IN THE MATTER OF AN ARBITRATION PURSUANT TO
***Section 148.2(1) of the Revised Regulations to the Insurance (Vehicle) Act (includes amendments up to B.C. Reg. 126/2014, July 31, 2014),* and**
***The Arbitration Act, S.B.C. 2020, c.2* (the "Act")**

BETWEEN:

A.K.

CLAIMANT

AND:

INSURANCE CORPORATION OF
BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

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COUNSEL FOR THE RESPONDENT	Sudhir K. Padmanabhan & Matthew J. Straw Eyford Partners LLP 1055 Dunsmuir St #1744, Vancouver, BC V7X 1L2
ARBITRATOR	**Avon Mersey, Q.C.**
Dates of Hearing	**June 1 – 3, 2022**
Place of Hearing	**Vancouver, British Columbia**
Date of Award	**August 9, 2022**

INTRODUCTION

1. This arbitration relates to a motor vehicle accident involving the Claimant AK ("the Claimant ") and Tomomi Wada that occurred in Los Angeles, California on January 16, 2019 (the "Accident").

2. Pursuant to section 148.2(1) of the *Insurance (Vehicle) Regulation* BC Reg. 447/83 the Claimant applies to the Vancouver International Arbitration Centre to arbitrate a claim for underinsured motorist protection insurance benefits. Generally speaking, the Claimant claims to be entitled to coverage for Underinsured Motorist Protection ("UMP"). The Claimant's position is outlined in more detail later in this award. In the Response to the Notice to Arbitrate filed by the Respondent, Insurance Corporation of British Columbia ("ICBC") a number of defences have been outlined. However, for the purposes of this part of the case, the Respondent takes the position that the Claimant is not entitled to access UMP because, *inter alia*, in the submissions of the Respondent, there has been:

   a. no judicial determination that there is an "underinsured motorist" as required in the regulations; or

   b. that there has been no admission by the Respondent that the matter may proceed to an UMP Arbitration without a judicial determination and that the tortfeasor is liable and unable to fully compensate the Claimant.

3. The Respondent's complete position is outlined in more detail later in this award.

4. Issues as to whether or not the Claimant is "an insured" for purposes of entitlement to compensation, whether or not the Claimant has or has not breached the terms of her insurance policy, and whether or not the subject insurance policy is void, are left to be determined at another date.

5. In addition, the Claimant wished to have entered as evidence in Reply a real property tax assessment record relating to a property apparently owned by the American defendant tortfeasor Tomomi Wada and one Yoshihisa Wada in

California as well as the law of California relating to Homestead protection from execution. A decision on admissibility at the hearing was reserved to be determined along with this award.

FACTS

6. The Claimant has a date of birth of March 26, 1969, and is a Canadian citizen.

Agreed Statement of Facts ("ASOF") at paras. 1-2

7. At the time of the Accident, the Claimant was living in Los Angeles, California and working as a hair stylist. She has resided in California since 2005.

ASOF at para. 3

8. At the time of the Accident, the Claimant was driving a 2006 BMW X3 bearing British Columbia licence plate number FM6 64R (the "BMW"). The BMW was owned by the Claimant 's mother, Tamara Mouminova, and insured under a policy of insurance through ICBC (the "ICBC Policy"). Ms. Mouminova was the registered owner of the BMW, and the Claimant was listed as the Principal Operator.

Exhibit 3 at pp. 4-5

ASOF at paras. 4, 8

9. At the time of the Accident, the Claimant had recently driven the BMW to California from British Columbia, and planned to return the BMW to British Columbia before the end of January 2019.

10. The Accident occurred when the Claimant was rear ended without warning by Ms. Wada. The BMW sustained extensive damage in the Accident.

ASOF at para. 4

11. As set out above, the Claimant was severely injured in the Accident. She sustained severe injuries to her neck and back, and was diagnosed with vascular headaches, cervicocranial syndrome, ligament sprains to her spine, protruding

and herniated discs in her thoracic and cervical spine, and radiculopathy. The Claimant received extensive physiotherapy, acupuncture and massage therapy, and targeted injections. She eventually underwent an anterior cervical discectomy and spinal fusion in June 2020. The Claimant's surgery did not alleviate her symptoms, and she continues to suffer from chronic and debilitating neck and back pain, with radiating pain and numbness in her limbs.

Exhibit 3 at pp. 46-50

Exhibit 3 at pp. 51-55

Exhibit 4

12. The Claimant did not have medical insurance at the time of the Accident. As a result, she was forced to bear the costs of her medical treatment, including surgery. As of the end of June 2020, the Claimant's Accident related medical costs were $400,608.24. The medical providers have placed liens against any funds received by the Claimant in claims related to the Accident.

Exhibit 3 at pp. 46-50

Exhibit 3 at pp. 51-55

Exhibit 4

13. As a result of her Accident injuries, the Claimant has been unable to return to her profession as a hair stylist.

14. The Claimant retained the Simon Law Group LLP ("Simon Law"), a California based law firm, to represent her in relation to the Accident.

ASOF at para. 6

Testimony of Eric Heath

15. Simon Law notified Ms. Wada's motor vehicle liability insurer, Tokio Marine America ("Tokio Marine"), that the Claimant was claiming damages against Ms. Wada arising out of the Accident.

16. By letter to the Law Offices of Philip N. Alexander APC dated January 30, 2019, Tokio Marine informed the Claimant that its investigation had revealed Ms. Wada was entirely responsible for the Accident and the Claimant's loss. Tokio Marine accepted the Claimant's claim against Ms. Wada.

Exhibit 3 at p. 10

17. On August 19, 2019, Simon Law requested the details of Ms. Wada's third party liability insurance limits from Tokio Marine. By letter dated August 23, 2019, Tokio Marine informed Simon Law that Ms. Wada's insurance policy (the "Tokio Marine Policy") limit was USD $300,000.

Exhibit 3 at p. 14

ASOF at para. 12

18. On August 22, 2019, Ms. Selena Carillo of Simon Law reported the Accident on the Claimant's behalf to ICBC, and advised that Simon Law was counsel for the Claimant.

Exhibit 3 at pp. 12-13

ASOF at para. 11

19. On August 23, 2019, Ms. Melanie Voight, ICBC Senior Injury Adjuster, sent a fax to Ms. Carillo (the "August 23rd Fax"). However, only one page of the August 23rd Fax was received by Simon Law. The first page of the August 23rd Fax set out that Ms. Voight was the adjuster handling the Claimant's claim, and that the Claimant "had first party coverage with the Insurance Corporation of British Columbia," which included UMP coverage in the amount of $1,000,000.

Exhibit 5

ASOF at para. 13

20. On August 27, 2019, Ms. Carillo of Simon Law emailed Ms. Voight of ICBC and advised again that Simon Law was representing the Claimant in relation to the Accident, and asked if the Claimant has underinsured motorist protection

insurance under the ICBC Policy. Ms. Carillo had not seen the August 23rd Fax. Ms. Voight replied to Ms. Carillo and emailed her a copy of the August 23rd Fax.

Exhibit 3 at pp. 20 and 23

Exhibit 3 at pp. 25-26

ASOF at paras. 14-15

21. The only copy of the August 23rd Fax in Simon Law's records prior to 2020 is only one page. The complete two page fax was again sent to Simon Law on August 28, 2020.

Exhibit 5

Testimony of E. Heath

Exhibit 3 at p. 72

22. As set out above, between August 2019 to June 2020, the Claimant continued to receive treatment for her injuries, and incur the costs of this treatment. Her treatment culminated in surgery in early June 2020.

Exhibit 3 at pp. 46-50

Exhibit 3 at pp. 51-55

Exhibit 4

23. On April 14, 2020, Ms. Sandi Gavreau of ICBC emailed Ms. Carillo and advised that she was now handling the Claimant's UMP claim. Ms. Gavreau stated that she understood ICBC was not liable for the Accident, and that the liable insurance company was Tokio Marine. Ms. Gavreau also inquired whether Tokio Marine "had accepted" and asked if ICBC could close its file.

