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:

[redacted]

CLAIMANTS

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION DETERMINATION OF SUBSIDIARY ISSUES PERTAINING TO THE CLAIMS OF A[redacted] T[redacted], C[redacted] C[redacted] AND D[redacted] T[redacted]

DATE OF HEARING:	**August 16 and 17, 2010**
PLACE OF HEARING:	**Camp Fiorante Matthews**
J.J. CAMP, Q.C. Camp Fiorante Matthews 400-856 Homer Street Vancouver, BC V6B 2W5	**Arbitrator**
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ISSUE TO BE ARBITRATED

1. The parties have agreed, pursuant to s. 148.2 of the Insurance (Vehicle) Regulation B.C. Reg. 447/83 ("*Regulation*") of the *Insurance (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. The parties have agreed that I have jurisdiction to determine the issues engaged in this arbitration.

3. The parties have agreed that each of the claimants are entitled to underinsured motorist protection("UMP") coverage of up to $1 million less all appropriate deductions.

4. An arbitration in this matter to determine the quantum of damages for three of the six claimants was heard on March 29 and 30, 2010. That arbitration dealt with the claims of three of the T[redacted] family members, namely, A[redacted] T[redacted], C[redacted] C[redacted] and D[redacted] T[redacted]. In my award dated May 13, 2010 I determined the amount of first party coverage UMP damages to be awarded to these three claimants. The subsidiary issues that remain to be determined are management fees, if any, for A[redacted] T[redacted], tax gross up, if any, for A[redacted] T[redacted], statutory deductions, if any, for A[redacted] T[redacted]; statutory deductions, if any, for C[redacted] C[redacted]; and statutory deductions, if any, for D[redacted] T[redacted]. In addition, I have been asked to allocate amongst the six claimants entitled to UMP damages, the third party liability limits of $200,000 paid by the Insurance Corporation of British Columbia ("ICBC"). I also will briefly address costs.

FACTS

5. The facts giving rise to the UMP awards can be found in my earlier determination dated May 13, 2010. I therefore propose to only refer to salient facts or additional facts that have come to my attention that are needed for the determination of the various subsidiary issues.

6. The single vehicle accident that is the subject of this arbitration occurred on October 27, 1996 near Chehalis, Washington (the "MVA" or the "1996 MVA"). The British Columbia vehicle involved in the accident was being driven by Mr. P[redacted] T[redacted], the patriarch of the T[redacted]

family. He had six family members with him. One of the tires on the vehicle rapidly deflated causing Mr. T[redacted] to lose control of the vehicle. It rolled over several times causing injuries to the claimants.

7. At the time of the accident, Mr. P[redacted] T[redacted] was a resident of British Columbia and was insured under a third party liability policy with a limit of $200,000 issued by ICBC. Mr. P[redacted] T[redacted] did not have any excess third party liability insurance on the vehicle. ICBC conceded the $200,000 third-party liability coverage would not be sufficient to satisfy the claims emanating from this accident. Some years later, ICBC paid the third-party liability coverage limits of $200,000 to counsel for the claimants and the issue of allocating the sum of $200,000 between the claimants was left to be resolved.

8. At the time of the accident, each claimant was a resident of British Columbia and a member of the same household as Mr. P[redacted] T[redacted] and, as such, each had UMP pursuant to Part 10, s. 148.1 of the *Regulation*. Hence, each of the claimants have UMP coverage of up to $1 million less appropriate deductions. The determination of what deductions were appropriate and the amount of those deductions were left to be resolved.

A[redacted] T[redacted]

Management Fees

9. In my earlier determination dated May 13, 2010, I said at paragraph 20: "If [A[redacted] T[redacted]] receives a substantial sum of money, she says that she would need to have advice on managing any such award because neither she nor her husband have any money management acumen." I awarded her $160,000 for the cost of future care and $315,000 for the impaired capacity to earn income, making a total of $395,000. A tax gross up award is also customarily included in the awards that can be aggregated for the purpose of determining if a management fee is appropriate.

10. The Supreme Court of Canada found in *Mandzuk v. ICBC*, [1988] 2 S.C.R. 650 at para. 2, that a management fee should be awarded when a plaintiff is unable to manage his or her affairs or lacks the ability to invest the fund to produce the required return for the fund to be self-

sustaining for the proper length of time. A factual basis is required to support a claim for a management fee. The evidence must show:

(a) necessity for management assistance;

(b) necessity for investment advice in the circumstances; and

(c) the expected cost of these services.

