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

AND

THE COMMERCIAL ARBITRATION ACT,
RSBC 1996, c. 55

BETWEEN:

BL

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION ON APPLICATION OF ARBITRATOR, MARK TWEEDY

Counsel for the Claimant: Mark Belanger

Counsel for the Respondent: Guy Brown, QC

Date of Hearing: June 2, 2016

Date of Decision: June 29, 2016

1. Introduction

[1] In this proceeding, the Claimant BL claims against the Respondent The Insurance Corporation of British Columbia ("ICBC") for under insured motorist benefits ("UMP Compensation") pursuant to the *Under Insured Motorist Protection Regulations* of the *Insurance (Motor Vehicle) Act* (the "*Regulations*").

[2] ICBC applies to dismiss this proceeding. ICBC says that the Statement of Claim does not allege a factual basis upon which BL is entitled in law to advance a claim for UMP Compensation pursuant to the *Regulations.* ICBC also relies upon *Beauchamp v. ICBC,* 2005 BCCA 507 and *GG v. ICBC* (Arbitration, October 27, 2010) in addition to the *Regulations.*

[3] BL opposes ICBC's Application. The principle argument made on his behalf is that this matter is one of first impression in BC, and that the authorities which ICBC relies on are distinguishable from this case because there were liability disputes in the tort actions underlying those cases. BL submits that there is no liability dispute in the tort action underlying this proceeding.

[4] As well, BL advances a number of other arguments, which I will address in due course.

2. Facts

[5] On May 15, 2009, BL was involved in a motor vehicle accident in Everett, Washington. KF was driving a vehicle which collided with BL's vehicle in a parking lot. BL was a resident of BC and KF was a resident of Washington State. BL commenced proceedings against KF and sought compensation for his injuries and the damage to his car. I will refer to this proceeding throughout this Decision as "the Washington State Action".

[6] The Amended Answer which KF filed in the Washington State Action did not admit liability and denied any alleged negligence.

[7] KF's insurer subsequently tendered her policy limits of $100,000 US to settle the Washington State Action to settle his claims.

[9] On April 15, 2014 BL through his counsel, notified ICBC that he was seeking its consent, pursuant to s. 148 of the *Regulations,* to accept the tender of KF's limits.

[10] On May 21, 2014, ICBC acknowledged receipt of the April 15, 2014 letter and requested certain documents relating to BL's injuries and losses. BL provided a response to these requests on May 29, 2014.

[11] By letter dated June 26, 2014 ICBC wrote to BL's counsel and said:

> This is a response to your April 15, 2014 request that ICBC consents to your client proceeding with an Underinsured Motorist Protection (UMP) claim under Sec. 148.1 of the Insurance (Vehicle) Regulation.
>
> This letter is confirmation that ICBC does not consent to your client proceeding with an UMP claim as it has not been established that the third party is an underinsured motorist.

[12] BL's counsel responded to ICBC's letter the same day. He said:

> I am in receipt of your letter of even date advising that the Corporation does not consent to UMP in this matter. Since we have provided your office with an asset search of KF evidencing she is insolvent,

> coupled with the fact that she has no other insurance, I would like clarification with respect to your assertion that "it has not been established that the third party is an underinsured motorist".

[13] ICBC responded to BL's counsel's letter by email dated June 30, 2014 and said:

> …
>
> The trigger for consent… under UMP is not a policy limits offer and proof that the defendant is for practical purposes impecunious.
>
> Insurers make limit offers for both economic reasons and for risk avoidance however that does not mean that the claim is worth more than what we offered. There is only one way to determine whether a motorist is underinsured and that is by judgment.
>
> Generally, cases where consent is granted are minimum limit cases where it is clear that there is significant risk that the award would exceed the defendants [sic] ability to pay. The other is where there are objectively severe injuries that in the US easily exceed defendant's [sic] ability to pay. We don't have either in BL's case.
>
> We take the position that it is not clear whether a Washington jury would award damages in excess of $100,000USD to your client therefore at this time there is no underinsured motorist.

