

IN THE MATTER OF AN ARBITRATION
PURSUANT TO s.148.2(1) OF THE REVISED REGULATIONS
TO THE *INSURANCE (VEHICLE) ACT* (BC REG. 447/83 AND
THE *ARBITRATION ACT*, R.S.B.C. 1996, c. 55

BETWEEN

MP

CLAIMANT

AND

INTACT INSURANCE COMPANY and
ECONOMICAL INSURANCE GROUP

RESPONDENTS

Arbitrator: Kenneth Glasner, Q.C.

Counsel for the Claimant: Kevin F. Gourlay

Counsel for Intact Insurance: Jordan A. Bank

Counsel for Economical Insurance: Matthew Bujar

**RECONSIDERATION PURSUANT TO PARAGRAPH 57 OF THE COURT'S
REASONS DATED SEPTEMBER 8, 2021**

[1] On September 8, 2021, the Court at para 57 stated:

I set aside the decision and remit the matter to the Arbitrator for
reconsideration in the light of these reasons.

(emphasis added)

[2] Section 30(1) of the relevant *Arbitration Act* states:

If an award has been improperly procured or an arbitrator has
committed an arbitral error, the Court may

- (a) set aside the award, or
- (b) remit the award to the arbitrator for reconsideration

(emphasis added)

[3] My first concern was whether I still retained jurisdiction in that the decision was set aside.

[4] In order to clarify my jurisdiction, I sought and received consent from the three parties that I retained jurisdiction.

[5] I agree with the Court at para 51 when the Court acknowledged that the case presented a novel issue – an issue where the existing authorities have not directly addressed the issue.

[6] In tackling the comments posed, I am mindful of the Court's comments at paras. 43 and 46.

[7] In undertaking the reconsideration I am mindful of the parties' positions as set out in para 19 of the Court's reasons.

[8] The Court at para 30 states:

It appears the parties agreed the coverage was the same and the issue was which policy was primary.

I agree.

[9] The issue is essentially a contest between two insurers as to who is primarily responsible.

[10] The required coverage under the legislation does not deal with which coverage is better, rather whether the coverage meets the statutory test.

[11] *Masur*, at para 44 provides a distinction between cases where ICBC is involved and where it is not – here ICBC is not involved.

[44] There is no provision in the Regulations with respect to the priority of UMP coverage where I.C.B.C. is not an insurer or where there is coverage under more than one SEF 44. There are no provisions in the Regulations modifying or precluding the application of Clause 7 of the SEF 44.

[12] *Family Insurance* deals with two policies, “covering the same risk”. See para 37 of the Interim Award. At para 39 of the Interim Award, the trial judge notes the two clauses, “was not identical”.

[13] A review of the para 41 of the Interim Award involved, “...looking at the means by and the extent to which each insurer sought to limit its liability....”

[14] Here I find the dominant distinction raised by both insurers is found in Intact’s policy which contained the benefit of an, “other insurance clause”. Had both policies contained such a clause, I would have needed to grapple with the reasoning in *Mazur*

with respect to effect of an SEF 44. Here the material issue is essentially resolved as a result of Intact's policy containing the "other insurance clause".

[15] If Economical wanted to limit their exposure, their policy could have included an, "other insurer" provision – it didn't.

[16] The degree of required coverage by out-of-province insurers is set out in the legislation which imposes such coverage. The ICVLI Regulation prevents insurers from relying on a provision of their policy to limit coverage.

[17] In considering Economical's position on whether section 148.1(9) of the Regulation "...was triggered and applicable respecting priorities between the Economical policy and the Intact policy." I refer to para 43 of *Mazur*.

[43] Section 148.1(9) has no application in this case because there is no I.C.B.C. coverage at issue. All three defendant insurers are out-of-province. All three provide UMP coverage, and that coverage is extended to the plaintiffs in this case. The only question is, as among the three policies, which policy (if any) is the primary coverage. The answer to that question does not affect the nature or extent of the coverage to which the plaintiffs are entitled, or coverage to which they would otherwise be entitled under the Regulations.

These reasons are applicable to this case.

[18] Economical raises the issue of section 2 of the ICVLI Regulation. I gather this refers to section 2(2)(b) dealing with the prohibition of setting up a defence. I agree with Intact's argument as set out in para 20 of the Court's reasons.

[19] Para 42 of *Mazur* says:

[42] I have concluded that Citadel and Liberty, by relying on Clause 7 of the SEF 44, are not setting up a defence to the claims of the plaintiffs. Rather, they are relying on Clause 7 to determine the scope of their respective obligations to the plaintiffs.

[20] The Court at para 39 raises the issue of whether an out-of-province policy stands in the shoes of ICBC. Had the applicable legislation provided for such an interpretation then I suspect the legislation would have been specific. On the material before me I am not prepared to make the implied assertion in the absence of clear legislation.

[21] This is not a case of stepping into the shoes of ICBC, but rather to impose upon an out-of-province insurer the requirement of providing UMP coverage as required by the applicable legislation.

[22] Para 18 of the Court's reasons state:

[18] Since N.C. was an underinsured motorist the Arbitrator found that both Intact and Economical were obliged to provide UMP coverage. Intact expressly provides such coverage (through the OPCF 44R endorsement) and Economical was required to provide it based on the statutory requirement that underinsured motor vehicle insurance protection is compulsory in BC. Neither party disputed this finding at the hearing of this petition; the disagreement is over which insurer (or both) is obliged to provide primary UMP coverage.

[23] If the reasons in *Mazur* applied then the issue of a dual obligation would have had to be considered.

[24] The reconsideration is to be read together with the reasons set out in the Interim Award.

[25] Having regard to the issues raised by the Court; the parties' positions as set out in para 19 of the Court's reasons; and the arguments raised by counsel before me, I find in this reconsideration that my decision rendered January 27, 2020 has not changed. I still find that Economical Insurance Group is the primary insurer for UMP coverage.

Vancouver, British Columbia
November 15, 2021

Kenneth Glasner, Q.C. FCI Arb.
Arbitrator