11. If a management fee is found to be appropriate, the question to be asked is what level of management assistance is requisite to look after the need for the injured plaintiff to achieve the required rate of return: *Towson v. Bergman*, 2009 BCSC 143 at para. 389. The requisite rate of return is a real rate of return equal to the discount rate used to calculate the present value of the future damages: *Yeung (Guardian ad Litem of) v. Au*, 2007 BCSC 175 at para. 46.

12. In *Chiu v. Chiu*, 2000 BCSC 108, the court found at paragraph 38 that the plaintiff had met the evidentiary burden of establishing a need for management assistance on the basis that: "...the plaintiff has a high school education. His work experience has been limited to helping in his parents' electronics factory. He has no experience investing large sums of money and there is evidence that his money-managing abilities are lacking."

13. A number of the cases dealing with management fees use the levels set out in the B.C. Law Reform Commission Report[1]. Level 2 states that "the plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award". Level 3 states that "the plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis."

14. The Law Reform Commission Report recommends fees of the present value of $1,000 expended at five-year intervals throughout the period of the award for Level 2, and for Level 3, the fee is calculated as a percentage of the future loss award.

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[1] Law Reform Commission of British Columbia. "Report on Standardized Assumptions for Calculating Income Tax Gross-Up and Management Fees in Assessing Damages." 1994.

15. Ms. T[redacted] was 18 years old and in her high school graduation year when she suffered serious injuries in the MVA. She eventually graduated from high school and has spent most of her time looking after her family including her five children. She twice failed attempts to register for a nursing aide course at Douglas College. Her work, such as it was, was concentrated on caring for people who needed assistance in their daily living. It does not appear that she has any experience, gainful or otherwise, in the field of investing, money management and the like. I do not put any weight on the fact that she and her husband have owned and rented a home or have managed household expenses and, by and large, have lived within their means, to constitute any predicate that would offset the need for management fees.

16. Counsel for ICBC cited cases for the proposition that if a court finds the plaintiff to be an intelligent, well balanced, psychologically stable person capable of managing his or her own affairs, no management fee ought to be awarded: see *Clarke v. Clarke*, [1987] B.C.J. No. 254 (B.C.S.C.); *Pharand v. Banks*, [1983] B.C.J. No. 1048 (S.C.). The problem, of course, is that no two cases are alike and, in particular, these cases are factually distinguishable from the case at hand.

17. It is my view that the amounts I awarded to Ms. T[redacted] for future care ($160,000), impaired capacity to earn income ($315,000) and tax gross up ($20,000) (addressed below) which totals $395,000, are sufficient to reach the threshold requirement for the necessity of management advice.

18. It is also my view that Ms. T[redacted] meets the threshold requirement for investment advice in the circumstances.

19. The third requirement is the expected cost of these services. Both parties filed extensive material generated by their respective economists on this subject with dramatically different outcomes. I do not propose to get into such arcane subjects as the asset mix nor do I intend to parse through the various speculative scenarios of how much a prudent asset manager might charge in the circumstances. It is my view that the capital sum that needs to be managed in this case is at the lower end of the scale and the only a modest amount of annual advice is required to manage this capital sum. Mr. Hildebrand, the economist for ICBC, offered a calculation for an

ongoing management fee of $1,500 per year to age 75, the present value of which is $32,721. In my opinion, even this figure is "too rich" given the fact that I found her incapacity to earn income should be limited to age 65 and taking into account the other vagaries of life. I set the management fee in all the circumstances at $25,000.

Tax Gross Up

20. It is clear that, where the evidence supports it, an allowance for the effect of taxation in computing damages for cost of future care must be made. The theory behind such an allowance for tax was explained by McLachlin J. (as she then was) in *Watkins v. Olafson* (1989), 61 D.L.R. (4th) 577 at 586-7 (S.C.C.):

> (a) Under existing tax law ... the impact of taxation on a lump-sum award for cost of future care is highly significant. The sum is predicated on the assumption that the currently unused portion of the fund will be invested and earn income, for which a discount is made. That income will attract tax under the Income Tax Act .... If no allowance is made for this tax, the judgment will prove insufficient to provide the care required for the predicted life span of the plaintiff. The theory of "grossing-up" is that there should be an additional sum awarded to compensate for the tax that will accrue on the interest portion of the award.

