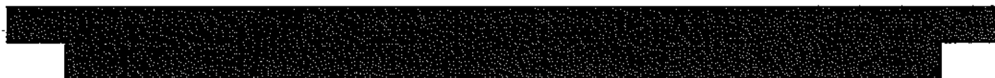
IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2(1) OF THE REVISED REGULATIONS TO THE *INSURANCE (MOTOR VEHICLE) ACT*
BC REG. 447/83

AND

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

BETWEEN:



CLAIMANTS

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION DETERMINATION
PRELIMINARY HEARING

DATE OF HEARING:	**August 28, 2009**
PLACE OF HEARING:	**Vancouver, British Columbia**

J.J. CAMP, Q.C. — **Arbitrator**
Camp Fiorante Matthews
400-555 West Georgia Street
Vancouver, BC V6B 1Z6

GREGORY L. SAMUELS — **Counsel for the Claimants**
Cross Border Law
Suite 204 – 1730 West 2nd Avenue
Vancouver, BC V6J 1H6

AVON M. MERSEY — **Counsel for the Respondent**
MARTHA VON NIESSEN
Fasken Martineau LLP
Barristers & Solicitors
Suite 2900-550 Burrard Street
Vancouver, BC V6C 0A3

ISSUE TO BE ARBITRATED:

1. The parties have agreed, pursuant to s. 148.2 of the Revised Regulations (1984) of the *Insurance (Motor Vehicle) Act,* R.S.B.C. 1996, c. 231 (the "Act"), and *The Commercial Arbitration Act,* R.S.B.C. 1996, c. 55 to submit this matter to arbitration.

2. A preliminary hearing was heard on August 28, 2009 to address the issue as to what impact, if any, the underlying tort decision in Washington State has on the claimants' Underinsured Motorist Protection ("UMP") claims. More specifically, was the underlying tort decision determinative of not only liability but of damages pursuant to s. 148.1 of the Act, such that each claimant would be entitled to the applicable amount set out in s. 148.1(5) ($1,000,000) less applicable deductable amounts, leaving the only issue to be determined by way of arbitration the sum of those applicable deductable amounts.

3. The parties have agreed that I have jurisdiction to determine this issue.

4. The issue at hand is the same matter which was previously determined by arbitration by Joseph A. Boskovich on March 16, 2006. His ruling has since been vacated by court order. Although I have read Mr. Boskovich's reasons, with the approval of the parties, they have not influenced my decision.

FACTS:

5. The single vehicle accident that is the subject of this arbitration occurred on October 27, 1996 near Chehalis, Washington. The British Columbia vehicle involved in the accident being driven by [redacted]. He had six family members with him. One of the tires on the vehicle rapidly deflated causing [redacted] to lose control of the vehicle. It rolled over several times causing injuries to the claimants.

6. At the time of the accident, [redacted] was a resident of British Columbia and was insured under a third party liability policy of insurance with a limit of $200,000 issued by the Insurance Corporation of British Columbia ("ICBC") pursuant to Part 6 of the *Act*. [redacted] carried no excess policy of third party liability insurance on the vehicle.

7. At the time of the accident, each claimant was a resident of British Columbia and a member of the same household as [redacted] and as such each had first party coverage pursuant to Part 10, s. 148.1 of the Regulations to the Act.

8. In September 1999, after many months of negotiations, an agreement was reached between the claimants, [redacted] and ICBC called an Advance Loan Agreement and Covenant Not to Execute the provisions of which included:

- a payment of CDN $150,000 from ICBC to the claimants;
- a denial of liability by the defendant [redacted];
- a covenant not to execute any judgement entered against the defendant [redacted] by a Washington court in excess of CDN $200,000;
- an agreement by the claimants to pay ICBC the lesser of 10% of any Washington state judgment or the full costs of the defendant [redacted]'s defence in the event that the tire manufacturer was held liable; and
- an acknowledgement by all the parties to the agreement that nothing in the agreement would impair the rights of the claimants to proceed with UMP claims in BC regardless of the outcome of the Washington action.