[14] There were no further communications between BL and ICBC regarding the consent issue.

[15] BL subsequently settled the Washington State Action without ICBC's consent, although the date that occurred is uncertain. A letter from KF's counsel to BL's counsel dated April 4, 2014 writes to "finalize settlement" of BL's claim, and encloses a Release and Hold-Harmless Agreement to be signed by him, a Stipulation and Order of Dismissal to be signed by BL's counsel, and a cheque from KF's insurer in the sum of $100,000. I note this was before BL had sought ICBC's consent to the settlement.

[16] On May 15, 2015, over a year later, counsel for KF again wrote to counsel for BL, acknowledging receipt of the release and one again enclosed the insurer's $100,000 cheque. There is no evidence as to why there was a delay in finalising the settlement.

[17] BL executed the Release and Hold-Harmless Agreement on May 7, 2015. It provides, *inter alia,* that it does not constitute an admission of liability but is a compromise settlement.

[18] Quite apart from the UMP claim which BL made in this proceeding, he reported a claim to ICBC following the accident with KF. A portion of ICBC's claim file was in evidence on this application, and indicates that on July 16, 2009, the responsible ICBC claims person determined that BL's vehicle was in the "main aisle" and KF's vehicle was exiting a "feeder aisle" when the accident occurred. The file notes then indicate that a liability change from "C" to "D" was made. Submissions were made regarding what this change means, and I will refer to them in due course.

3. The history of this proceeding

[19] BL commenced this proceeding by a Notice to Arbitrate delivered on May 29, 2015. A Statement of Claim was delivered on September 20, 2015. Both the Notice to Arbitrate and the Statement of Claim referenced a without prejudice settlement offer which a Mr. AS made on behalf of ICBC to counsel for BL. BL alleged that the offer constituted *de facto* consent for the Claimant to settle the Washington State Action.

[20] Both the Notice to Arbitrate and the Statement of Claim contained a paragraph which pleads that the Washington State Action has been settled and that the settlement does not "prejudice" ICBC, as contemplated by section 148 of the Regulations.

[21] On or about December 2, 2015 ICBC brought an Application to strike the two paragraphs in the Notice to Arbitrate and Statement of Claim which referred to the settlement offer made by Mr. AS. The basis of the Application was that they improperly disclosed "a communication created for and communicated in the course of settlement negotiations which is subject to settlement privilege".

[22] BL agreed that the two paragraphs referencing the settlement offer disclosed a privileged communication, but said that their disclosure ought to be permitted as an exception to the general rule. BL argued that public policy and interest demanded disclosure of the otherwise privileged communications, to ensure fairness between ICBC and its insured, BL.

[23] In support of the Application to strike the two paragraphs in the Notice to Arbitrate and Statement of Claim, ICBC delivered an Affidavit sworn by Mr. AS. BL applied to cross-examine Mr. AS on his Affidavit. ICBC opposed that Application. In a Decision dated December 7, 2015, I ordered that Mr. AS be cross-examined on his Affidavit. That cross-examination took place on December 15, 2015.

[24] In a Decision dated February 16, 2016, I ruled that there was no public policy or interest which dictates that the settlement offer which Mr. AS made should not remain privileged. I therefore ordered that the two paragraphs in the Notice to Arbitrate and Statement of Claim be struck.

[25] On or about March 8, 2016, ICBC brought this Application. In his Response to the Application, BL took the position, as I have stated, that this case was one of first impression, and that because there was no liability issue in the Washington State Action, it was distinguishable from *Beauchamp* and *GG.*

[26] After BL advanced the argument that *Beauchamp* and *GG* were distinguishable, ICBC brought an Application to compel production of documents relating to the settlement of the Washington State Action. BL opposed that Application.