21. Any assessment of income tax gross-up must be properly grounded on an evidentiary base. In other words, the calculation is not a simple mathematical task and the rate of tax gross-up should not be arbitrarily set by the court. It must be based upon proper assumptions and a consideration of relevant facts in each particular case. Indeed, there are many variables which will have an impact on the calculation of a tax gross-up. These include: future inflation rates; the components of the fund which comprise the award – interest income, dividend income and capital gains; future tax rates; future investment rates; life expectancy of the plaintiff; amount of income from other sources; and so on.

22. Both sides presented evidence from economists on the subject of tax gross up including evidence and comment on the myriad assumptions that can be made which may materially affect the award for tax gross up. Again, I do not intend to parse through and make findings with respect to all of the assumptions. Suffice it to say in the circumstances of this case I awarded $160,000 for future costs of care and this is the core figure which attracts an award for tax gross up.

23. There are two principal assumptions that I do need to address. The first is annual residual income which, if found, will have a substantial impact on the award for tax gross up. The second is fund management fees which could also have an impact on the award for tax gross up.

24. With respect to annual residual income, I addressed the subject of past and future income loss in paragraphs 59 to 66 of my May 13th, 2010 award. Economists from both sides along with vocational experts all conceded that Ms. T[redacted] had some residual earning capacity. The opinions of the experts differed sharply and ranged from a decrease of 85% to a decrease of 25%. I do not intend to find a specific annual dollar figure which would constitute the amount of annual residual income for Ms. T[redacted]. Rather, I will note that I have taken the annual residual income earning capacity of Ms. T[redacted] into account in coming to my award for tax gross up.

25. With respect to fund management fees, earlier in this award I set management fees at $25,000.

26. I have carefully reviewed all of the evidence pertaining to tax gross up including all of the evidence and arguments pertaining to the myriad assumptions that can be employed, and I conclude that a reasonable and proper award for tax gross up is $20,000.

Deductions

27. Deductions are governed by the provisions of s. 148.1(1) of the *Regulation* which reads as follows:

> 148.1 (1) In this section: ...
>
> "deductible amount" means an amount
>
> (a) paid or payable by the corporation under section 20 or 24 of the Act, or recoverable by the insured from a similar fund in the jurisdiction in which the accident occurs,
>
> (b) paid or payable under section 148,
>
> (c) paid or payable under Part 7 or under legislation of another jurisdiction that provides compensation similar to benefits,
>
> (d) paid directly by the underinsured motorist as damages,

(e) paid or payable from a cash deposit or bond given in place of proof of financial responsibility,

(f) to which the insured is entitled under the *Workers Compensation Act* or a similar law of the jurisdiction in which the accident occurs, unless

(i) the insured elects not to claim compensation under section 10 (2) of the *Workers Compensation Act* and the insured is not entitled to compensation under section 10 (5) of that Act, or

(ii) the Workers' Compensation Board pursues its right of subrogation under section 10 (6) of the *Workers Compensation Act*,

(f.1) to which the insured is entitled under the *Employment Insurance Act* (Canada),

(f.2) to which the insured is entitled under the Canada Pension Plan,

(g) paid or payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist,

(h) paid or payable under vehicle insurance, wherever issued and in effect, providing underinsured motorist protection for the same occurrence for which underinsured motorist protection is provided under this section,

(i) paid or payable to the insured under any benefit or right or claim to indemnity, or

(j) paid or able to be paid by any other person who is legally liable for the insured's damages;

28. The deductible amounts at issue in this case pertain to Part 7 benefits (s.148.1 (1) (c)), employment insurance benefits (s.148.1 (1) (f.1)) and Canadian Pension Plan benefits (s.148.1 (1) (f.2)).

29. Before embarking on a discussion of the deductible items, I wish to elaborate on the purpose that underlies s.148.1(1) and the subject of onus.