Exhibit 3 at p. 31

24. On April 15, 2020, Mr. Eric Heath, pre-litigation manager at Simon Law, replied to Ms. Gavreau by email and advised that he was handling the Claimant's claim.

Exhibit 3 at p. 33

Testimony of E. Heath

25. On April 21, 2020, Ms. Gavreau of ICBC emailed Mr. Heath and asked if Mr. Heath had any update on the Claimant's claim and if ICBC could close its file. Mr. Heath replied and advised that the Claimant was still receiving treatment for her injuries.

Exhibit 3 at pp. 36-37

Testimony of E. Heath

26. In a subsequent email sent on April 21, 2020, Ms. Gavreau of ICBC asked Mr. Heath to confirm that the other insurance company "ha[d] accepted," and asked for the limits of this policy.

Exhibit 3 at p. 36

Testimony of E. Heath

27. Following the Claimant's surgery, and once her medical costs to that point were known, Mr. Heath of Simon Law prepared a demand letter to Tokio Marine, dated June 24, 2020. This demand letter appended the Claimant's medical records, set out the Claimant's medical costs to date of $400,608.24, and demanded the limits of the Tokio Marine Policy. This letter was mailed to Tokio Marine on June 24, 2020.

Exhibit 3 at pp. 46-50

ASOF at paras. 16, 18

Testimony of E. Heath

28. Mr. Heath also drafted a letter, dated June 24, 2020, to ICBC (the "ICBC Demand"). The ICBC Demand set out that it was a formal demand, and asked for a response within 30 days. The ICBC Demand discussed liability, summarized the Claimant's injuries, treatment, and medical costs, and appended her medical records. The ICBC Demand demanded policy limits. The ICBC Demand was mailed to ICBC's Surrey office on June 24, 2020.

Exhibit 3 at pp. 51-55

ASOF at paras. 17, 18

Testimony of E. Heath

29. On July 21, 2020, Tokio Marine responded to Mr. Heath of Simon Law and advised that it accepted the Claimant's demand for the policy limits and was willing to settle the Claimant's claim for payment of the $300,000 Tokio Marine Policy limits, less a small amount paid to the Claimant likely for the damage to the BMW or possibly a lien.

Testimony of E. Heath

30. On or around July 22, 2020, Tokio Marine provided to Simon Law a statutory declaration of Ms. Wada declaring that she did not have any other insurance policies that would provide coverage in relation to the Accident.

Exhibit 3 at p. 59

ASOF at para. 19

31. On July 22, 2020, Mr. Heath emailed Ms. Gavreau of ICBC to follow up on the ICBC Demand as ICBC had provided no response. Mr. Heath attached the ICBC Demand to this email. Mr. Heath advised that he had settled the Claimant's claim against Ms. Wada for the Tokio Marine Policy limits. Ms. Gavreau did not respond.

Exhibit 3 at p. 58

Testimony of E. Heath

32. On July 24, 2020, the Claimant signed a Settlement and Release Agreement wherein she agreed to release Ms. Wada and Tokio Marine from any and all claims arising out of the Accident in exchange for payment from Tokio Marine in the amount of US $296,335.87 (the "Third Party Settlement"). The signed Release provides a date of June 24, 2020 but that is incorrect. It was signed by the Claimant on July 24, 2020.

Exhibit 3 at pp. 38-45

ASOF at para. 21

Testimony of E. Heath

33. By cheque issued August 3, 2020, Tokio Marine paid to the Claimant the amount of $296,335.87.

Exhibit 3 at p. 44

34. The funds received from Tokio Marine are being held in trust by Simon Law, pending the resolution of the Claimant's UMP claim. The medical liens exceed the funds in trust by more than $100,000.

Testimony of E. Heath

35. On August 9, 2020, Mr. Heath again emailed Ms. Gavreau and requested a response to the ICBC Demand. Ms. Gavreau did not respond.

Exhibit 3 at p. 60

Testimony of E. Heath

36. On August 25, 2020, Mr. Heath again emailed Ms. Gavreau and requested a response to the ICBC Demand. Ms. Gavreau did not respond.

Exhibit 3 at p. 62

Testimony of E. Heath

37. On August 26, 2020, Ms. Ashley Rodriguez of Simon Law (Mr. Heath's assistant), emailed Ms. Gavreau and requested an update on the Claimant's claim. Ms. Gavreau responded the same day, stated that she had been dealing with Mr. Heath, and asked that Ms. Rodriguez coordinate with him.

Exhibit 3 at p. 67

38. Later in the day on August 26, 2020, Ms. Gavreau emailed Mr. Heath, stated she had not received a response to her inquiries about the limits of Ms. Wada's insurance, and set out a number of additional informational requests related to the Claimant's residency. Ms. Gavreau indicated that this information was required before the Claimant's UMP claim could be addressed. Mr. Heath responded and, referencing his prior emails, advised that the Claimant's claim against Ms. Wada had been settled for the Tokio Marine Policy limits.

Exhibit 3 at pp. 63-65

Testimony of E. Heath

39. On August 27, 2020, Fred McKay, ICBC Claims Specialist, wrote to Simon Law, and advised that ICBC could not accept the Claimant's UMP claim given that the Third Party Settlement had been entered into and finalized without ICBC's written consent.

40. On August 28, 2020, Ms. Gavreau emailed Mr. Heath and advised that the Claimant's claim file had been transferred to Fred McKay.

Exhibit 3 at p. 78

Testimony of E. Heath

41. Later in the day on August 28, 2020, Mr. McKay of ICBC faxed a letter to Simon Law to the attention of Robert Simon (the "August 28th Letter"). The August 28th Letter set out that ICBC understood that the Claimant's claim against Ms. Wada had been settled. The August 28th Letter also set out section 148.2(4) of the UMP Regulation, which provides that if an insured settles a claim without the consent of ICBC, and to its prejudice, ICBC is not liable to an insured for UMP coverage. The August 28th Letter cited this section of the UMP Regulation as the basis pursuant to which ICBC was denying the Claimant's claim.

Exhibit 3 at pp. 72-73

ASOF at para. 23

42. On October 26, 2020, Lucas Whitehill of Simon Law responded to Mr. McKay's August 28, 2020 letter and took the position that the Third Party Settlement caused no prejudice to the Respondent.

43. The Claimant did not obtain or provide to ICBC any Statutory Declaration or Affidavit of Ms. Wada regarding her personal assets other than the "declaration of no other insurance".

44. The Claimant did not conduct an assets search for Ms. Wada prior to signing the Settlement and Release Agreement. There has been no judicial determination in California of the liability of Ms. Wada for the injuries sustained by the Claimant although fault appears to be accorded to Ms. Wada since this is a rear end collision.

ADMISSIBILITY OF THE TAX ASSESSMENT AND THE LAW RELATING TO HOMESTEAD EXEMPTION

45. As noted above, the Claimant wished to lead as evidence at the Reply stage of the proceedings the alleged tax assessment of a certain property in the state of California. In addition the Claimant wished to also advance evidence that the property was subject of a Homestead exemption by providing an extract purporting to be the law of California relating to Homestead exemptions (collectively, "the Documents"). The Claimant submits that the Documents are admissible because I can take judicial notice of them.

46. I reserved a decision on admissibility of the Documents to consider this evidence and the objections of the Respondent to admissibility.

47. It appears that the purpose of these documents was to help establish that the tortfeasor may have some property which would be an asset but that there could, in any event, be no execution against it which by inference would suggest that the tortfeasor is unable to pay any judgement in favour of the claimant.

48. The Respondent objects to the admissibility for a number of reasons.

49. First, these documents were provided at or just before the hearing commenced so no fair notice was provided nor were the Documents proper Reply evidence as it did not arise as a result of any evidence led by the Respondent. Secondly, this evidence is hearsay, and Judicial Notice exception does not apply for admissibility. Thirdly, the assessment itself constitutes opinion evidence and there was no compliance with the legal requirements for the admissibility of

expert evidence. Fourthly, the law relating to the Homestead exception was foreign law and that has not been proved as a matter of fact by a qualified expert.