[27] On May 19, 2016, I ordered that BL produce copies of all documents in his possession or control, including any release that related to the settlement of the Washington State Action. Specifically excluded from the Order was counsel's work product, and the Order was restricted to documents relating to the settlement of the Washington State Action *per se.*

4. The *Regulations*

[28] The *Regulations* set out the UMP scheme. Those portions of the *Regulations* which counsel for BL and ICBC say are relevant on this Application are the definition of "underinsured motorist" in section 148.1(1), what I term the "insuring agreement" set out in section 148.1(2), the mechanism for determining whether an insured should be compensated set out in section 148.1(2), and section 148.2(4) which sets out certain exclusions from coverage.

[29] "Underinsured motorist" is defined in section 148.1(1) as follows:

> …an owner or operator of a vehicle who is legally liable for the injury or death of an insured but is unable, when the injury or death occurs, to pay the full amount of the damages recoverable by the insured or his personal representative in respect of that injury or death.

[30] The insuring agreement is set out in section 148.1(2) which provides as follows:

> 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 Unite 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.

[31] The mechanism to determine whether an insured is entitled to compensation is set out in section 148.2(1) which provides as follows:

> Subject to subsection (1.1) 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 the 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 the compensation shall be submitted to arbitration under the *Commercial Arbitration Act.*

[32] Certain exclusions from coverage are set out in section 148.2(4) which provides as follows:

> The corporation is not liable under section 148.1
>
> > (a) in respect of an accident occurring in a jurisdiction of Canada or the United States of America in which the right to sue and recover damages for injury or death caused by a vehicle accident is barred by law, or
> >
> > (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.

5. The position of the parties on this Application

[33] ICBC's position is that BL has not established the factual basis necessary to advance a claim for UMP Compensation, and says that BL has not established that KF was an underinsured motorist, as section 148.1(1) defines the term. ICBC says 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 its consent. Because BL did not obtain a judgement in the Washington State Action, and did not obtain its consent to settle, ICBC says that there is no basis to proceed to an arbitration under section 148.2(1). ICBC says "that *Beauchamp v. ICBC* is binding authority", and that *GG* is "on all fours" with the instant case.

[34] BL takes the following positions in response:

> (a) *Beauchamp* and *GG* are distinguishable because in those cases there was a liability dispute in the underlying tort proceedings, and there was no liability dispute in the Washington State Action;

(b) Relying on section 148.2(4) B's settlement of his case did not prejudice ICBC and therefore its lack of consent is immaterial;

(c) Because ICBC has taken the various steps it has in this proceeding, it has "attorned" to the jurisdiction of this arbitral tribunal, and has waived its right to contest the standing of BL to bring this proceeding.

[35] ICBC takes the following positions in reply:

(a) The distinction drawn regarding liability in the underlying tort proceedings between this case and *Beauchamp* and *GG* is not material to whether ICBC's consent was required to settle BL's case;

(b) ICBC was prejudiced by BL's settlement of his case because it avoided an assessment of his case in Washington State, which may have resulted in an award less than the limits of KF's insurance, obviating his claim for UMP Compensation;

(c) ICBC does not challenge the jurisdiction of this tribunal. Rather, it asks this tribunal to exercise the exclusive jurisdiction conferred by section 148.2(1) to determine whether BL is entitled to UMP Compensation

6. Discussion, review of the authorities, and analysis

(a) Introduction

[36] ICBC says that *Beauchamp* and *GG* apply, and that BL cannot proceed with this Arbitration absent a judgment in the underlying tort proceeding or with ICBC's consent. BL says that both cases are distinguishable from this case because there was no liability issue in the Washington State Action, as there was in those cases. ICBC says the distinction, if it exists, is immaterial, and is not relevant to a determination of whether BL is entitled to bring a claim for UMP Compensation.

[37] The parties are also not in agreement as to whether liability was in fact an issue in the Washington State Action.