30. With respect to the purpose that underlies s.148.1(1), I agree with the contention that in the UMP compensation scheme, part of the rationale for deductible amounts "is to ensure that a Claimant exhausts all other potential sources of benefit before accessing this fund of last resort". See *Hosseini-Nejad v. ICBC*, Arbitration Decision dated December 21, 2000, at para. 67. I also agree with the contention that the underlying purpose in both deductions made pursuant to s.83(5) of the *Act*, which deals with the deduction of Part 7 benefits in a tort action, and deductions made pursuant to s.148.1(1) is "...the avoidance of both excess recovery and no proper recovery." (*Hosseini* at para. 68). Although the statutory scheme governing deductions from a tort award under s.83(5) of the *Act* is distinct from the deductions required from a UMP award pursuant to *Regulation* s.148.1, in my opinion the approach articulated by the courts with respect to the deductibility of benefits from a tort award is instructive of the approach that should be taken to the deductibility of benefits from an UMP award.

31. A number of cases have addressed the deductibility of benefits from a tort award pursuant to s.25(5) of the *Act* (now s.83(5)). A seminal case and one which was relied upon by counsel for ICBC is *Schmitt v. Thomson*, (1996) 18 B.C.L.R. (3d) 153 (C.A.), a unanimous five justice panel decision of the British Columbia Court of Appeal. In *Schmitt*, the plaintiff contended that ICBC led no evidence on which the trial judge could make an appropriate estimate of the future Part 7 benefits to be deducted. The British Columbia Court of Appeal at paras. 18 and 19 held that although it may be a difficult task to estimate the amount of the benefits to which the plaintiff "is or would be entitled to" in the future, trial judges must necessarily embark upon this task and that they can rely upon the evidence presented at the trial of the tort action. The Court said: "The uncertainties as to the payment of future benefits which are created by the regulations cannot, in my own opinion, act as a bar to the court estimating these future benefits as best it can as required by [s.83(5)]." The Court went on to hold that because of the uncertainties, the estimated deductible amount may be nominal and trial judges may be cautious because deduction results in a lessening of the award, and that ICBC should not be heard to complain if these uncertainties are inherent in the regulation. At paragraph 22, the court said: "To put it another way, I think that [the ICBC discretion to review benefits] may be a factor that the trial judge will take into consideration in his or her valuation of the future benefits for the purpose of deduction under [s.83(5)].

32. The *Schmitt* decision was followed in a later British Columbia Court of Appeal decision, *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.). Here, one of the issues on appeal was the failure of the trial judge to deduct Part 7 benefits. The unanimous court held at paragraph 18: "The defendant bears the onus of proving that the plaintiff is, or will be, entitled to the benefits which it claims to have deducted from the award for the cost of future care. Strict compliance with the requirements of the statute is called for." The Court went on to hold that uncertainty as to whether the benefits will be paid must be resolved in the plaintiff's favour.

33. In *Sovani v. Jinet al.*, 2005 BCSC 1285, the uncertainty of future payment by ICBC was one of the factors the court took into account in estimating the deductible amount for benefits (para. 59). Other uncertainties that the court took into account were: the period of time for which services will be needed; the pattern of use; changes to legislation that may affect entitlement to benefits; if and which of the services awarded are mandatory, and which are discretionary. If the services are discretionary, this may be reflected in reducing the estimate (para. 60). Further, the onus to establish that a deduction is appropriate in the face of such uncertainties, remains with the defendants (para. 63).

34. ICBC conceded that it bears athe onus of proving that the subject matter falls within the enumerated matters in s.148.1(1) and has the onus of proving the amount to be deducted. I pause to note that in my view they also bear a the onus of proving the long term continuous payment of these Part 7 benefits if they contend that the amount that stems from the long term continuous payment of Part 7 benefits ought to be deducted. This onus must be met on a balance of probabilities test.

Part 7 Benefits

35. In my May 13, 2010 award to Ms. T[redacted] I found that she should receive four hours per week of long term homemaking services (para. 56). The total future care award to Ms. T[redacted] was $160,000 (para. 58). The items and services mentioned in relation to the future care costs award were found to be both medically necessary and reasonable - the legal standard that must be met before such costs are awarded in the circumstances of this case.

36. Counsel for ICBC submitted that although Ms. T[redacted] was precluded by a limitation period from commencing an action against ICBC for any Part 7 benefits pertaining to homemaking services, ICBC was nevertheless entitled to a Part 7 benefits deduction in the range of $71,385 to $87,810. ICBC submitted that *Baart v. Kumar* (1985), 66 B.C.L.R. 1 (C.A.) is authority for the proposition that a plaintiff's failure to claim the benefits under Part 7 does not prohibit ICBC from claiming the value of the benefits as a deductible amount. ICBC further submitted that based on *Gurniak v. Nordquist*, 2003 SCC 59, there is no requirement to match the deductible Part 7 benefits to the underlying loss.