ANALYSIS AND RULING ON ADMISSIBILITY

50. In my opinion the late notice of the Documents and the fact that this did not form a proper Reply because it did not arise out the any evidence led by the Respondent leads me to conclude these Documents are inadmissible. I note that the parties filed a Document Agreement and agreed on what was admissible evidence by way of a jointly agreed book of documents. The Claimant only called one witness and the Respondent did not tender any additional evidence at the hearing. The Documents are not subject of the Document Agreement.

51. Further, in my view, the Documents are in the nature of hearsay. These amount to out of court statements on value and on foreign law which must be established as facts by a witness not available or presented for the hearing. I do not regard these Documents as falling within what would be admissible under the Judicial Notice doctrine.

52. In order to take judicial notice of a fact or document, it must be either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources or indisputable accuracy.

53. In ***R. v. Markin,*** 1969 CanLII 809, the Court of Appeal explained when a trier of fact may take judicial notice of a document or fact:

> The basic rule is that all facts, including documents in issue in any case, must be proven in evidence at the trial, unless the same are admitted, or unless proof is dispensed with or simplified by statutory authority, or by rule of the common law. Various statutes passed over the years in England, in Canada, and in our Province have facilitated the burden of proof by statutory directions that judicial notice shall be taken of certain things and of certain documents. **If a thing or document may be judicially noticed at common law it is upon the basis that the fact is of a class that is so generally known as to give rise to a presumption that all persons are aware of it. In**

> **such cases a document, for example, need not be proved, but is judicially noticed without proof.**[1] [Emphasis added]

54. In ***R. v. Find**, [2001] 1 SCR 863*, the Supreme Court of Canada stated the threshold for judicial notice is strict and requires that the facts are generally accepted or capable of immediate and accurate demonstration:

> In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy [citations omitted].[2]

55. In ***R v J.M.***, 2021 ONCA 150, the Court identified three different forms of judicial notice:

    a. tacit or informal judicial notice – drawing on common experience, common sense, or common knowledge to interpret the formal evidence produced at trial,

    b. express judicial notice – notice of specific facts that can be categorized as notorious and indisputable, and

    c. contextual judicial notice – strives, at a general level, to provide context, background or a frame of reference to aid the trier of fact in making case-specific findings; included in this group are "social framework facts" or "legislative facts".[3]

56. The Court further stated that in determining whether judges should take judicial notice, one must consider whether those facts are dispositive or central to an issue or just background information. The more dispositive the fact is, the more

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[1] *R. v. Markin,* 1969 CanLII 809 at page 518.

[2] *R. v. Find,* [2001] 1 SCR 863 at para. 48

[3] *R v J.M.*, 2021 ONCA 150 at para. 32.

pressing it is to meet the criteria of notoriety or immediate demonstrability.[4] For example, the Ontario Court of Appeal ruled that judicial notice would not have supported the admission of a report from Statistics Canada since it was being offered to establish facts relevant in determining a factual dispute between the parties.[5]

57. Judicial notice may not be taken of matters that require expert evidence as such matters, by definition, are neither notorious nor capable of immediate and accurate demonstration.[6]

58. The *BC Evidence Act* s. 29 allows for the admissibility of a book or documents that are of a public record and therefore admissible in evidence by merely producing it. S. 29 does not apply to this document in my view. There is no evidence that this particular assessment is a matter of public nature or record and even if it were there is no certified copy as required under s. 29(1) of the *BC Evidence Act.* Further, it is questionable whether a document from the State of California, USA relating to assessments would be a document of public record as envisioned by the *Evidence Act* of BC. It is not a document of public record in the province of British Columbia. In my view, s. 2 of the Act applies only to all proceedings on the matters over which the legislature (British Columbia) has jurisdiction.

59. The Assessment itself is of its very nature of an opinion on the value of some real estate. The word "assessment" suggests that it must be assessed against other improvements and/or land values relative to this location at the time of assessment. It therefore constitutes an opinion of the value based on the nature of the structure and the composition of the land. Clearly, and apart from the late notice, there was no satisfaction of the legal requirements for admissibility of expert evidence in this case. There is no indication as to whose opinion it is, and

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[4] *R v J.M.*, 2021 ONCA 150 at para. 33.
[5] *West v Knowles*, 2021 ONCA 269 at para. 62.
[6] *R v J.M.*, 2021 ONCA 150 at para.at para. 35.

there is obviously no statement of qualifications of which, if any, assessor created the document. It is not signed and there is no notation of the expertise required to come to this conclusion, no assumptions are stated, and no basis for the opinion is expressed in the document itself. Further, there has been no opportunity provided for cross examination of the deponent if in fact it was the result of one deponent's conclusions on the value of the land and improvements. Therefore, in addition to the matters previously raised it is not admissible evidence.

60. The Claimant further argues that the assessment should be admitted as to evidence of value with respect to property of the tortfeasor. However, I note it appears to be owned by two people with the surname "Wada". I am not at all certain just from the document that it is exempted from execution under "Homeowner Exemption" legislation given among other things that there appears to be two owners.

61. Further, the Claimant seeks to have me accept as fact the relevant legislation summary document relating to Homeowner's exemption. I decline to admit as evidence a summary of what the Claimant says is the law relating to exemptions with respect to a homeowner under California law. California law must be proved as a matter of fact since it is foreign law. That requires an opinion from a qualified lawyer in the State of California in order for it to be admitted as evidence. There is no evidence in this proceeding from a California lawyer with respect to what law of the State of California applies to homeowners in that jurisdiction. That makes the Homestead law exemption document inadmissible.

62. If I am wrong on my ruling on admissibility I would add that these Documents are of little weight because the assessment appears to be in relation to what amount of real estate tax would be payable as opposed to an opinion as to the actual value. There is no information as to the relationship between tax assessed value versus an opinion given by a qualified appraiser as what the market value may be. Further we do not know what the defendant Tomomi Wada's share of the

property is and whether she is on her own entitled to the homeowner exemption, if at all, without an opinion from a qualified lawyer in that jurisdiction. At best it would be some indication of the value of the property but the share in ownership between Yoshihisa Wada and Tomomi Wada is unknown. Perhaps the tortfeasor's share may be exempt from execution even if there is value. We do not know whether it is subject to any kind of liens or mortgage or unpaid tax assessments. At best all we can say from the Respondent's point of view is this does indicate there may be something upon which execution can take place as there may be some value.

POSITION OF THE PARTIES

63. Taken directly from the Claimants brief, the Claimant submits that the issues to be determined in this stage of the Arbitration are as follows:

   a. Is arbitration available to an insured to determine the existence of an underinsured motorist having regard to the language of the UMP Regulation, the purpose of the UMP Regulation, and overall fairness to the insured?

   b. Has the existence of an underinsured motorist, as that term is defined in the UMP Regulation, been established by way of admissions?

   c. Is the relevant time for determination of the entitlement to damages from an underinsured motorist the time of the Accident?

   d. Has ICBC been prejudiced by the fact that Ms. Kasper settled her claim against Ms. Wada for the Tokio Marine Policy limits?

64. In this phase of the bifurcated arbitration proceeding, taken directly from the Respondent's brief, the Respondent's ’s position is as follows:

   a. The Claimant has not proven that Ms. Wada is an underinsured motorist.

b. The Release executed by the Claimant in favour of Ms. Wada extinguishes the Claimant's right to sue and recover damages under section 148.2(4)(a) of the UMP Regulation.

c. Pursuant to section 148.2(4)(b), ICBC is not liable to pay UMP compensation because the Claimant without ICBC's written consent and to its prejudice settled her claim against Ms. Wada.

APPLICABLE LEGISLATION

65. The important parts of the Regulation for the purpose of this Hearing are the definition of Underinsured Motorist in section 148.1(1), the Insuring Agreement in section 148.1(2), the Requirement for Dispute Resolution by Arbitration in section 148.2(1) and the Restriction on Liability in section 148.2(4)(b).

66. "Underinsured motorist" is defined as follows:

> "Underinsured motorist means 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."

67. The Insuring Agreement is as follows:

> Section 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 section 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."

68. The requirement for Dispute Resolution by Arbitration in Section 148.2(1) is as follows:

> "The determination as to whether an insured provided underinsured motorist protection under section 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*".

