) an amount "payable to the Insured under any benefit or right or claim to indemnity" was added to the list of deductible amounts. The court held that this additional deductible amount could not apply to the insured's claim because his rights accrued at the date the policy was issued. I will discuss this case below in conjunction with the other caselaw.

32. The Respondent's third submission is that the *Hicks* and *Ayres* decisions relied upon by the Claimant are distinguishable on the basis that they do not involve a statutory contract of insurance, but rather involve statutory claims for compensation under either Section 20 (Uninsured Motorist) or Section 24 (Hit and Run) of the *Act*. In those cases no claim or compensation can arise until the dates specified in Sections 20 and 24.

33. Finally, the Respondent says that applying the deduction is not unfair because the WCB accepted the Claimant's reelection in February 2018 and must have been aware of the Respondent's position that WCB benefits were a deductible amount in this case. If there is unfairness to the Claimant, that is a matter to be resolved between the Claimant and WCB.

CLAIMANT'S REPLY SUBMISSION

34. The Claimant submits, reiterating his reliance on the *Niedermeyer* and *Symons* decisions that automobile insurance coverage issues, particularly benefit-conferring provisions should be interpreted to the benefit of the insured. The New Regulation should be applied to this UMP claim that was initiated in 2018 in accordance with the interpretation given to the similar change in Regulation Section 106 in the *Hicks* and *Ayres* decisions.

CONSIDERATION OF THE CASELAW

Buxton v. Tang, 2007 BCSC 1101

35. The chronology in these cases is important and I set out the relevant dates in point form.

A. Date of motor vehicle accident – July 2003;

B. Date of application (statutory declaration) under Section 20 of the *Act* for compensation for an uninsured motorist claim – 2005;

C. Date of change to the definition of "insured claim" involving WCB benefits – June 1, 2007;

D. Date of hearing to determine deductibility issue – June 28, 2007.

36. The court recognized the unfairness of the prior legislation as set out in paragraph 4 of the judgment:

> "4. This application (for statutory benefits) is made by way of a prescribed form and sworn as a Statutory Declaration. The entire claim is subrogated by the WCB. If an award is made, the benefits paid to the plaintiff from the WCB are paid back. Under Regulation 106 of the old *Act* ICBC did not have to make any

> payment for loss which had already been compensated for by the WCB. The result was that the injured worker could, to use an example provided by counsel, end up with nothing. If WCB paid the injured worker $7,000 for income and medical benefits and the court awarded $12,000 as damages, comprised of $7,000 for income and medical expenses and $5,000 general damages, ICBC would not be obliged to pay $7,000 and the WCB would take the $5,000 as a payment towards the $7,000 it paid out to the injured worker. This unfairness was recognized and addressed by the passage of the new legislation, the *Insurance (Vehicle) Act.* This new *Act* came into force on June 1, 2007. Regulation s.106 was amended and now requires ICBC to pay the entire amount of the claim and not deduct WCB benefits."

37. In the decision the court cited the transitional provisions but the decision was not based on them.

38. At paragraphs 7 and 8 the court commented on the nature of uninsured motorist and unidentified motorist claims as follows:

> "7. A claim under this section, that is, the uninsured vehicle section, is not based on an insurance contract because the defendant has no contract. The language in Section 20 is that ICBC <u>may</u> pay. It is a creation of statute to assist those who are injured by persons who are so irresponsible as to not carry insurance. The injured person could sue the defendant directly, but often those who do not carry insurance have not means to pay a claim. The benefit of having a government-run insurance program is that persons who are injured with no recourse to the negligent party are often compensated for their injuries directly by ICBC. ICBC can then sue the uninsured driver.

8. Section 24, which is similarly worded to Section 20, relates to the situation where the party is injured as a result of a hit and run driver, and this Section imposes a statutory obligation on ICBC to compensate the injured party if a settlement is reached or a judgment is granted. The terms there are mandatory; "shall pay". The difference is that there is no defendant who can be sued and the only possibility for compensation for the injured party is from ICBC."