37. Counsel for Ms. T[redacted] submitted that (1) the principles for deductions from a tort award under s.25(5) of the Act (now s.83(5)) are generally applicable to the assessment of deductible amounts under *Regulation* s.148.1; (2) the burden of proof of establishing the type and amount of deductible amounts is on ICBC; and (3) no amount for future benefits should be deducted when the potential benefits are discretionary under *Regulation* s.88, and ICBC has disputed payment of certain no-fault benefits.

38. The provision that governs when Part 7 homemaking services benefits will be paid is found in s.84 of the *Regulation.* This section provides that ICBC "shall" pay disability benefits for homemakers where an injury sustained in the accident "substantially and continuously disables an insured who is a homemaker from regularly performing most of the insured's household tasks" [emphasis added]. Section 86 of the *Regulation* extends the period during which benefits are payable beyond the 104 week maximum when the injury for which the disability benefits are being paid continues to disable the insured. The decision to pay these benefits is reviewable every 12 months, and ICBC can cease to pay on the advice of their medical advisor (*Regulation* s.87). Needless to say, this latter provision creates uncertainty as to the continuous long-term payment of these benefits.

39. In awarding future care costs in a negligence action, the analysis turns on whether the costs are both medically necessary and reasonable, a standard that is significantly different from the standard that must be met to receive homemaker benefits under ss. 84 and 86 of the *Regulation.* Furthermore, I reiterate that s.87 of the *Regulation* allows ICBC to review the homemaking benefit every 12 months and cease payment on the advice of their medical advisor.

Thus, even if Ms. T[redacted] could meet the more onerous standard of proving entitlement to homemaking benefits under s. 84 of the *Regulation*, there is no certainty that these benefits would be payable indefinitely as was the assumption under the tort award.

40. I find that ICBC has not met their onus. The principal contention made by counsel for ICBC was that my May 13, 2010 award to Ms. T[redacted] for long-term housekeeping services was tantamount to a finding that she would therefore be entitled to receive the long term continuous corresponding disability benefits. In my opinion, this does not properly take into account the significantly different standards noted above. Nor was there any additional evidence provided by ICBC as to the necessary facts and circumstances to satisfy the test laid down by s. 84 of the *Regulation.* My conclusion is reinforced by a recent British Columbia Court of Appeal decision.

41. In *Gasior v. Bayes,* 2010 BCCA 285, the British Columbia Court of Appeal commented on the *Gurniak* case upon which ICBC relied. Although the decision is not predicated on the deductibility provisions under s. 148.1(1) of the *Regulation* to the *Act*, it does stand for the proposition that not only must we guard against double recovery, we must also guard against double deduction. In *Gasior* this meant that the trial judge was not required to deduct benefits from an award for special damages, because if the deduction were made: "that would effectively result in a 'double deduction' ...which would be equally contrary to law and justice as permitting double recovery would be (at para. 16). The Court concluded that "...the principle against double recovery, is not in doubt. But the question is, was there any infringement of that principle as a result of what occurred in this case." (para. 16)

42. Applying this *Gasior* principle to Ms. T[redacted]'s circumstances, makes the legal analysis relatively simple. In this case, ICBC led no evidence to support the proposition that Ms. T[redacted] could meet the more stringent test laid down by s.84 of the *Regulation.* To the contrary, the evidence led by ICBC at the damages hearing was to the opposite effect namely, that homemaking services were neither medically required nor necessary. My determination that four hours a week of such services were appropriate is not tantamount, in my opinion, to a finding that Ms. T[redacted] is a homemaker who is "substantially and continuously" disabled from "regularly performing most of [her] household tasks".

43. I also feel constrained to comment on the position adopted by ICBC that Ms. T[redacted] is statute barred from recovering any future Part 7 benefits. This position dictates that there could not be double recovery in the circumstances of this case. ICBC is seeking what can only be described as a windfall and, in my opinion, courts and arbitrators should strive to avoid this outcome.

44. In the facts and circumstances of this case, I decline to order the deduction of any Part 7 disability benefits from my award of future costs to Ms. T[redacted].