69. The Restriction on liability in Section 148.2(4)(b) is as follows:

> S.148.2(4) The Corporation is not liable under section 148.1 (b) to an insured who, without the written consent of the corporation and to its prejudice, settles or prosecutes to judgment an action against a person or organization that may be liable to the insured for injury or death.

70. As noted by arbitrator Yule in *GG* (para 20):

> "In simple terms, the scheme of the *Act* is that ICBC shall compensate an insured for any amount he is entitled to recover from an underinsured motorist as damages for the injury sustained. "Underinsured motorist" is defined to mean a motorist who is "legally liable" for the injuries of the Insured but is unable when the injury occurs to pay the full amount of damages recoverable by the Insured in respect of the injury. The entitlement to UMP compensation and the amount of compensation are to be determined by arbitration. Thus, the scheme of the *Act* seems to contemplate a prior judicial proceeding at which the tortfeasor has been found legally liable for a sum that he is unable to pay."

DISCUSSION AND ANALYSIS

71. In the context of a USA MVA, the Claimant submits that "an insured can have the issue of the existence of an underinsured motorist determined in arbitration" rather than by the foreign court which in this case would be that in California. The importance of the distinction between a MVA in BC versus one that occurs in the USA is discussed later in the award.

72. On the other hand the Respondent takes the position that as a preliminary matter, a claimant must show that injuries resulted from an accident with an

"underinsured motorist". That means the Claimant must establish that the tortfeasor (as an owner or operator of a vehicle) is legally liable for the injuries of the insured and is unable to pay the full amount of the Claimant's damages. Legal liability must be determined by a judicial decision, in this case by a California court, or in alternative, such must be admitted by the Respondent. The Respondent relies on a number of Arbitration decisions (for instance see *BL v. ICBC* – Arbitrator Tweedy, *GG v ICBC* - Arbitrator Yule and *SD v ICBC* - Arbitrator Yule) and *Beauchamp v ICBC* 2005 BCCA 507 at paras 17, 23 and 24).

73. I do note that the parties agree that generally speaking, I am bound by BC decisions of the court but not bound by the decisions of other arbitrators although these may be persuasive.

74. The parties also agree that the burden on this part of the argument is on the Claimant. The burden to prove that the Release and settlement are a bar to the UMP claim is on the Respondent.

75. As I understand the Claimant's submissions, for claims arising out of an accident in BC I would be bound by *Beauchamp*, and *Dhal v. Whitehall* (1996 CanLii 3128) however, for claims arising out this accident in California, *Beauchamp* and *Dhal* may be distinguished and therefore not applicable.

76. There is considerable judicial history in British Columbia in support of the proposition that in order to be entitled to access UMP compensation an insured claimant must either have the consent of ICBC to proceed to UMP or a judicial determination of liability against the underinsured motorist which is not satisfied.

77. The starting point is *Dahl v. Whitehill* (New Westminster Registry No. SO-6905, January 2, 1996). Dahl involved an application to have an UMP arbitrator determine whether the claimant was contributorily negligent for accepting transportation with an impaired driver. It was known that the claims of the claimant and another person would exceed the limits of the tortfeasor's liability

insurance. The plaintiff and ICBC had agreed that there needed to be a determination of the quantum of the plaintiff's damages. ICBC wished to have the arbitrator determine whether the plaintiff was contributorily negligent and brought the application to make that determination. In dismissing the application Hogarth, J. concluded as a matter of law that section 148.2 did not apply until there had been a determination that there was an "underinsured motorist". At paragraph 13 and 14 he stated:

> "13. In my view subsection 148.2 does not apply until it has already been determined that a person claiming, the "insured", is claiming as a consequence of an accident with an "underinsured motorist", that is someone who is unable to pay the full damages awarded to the insured. This amount can only be claimed in the action and after a trial or an assessment. The third party can defend the action in the stead of the defendant if it so desires and raise the question of contributory negligence, but before any claim can be made under the provisions of an UMP the final amount in the action is to be determined, as until then there is no "underinsured motorist".
>
> 14. The amount that is to be arbitrated is the amount finally determined in the action as it is affected by the "deductibles" and other sums mentioned in section 148.1."

78. What that means is that the Respondent could participate in the trial as a third party and contest both liability and quantum, leaving only the question of deductibles to be determined in the UMP arbitration.

79. In *Beauchamp v. ICBC* 2005 BCCA 507 the BC Court of Appeal concluded:

> 23. Arbitration is not available until it is shown that the person claiming is an “insured”, and is claiming in relation to an accident with an “underinsured motorist.” The definition of “underinsured motorist”, set out above, contains three elements. A person falls within the definition if he or she: (1) is the owner or operator of a vehicle; (2) is legally liable for the injury or death of an insured; and (3) is unable to pay the full amount of the insured’s damages.
>
> 24. Until those facts are either determined by judicial decision, or by admissions, there is no “underinsured motorist”, and the arbitration provisions of the Regulations cannot be engaged.

80. *Beauchamp* has been followed in a number of arbitration decisions, including, the decision of arbitrator Yule, Q.C. in ***S.D. v. ICBC*** (29 February 2019), in which he set out a useful summary of this line of cases, beginning at paragraph 63:

> 63. In *Undisclosed v. ICBC*, an arbitration dated September 17, 2009, by arbitrator Camp, Q.C., the issue was whether the determination of the quantum of damages by a Washington State jury was binding on ICBC in the subsequent UMP arbitration. Arbitrator Camp found that it was not binding relying upon the clear meaning of Regulation 148.2(6)(b). In the course of his decision Arbitrator Camp stated at paragraphs 21 and 22 as follows:
>
>> "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."
>
> 64. In that case, ICBC required a tort trial to determine the prerequisites necessary for UMP arbitration.
>
> 65. In *GG*[7], the Claimant settled with the tortfeasor by accepting his share of the insurer's limits that had to be shared with three other Claimants. The accident involved an intersection collision. GG was the driver of one of the vehicles. In an action commenced in Washington State the defendant (other motorist) had admitted sole liability for the accident and not pled contributory negligence against GG. ICBC permitted the three other Claimants to settle their claims against the tortfeasor and paid some UMP compensation to each

[7] *GG v. ICBC* (27 October 2010, Arbitrator Yule)

of them. It refused to consent to a settlement of GG's claim as it wished to have determined the issue of possible contributory negligence on the part of GG. GG proceeded to settle his claim, executed a release of the tortfeasor and consented to the dismissal of the Washington State action. The tortfeasor executed a statutory declaration evidencing an inability to pay any judgment.

66. Relying on the *Dahl*[8] and *Beauchamp* decisions ICBC argued that there was no "underinsured motorist"; that the settlement and release precluded legal entitlement to ay further compensation; and that there was a breach of section 148.2(4)(b).

67. The Claimant argued that legal entitlement had been conclusively established under Washington law by the tortfeasor's admission of sole liability for the accident. By making UMP payments to the other three Claimants, ICBC was precluded from denying that the tortfeasor was unable to satisfy any further damages.

68. In GG the arbitrator concluded that in order to be entitled to proceed with an UMP claim, there had to be either an unsatisfied judgment in the underlying tort claim or ICBC's consent. The decision in *Somersall v. Friedman* (2002 SCC 59) was considered but found not to be a "third way" to proceed to UMP arbitration under the BC legislative scheme. The arbitrator also concluded that ICBC had not been prejudiced by the settlement of the Washington State action because, the tortfeasor having admitted sole liability for the accident in the pleadings, the issue of contributory negligence on the part of GG was not going to be an issue had the Washington action proceeded to trial.

69. In *Lee v. ICBC* (Arbitration decision, June 29, 2016; supplementary decision, July 5, 2016, Mark Tweedy, Arbitrator) Mr. Lee was injured in a parking lot accident in Everett, Washington. The other motorist's liability insurer offered its policy limits of $100,000 US in settlement. The Claimant requested ICBC's consent to settle which was refused in writing. ICBC's reason for refusal was that it was not clear whether a Washington State jury would award damages in excess of $100,000 US; therefore without a decision there was no proven underinsured motorist. Mr. Lee accepted the limits offer without ICBC's consent.