(b) *Beauchamp v. ICBC*

[38] *Beauchamp v. ICBC* is a 2005 Decision of the BC Court of Appeal. The claimant in that case had not obtained a judgment in the tort proceeding underlying his UMP claim. Nevertheless, he petitioned pursuant to section 148.2 of the *Regulations* for the appointment of an arbitrator to hear his claim. A master heard the initial application. The master ordered that the arbitration proceed "on the assumption that judgment has been obtained against the tortfeasor and on the assumption the tortfeasor is unable to satisfy the judgment".

[39] ICBC appealed the master's order. The chambers judge who heard the appeal said that the master was in error. His reasons for doing so are set out in the Court of Appeal Reasons on page 8. The chambers judge said:

> [17] UMP coverage is only available when the tortfeasor is an "underinsured motorist". That term, as previously noted, is defined in the *Regulation* and requires that the tortfeasor be an owner or operator of a vehicle, legally liable to for the death of injury of an insured, but unable to pay the full amount of the insured's damage. There is no UMP coverage unless a tortfeasor meets these criteria.
>
> [18] I agree with the comments of Hogarth J. in *Dahl* that s. 148.2 does not apply until the existence of an underinsured motorist is determined. In this case, that requires that Mr. Smith is legally liable for Mr. Beauchamp's injuries and is unable to pay the full amount of damages in respect of those injuries. **Legal liability and damages can only be decided in the tort action** (emphasis added).
>
> [19] UMP is available to persons injured or killed in accidents with underinsured motorists. The entitlement is a contractual one as between an injured party who meets certain prerequisites (the "insured") and ICBC. Coverage is not absolute. Disputes about whether an insured is entitled to compensation and the amount of compensation are resolved by arbitration.

[40] The decision of the chambers judge referred to liability being contested in the underlying tort action, and to the defences of *ex turpi causa non oritor action* and *volenti non fit injuria* which were raised as defences to Mr. Beauchamp's claim. It is important to note however, as the emphasised portion of his reasons state, that the positions taken by the parties with respect to liability were not material to his decision. What was material was that legal liability had to be decided in the tort action.

[41] The Court of Appeal agreed with the chambers judge. It said:

> [26] Proceeding to arbitration before it is established that the petitioner is an "insured" who was injured by an "underinsured motorist" would result in a decision based entirely on hypothetical facts which may never come to fruition. The petitioner's entitlement to UMP benefits cannot be decided on a hypothetical basis.
>
> …
>
> [28] I also agree that in order to engage the arbitration provisions in s. 148.2 it must first be determined, judicially or by admissions, that there is an "underinsured motorist". The master's order was based on

> assumptions and purported to engage *Regulation* 148.2 on a hypothetical basis. This is not permissible under the *Regulations.*

[42] Nowhere in its decision did the Court of Appeal reference whether there was in fact a liability issue in the single car accident which gave rise to the UMP claim. In fact, the court expressly referred, in paragraph 14, to there being no evidence at all regarding the "material facts surrounding the accident".

(c) *GG v. ICBC*

[43] *GG v. ICBC* was an UMP arbitration decided by Arbitrator Don Yule, QC. The facts of that case are similar to this case. The claimant in that case was involved in a motor vehicle accident in Washington State. The claimant demanded that the insurer of the Washington State driver offer up its policy limits to settle the claim, which it did. The claimant's counsel then sought ICBC's consent to the settlement, which it did not agree to do.

[44] The claimant subsequently commenced UMP proceedings, in the same manner as has been done in this case.

[45] The driver in the *GG* case had admitted liability. ICBC had settled UMP claims brought by the other passengers in the vehicle. The claimant argued that the admission of liability established that the Washington State driver was "legally liable" for the claimant's injuries, and that it was not necessary for there to be a judicial determination of that issue.

