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

AND

THE COMMERCIAL ARBITRATION ACT,
RSBC 1996, c. 55

BETWEEN:

BYONG LYUL LEE

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION ON APPLICATION OF ARBITRATOR, MARK TWEEDY

Counsel for the Claimant: Mark Belanger

Counsel for the Respondent: Guy Brown, QC

Hearing Date: February 11, 2016

Date of Decision: February 16, 2016

A. Introduction

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

[2] ICBC applies to strike paragraph 6 of the Notice to Arbitrate and paragraph 6 of the Statement of Claim. The basis of the Application is that ICBC says that the two paragraphs in question improperly disclose a "communication created for and communicated in the course of settlement negotiations which is subject to settlement privilege".

[3] The Claimant agrees that the two paragraphs disclose a settlement communication which is ordinarily privileged, but says that their disclosure ought

to be permitted as an exception to the general rule. The exception which is argued is that public policy and interest demand disclosure, to ensure fairness between ICBC and its insured, Mr. Lee.

[4] The two paragraphs in issue contain identical language and read:

> Despite their position, the Respondent subsequently offered to settle the Claimant's Under Insured Motorist Protection claim on September 22, 2014. By way of these actions, the Respondent provided their *de facto* consent for the Claimant to accept the tender of third party limits in the Washington State action.

B. Issue

[5] The sole issue on this Application is whether a public policy and interest exception to the general rule that privilege attaches to settlement communications applies in this case.

B. The evidence on the Application

[6] ICBC filed an Affidavit of Mr. Andre Scali in support of the Application. On December 7, 2015 I ordered that Mr. Scali be cross examined on his Affidavit. That cross examination took place on December 15, 2015. The transcript of the cross examination is in evidence on the Application.

[7] Paragraph 4 of Mr. Scali's Affidavit reads:

> The reference to "all in Part 10 and Part 7" in my e-mail in Exhibit "A" means the offer was for settlement of all claims brought by Mr. Lee under Part 10 and Part 7 of the *Insurance (Vehicle) Regulation*-Part 10 of the *Regulation* includes UMP coverage and Part 7 provides coverage for no-fault accident benefits. At the time I made the settlement offer, I was not persuaded that Mr. Lee was entitled to UMP compensation, but decided to make an offer which extended to both UMP and Part 7 claims to avoid the costs and risks of an UMP arbitration. I would not have made the settlement offer to Mr. Lee if I had believed that it could be used against ICBC to try and establish an entitlement to UMP compensation in arbitration.

[8] I will refer to the pertinent portions of Mr. Scali's cross examination later in this Decision.

B. The Parties' positions

[9] ICBC's position is that paragraph 6 in the Notice to Arbitrate and paragraph 6 of the Statement of Claim disclose a communication created for, and communicated in, the course of settlement negotiations which are subject to a

claim of privilege. The Claimant agrees with the general proposition that such communications are privileged, but says that that Mr. Scali's settlement offer falls within an exception to the general proposition, on the basis of public policy or public interest. The specific public policy or interest relied on by the Claimant relates to ensuring fairness between insurers and those they insure.

[10] Counsel for the Claimant relies upon the evidence given by Mr. Scali on his cross-examination to support his argument that ICBC was acting in bad faith by denying that the Claimant's claim would exceed the limits of insurance in the underlying Washington state action, but nevertheless offering $20,000 to settle, *inter alia,* the Claimant's UMP claim. Specifically counsel for the Claimant points to Mr. Scali's request for and review of various medical and employment records. This evidence is found at pages 23 through 27 of the Transcript of Mr. Scali's cross examination.

C. Analysis and Decision

[11] In my view the evidence of Mr. Scali does not establish that he had an improper motive or was acting in bad faith, either in requesting various medical and employment records for review, or in making an offer of settlement. With respect to the request for records, I expect that this is commonplace, and is both usual and necessary in the discharge of Mr. Scali's responsibilities.

[12] With respect to Mr. Scali making a settlement offer on September 2, 2014, I do not accept the submission that the offer was made "for procedural purposes", in order to somehow lull the Claimant into thinking that ICBC did not take issue with the position then advanced by the Claimant that the underlying Washington State action exceeded the available policy limits. There are any number of reasons as to why Mr. Scali might make a settlement offer, including litigations risks and costs, both of which he deposed to. Despite a thorough and vigorous cross examination of Mr. Scali, no evidence to the contrary was adduced.

[13] I also note that Mr. Scali had previously said in an email dated June 30, 2014 that "it is not clear whether a Washington jury would award damages in excess of $100,000USD to your client therefore at this time there is no underinsured motorist". I do not think a relatively modest subsequent settlement offer can be seen as in any way detracting from or abrogating that position.

[14] In the circumstances I am unable to find that public policy or interest dictates that the settlement offer which was made on September 2, 2014 not be privileged.

D. Conclusion

[15] The Application is allowed, and paragraph 6 of the Notice to Arbitrate and paragraph 6 of the Statement of Claim are struck.

[14] Costs were not argued at the hearing of the Application, and I would be pleased to hear from Mr. Brown and Mr. Belanger, in turn.

Mark Tweedy
Arbitrator