70. Relying upon *Dahl, Beauchamp* and *GG*, ICBC submitted that a party only has two ways in which to establish whether someone is an underinsured motorist: either by a judgment obtained in the underlying tort proceeding or with ICBC's consent. Mr. Lee argued that the *Beauchamp* and *GG* decisions

[8] *Dahl v. Whitehill*, 1996 CanLII 3128 (BCSC)

were distinguishable because in those cases there was a liability dispute in the underlying tort action. Mr. Lee further asserted the right to settle without ICBC's consent providing ICBC was not prejudiced, relying on section 148.2(4)(b).

71. The arbitrator determined that the existence or not of a liability issue in the underlying tort proceeding was not material to the result in either *Beauchamp* or *GG*. The authorities required that the determination of an underinsured motorist could only be accomplished where there was a judgment in the underlying proceeding or the consent of ICBC. In dicta, the arbitrator held that the argument that consent to settle was not required if there was no prejudice was "akin to trying to establish that an exception to an exclusion creates coverage and ignores that he has not bought himself within the insuring agreement". In any event the arbitrator concluded that there was "obvious prejudice" to ICBC in that it was deprived of the possibility that a Washington State jury would award damages within the policy limits of $100,000 US which would amount to a judicial determination that there was no underinsured motorist.

72. In supplementary reasons the arbitrator held that it was not his function to determine if the tortfeasor was an "underinsured motorist". "Whether someone is an underinsured motorist can only be determined by there being a judgment in excess of policy limits and an inability of the tortfeasor to pay that judgment, or if ICBC admits these matters." The arbitrator rejected a submission that any prejudice to ICBC arising from the settlement could be satisfied by an award of costs in the arbitration to ICBC if ICBC were successful. The arbitrator repeated at paragraph 6 that "the true prejudice to ICBC is that the Washington State action did not proceed to judgment, which might have resulted in a judgment for less than the tortfeasor's policy limits, thus eliminating an UMP claim".

81. What I take from these decisions is that the requirements set out in *Beauchamp* must be established by the Claimant if there is no consent from the Respondent to proceed directly to arbitrate in order to determine whether any compensation is available to the Claimant. Many of the Arbitration decisions that follow *Beauchamp* are based on MVAs in the US and they all to my knowledge follow the same *Beauchamp* requirements. So unless *Beauchamp* can be distinguished because the MVA in this case arises out a USA MVA I am bound by *Beauchamp* and the application brought by the Claimant should be dismissed.

ISSUE NUMBER ONE

82. I now turn to the Claimant's argument that the requirements set out in *Beauchamp* do not apply to a claim for UMP arising out of a MVA in California. The Claimant's position is that in fairness to the Claimant, given the purpose of the Regulations, the determination of whether there is an uninsured motorist can be done at this stage in the arbitration proceeding.

83. At paras. 75 to 110 of her written submissions, the Claimant suggests that the *Dahl* and *Beauchamp* decisions should be restricted to BC accidents. The nub of the Claimant's argument is where she says that "if AK proceeded to obtain judgment against Ms. Wada in California, it would be a complete waste of time and resources and would serve no purpose. The judgment obtained would not be binding on an arbitrator in an UMP proceeding, and ICBC could seek to have all issues of liability and damages reheard in an arbitration." The solution she proposes is that the existence of an underinsured motorist should be determined in a BC arbitration and that "costly and time-consuming litigation" in California would be avoided if the Claimant could establish her entitlement to UMP coverage in an arbitration in British Columbia. She further says that "Claimants who have been injured in the United States by an American tortfeasor should not be required to obtain a foreign judgment in order to establish their entitlement to UMP coverage".

84. The Claimant relies on *Rizzo & Risso Shoes Ltd*. (Re) (1998) 1 SCR 27 ("Rizzo"), *Niedermeyer v. Charlton*, 2014 BCCA 165 and S.A. (re), 2020 BCSC 1323 for the proposition that the UMP regulations should receive a purposeful and generous approach to their interpretation given that there is compulsory vehicle insurance and that it is "benefits conferring legislation". The Claimant also says, pursuant to *Rizzo*, that the regulations should not be interpreted so that the result is absurd. I accept that is the way the regulations should be considered, but that does not mean that an arbitrator can create an entirely different regime for USA based MVAs not otherwise specifically available under the legislation. That, in my view, would not be an interpretation that avoids absurdity but rather

an attempt by an arbitrator to create jurisdiction that does not spring from the legislation itself.

85. In the case of a USA MVA, the scheme requires that a Claimant must proceed to a foreign judgment (absent the Respondent's consent to go directly to UMP), which means that the Claimant must pursue the foreign litigation to its conclusion. That does suggest there may be hardship in terms of cost and inconvenience just to achieve the threshold to further advance an UMP claim in BC. However, in my view that is the most practical way to determine the tortfeasor's liability given issues of proof and use of foreign law on liability. It also offers a means to simplify execution against the assets of the tortfeasor, which is in the joint interests of the Claimant and the Respondent. There may be cases where the tortfeasor (an individual or a corporation) has assets that exceed both available USA insurance and the limits of cover in an UMP policy although that may be rare. After all, Claimants, by operating a vehicle or exposing themselves to injury as a passenger or pedestrian, for example, in the USA have implicitly taken on the risks inherent in that jurisdiction including the law there as well as litigation there. (See *Tolofson v. Jensen*, 1994 3 SCR 1022).

86. The Respondent, in answer to the argument of the Claimant, argues that there are practical difficulties in determining legal liability of the USA tortfeasor as a preliminary matter in an UMP hearing. For instance there would be difficulties in compelling the tortfeasor to appear and testify. Why would the tortfeasor agree to do so? Would a US Court compel the tortfeasor to testify in an UMP proceeding in BC at the request of an Arbitrator when there is also exposure to a US lawsuit? Would an Arbitrator have the jurisdiction to even make an award against the tortfeasor? Could any such award be the basis for execution and the reciprocal enforcement or collection in the USA either against Tokio Marine insurance or the tortfeasor?

87. In my view the Respondent raises some valid points. Given these points, it seems to me that the UMP arbitration, as proposed by the Claimant as a

preliminary proceeding, would in itself be a waste of time and money because, quite apart from whether the arbitrator has any jurisdiction to determine legal liability of the tortfeasor, who is not a party to the arbitration, it would be unlikely to be of practical use with respect to enforcement and collection in the USA.

88. On balance, while there some inconvenience to the claimant to first proceed to a judicial determination either in the USA (as here) or in another province in Canada in the case of a non BC, but Canadian MVA, that is offset by the utility in getting an award where the tribunal is most familiar with the local law and its nuances, and which is enforceable from the point of execution. Execution in aid of collection is also achieved by having an award in the jurisdiction of the MVA which is to the benefit of the claimant in terms of recovery and in terms of deductions for the respondent. This points to fairness to both parties especially since UMP coverage is coverage of last resort meaning that the claimant is supposed to exhaust all other sources of recovery.

89. I should also note, that the scheme contemplates a second hearing, namely the UMP arbitration which is to apply law relating to liability which will no doubt be influenced by the foreign judicial determination if not wholly accepted in practical terms save and except in exceptional circumstances (the *GG* case being an example of which) and that the quantification of damages is determined according to the law of BC. The question of damages according to the law of BC avoids inconsistent damage awards that might occur if the foreign decision on quantum was just accepted as binding. For instance, in Canada the courts and arbitrators are bound by the cap on damages (adjusted for inflation), which is not the case for cases in the USA. For an example of a jury award in the state of Washington that exceeded the Canadian maximum general damage cap but not applied to quantification in a BC UMP case, see Arbitrator Camp's decision (mentioned above) in *Undisclosed v. ICBC* (September 17, 2009).

90. This two stage scheme is the method which integrates and solves the various competing interests and is the best attempt at achieving a fair and balanced result for both parties in my opinion.

91. However, while there are interesting arguments based on different views on the approach to be taken in UMP, the real answer depends on what the Regulations state.