Employment Insurance Benefits

45. Section 148.1(f.1) of the *Regulation* provides that a "deductible amount" includes an amount "to which the insured is entitled under the *Employment Insurance Act* (Canada)". There is no further guidance on how this provision is to be applied. The facts in this case show that Ms. T[redacted] received a total of $3,034 in Employment Insurance benefits ("EI benefits") from the date of the accident until the date of her damage assessment arbitration hearing.

46. At paragraph 59 of my May 13, 2010 arbitration reasons I said: "Section 148.1(1) provides that employment insurance benefits to which the insured is entitled is to be taken into account in determining the "deductible amount". It seems to me that ICBC would be approbating and reprobating if I did not include EI benefits in assessing earnings while at the same time EI benefits must be taken into account in determining a deduction from earnings." In the following paragraphs, I proceeded to include a component for EI benefits in making a determination of past income loss and I mentioned possible employment insurance maternity benefits in discussing the subject of future income loss. It is important to understand, however, that I did not crystallize EI benefits in coming to the amounts that I awarded for both past income loss and future income loss.

47. ICBC argues for a deduction of approximately $65,000 from past income loss. The argument is based on the contention that because EI benefits were taken into account in assessing past loss of income, the full amount of those benefits must be deducted pursuant to *Regulation* s.148.1. ICBC arrives at the $65,000 figure as follows. Mr. Carson, the economist retained by Ms. T[redacted], opined that total past wage loss including EI benefits amounted to approximately

$225,000 of which approximately $65,000 is attributable to notional EI benefits. I use the adjective "notional" because the actual EI benefits received by Ms. T[redacted] amount to $3,034 from the date of the MVA up to the date that I assessed her damages.

48. As a preliminary matter, there is a problem with this logic. The total amount of past income loss awarded by me was $95,000 which is approximately 42% of Mr. Carson's estimate of $225,000. If there is merit in the contention that the EI benefits of approximately $65,000 were folded in his to the total past wage loss calculation of $225,000, then the $65,000 should be reduced by 58% to $27,300. Put another way, if I were to deduct $65,000 from the $95,000 award, this would mean only $30,000 of the award for past income loss was attributable to the wage loss projection of $160,000. I consider it illogical to posit that my past income loss award was made up of 100% employment insurance benefits and only 18.75% of past income loss.

49. Alternatively, ICBC submitted that the EI benefits received by Ms. C[redacted] C[redacted], Ms. T[redacted]'s sister, could be used as a surrogate means of determining the amount of EI benefits to be deducted from Ms. T[redacted]'s claim. In the period 2000 – 2007, the EI benefits received by C[redacted] C[redacted] amounted to approximately $83,000.

50. The problem with this argument is that I specifically stated in my May 13, 2010 arbitration award at paragraph 59 that I rejected the contention that C[redacted] C[redacted] could be used as a surrogate for calculating past income loss and future income loss for Ms. T[redacted]. I stated that I would determine these losses for Ms. T[redacted] on a stand alone basis. I am therefore not prepared to use Ms. C[redacted] as a surrogate on this issue either.

51. Counsel for Ms. T[redacted] argued first that the word "entitled" in *Regulation* s.148.1 (1) (c) is ambiguous and any ambiguity should be construed against ICBC. In particular, he argued that "entitled" should not to be construed as "payable". First, I am not aware of any law that permits the principle of *contra proferemtum* to be applied in respect of a statute. Second, I do not consider it necessary to embark upon an interpretation of the word "entitled" in coming to my decision on this issue.

52. Next, counsel for Ms. T[redacted] argued that it is necessary to determine why the EI benefit is payable or why the person would be entitled to the benefit before it can be deducted. In the arbitration decision *Lake v. ICBC*, Arbitration 20 June 2001, the arbitrator was dealing with the deductibility of Canada Pension Plan ("CPP") benefits. He found that the present value of CPP disability benefits to age 65 were deductible, but not CPP retirement benefits after age 65. The arbitrator based his reasoning on the fact that the CPP disability benefits were payable because of injury and disability, whereas the retirement benefits are payable irrespective of the injury and disability. More specifically, counsel for Ms. T[redacted] posits that EI benefits that may be paid as a form of maternity benefits have a no connection to the accident or the injuries and therefore should not be deducted.