9. On October 26, 1999, the claimants filed a Complaint for Damages For Negligence and Product Liability in the Superior Court of Washington for Lewis County against the defendants, the Uniroyal Goodrich Tire Company, Uniroyal Goodrich Tire Company Inc., Michelin North America and Petru Tepei (the "Complaint"). The claim against the defendant [redacted] was for negligent maintenance and operation of his motor vehicle. The claim against the remaining defendants was for defective design or defective manufacture of the tires on the vehicle.

10. The Complaint alleged the customary array of heads of damage.

11. On November 14, 1999, counsel for the claimants served a copy of the Complaint on ICBC and notified ICBC that the damages suffered by the claimants were likely to exceed the $200,000 third party liability insurance.

12. The tort trial before a jury commenced in March, 2004 and lasted approximately 45 days. The defendant Michelin brought a number if interlocutory motions including:

- an application in February 2001 to dismiss the claims on the ground of *forum non conveniens*. The basis of the application was that the action should be decided in the courts of Canada – the country having the closest relationship with the parties of this dispute.

- an application in September 2003 to apply British Columbia law with respect to liability and quantum.

13. Both the claimants and the defendant [redacted] opposed these applications and both applications were denied by the court in Washington State

14. On April 23, 2004, the jury delivered a verdict, dismissing the product liability case. The jury also found that, although the defendant [redacted] was not negligent in his operation of the vehicle, he was negligent in failing to maintain the tire in proper working order and in this regard his negligence was the proximate cause of the plaintiffs' injuries. The jury awarded damages of approximately $9.1 Million (U.S.) to the plaintiffs as follows:

- [redacted]: US $ 1,497,266
- [redacted]: US $ 1,129,271
- [redacted]: US $ 1,553,921
- [redacted]: US $ 3,605,832
- [redacted]: US $ 1,179,991
- [redacted] US $ 136,798

15. On June 30, 2004, as per the terms of the Advance Loan Agreement and Covenant Not to Execute, the balance of the third party liability coverage was paid to the claimants.

16. I note that the record before me was very substantial including some transcripts of depositions, the exhibits at the trial of the action in Washington state, and very comprehensive written submissions and authorities from both parties. Both counsel provided very helpful oral submissions as well.

ANALYSIS:

17. In my opinion, I must conduct a two step process to answer the question to be arbitrated. The first step is to interpret the meaning of s. 148.2(6) of the *Act* as it read at the time of this motor vehicle accident. The second step is to determine whether this section is overridden, given the facts and circumstances of this case, by various principles including res judicata, issue estoppel and abuse of process.

18. To properly interpret s. 148.2(6), this section must be read in the context of the legislation as a whole and the surrounding germane sections. The important sections and definitions to put this matter in context include:

"insured" in s. 148.1 which is defined as follows:

(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, or

(ii) a member of the household of a person described in subparagraph

(b.1) a person who is

(i) an insured as defined in s. 42 and who is not in default of premium payable under s. 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" in s. 148.1 which is defined as follows:

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,

s. 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 s. 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,

s. 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

(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 s. 148.2 (6), or

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

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

s. 148.2(1) The determination as to whether an insured provided underinsured motorist protection under s. 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*,

s. 148.2(6) Subject to subsection (1), where an accident for which a claim is made under s. 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.

19. It is trite law that the UMP entitlement scheme is remedial legislation and as such must be accorded such fair, large and liberal construction and interpretation as best to ensure the attainment of its objectives. It is equally trite law that a proper interpretation requires a purposive approach.

20. Generally speaking, these sections establish that the claimant or claimants must prove to ICBC's satisfaction that they have suffered compensable loss at the hands of an underinsured motorist, must establish the liability of the underinsured motorist for the damages sustained, must resolve any issues of contributory negligence and must establish that the damages attributable to the fault of the underinsured motorist exceeds the insurance limits and assets available to compensate the claimants.