92. We must start with s. 148.1 which says that an underinsured motorist means an owner or operator of a vehicle who is legally liable for the injury or the death of an insured but is unable to pay the full amount of damages recoverable by the insured. The proof of these requirements is required under *Beauchamp* and the numerous prior Arbitration decisions as noted above. But for this part of the argument it is relevant to note that coverage under s. 148.1 (2) is based on accidents that occur either in Canada or the United States of America. There is no specific direction in the regulations that the determination of legal liability, other than by a court of law should be made at the first instance by an arbitrator whether the accident occurs in Canada or the USA. In fact the opposite appears to be the case.

93. I note that in s. 148.2 (4) there is no distinction between Canadian or USA accidents if the right to sue and recovery of damages is barred by law. That suggests the requirements for UMP do not differ based on the location of the MVA.

94. S. 148.2(6) is very clear that if the accident occurs in another jurisdiction the law of the place where the insured suffered the injury is to be applied:

> (i) to determine if the insured is legally entitled to recover damages…

95. That means the only way to determine whether the Claimant is legally entitled to recover damages from the tortfeasor is to get a judicial determination in the jurisdiction where the MVA occurred. The jurisdiction in question is the one

where the MVA occurred whether it be in Canada or in the USA. The legislation does not differentiate between which country or province for that matter.

DOES BEAUSOLEIL ASSIST THE CLAIMANT?

96. The Claimant argues the *Beausoleil v. Canadian General Insurance Co*., [1992 O.J. No. 954 (C.A.) (referred to herein as "*B v. C"*) provides support for the proposition no California judgement is required to go directly to UMP. In my view this case does not assist in that regard. In *B v. C* the claim for underinsured coverage is based on the Ontario S.E.F. 42 endorsement. This endorsement provides coverage that is the difference between the liability insurance coverage available to the insured and the insurance carried by the at fault motorist. The reference in the S.E.F. 42 endorsement to the example of a judgement shortfall was considered by the Ontario Court of Appeal to be just that, an example. Importantly, according to the Ontario Court of Appeal, under S.E.F. 42, the "sole" concern is the state of the tortfeasor's insurance" (*B v. C*,para. 9). In the case of the Ontario coverage, the only requirement is to establish "the amount such a person is legally entitled to recover" and does not require a judgment or even require the insured to exhaust remedies under the judgment. So, as a result of this decision in Ontario, an action does lie against the first party insurer for the claim of underinsurance before judgment is obtained against a tortfeasor and before all remedies are exhausted (*B v. C,, para. 11*).

97. The Ontario decision is not binding on me and in any case in my opinion is premised on a different basis for coverage than on what is available in BC under UMP. To repeat, the BC UMP coverage does require a finding of legal liability by judicial decision (absent admissions of the Respondent) for the injuries sustained and that the tortfeasor is unable to pay the full amount of the damages whereas the language of the Ontario coverage does not.

THE DECISION in GG v. ICBC

98. The Claimant deals at some length with why she says the decision in *GG v. ICBC* (referred to herein as "*GG"*) should not be followed. In *GG* the subject MVA took place in Washington, USA. The Arbitrator in *GG* did follow the requirements set out in *Beauchamp* even though the UMP claim was based on a USA MVA and dismissed the UMP claim because there was no USA judicial determination of legal liability. The Claimant focuses on the fact that in *Dhal* contributory negligence could not be considered in the proposed UMP arbitration because that would be determined in the tort trial. That made the UMP arbitration in *Dhal* premature. Whereas, in *GG* the issue of contributory negligence could be dealt with under s. 148.2 (6) in the UMP arbitration according to the arbitrator after a USA trial. That, argues the Claimant, raised inconsistency that would be washed away if legal liability was determined in the arbitration because contributory negligence could be considered at the same time as the determination of the existence of an underinsured motorist in a BC UMP determination. This argues for a practical resolution the Claimant says, which is to make all the determinations in a BC UMP arbitration. While contributory negligence was a key issue in *GG*, which is not likely a factor in the rear end collision in this case, the Claimant says the *GG* decision does suggest there may be some practical reasons for a complete "one stop" liability and compensation UMP hearing. However, for the reasons stated herein, I do not accept that is possible. I do note that in *GG* the arbitrator did accept the proposition that a claimant cannot avoid the *Beauchamp* requirement for a judicial determination of liability even if it relates to a USA MVA. Although to be fair, the claimant GG, did not advance the arguments raised by the Claimant here.

99. The Claimant goes on to argue there is nothing specific in the UMP regulations that prohibits an arbitrator from making a preliminary determination on whether there is an "underinsured motorist." However, there is nothing in the regulations that authorizes that either. And to the contrary, the law set out in *Beauchamp*

does require that there be a judicial determination of legal liability and that the tortfeasor is unable to pay the full amount of the damages.

100. As I have concluded that the Claimant is not entitled to advance an UMP claim at this arbitration, because the Claimant has not satisfied the *Beauchamp* requirements, it is not necessary for me to address the other issues raised by counsel. In the event I am wrong in my conclusions, and in deference to able submissions of counsel and to avoid the possibility of further proceedings on the other issues I will address my conclusions on the other issues.

HAS THE EXISTENCE OF AN UNDERINSURED MOTORIST BEEN ESTABLISHED BY ADMISSIONS

101. The Claimant takes the position that, in the alternative to a judicial determination - the requirement in *Beauchamp* frequently referred to in the arbitration decisions, the requirement that there be admissions by ICBC that the matter may proceed to UMP, is overly restrictive. That admissions could be made by the tortfeasor, or its liability insurer ("Tokio") which would satisfy the preliminary requisites. And, that the agreement of ICBC that there is an underinsured motorist is not in fact necessary.

102. The Claimant argues that since the BCCA used the word "admissions" in *Beauchamp* it did not mirror the language of the regulations. In connection with the determination of entitlement to compensation, the actual words in s.148.2 (1) are that entitlement and the amount of compensation "shall be made by agreement between the insured and the corporation".

103. The Claimant also takes the position that the real basis for *Beauchamp* was that the case could not be determined on a hypothetical basis. That there was in fact no evidence of how the accident occurred or that there was indeed an underinsured motorist. Thus, the Claimant argues, if that sort of evidence was available, the result in *Beauchamp* might have been different. The Claimant says that in this case, there is evidence that the subject MVA was a rear end collision

therefore liability is presumed and since Tokio accepted it was obligated to pay its policy, and there was a declaration that there was no further insurance available the predicates were satisfied.

104. I note that in *GG*, the arbitrator stated that:

> "I do not think the Court of Appeal in *Beauchamp* in its reference to "admission" had in mind anything beyond the admission of the party to the proposed arbitration, namely ICBC." (See *GG* at paras 31 and 37)

105. I agree with the GG analysis.

106. In this case, the statements of the tortfeasor and Tokio are made by non-parties to the arbitration and therefore cannot constitute admissions of one of the parties for purposes of an UMP arbitration. They were never meant to be admissions in the UMP arbitration, rather they are connected with the tort claim. In addition, the Claimant executed a release in exchange for the policy payment under the Tokio insurance policy. There was no agreement in the release that liability was accepted. In fact, the release specifically states that there is no admission of liability and that the settlement is a compromise of a doubtful and disputed claim. (See clause 3 of the recitals in the release. Defendant document 1.16)

107. In my view, apart from the legal question as to whether a non-party's admission is the type of admission that meets the requirement to proceed to UMP, the evidence in this case falls short. Liability was not admitted and there is no conclusive evidence that the tortfeasor cannot pay anything further.

108. As a result, I do not accept that the tortfeasor or her insurer can make an admission that satisfies the necessary requirement that there be an agreement or admissions by the Respondent to proceed to an UMP determination.

IS THE RELEVANT TIME FOR DETERMINATION OF THE ENTITLEMENT TO DAMAGES FROM AN UNDERINSURED MOTORIST THE TIME OF THE ACCIDENT?

109. The Claimant submits that her legal entitlement to UMP arose at the time of the MVA; therefore, the settlement with the tortfeasor is irrelevant. For this the

Claimant relies on *Somersall v. Friedman* 2002 SCC 59 ("Somersall"). The court in *Somersall* was dealing with the Ontario SEF 44 endorsement.

110. In *Somersall,* the plaintiffs, Ontario residents, were injured in a motor vehicle accident, and brought an action against the tortfeasor. They settled the action against the defendant and executed a “Limits Agreement” with the tortfeasor releasing them from liability, without informing their insurer. As the settlement with the tortfeasor did not adequately cover the plaintiffs’ damages, the plaintiffs then made a claim to their insurer for the underinsured portion of their insurance coverage, pursuant to the SEF 44. The insurer initially dismissed their claim, finding that because the plaintiffs’ settled without their consent, they had lost their claim and interfered with the insurer’s subrogation rights. [9]

111. The SEF 44 Endorsement provided in part that:

> In consideration of the premium charged and subject to the provisions hereof, it is understood and agreed that the Insurer shall indemnify each eligible claimant for the amount that such eligible claimant is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury or death sustained by an insured person by accident arising out of the use or operation of an automobile.[10]

112. The motions judge ruled that the limits agreement precluded the respondents from advancing a claim against the insurer for damages against the appellant under the SEF 44, as they were no “longer legally entitled” to recover damages from the tortfeasor. At the Supreme Court of Canada (“SCC”), the SCC found that the promise not to pursue the underinsured motorist beyond his policy limits had no bearing on the question of legal entitlement that existed *at the time of the accident*. The SCC further found that SEF 44 was intended to compensate the

[9] *Somersall, supra,* at paragraph 2.

[10] *Somersall, supra,* at paragraph 7.

insured against the existence of a claim against an inadequately insured driver and that accordingly, the obligation of the insurer comes into being at the same time as the obligation of the tortfeasor to pay damages.[11]

***Somersall, supra,* at paras. 9-10, 28-30**

113. In reaching the above conclusions, the SCC examined previous case law that considered the SEF 44. The SEF 44 includes a provision allowing the insured to bring a direct action against their insurer for underinsured compensation. In much of the case law discussed by the SCC, the direct right of action was central to the decisions of the court, largely in relation to the direct right of action eliminating the need for an insured to obtain judgment against the tortfeasor before proceeding with a claim for underinsured compensation. However, in answering whether the limits agreement barred the insured from seeking compensation from the insurer, the SCC turned to the principles of statutory interpretation to determine the meaning of the phrase "legally entitled to recover."

114. The SCC specifically set out that the key question was not how the direct right of action impacted what procedural law or waivers were considered, but was at what point in time the insured's legal entitlement arose. To answer this, the SCC examined when the obligation on the part of the insurer to indemnify the insured comes into being. The SCC looked at the language of Clause 2 of the SEF 44, which does not relate to the direct right of action, and determined as follows:

> In my view, the answer must be that the insurer becomes obliged to make the payment the moment the claim of the insured against the tortfeasor comes into being, that is, at the time of the accident. At that moment, all of the conditions set out in the SEF 44 will be satisfied: death or bodily injury has occurred, negligently caused by an inadequately insured motorist. In other words, all of the conditions necessary to make out a claim in tort against the inadequately insured driver come into being at the moment of the accident. The SEF 44 means to compensate the insured for the existence of such a claim against the inadequately insured driver.

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[11] *Somersall, supra,* at paragraphs 9-10, 28-30.

> The obligation of the insurer, therefore, comes into being at the same time as the obligation of the tortfeasor to pay damages.[12]

115. Based on the above, the SCC concluded that the limits agreement did not prevent the insured from seeking compensation from the insurer because *it had no bearing on the right of the insured against the tortfeasor at the time of the accident*. It did not impact the legal entitlement of the insured that existed on the date of the accident.[13]

116. The Claimant argues that the decision in *Somersall* did not turn on the direct right of action contained in SEF 44. This had no impact on the conclusions summarized above. The SCC looked at the principles of the underinsured compensation scheme and determined that the time legal entitlement is determined is the time of the accident. The Claimant submits that this applies equally in British Columbia in relation to the UMP Regulation. The UMP Regulation obligates ICBC to compensate an insured for any amount the insured is entitled to recover as damages from the underinsured motorist: someone who is legally liable for the injury of an insured and unable to pay the full amount of damages. The time the legal entitlement to recover from an underinsured motorist arises, that is the time the claim against the tortfeasor arises, is the time of the accident. *Somersall* establishes this and applies in exactly the same manner in relation to the UMP Regulations.

117. Further, the Claimant submits the wording of the definition of "underinsured motorist" in the UMP Regulation explicitly establishes that the relevant time is the

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[12] *Somersall, supra,* at paragraphs. 27, 30.
[13] *Somersall, supra,* at paragraphs. 41.

time of the Accident. Section 148.1 of the UMP Regulation defines "underinsured motorist" 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 the insured's personal representative in respect of the injury or death.

118. The Claimant says that the definition specifically notes that the relevant time of inquiry is when the death or injury occurs, not the time of a judgment, or an UMP arbitration. The entitlement to UMP compensation arises at the time of the accident – when the injury occurs and when the action against the tortfeasor arises. Notably, the SEF 44 does not have any such language, and the SCC still concluded the relevant time was the time of the accident. The legislature could not have intended an interpretation of the UMP Regulation where legal entitlement was determined at one point, but whether a tortfeasor could pay the damages was determined at a different point in time. Both are determined at the time of the accident.

119. In my opinion, as noted in the *Beauchamp* case discussed above and the *Somersall* case, both rely on Ontario endorsements (SEF 42 or SEF 44) which provide coverage based on different language from that contained in the UMP regulations. I agree with opinion of Arbitrator, Don Yule, in *GG* in pages 17 to 34 of his award with respect to the applicability of *Somersall* in a BC UMP arbitration. In summary arbitrator Yule in that regard stated:

> In BC the definition of underinsured motorist requires proof that a tortfeasor is unable, when the injury or death occurs, to pay the full amount of damages RECOVERABLE BY THE INSURED [emphasis added]

120. What is recoverable by the insured, it seems to me, is only determined at the time of a judicial hearing absent an agreement by the Respondent. A judicial determination of what is RECOVERABLE is of course relating back to the time of the MVA for both quantum and liability, but cannot be at the moment of impact.

Rather it is at the time of the judicial determination of what is recoverable, which would be some later date than that of the MVA.

121. If the Release is signed some time post MVA, as here, that prevents the judicial determination of quantum and liability and therefore caps what is recoverable. But clearly that is not at the moment of impact either.

THE SETTLEMENT AND RELEASE IS ADMITTED - BUT WAS THERE PREJUDICE TO THE RESPONDENT AS A RESULT?

122. The Claimant admits that she settled her claims with the tortfeasor without written consent of the Respondent, but says that there was, in fact, no prejudice to the Respondent. If there is no prejudice, then under s. 148.2(4)(b), the Respondent cannot escape liability for UMP coverage.

123. The Claimant further takes the following positions:

  a. the communications from the Respondent were not clear that consent was required;

  b. there was no express reservation by the Respondent that it wanted to argue that the Claimant was not an underinsured;

  c. the actions of the Respondent created an estoppel which prevents it from claiming prejudice;

  d. the payment by Tokio and the statutory declaration of no other insurance suggest there was no prejudice;

  e. prejudice cannot be established hypothetically;

  f. there is no suggestion of any other 3rd party being liable or that there was contributory negligence by the Claimant;

g. although the Respondent knew of the claim it did not request that the Claimant investigate whether the tortfeasor had assets or had claims against another possible defendant;

h. the burden is on the Respondent to show that the steps the Claimant could have taken would actually reduce its exposure; and

i. in any case the Respondent could not participate in any liability or quantum trial in California.

124. The Respondent takes the position that there is in fact prejudice. It argues:

a. the establishment of legal liability in California would clear up whether some form of contributory negligence existed such as an unexpected stop. Or whether some other tortfeasor contributed to the loss, such as brake shop, or some manufacturer of the vehicle or its parts;

b. an award less than Tokio's policy limits might result; and

c. there is no possible execution against the tortfeasor who may have some further means to pay an award.

DISCUSSION

125. With respect to Claimant's points (a) and (b), the regulations are clear about what is required by the Claimant to get compensation. While specific notice of all that the Respondent required appears not to have been received by the Claimant's attorneys in the Respondent's August 23rd Fax, as only the first page was received. The first page did state that:

> "Underinsured Motorist Protection is a first party coverage governed by British Columbia statute which differs from American "UMP" policies"

126. The clear indication that British Columbia coverage is different put the Claimant's attorneys on notice to refer to the relevant link which should have lead them to at

least make some enquires as what might be different which in turn would or should have lead to the discovery of the claim requirements including consent to settlement. Further, in my opinion there is no requirement in the regulations for the Respondent to reserve its rights to insist on compliance, as the obligation is solely on the Claimant to advance and prove her claim.

127. In any case, a complete copy of the August 23rd fax was emailed to the Claimants attorneys on August 27, 2019 (as per the Agreed Statement of Facts) before the Release was signed in July of 2020. The second page specifically stated "You must obtain written consent from ICBC to settle with the third party".

128. With respect to the Claimant's claim that estoppel prevents the Respondent from relying on prejudice, I start by considering the meaning of the doctrine of estoppel.

129. The doctrine of estoppel protects a party's reasonable reliance on another party's representations, by words or conduct, which results in a loss to the first party. Cast broadly, estoppel generally requires:[14]

    a. an act or statement by the representor;

    b. which is reasonably relied on by the representee;

    c. to the representee's detriment.

130. Reasonable reliance is also sometimes referred to as the fact that the representor intended that its representation be relied upon by the representee; either way, the effect is that the reasonableness of the representee's reliance must be determined objectively rather than subjectively.

[14] Angela Swan, *Canadian Contract Law*, 2nd ed. (Markham: LexisNexis, 2009) at 107.

131. Estoppel does not alter the terms of the parties' contract; it merely restrains a party's remedies for the other party's deficient performance which was in reliance on the representation.[15]

132. On the evidence in this case, there is no act or statement or representations of the Respondent which would suggest that it was waiving the requirement for consent. There was in fact no request by the Claimant for consent to the settlement to which the Respondent could even reply. There was a reasonable attempt by the Respondent to give complete notice of the requirements although in fact apparently only partial timely notice was first provided. I note that the partial fax was on August 23, 2019 and the complete fax was sent on August 27, 2019 and on August 28, 2020 (see above) and the settlement was in July 2020. There was however enough notice in 2019 to put the US attorneys on guard that they should consider what the Regulations might say that differs from what applies in the US which would in turn lead the discovery of the requirement for consent to any settlement with the tortfeasor or her insurer. In addition, there is no evidence that the US attorneys, right after the partial fax was received, immediately requested the complete fax be resent. That is a far cry from the Respondent representing by fact or deed it was not relying of the requirements of the regulations. I could see no evidence that there were any representations by the Respondent that consent was either waived or that consent was not an impediment to settlement.

133. I do not accept the Claimant's argument that payment of the Tokio policy limits and the statutory declaration of no other insurance, collectively, means there could be no prejudice to the Respondent. While the availability of insurance was limited, that does not by itself mean there were no other assets available for execution.

134. On the other hand, I also do not accept that in this case the Respondent has been prejudiced by not having the legal liability determined in California. This

[15] Halsbury’s Laws of Canada, “H-55 Variation and waiver”.

appears to be a straight forward rear end collision and it is entirely speculative that any other tortfeasor exists or that there is some other 3rd party claim. It cannot be the case that a California judicial determination would come in at less than the limits of the Tokio policy because the medical bills incurred by themselves exceed the policy limits. In addition to the short fall of out of pocket medical expenses, the Claimant, who the parties have agreed was very seriously injured, would have additional claims for general non pecuniary damages, loss of wages, care and other specials and so forth.

135. I would also point out that a Release and settlement in the typical case would mean that there is no judicial determination of liability or quantum, but that in itself cannot be the type of prejudice envisioned by the regulations.

136. In other words, by adding the requirement that the Respondent must establish prejudice in addition to establishing lack of consent to the settlement must mean there has to be something more than just the Release and settlement itself otherwise the words requiring proof of prejudice would have no meaning or purpose. Here the Respondent led no evidence that it was actually prejudiced. That would have been the preferred way to establish prejudice. Therefore the Respondent must rely on the inferences arising from proven facts in order to establish prejudice.

137. In my opinion there is prejudice to the Respondent in that the Claimant now has no ability to pursue the tortfeasor for collection of any excess over the Tokio policy limits. That means that there is no possibility of further tortfeasor payments which otherwise would be "deductions" available to the Respondent. The tortfeasor was driving a 2018 Lexus at the time of the 2019 MVA, did have $300,000.00 insurance coverage and may have a property interest in some real estate, or other assets or the income required to fund these things. Without direct evidence of prejudice from the Respondent, however, the inference of prejudice from these facts is weak. But, nonetheless, the inference is that prejudice arises from these facts because these circumstances could have been investigated post

judgement leading to the possibility of execution, and the collection of money, and therefore "deductions" but for the settlement. Now the tortfeasor has no obligation or incentive to provide the Respondent with any information about her assets and there cannot be any execution against her.

138. With respect to the Claimant's argument that the Respondent did not request the Claimant to do any investigation of the tortfeasor's assets, I do not regard that as an obligation arising out of the regulations. The burden is on a Claimant to satisfy the requirements for compensation. The Respondent has not been tasked under the Regulations to make any such requests.

139. With respect to the Claimant's argument that the burden is on the Respondent to show that steps to be taken by the Claimant would show a reduction in exposure, is no more than saying the Respondent must establish prejudice. That is already the subject of this analysis.

140. I do agree that the Respondent would not be able to participate in the US proceedings because of course it would not be a party to the tort claim. However, one would expect that useful evidence would be disclosed as to the quantification of the Claimant's claims if the Respondent chose to have a representative attend and observe the trial. But as noted, the Respondent chose to call no evidence on this issue to establish actual prejudice.

THE EFFECT OF THE RELEASE

141. The Respondent argues that once the Release has been signed there is a cap on the claim. In other words, there is no excess claim over an above the amount set out in the Release. It is in fact an acknowledgement that the Claimant has received full compensation. I therefore agree with Mr. Yule's decision in *GG* where he states in paragraph 61:

> "the entry of a Consent Dismissal Order in the Washington action and the provision of a Full and Final Release of SK means that the Claimant is no longer legally entitled to recover damages from SK and the is no "excess"

> damages that could be the subject of an UMP claim. Hence, the claimant is not entitled to advance an UMP claim now"

In my opinion the same logic applies here even though in this case there is only a Release but no Dismissal Order because the effect is the same.

SUMMARY

142. One cannot commence an arbitration proceeding without there first being an underinsured motorist. That can only be determined if there is (a) an unsatisfied judgment against the tortfeasor or (b) the consent of ICBC. There is no "third way" for a claimant to establish the right to proceed to arbitration.[16] The Claimant did not obtain a judgment against the tortfeasor and did not obtain the Respondent's admission or agreement that Ms. Wada was an underinsured motorist. Therefore, she cannot meet her onus to show that Ms. Wada is an underinsured motorist.

143. The Claimant cannot rely on the admissions of the tortfeasor or her insurer to meet the necessary requirements to go directly to the UMP arbitration. Further, in this case, the tortfeasor denied any liability for the cause of the subject MVA and there is not sufficient evidence that the tortfeasor is unable to pay the entirety of any USA judgement (if there was one).

144. While the Respondent did not lead any direct evidence that it was prejudiced by the settlement there probably was some prejudice established by the Respondent.

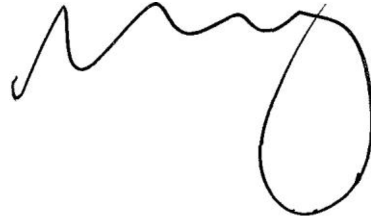
145. The effect of the Release caps the damages and therefore the Claimant is not entitled to advance an UMP claim for further compensation.

146. Therefore the Claimant's claim for compensation under UMP is dismissed.

[16] *GG v. ICBC* (27 October 2010, Don Yule arbitrator) at para. 37.

147. The parties may speak to costs bearing in mind the regulatory restrictions.

Dated August 9, 2022.



Avon Mersey, Q.C. Arbitrator