53. Counsel for ICBC says a full answer to this contention can be found in the Supreme Court of Canada *Gurniak* case *(supra)* which specifically held that there was no duty on the insurer to match the deductible amounts with the underlying losses. At paragraph 44 the Court held that "...nothing in the language of [section 83(5) of the *Insurance (Vehicle) Act*] mandates that there be a "match" between the specific heads of damage in a tort award and the specific heads of damage under the contract or benefits scheme in question before a deduction is appropriately made."

54. Again, I turn to the *Gasior* case *(supra)* which interpreted *Gurniak* to stand for the principle against double recovery, and in the *Hosseini-Nejad* case *(supra)* to stand for the principle that we should avoid both excess recovery and no proper recovery (see para. 68).

55. *Regulation* s.148.1(2) defines UMP coverage as: "...any amount [the insured] is entitled to recover from the underinsured motorist as damages for the injury or death". I hearken back to the notion in paragraph 59 of my May 13, 2010 arbitration award to the effect that ICBC would be approbating and reprobating if EI benefits were not taken into account in assessing earnings while at the same time these benefits must be deducted. I am reminded of the adage "what is sauce for the goose is sauce for the gander" and since I noted above that I included a component for EI benefits in making a determination of past income loss, Ms. T[redacted] would be approbating and reprobating if EI benefits were not taken into account in the deduction process since they were taken into account in assessing earnings. It bears repeating that I did not

crystallize EI benefits in coming to the amounts that I awarded for both past income loss and future income loss. What I must strive to do is avoid double recovery and at the same time avoid a windfall or double deduction.

56. I return to onus which is on ICBC to establish that Ms. T[redacted] was entitled and is entitled to EI benefits and the amount of those EI benefits before they can be deducted.

57. Other than pure speculation as to future EI benefits, some of which may indeed be predicated on maternity which is completely unrelated to the underlying facts and circumstances giving rise to the UMP award and therefore to any issue of deductibility, ICBC led no evidence pertaining to the deductibility of future EI benefits. I therefore find that ICBC has not met the onus of proving any amount to be deducted with respect to future EI benefits.

58. I hold a different view with respect to past EI benefits which I referred to explicitly when addressing past income loss for Ms. T[redacted]. There is no doubt that Ms. T[redacted] received $3,034 in EI benefits and, in my opinion, there is no doubt that the plain reading of s.148.1(f.1) of the *Regulation* require that this sum be deducted and I so order.

Canada Pension Plan ("CPP") Benefits

59. S.148.1(f.2) of the *Regulation* provides that a "deductible amount" includes an amount "to which the insured is entitled under the *Canada Pension Plan*". There is no further guidance on how this provision is to be applied.

60. ICBC concedes that both Part 7 disability benefits and CPP disability benefits should not be deducted, but takes the position that the larger of the two should be deducted.

61. ICBC also concedes that eligibility for CPP disability benefits requires that Ms. T[redacted] meet the definition of disability as defined by CPP legislation, that is a, she must have a medical condition and that medical condition must result in a "severe" and "prolonged" disability. This test has been refined by the CPP in a guideline "Severe Criterion for the Prime Indicator

(Medical Condition)"[2] which provides a framework for evaluating medical conditions to determine eligibility for CPP disability benefits. Again, Ms. T[redacted] would have to meet the necessary medical preconditions in order to be eligible.

62. In addition, Ms. T[redacted] must have made valid CPP contributions, which currently entails earning more than $4,600 per year, and having made CPP contributions in four of the preceding six years.

63. ICBC notes that according to Ms. T[redacted]'s tax returns she has been making CPP contributions in the period 2004-2007. In two of those four years her income was over $4,600. The information for 2009 and 2010 is not known.

64. Once again I refer to onus which is on ICBC to prove the applicability of this deduction. In my view, the evidence does not establish that Ms. T[redacted] is entitled to CPP disability benefits. In particular, ICBC has not provided any evidence or analysis as to whether Ms. T[redacted] falls within the medical criteria as defined in the CPP scheme to be eligible for CPP disability benefits. I do not think it is proper nor am I willing to venture into mere speculation.

65. On the facts and circumstances of this case, I decline to order the deduction of any CPP disability benefits pertaining to Ms. T[redacted].

C[redacted] C[redacted]

66. In my May 13, 2010 arbitration award, I determined that Ms. C[redacted] should receive an award for future care of $1,200 for future psychological counselling (see para. 82 and following).