39. Turning to the question of whether the legislation was prospective or retrospective, the court relied on *Dixie v. Royal Columbian Hospital* (1941) 2 DLR 138 (BCCA) for the following relevant principles at paragraph 6:

> "Unless the language used plainly manifests in expressed terms or by clear implication a contrary intention –
>
> (a) a statute divesting vested rights is to be construed as prospective.
>
> (b) a statute merely procedural is to be construed as retrospective.
>
> (c) a statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective."

40. There is a presumption that substantive legislative is prospective. An amendment that affects vested rights is prospective.

41. At paragraph 14, the court concluded that the plaintiff's rights arose on the date of the accident but the rights of ICBC were not engaged until the plaintiff filed the Statutory Declaration. It was at that point that ICBC was in a situation where it at least "might" pay. In *Hicks*, both the accident and the delivery of the Statutory Declaration occurred prior to the amendment in the legislation. The court noted "the transitional provisions are clearly prospective". In the result, the court held that the legislative change was prospective and the Old Regulation applied with the consequence that the payments made

by WCB could be deducted by ICBC before payment out to the plaintiff of the agreed settlement monies.

42. The significant conclusions from this case are:

A. the judicial recognition of the harm addressed by the legislative change;

B. the distinction drawn between claims for statutory compensation under Sections 20 and 24 of the *Insurance (Vehicle) Act* and claims arising under a statutory contract of insurance; and

C. the legislative change was prospective not retrospective.

***Ayres v. John Doe* (2008 BCSC 48; 2009 BCCA 552)**

43. Ayres is a claim for statutory compensation arising out of a hit and run accident. The chronology of events is as follows:

A. Date of accident – May 8, 2003;

B. Claim made for WCB benefits – May / June 2003;

C. WCB gave notice of its subrogated claim – June 4, 2003;

D. Action commenced against ICBC as nominal defendant – June 23, 2003;

E. Effective date of legislative change to "insured claim" respecting WCB benefits – June 1, 2007;

F. Trial of action against ICBC – November 2007.

44. The trial judge, Mr. Justice Meiklem, who coincidentally was also the trial judge in the *Kovacs* case, concluded that the New Regulation applied and WCB benefits were not

deductible. The court discussed the decisions in both *Buxton* and *Kovacs*. Section 24(8) of the *Insurance (Vehicle) Act* set out ICBC's obligation to pay on a hit and run claim. Section 24(8) provided as follows:

> "8. On judgment against the Corporation as nominal defendant under this section and expiry of the time limited for appeal, or on a compromise and settlement of a claim under this section, the Corporation must pay towards satisfaction of the judgment or claim an amount that the Corporation is authorized to pay under this Act, the regulations and the terms, conditions and limits of the plan."

45. The trial judge in *Ayres* concluded that until there was a judgment and expiry of the time limited for appeal it made no sense to talk of a vested right in ICBC to deduct an amount from a payment obligation that did not yet exist. The court further noted that the rights of the claimant and the rights of ICBC need not necessarily arise at the same time. Since ICBC's obligation to pay was not engaged until after the time for appeal of the trial judgment had expired, which was after November 2007, the New Regulation applied and WCB benefits were not to be deducted.

46. On appeal, (and it is noted that Madam Justice Bennett decided the *Buxton* case and was a member of the panel hearing the *Ayres* appeal) the court characterized the issue as follows at paragraph 28:

> "28. The central issue in determining whether the new Section 106 of the Regulation applies is whether ICBC had a right to deduct under the old Section 106 at the time the new Act and Regulation came into effect. If it did, then the general attitude against retrospective application of a substantive new provision will weigh heavily against the application of the new Section 106."

47. The court recited at paragraph 17 the excerpt from the decision in *Buxton* identifying the purpose of the legislative amendment being to address a situation that had the potential to be unfair to an injured worker. The court described the case as one of first impression in the Appeal Court. It further asserted that the question was whether the reasoning was correct that the applicable legislation was the provision in effect when the appeal period expired. The court considered *Buxton* and *Cowden*. The only reference to the *Kovacs* case (in paragraph 26) described it as a case that considered uninsured motorist protection which was not of much assistance to the issue before the court.