[46] There was a preliminary hearing to determine whether the UMP arbitration could proceed. Arbitrator Yule ruled it could not. He said in paragraph 37 of his decision:

> The essence of the dispute between the parties regarding the entitlement issue is whether there is a "third way" for a Claimant to establish the right to proceed to arbitration. ICBC says there are only two ways to establish that right, namely (1) an unsatisfied judgment against the tortfeasor or (2) the consent of ICBC. The Claimant says that there is a third way, namely, by admissions of the tortfeasor, both as to fault for the accident (legal liability and legal entitlement) and as to an inability to satisfy any damages that may be awarded. The third way is the approach in *Somersall v. Friedman* (2002 S.C.C. 59) which I address in the next section of this decision and where I conclude that it is founded on fundamentally different insuring provisions. I cannot construe *Dahl* and *Beauchamp* interpreting the BC UMP legislation as contemplating a third way of establishing entitlement to proceed to arbitration. I do not think the Court of Appeal in *Beauchamp* in its reference to "admissions" had in mind anything beyond the admission of the party to the proposed arbitration, namely ICBC. The Claimant asserts that in this case compelling him to obtain a judgment in the Washington State action is unfair, particularly having in mind the

> uselessness of an assessment of damages under Washington State law. I agree. However, in light of the legal authorities, I am constrained to conclude that the Claimant is not entitled to UMP compensation because he has not established the necessary prerequisites.

(d) Did *Beauchamp* and *GG* turn on there being a liability issue in the underlying tort proceeding?

[47] BL's position is that *Beauchamp* and *GG* are distinguishable because liability was an issue in the tort proceedings underlying those UMP claims, and it is not an issue in this proceeding. In my view the existence or not of a liability issue in the underlying tort proceeding was not material to the result in either *Beauchamp* or *GG.* In both cases, what was of import was that liability had not been determined in the underlying tort claim, not whether or not it was an issue.

[48] In *Beauchamp,* the Court of Appeal emphasized that whether or not there was an "underinsured motorist", a pre-requisite for UMP recovery had to be determined judicially or by admission. As Arbitrator Yule clarified in *GG,* the admission necessarily has to be one made by ICBC. Accordingly, in my opinion, the existence of an issue with respect to liability was irrelevant to the Court of Appeal's decision.

[49] A similar finding was made in *GG.* In that case, there had been admission of liability by the at fault driver in the underlying tort proceeding. Arbitrator Yule, applying and interpreting *Beauchamp,* held that this admission was not sufficient to establish that the driver was an "underinsured motorist", and reiterated that this could be accomplished only where there was a judgment in the underlying proceeding or the consent of ICBC. The admission of liability was irrelevant, and did not constitute a "third way" of establishing an entitlement to UMP coverage.

(e) Was there a liability issue in the Washington State Action?

[50] The factual underpinning of BL's argument that ICBC's consent was not required to settle the Washington State Action is that there was no liability issue in that case. The evidence as to whether there was a liability issue in the Washington State Action is contradictory, and consists of the following:

> (i) a denial of negligence and express statement that liability was not admitted in the pleading filed on behalf of KF in the Washington State Action;
>
> (ii) an acknowledgement of a denial of liability by KF in the Release and Hold-Harmless Agreement executed by BL;
>
> (iii) the change in file status from "C" to "D" by the ICBC adjuster after reviewing surveillance video;

> (iv) ICBC has never taken the position that liability was in issue in the Washington State Action.

[51] In my view, the evidence before me is not conclusive as to whether in fact there was a liability issue in the Washington State Action. The pleading and the clause in the Release and Hold-Harmless Agreement may or may not be indicative of the true state of the facts. The description of the events shown in the surveillance video, as noted by the ICBC examiner and the subsequent change in file status from "C" to "D", which counsel for BL says means from "customer" to "defendant" does not assist me either, as I do not know what those designations mean. I also note that there was no evidence of the circumstances of the accident itself from either BL or KF.

[52] I am therefore unable to find that there was not a liability issue in the Washington State Action, even if that is relevant.

(f) Did BL's failure to obtain ICBC's consent to the settlement of the Washington State Action prejudice ICBC?

[53] BL's submission with respect to ICBC not being prejudiced by the lack of consent to the settlement of the Washington State Action is founded on section 148.2 (4) which, once again, provides:

> The corporation is not liable under section 148.1
>
> > (a) in respect of an accident occurring in a jurisdiction of Canada or the United States of America in which the right to sue and recover damages for injury or death caused by a vehicle accident is barred by law, or
> >
> > (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.

[54] Given my opinion that BL has not established that there is an "underinsured" motorist pursuant to section 148.1, whether there is prejudice arising from a lack of consent is not material. In my view, BL's argument is akin to trying to establish that an exception to an exclusion creates coverage and ignores that he has not brought himself within the insuring agreement.

[55] Regardless, I agree with ICBC's submission that the obvious prejudice to ICBC is that without its consent, the only other way for BL to establish an entitlement to UMP coverage was to proceed to judgment in the Washington State action. As this may have resulted in an award less than the limits of KF's policy, the prejudice in my view is clear.

(g) Has ICBC attorned to the jurisdiction of this arbitral tribunal by taking the various steps it has in this proceeding, and has it waived its right to contest the standing of BL to bring this arbitration?

[56] BL's argument with respect to this issue is set out in paragraph 32 of his "Response to Application", which says:

> 32. Even if this matter falls within the scope of *Beauchamp v. ICBC* and *GG v. ICBC,* which the claimant respectfully submits it does not, the Respondent has take actions which constitute the attornment of it to the jurisdiction of this Tribunal and waived any jurisdictional *simpliciter* argument.

[57] BL relies on two authorities in support of this submission. The first case is *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.,* (1995), 13 BCLR (3d) 41 (BCCA). This case concerned the enforcement in BC of a default judgment obtained in Ohio. The Plaintiff was applying under the then summary trial rule to enforce the judgment in BC. The summary trial judge dismissed the application, and found among other things, that the Defendant had not attorned to the jurisdiction of the Ohio court. The Plaintiff appealed. The appeal was allowed. The Court of Appeal said that the Defendant's application in Ohio to strike the Plaintiff's case in fraud for lack of particularity, coupled with an application that challenged the jurisdiction of the Ohio court, resulted in the Defendant attorning to the jurisdiction of the Ohio court. Accordingly this argument was not now open to it in BC.

[58] The second case is *Imagis Technologies Inc. v. Red Herring Communications Inc.,* 2003 BCSC 366. That case was a defamation case. The Plaintiff was a BC company. The corporate Defendant was a California company. It published material on the internet, which was alleged to be defamatory, that had been written by the individual Defendant, who was a freelance writer living in Connecticut. After entering an appearance and statement of defence, and delivering a demand for discovery of documents, the Defendants applied for a stay of the action on the basis that BC was not a convenient forum. The court held that the steps taken in the action constituted attornment to the jurisdiction of the court.

[59] I am not persuaded that the issue of attorning to the jurisdiction, as discussed in the two cases referred to, has any bearing on the issues raised in this proceeding. ICBC's position throughout has been that BL has not established that KF is an "underinsured motorist" and that BL is not therefore entitled to pursue a claim for UMP Compensation. ICBC pleaded this position in its Statement of Defence as the legal basis for opposing BL's claim.

[60] Disputes as to whether there is an entitlement to compensation (which necessarily includes whether there is an underinsured motorist) must be resolved by arbitration. See section 148.2 (1) of the *Regulations.* Issues of attornment,

and its consequences do not arise as the *Regulations* dictate that it is before an arbitral tribunal where disputes as to entitlement to compensation are decided. I do not therefore accept the submission that the various steps taken by ICBC in this proceeding limit its ability to argue that BL is not entitled to UMP Compensation.

G. Decision

[61] I am of the view that BL has not established an entitlement to UMP compensation, as he has not established that KF was an "uninsured motorist" as defined in the *Regulations.* Therefore, I dismiss this proceeding, with costs.

_____
Mark Tweedy
Arbitrator
June 29, 2016