21. On the facts of this case ICBC concedes the claimants have satisfied all of the prerequisite requirements laid down for UMP coverage. Hence, it is conceded that the Washington jury verdict established liability on the underinsured motorist, resolved issues of contributory negligence and established that the damages attributable to the fault of the underinsured motorist exceeded the insurance limits and assets available to compensate the claimants. Put another way, it is conceded that the Washington jury verdict determined that the claimants are "insureds" and [redacted] is an "underinsured motorist" for the purposes of the UMP scheme.

22. In the majority of cases, in my experience, the parties (ICBC and the claimants) agree that the prerequisites for UMP coverage have been satisfied and the parties arrive at a settlement pertaining to UMP compensation. 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 an UMP arbitration by consent.

23. In this case, the evidence satisfies me that ICBC required a tort trial to determine the prerequisites necessary for UMP arbitration. The claimants chose Washington State as the most favourable jurisdiction to proceed with the tort trial, for good and valid reasons which are not germane to the arbitration issue before me.

24. Stepping back, there can be little doubt that the UMP provisions were intended to provide benefits to a broad range of victims of motor vehicle accidents who were injured or killed in circumstances where the person at fault is uninsured or underinsured. The UMP compensation has waxed and waned over the years but at the time that this accident

occurred, each of the claimants was entitled to $1 million in UMP coverage less the deductible amounts set forth in s. 148.1.

25. Turning to the specific sections, s. 148.2(1) is quite straightforward and provides that any dispute relating to eligibility for UMP compensation or as to the amount of UMP compensation is to be submitted to arbitration. Similarly, in my opinion s. 148.1(5) is also straightforward. It is a limiting provision that stipulates that the UMP compensation shall not exceed the total amount of the damages awarded in the tort action, **the amount assessed under s. 148.2(6)** or $1 million whichever is the least, minus the sum of the applicable deductible amounts. There can be no doubt, in my mind, that I must give meaning to the reference to s. 148.2(6) in the limiting provisions of s. 148.1(5).

26. I now turn to an interpretation of s. 148.2 (6) which, for ease of reference, is set out again as follows:

> Subject to subsection (1), where an accident for which a claim is made under s. 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.

27. First, so far as I am aware, there is no jurisprudence squarely on point, that is to say, there is no case that squarely decides what effect is to be given to the outcome of a damages award made by a judge or jury in a foreign North American jurisdiction on the amount of UMP compensation.

28. Section 148.2(6)(a) relating to legal entitlement to UMP coverage is relatively straightforward. It says that where an accident for which UMP compensation is being sought occurs in another jurisdiction, the law of the place where the injury or death was suffered shall be applied to determine whether the claimants are legally entitled to recover UMP compensation and if a difference arises as to that legal entitlement, that difference shall be arbitrated under the Commercial Arbitration Act of British Columbia. It is s. 148.2(6)(b) relating to the measure of any damages and the assessment of the amount of UMP compensation payable that is at the nub of this arbitration.

29. Having said that there is no case squarely on point, there is a helpful British Columbia Supreme Court and British Columbia Court of Appeal decision in *Kreaker Estate v. Insurance Corp. of British Columbia,* [1991] I.L.R. 1053 (B.C.S.C.) and *Kreaker Estate v. Insurance Corp. of British Columbia* (1992), 93 D.L.R. (4th) 431 (B.C.C.A.). A deceased was killed in a motor vehicle accident in Washington state. The defendant carried minimum third-party liability insurance and had no other means of satisfying the claim. The deceased had UMP coverage but if the law of British Columbia applied, there would be no claim as the deceased left no dependents, whereas under Washington state law, the estate of a deceased who left no dependents could pursue a claim. A petition was launched for a declaration concerning which law was to be applied under an earlier version of s. 148.2(6) with almost identical language. Mr. Justice McKenzie (as he then was) said as follows:

> The respondent submits that the intention of the legislature in enacting [s.148.2(6)(a)] was to confirm that foreign law would determine all issues of liability, and in enacting [s.148.2(6) (b)] that B.C. law would be applied to determine all issues of quantum. Thus, on the facts herein Underinsured Motorist Protection coverage should be read as only providing compensation to the levels awarded by B.C. courts.
>
> ICBC documented the recent legislative changes to these sections and submitted that the present wording reflects the legislature's intention to avoid claims made on Underinsured Motorist Protection for exemplary and punitive damages not recoverable in B.C., and to avoid the extravagant mega judgments sometimes awarded in foreign jurisdictions.
>
> I agree with the respondent's interpretation of the two subsections. I disagree with the petitioner's interpretation that the

> words "measure of damages" in [s.148.2(6)(b)] neither explicitly nor by necessary implication covers a determination of what types of damages are available, and disagree that the words deal only with the procedural issue of measuring or quantifying damages.
>
> The more I read the two subsections the more I am impressed with the simplicity and clarity of their message. They make a clear and explicit division between the issues of liability in [s.148.2(6)(a)] and quantum in [s.148.2(6)(b)] without ambiguity and therefore the issues of liability must be determined by Washington law and the issues of quantum by British Columbia law.

This decision was appealed to the British Columbia Court of Appeal and Mr. Justice Goldie dismissed the appeal and employed the following language:

> I think it clear the intention of [s.148.2(6)] 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.148.2(6)] "... 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 (a) relates to quantum. These directions are confined to the issues of the legal liability of the wrongdoer and the contributory negligence, if any, of the insured.
>
> To the result determined under clause (a) there is to be then applied, by virtue of clause (b), the substantive law of the Province - the "measure of damages" - to arrive at what the insured could recover if the accident had occurred in the Province. The final direction, stated in the words "and to assess the amount of compensation payable to the insured", then requires the arbitrator to subtract what is stipulated elsewhere in the regulations to be subtracted, including what can be or has been recovered from the wrongdoer and so to arrive at what the insurer must pay the insured.

30. Before turning to the argument of ambiguity, I wish to deal with the Supreme Court of Canada decision in *Sommersall v. Friedman*, 2002 SCC 59. Mr. Justice Iacobucci for the majority said at paragraph 33:

> 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. Insurance Corp. of British Columbia* (1992), 93 D.L.R. (4th) 431 (B.C.C.A.).

It was argued that this reference to the British Columbia Court of Appeal decision in *Kreaker Estate v. Insurance Corp. of British Columbia* (1992), 93 D.L.R. (4th) 431, undermines the legal efficacy of that decision vis-à-vis the facts and circumstances of the subject case. I do not believe this to be the case.

31. The conclusion in the *Kreaker Estate*, with which Mr. Justice Iacobucci disagreed was Mr. Justice Goldie's statement that "legally entitled to recover damages" means "has a right of action for damages". What the majority in the Supreme Court of Canada held is that a claimant can satisfy the requirement of "legal entitlement" in an underinsured motorist protection clause by proving the tortfeasor was at fault and by proving the resulting damages, and that this does not mean that the claimant had to prove that he or she "has a right of action for damages" as suggested by Mr. Justice Goldie. Put another way, the majority of the Supreme Court of Canada found that a claimant was not required to have right of action against the tortfeasor for the claimant to be legally entitled to recover damages under the underinsured motorist insurance provisions at issue in that case. Hence, I continue to place considerable weight on the *Kreaker Estate* decisions.

32. Although counsel for the claimants argued that there was ambiguity which would invoke the *contra proferemtum* rule, I do not find any ambiguity which would permit this rule to be applied, assuming that this rule could be applied to legislative provisions. Certainly, Mr. Justice McKenzie found no ambiguity in this language. To the contrary, he was impressed with the simplicity and clarity of the language. Similarly, the British Columbia Court of Appeal did not find any ambiguity in their reading of the subject language.

33. Turning to my interpretation of s. 148.2 (6), I find that the section is properly interpreted to mean that issues of legal entitlement shall be determined by Washington law in this case and that the issues pertaining to the quantum of damages shall be determined by the law of British Columbia. I am fortified in coming to this interpretation because of the linkage between s. 148.2(6) and s. 148.1(5). Section 148.1(5) constitutes a

limiting provision and the limitation only works or works much better if the interpretation of s. 148.2 (6)(b) is interpreted such that the issues pertaining to the quantum of damages shall be determined by the law of British Columbia.

34. Turning to the remaining issues including res judicata, issue estoppel and abuse of process, there is no doubt in my mind that these doctrines can be applied if the facts and circumstances support such application. However, I am not persuaded that the facts and circumstances in this case do support the application of any of these doctrines.

35. Turning first to the res judicata argument, I am satisfied that the tort action in Washington neither decided the "same question" as the UMP action will decide in British Columbia nor are the parties the "same parties" or their privies in the two actions. The Washington State tort action decided issues of liability and quantum in the context of the third-party tort trial whereas the UMP action is a first party action that is contractual in nature where, among other things, the arbitrator must take into account deductibles that are not germane in the third-party tort action. So far as the parties are concerned, although ICBC wears two hats, one hat as a third-party insurer in the tort action and one hat as a first party insurer in the UMP action (however uncomfortably those hats may sit), ICBC wears two hats as dictated by legislative mandate and that cannot be gainsaid.

36. Turning to the issue estoppel argument, it also fails for essentially the same reasoning that causes the res judicata argument to fail.

37. Turning to the abuse of process argument, I have reviewed the evidence carefully and I simply find that there was no abuse by ICBC on the facts and circumstances of this case. The strongest argument raised by counsel for the claimants was that the Advance Loan Agreement and Covenant Not to Execute struck between the claimants and ICBC for a partial advance of the third-party liability limits had a provision that allowed ICBC to recover an escalating amount of costs if the action had been successful against the tire manufacturer and dependent upon the amount of damages recovered. In return, among other consideration, the claimants agreed not to execute against the estate of the defendant driver. In my opinion, the bargain that was struck benefited both sides and no conflict of interest could be said to arise on the face of the document as it was executed.

38. I will deal briefly with the argument on behalf of the claimants that s. 10 of the *Law And Equity Act* which posits that all matters in controversy between the parties should be completely and finally determined and all multiplicity of legal proceedings should be avoided. It is my opinion that this section can have no application in the facts and circumstances of this case where the Act lays down a requirement for further proceedings in British Columbia to resolve UMP differences.

39. The claimants also argued that s. 88 (b) of the *Insurance (Vehicle) Act* offers substantial persuasive support to the claimants argument that re-litigation of the quantum issues sought by ICBC should be forbidden. It is my opinion that this section pertains to third-party liability issues and not to first party UMP issues and therefore offers no support for the contention made on behalf of the claimants.

40. It was also argued on behalf of the claimants that their contentions were supported by the doctrine of comity. I disagree. This argument also founders on the fact that the claimants are seeking recovery from ICBC under a form of first party UMP insurance as opposed to ICBC acting in response to third-party liability coverage in the Washington state action.

CONCLUSION

41. I find that s. 148.2 (6) is properly interpreted to mean that issues of legal entitlement shall be determined by Washington law in this case and that the issues pertaining to the quantum of damages shall be determined by the law of British Columbia.

42. I cannot leave this matter without commenting upon the passage of time, over 12 years, from the time of the accident to the date of this award. I am not intending this comment to be critical of any party but rather to ask the parties to move with dispatch so that this matter can be concluded once and for all.

Dated: Sept. 17, 2004