48. The court concluded at paragraph 31 that Section 24(8) of the *Act* directly created the obligation on ICBC to pay as of the date the appeal period expired. Because that was the date when ICBC's obligation was created by Section 24(8), the Regulation in effect at that date determined the amount of the obligation. The result was not a retrospective application of the new Section 106 of the Regulation, but rather its application to a payment obligation newly created. Accordingly, the appeal was dismissed and the WCB benefits were not deductible.

***Hicks v. Bieberbach Estate* (2011 BCSC 226)**

49. *Hicks* concerns an uninsured motorist claim under Section 20 of the *Insurance (Vehicle) Act*. The chronology is as follows:

A. Date of motor vehicle accident – April 21, 2005;

B. Delivery of Statutory Declaration for property damage only – April 29, 2005;

C. Election to receive WCB benefits – May 6, 2005;

D. WCB advise ICBC of a subrogated claim – August 10, 2005;

E. ICBC advise WCB benefits are deductible from an uninsured motorist claim – August 17, 2005;

F. Action commenced against uninsured motorist – October 23, 2006;

G. Settlement negotiations premised on deductibility of WCB benefits – prior to June 1, 2007;

H. New Regulation in force amending "insured claim" respecting WCB benefits – June 1, 2007.

I. Buxton *v. Tang* decided – June 28, 2007;

J. Statutory declaration for personal injury claim delivered – February 22, 2008.

50. It is unclear when the actual settlement occurred except that it was after June 1, 2007. The parties agreed to submit for determination by the court whether the WCB benefits were deductible from the settlement. The court applied the reasoning in *Buxton,* namely that ICBC's rights were not engaged until it had received a Statutory Declaration. This analysis however produced a different result in *Hicks* because the *Hicks* Statutory Declaration was not delivered until February 2008, when the new Regulation was in force. Thus ICBC was not entitled to deduct the WCB benefits.

***Kovacs v. ICBC* (No. 924468 Vancouver Registry, January 7, 1994)**

51. Kovacs involved an appeal from an arbitrator's decision in an UMP claim. The chronology was as follows:

A. Insurance policy issued by ICBC for the term August 17, 1987 to August 17, 1988;

B. Effective date of an amendment adding a new deductible amount as Regulation Section 110(1)(i) – January 1, 1988;

C. Date of motor vehicle accident – June 30, 1988;

D. Date of judgment against underinsured motorist – January 29, 1991.

52. The amendment, which was in force prior to the motor vehicle accident, added to the list of deductible amounts an amount "payable to the insured under any benefit or right or claim to indemnity".

53. The new deductible amount evidently applied to Mr. Kovacs' circumstances. An arbitrator had held that the claimant's right to UMP compensation only arose at the date of the accident (after the amendment came into force) with the result being the deduction of amounts under Section 110(1)(i). On appeal, the decision was reversed. Cases such as *Quigley* ((1985) 62 BCLR 100) and *Cowden* ((1981) 32 BCLR 312) were distinguished on the basis that they were not contractual claimants. Mr. Justice Meiklem concluded at page 16 as follows:

> "The fact of the accident did not gain Mr. Kovacs a right to UMP benefits. Several events remained as contingencies to crystalize that right, notably obtaining a judgment or settlement amount in excess of the tortfeasor's coverage (see *Carson v. Browning,* (1987) 21 BCLR (2^{nd}) 40). The right to UMP coverage, inchoate and contingent though it may have been, was acquired when he paid his premium and acquired a policy of insurance with the then operative Regulations incorporated. ICBC incurred a contingent obligation at the same moment. The accident and subsequent judgment in excess of coverage were simply the contingencies that activated the cause of action."

54. And at page 17:

> "None of the authorities cited by the Respondent is persuasive that a contractual ICBC policy holder is a person without a right acquired or accrued or accruing under the Regulation that forms part of its policy until such time as a loss or claim arises."

55. *Kovacs* is thus factually different from *Cowden, Buxton, Ayres* and *Hicks*. All of those cases involve claims for statutory compensation under Section 20 or 24 (or their predecessors) of the *Insurance (Vehicle) Act*. *Kovacs* on the other hand is a claim for UMP coverage included in a statutory contract of insurance with ICBC. It is also noteworthy that the legislative change adding a new deductible amount in the UMP coverage was detrimental to the insured who had paid a premium for UMP coverage that did not include Section 110(1)(i). The Reasons for Judgment do not reference any statutory transitional provisions associated with the legislative change.

***Niedermeyer v. Charlton* (2014 BCCA 165)**

56. The plaintiff was injured returning to Whistler Village after participating in a zipline experience when a bus operated by the zipline contractor left the road. The plaintiff had executed a waiver form which purported to exclude any liability for travel to and from the tour areas. A summary trial judge had dismissed the plaintiff's claim on the basis of the signed waiver. On appeal the court found that the terms of the Release were unambiguous and had reasonably been brought to the attention of the plaintiff and were not unconscionable. However, the court found that the release of liability for a claim arising out of the use or operation of a motor vehicle was contrary to public policy. Such a waiver was contrary to the nature of the statutory scheme of automobile insurance. The court referenced various sections of the *Insurance (Vehicle) Act* pointing to the universality of the scheme, including Sections 20 and 24 as examples of the legislature's intent to make compensation available to all those injured in British Columbia.

57. At paragraph 90, the court stated:

> "While it is clear that none of these provisions on their own invalidates the exclusion clause here at issue, it is my opinion that the scheme taken as a whole lends support to the appellant's argument that there is a compelling public policy interest at stake in this case. The public policy embraced by

> the legislative scheme is to provide a universal compulsory insurance program as part of the legislature's efforts to ensure safety on the roads and access to compensation for those who suffer losses when those measures fail."

58. And at paragraph 93:

> "Reading the words of this legislative scheme in its entire context, harmoniously with the whole of the scheme and the purpose of it, supports the appellant's view that the legislature could not have intended vehicle owners and operators to have the ability to exclude the operation of the otherwise universal compulsory insurance."

59. And at paragraph 114:

> "In my view, the ICBC regime is intended as a benefit to the public interest just as is human rights legislation. It would be contrary to public policy and to a harmonious contextual interpretation of the legislation to allow private parties to contract out of this regime. As such, to the extent that the release purports to release liability for motor vehicle accidents it is contrary to public policy and is unenforceable."

***Felix v. ICBC* (2015 BCCA 394)**

60. The plaintiff was severely injured in a motor vehicle accident that was caused by a front seat passenger grabbing the steering wheel of the plaintiff's vehicle causing it to crash. The passenger was killed in the accident. The plaintiff obtained judgment against the estate of the passenger. She then sued ICBC for payment on the basis that the passenger was insured under her own owner's policy because the accident arose out of the passenger's "use" of the vehicle. The trial judge found that the passenger was not "using" the vehicle because such an interpretation was incompatible with Section 66 of the Regulation. The Court of Appeal reversed. It held that the passenger was "using" the

vehicle when travelling in it and there was some nexus or causal relationship between the plaintiff's injuries and the passenger's use of the her vehicle. Citing *Niedermeyer* among other authorities, the court concluded at paragraph 46 as follows:

> "The word "use" is to be considered in the context of the legislative scheme to provide "access to compensation for those who suffer losses" as a result of a motor vehicle accident, along with a legislative history, context and jurisprudence noted above. The word has been given a broad meaning in other judicial authorities. Considering all of these factors, as noted in *Rizzo Shoes* I can only conclude that the word "use" in Section 63(b) includes use by a passenger in a motor vehicle when it is used as a motor vehicle."

***Symons v. ICBC* (2016 BCCA 2007)**

61. The issue in *Symons* was whether the insured was entitled to disability benefits after two years following an accident. She had received total disability benefits immediately following the accident. Payment of benefits ceased and the insured returned to employment. On the two year anniversary of the accident she was not in receipt of benefits and was working. Sometime later, she again became totally disabled as a result of the injuries she sustained in the accident. The entitling section for disability benefits beyond 104 weeks read as follows:

> "S.86(1) Where an injury for which disability benefits are being paid to an insured under Section 80 or 84 continues, at the end of the 104 week period, to disable the insured as described in the applicable section, the corporation shall, subject to subsections (1.1) and (2) and sections 87 to 90, continue to pay the applicable amount of disability benefits to an insured described in Section 80 or 84 ..."

62. The issue was whether entitlement required the insured to be disabled and receiving benefits at the end of the 104 week period.

63. ICBC submitted the Regulation was clear and unambiguous and required no further analysis. The claimant argued that ICBC's position ignored the contextual and purposive approach to statutory interpretation and would result in an unfair and absurd result. ICBC acknowledged that outcome but said it was a practical limitation imposed by the legislature. The court cited the remedial provisions of Section 8 of the *Interpretation Act*, RSBC 1996, chapter 236 as well as the prior decisions in *Niedermeyer* and *Felix*. It specifically noted that this legislation was "benefits – conferring legislation". Despite the apparently clear language of Section 86, the court in *Symons* concluded that the insured was entitled to further total disability benefits stating at paragraph 24 as follows:

> "Reading the words of this legislative scheme in its entire context, harmoniously with the whole of the scheme and purpose, leads to the conclusion that if a person who was disabled as the result of an accident returns to work, and then, because of setbacks or otherwise, is again totally disabled due to the accident, she qualifies for benefits under Section 86, even if she was not disabled on the "magic" day at the end of 104 weeks. This interpretation is consistent with the object of the Act – to provide no fault benefits for persons injured in motor vehicle accident."

DISCUSSION AND ANALYSIS

64. Although it is the WCB advancing a subrogated claim in this case, it is not disputed that in doing so the WCB has no greater rights that those of the Claimant.

65. As the issue is whether to apply a deductible amount, the onus of proving the deductible amount is on the Respondent (*Burleigh v. Semkow* (1995) 12 BCLR (3rd) 111 at paragraph 31; *Montgomery v. ICBC,* Arbitration 30 November 1999; *Mardesic v. ICBC,*

Arbitration July 25, 2005 at paragraph 20). The outcome however does not turn on the burden of proof.

66. It is clear, as prior cases have held, that the June 2007 changes to Section 106 and Section 148.1(1) of the Regulations relating to WCB benefits were remedial in nature, intended to eliminate the possibility of a "double deduction" of benefits to the detriment of an injured insured.

67. In my view it is not determinative that the UMP claim in this case was not advanced until sometime in 2017, some 10 years after the legislative change to prevent the deduction of WCB benefits in these circumstances. The delay is largely the result of the course of the underlying tort action. The legal analysis of the deductibility issue is the same, regardless of whether the UMP claim was presented in 2008 or in 2017. The June 2007 legislative change either applied to pre-existing contracts of insurance or it did not, and how long after June 1, 2007 the UMP claim is presented is not a principled basis for any different outcome.

68. I do not accept the Claimant's submission that the reference to "insurance" in Section 81 of the transitional provisions does somehow not include insurance provided by a statutory contract of insurance. Further, I do not accept the Claimant's submission that the New Regulation should apply because the UMP claim was not brought until after the New Regulation was in force. The problem with these submissions is that the claim, whenever brought, remains a claim under the pre-existing contract of insurance.

69. If the *Hicks* and *Ayres* decisions interpreting Regulation Section 106 have created a test applicable to all types of claims for when the Respondent has a vested right, then I have no hesitation in concluding that the Respondent in this case did not have any obligation to pay UMP compensation until long after June 1, 2007. Until it is determined that there is an "underinsured motorist" as defined in the Regulation, either by unpaid judgment after trial or by agreement of the Corporation, an UMP claim may not be advanced (*Beauchamp v. ICBC* (2005 BCCA 507). So long as the Minister was a viable Defendant

in the tort action, the Claimant retained the prospect, if any degree of fault were proven against the Minister, of recovering full compensation in the tort action with the result that there would be no UMP claim.

70. The Claimant submits that the *Hicks* and *Ayres* decisions have established the law on how the legislative change involving WCB benefits is to be applied. By implication it is argued that the *Kovacs* decision has been overruled. I do not agree. *Ayres* involved a claim for statutory compensation under Section 24 (hit and run) of the *Act*. *Hicks* involved a claim for statutory compensation under Section 20 (uninsured motorist) of the *Act*. In neither case was there a contract of insurance. The Court of Appeal in *Ayres* characterized the issue as whether ICBC had a right to deduct under the old Section 106 at the time the new Act and Regulation came into effect. Thus, the focus was on the timing of when ICBC might or must make a payment under the provisions of Section 20 and 24 of the Act. The court did not address the possibility of an acquired right to deduct under the terms of an existing contract because there was no such contract. *Ayres* neither expressly or by implication overrules the analysis in *Kovacs*. *Kovacs* is dismissed in paragraph 26 as involving uninsured motorist protection and being a case not of much assistance to the issue in *Ayres*. (The Court of Appeal was in fact in error in characterizing *Kovacs* as an uninsured motorist case. The same error appears in the trial judgment at paragraph 12. The tortfeasor had minimum limits of $200,000. The judgment against the tortfeasor totalled $426,283.83. The tortfeasor's liability policy paid $182,424.02 towards the judgment. It was the shortfall on the judgment that Kovacs sought to recover from his underinsured motorist protection. This misunderstanding of the basis of the *Kovacs* claim may account for the Appeal Court's omission to comment on the much more significant factor that distinguished *Kovacs* from *Ayres*, namely, Kovacs' insurance coverage was contractual.) It is also noteworthy that in August 1987 when Kovacs acquired his insurance policy UMP coverage was optional insurance for which he would have paid a small additional premium. I do not think *Ayres* purports to address the different analysis that might be required where there was a pre-existing contract of insurance in place.

71. The trial judge in *Ayres* (who was the trial judge in *Kovacs*) followed *Cowden* on the basis that it, like *Ayres,* did not involve a statutory contract of insurance but rather a claim under Section 24 (Hit and Run) of the *Act*. In *Buxton*, as noted previously, at paragraph 7 of the Reasons for Judgment, the court specifically distinguished between contractual claims and claims under Section 20 or 24 of the Act. *Kovacs* was summarized at paragraph 12 as finding that "without specific language the amendment could not affect the current contract of insurance". The different results in *Buxton* and *Hicks*, both uninsured motorist claims arise from the different dates relative to the legislative change when the claimants delivered their statutory notices under Section 20. The different time for when ICBC acquired a right to deduct in *Ayres* arises from the difference between Section 20 and Section 24 of the Act. Under Section 24 ICBC's obligation to pay arises only upon the expiry of the time for appeal following a judgment.

72. On this issue, I agree with the Respondent's submission. In my view the analysis is different between claims for statutory compensation under Sections 20 and 24 of the Act and claims on a pre-existing contract of insurance.

73. In my view none of *Buxton, Hicks,* nor *Aryes* precludes a different analysis.

THE TRANSITIONAL PROVISIONS AND *KOVACS*

74. It is important to appreciate that the changes to the automobile insurance scheme brought about effective June 1, 2017, when the *Insurance (Motor Vehicle) Amendment Act, 2003* was proclaimed in force were wide ranging. *The Insurance (Motor Vehicle) Amendment Act, 2003* itself contained 85 sections. The Table of Concordance in the CLE BC Publication Vehicle Insurance: British Columbia Legislation and Commentary, records 69 changes to the *Act* alone, not including sections that were repealed. The significance is that the transitional provisions in Section 81(1) of *the Insurance (Motor Vehicle) Amendment Act, 2003* applied across a whole range of legislative changes. It is not a case of the legislature addressing in a single amendment a problem in the application of Regulations 106 and 148.1(1) with a transitional provision specific to that change. As

noted by the Respondent, as part of the legislative change, Section 1.2 provided that Part 1 of the *Insurance (Vehicle) Act* applied to insurance under the plan that took effect on or after the date the *Act* came in to force. A similar provision in Section 58 applied to optional insurance contracts under Part 4 of the *Act* and in Section 74 of the *Act* to the General Provisions in Part 5 of the *Act*. UMP coverage of course is provided pursuant to Section 148.1 of the Regulation, although it is part of the mandatory coverage under the plan. These provisions, together with the specific language of Section 81(1) in my view make it clear that the legislative changes in June 2007 to the Act and Regulation were prospective in nature.

75. Where a statutory contract of insurance was in effect prior to June 1, 2007, it accords with the principles of statutory interpretation that the contract would not be altered to the detriment to the insured without specific language in the legislation indicating a retroactive effect.

76. The analysis in *Kovacs* is in my view applicable to the present case with one significant difference. As noted previously, Kovacs purchased his insurance coverage in a policy that ran from August 17, 1987 to August 17, 1988. He purchased optional underinsured motorist protection for an additional premium. The tortfeasor whose negligence caused Kovacs' injuries had minimum third party liability insurance of $200,000. The claim against ICBC therefore was one involving an inadequately insured motorist. A Regulation amendment to UMP came into effect on January 1, 1988. It added a new deductible amount namely an amount "payable to the Insured under benefit or right or claim to indemnity". Judgment was obtained against the tortfeasor on January 29, 1991 at which point, after payment of the remaining limits of the tortfeasor's liability policy, there was a shortfall which became the subject of the UMP claim. The deductible amounts at issue were past and future CPP benefits. (At the time, entitlement to CPP benefits was not a separate specified deductible amount. That change did not occur until 1994.) The result is that, had the legislative amendment been applicable to Kovacs' pre-existing policy, a term of the policy would have been changed during the currency of the policy and his entitlement to UMP compensation would have been reduced to the extent

of the amount applicable to the new deductible amount. I agree with the conclusions in *Kovacs* that:

A. Whatever was in the policy had the force of contract between the parties. … Upon the next renewal there would be a new contract in the form required by the legislative amendment … however the old contract remained in force unless and until the legislature in its wisdom said something to the contrary … (at paragraph 46);

B. The right to UMP coverage inchoate and contingent though it may have been, was acquired when (Kovacs) paid his premium and acquired a policy of insurance with the then operative regulations incorporated. ICBC incurred a contingent obligation at the same moment. The accident and subsequent judgment in excess of coverage were simply the contingencies that activated the cause of action. … (at paragraph 51).

THE PUBLIC POLICY ARGUMENT

77. The conclusion that the analysis in *Kovacs* in the case of a pre-existing contract of insurance is correct and the Old Regulation requiring deduction of WCB benefits remains part of the contract, does not end the analysis. There remains for consideration the Claimant's submission that the context of the legislative scheme to provide a universal compulsory insurance program and access to compensation for those who suffer losses from motor vehicle accidents must be taken into account both in interpreting the transitional legislative provisions and in considering the enforceability of a contractual term.

78. With respect to statutory interpretation, the well-established approach was laid out in *Rizzo and Rizzo Shoes Ltd.* (Re) (1998) 1 SCR 27, at paragraph 21, as follows:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

79. A plain language analysis alone may be an incomplete analysis (Rizzo at paragraph 20; Symons at paragraph 14).

80. The 2007 legislative change was obviously intended to be benefit – conferring upon insureds by eliminating the possibility of double deduction with respect to WCB entitlement in particular circumstances.

81. With respect to contractual interpretation, the Court of Appeal in *Niedermeyer* struck down a contractual waiver of liability because it was inconsistent with the public statutory regime of comprehensive universal automobile insurance. Even more relevant to the present case is the decision of the Court of Appeal in *Symons*. In *Symons*, the provision respecting entitlement to disability benefits beyond 104 weeks provided such entitlement "where an injury for which disability benefits are being paid to an insured under Section 80 or 84 continues, at the end of the 104 week period ..." (emphasis added). On a plain and grammatical reading of this language, entitlement depended upon continuing disability benefits being paid and continuing disability at the end of the 104 week period. Relying upon the *Rizzo* case, Section 8 of the *Interpretation Act,* RSBC 1996, chapter 238, as well as the whole of the automobile compensation scheme and its purpose, the appeal court simply did not apply the clear literal meaning of Section 86(1).

82. In particular, in *Symons*, at paragraph 18 the Court of Appeal said:

> "The legislation is benefits – conferring legislation. In *Rizzo*, the court stated that benefits-conferring legislation "ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant". The court held

> that the "consequences or effects" of an interpretation cannot be incompatible with the object of the enactment in question."

83. In my view, this reasoning applies in the present case.

84. In *Rizzo* the question was whether under the *Employment Standards Act* governing the entitlement of employees to severance, termination or vacation pay, termination by an employer included termination resulting from bankruptcy. At paragraph 27 the court said as follows:

> "In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss.40 and 40(a) of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment. Sutherland echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile."

85. The court identified the absurdity that would arise where employees who were dismissed the day prior to the bankruptcy would be entitled to their termination and severance payments but those whose employment was terminated on the day the bankruptcy was final would not be so entitled. This result was even more absurd in the context of a unionized workplace where the most senior employees with the greatest entitlement to severance and termination payments would likely be the last to be terminated. (*Rizzo* paragraph 28)

86. Further, at paragraph 29, the court said:

> "If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion this is an unreasonable result."

87. Likewise, in *Symons* the court identified the inequity that would arise where entitlement to future disability benefits beyond 104 weeks depended upon whether the claimant was continuing to receive benefits on the last day of the 104 weeks. Thus, the court said at paragraph 23 that "if the sections are read, as ICBC suggests, to mean that only a person who is disabled "at" the 104 week mark can obtain benefits after that period, that interpretation does not accord with the context and object of the legislation, nor with the reasoning of *Halbauer*".

88. In the present case a similar absurdity occurs. An insured who took out a contract of automobile insurance on June 1, 2007 would not have WCB benefits deducted from their UMP claim. An insured who took out a contract of automobile insurance on May 31, 2007 would have WCB benefits deducted from their UMP claim notwithstanding the legislative change removing the deduction because of its acknowledged unfairness.

89. To adopt the language of *Rizzo*, it would be extremely inequitable and hence an absurd consequence to apply a deduction that the legislation has just removed as being unfair to injured UMP claimants.

90. What distinguishes the present case from *Kovacs* is that the amending legislation in *Kovacs* was detrimental to the interests of the insured because it added an additional

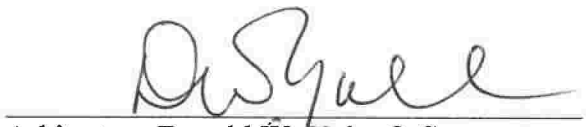
deductible amount. In the present case, the legislative change was conferring a benefit on insureds by relieving them of the inequity of a double deduction of WCB entitlement in UMP claims.

91. I note that another change to UMP coverage brought about in the same June 1, 2007 re-enactment was to add yet another deductible amount, namely an amount "(j) paid or able to be paid by any other person who is legally liable for the insured's damages". That is clearly a change detrimental to the insured. In my view, applying the *Kovacs* analysis and the transitional Section 81(1), that change would not apply to claims under contracts of insurance in existence prior to June 1, 2007.

92. In my view, to require the deduction of WCB entitlement in this case under the Old Regulation would be inconsistent with the overall scheme of providing universal compulsory automobile insurance and in particular the purpose of deductible amounts in calculating UMP compensation; it would also be contrary to the principles of statutory interpretation requiring a broad and generous manner of interpreting benefits conferring legislation; and it would be unfair and unjust to this Claimant to saddle him with a deduction that the legislature has abolished for other UMP claims.

CONCLUSION

93. I find that the Claimant's WCB benefits are not deductible from his UMP compensation.



Arbitrator: Donald W. Yule, Q.C.