67. ICBC argues that this amount of $1,200 should be deducted under s.148.1 (1) (c) of the *Regulation* pertaining to Part 7 benefits.

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[2] http://www.rhdcc-hrsdc.gc.ca/eng/oas-cpp/cpp_disability/adjudframe/primeind.shtml

68. Although psychological counselling is not listed in s.88(1) of the *Regulation,* which provides that ICBC "shall" pay as benefits "all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing services, or for necessary physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis", in my view a tenable argument can be mounted that psychological counselling is included as a necessary medical service.

69. I also note that s.88(1) and s.88(2) of the *Regulation* states that ICBC may pay " funds for any other costs the corporation in its sole discretion agrees to pay". What amounts, if any, are payable under this section is clearly at the discretion of ICBC.

70. I return yet again to onus to prove deductibility which is on ICBC and I was directed to virtually no evidence upon which I could find that ICBC met this onus that psychological counseling would be paid by ICBC as a Part 7 benefit.

71. Having come to this conclusion, I will not deal with other alternative arguments including windfall for ICBC.

72. In the facts and circumstances of this case, I decline to order the deduction of any Part 7 benefits pertaining to Ms. C[redacted].

D[redacted] T[redacted]

73. D[redacted] T[redacted] was awarded a sum of $9,500 for future care costs at paragraph 96 of my May 13, 2010 award. I deliberated the array of potential future care costs at paragraphs 93 to 96 and noted that my award was intended to cover some part of the supplies, services and equipment recommended by to improve Ms. T[redacted]'s quality of life. The services, supplies and equipment include an orthopaedic bed, homemaking services of four to six hours per month, a recliner chair, safety features for her bathroom, a physical therapy assessment and ongoing psychological counselling. The array of future care costs amounted to approximately $77,000, an amount more than eight times larger than my award.

74. The Part 7 provisions of the *Regulation* include the following discretionary benefits: alterations to the insured's residence necessary to make the residence accessible and usable (s.88(2)(b)); a medically prescribed bed (s.88(2)(d)(ii); and physical therapy (s.88(1)). Homemaking services (discussed above) are payable under s.84 and 86 of the *Regulation*, require the applicant to meet stringent eligibility requirements and if any payments are made, they are reviewable yearly.

75. ICBC argued again that because the future care costs I awarded were found to be reasonably and medically necessary, the same amount of $9,500 should be deducted.

76. Of the future care costs items canvassed for Mrs. T[redacted] compared to the benefits listed under Part 7, the only non-discretionary Part 7 benefit that Mrs. T[redacted] may have been entitled to was for a physical therapy assessment. I refer back to the discussion pertaining to homemaking services for Ms. T[redacted] which require a much higher test for eligibility. These along with the other Part 7 benefits are discretionary and I am not satisfied that ICBC met the evidentiary burden to prove on a preponderance of the evidence that these benefits would have been paid by ICBC under Part 7 and are therefore deductible.

77. Having come to this conclusion, I will not deal with other alternative arguments including windfall for ICBC.

78. I therefore refuse to order any deduction from Mrs. T[redacted]'s award of future care costs.

ALLOCATION OF THE $200,000 THIRD-PARTY LIABILITY LIMITS

79. This issue pertains to the allocation of the $200,000 third-party liability limits paid by ICBC to the claimants' counsel some years ago. Both sides agree that an allocation to each of the six claimants is necessary but cannot agree on the appropriate allocation. It is my view that the proper way to allocate this sum is to wait until each of the damage awards or settlements have been reached including all appropriate deductions, and then allocate the $200,000 on a *pro rata* basis. These reasons will conclude all matters pertaining to Ms. T[redacted], Ms. C[redacted] and Mrs. T[redacted]. I was informed that a settlement has been reached with respect to Mr. B[redacted] T[redacted] although I was not advised whether all deductions have been agreed upon pertaining to his

claim. The claims for A[redacted] T[redacted] and D[redacted] T[redacted] are set to be arbitrated at the beginning of December, 2010. I propose, therefore, to leave this allocation issue in abeyance until all of the claims have been determined one way or another.

COSTS

80. I understand that the parties require these reasons before they can definitively determine costs pertaining to the arbitration process to date. Needless to say, I urge the parties to come to terms on costs but if they are unable to do so, time can be set aside to hear and resolve the issue of costs if necessary.

Dated: Oct. 15, 2010 Signed: