IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2 OF THE INSURANCE (VEHICLE) REGULATION, B.C. Reg. 447/83 and the ARBITRATION ACT [SBC 2020] c. 2

BETWEEN:

JO

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA AND
DEFINITY INSURANCE COMPANY
(formerly Economical Insurance / Family Insurance Solutions Inc.)

RESPONDENT

RULING ON INTERLOCUTORY APPLICATION

Counsel for the Claimant, JO	Michael Elliott Mallory K. Hogan
Counsel for the Respondent, Insurance Corporation of British Columbia	Robert Hodgins
Counsel for the Respondent, Definity Insurance Company	Amelia Staunton
Place of Hearing	Vancouver, B.C. Via Zoom
Date of Hearing	February 17, 2026
Date of Ruling	March 19, 2026
Arbitrator:	Dennis C. Quinlan, K.C.

TABLE OF CONTENTS

I. INTRODUCTION

[1] This is an interlocutory application related to deductible amounts brought within an underinsured motorist protection ("UMP") arbitration conducted pursuant to section 148.2 of Part 10 of the Insurance (Vehicle) Regulation B.C. Reg 447/83 (the "Regulation") and the Arbitration Act [SBC 2020] Chapter 2.

[2] The parties worked together to agree on the nature and scope of the application and the process by which it would proceed.

[3] On September 12, 2014, JO (the "Claimant") sustained injury, loss and damage after being struck by an unidentified vehicle while crossing in a marked crosswalk at the intersection of West 12th Avenue and Manitoba Street, in Vancouver, B.C. (the "Accident").

[4] On March 18, 2016 the Claimant commenced an action by way of Notice of Civil Claim in the Supreme Court of British Columbia (the "Tort Action") naming the Insurance Corporation of British Columbia ("ICBC") as a nominal defendant pursuant to section 24 of the Insurance (Vehicle) Act [RSBC 1996] Chapter 231 (the "Act").

[5] The Tort Action proceeded to trial in November 2019 and on December 20, 2019, reasons for judgement were released by Justice Millman (the "Trial Judge") awarding damages to the Claimant totaling $1,148,253.72 (the "Tort Judgment").

[6] In arriving at the Tort Judgment, the Trial Judge awarded $400,000 for loss of future earning capacity based upon his finding of fact that the Claimant had residual earning capacity of fifteen hours per week.

[7] The Tort Judgment plus additional amounts for pre-judgment interest, management fees, tax gross up and costs and disbursements totalled

$1,321,907.86 which was well in excess of the $200,000 compensation available pursuant to section 24 of the Act.

[8] At all material times, the Claimant was an insured under contracts of insurance with the respondents ICBC and Definity Insurance Company ("Definity") that provided, *inter alia*, UMP compensation to the respective limits of $1,000,000 extended to $2,000,000 less applicable deductible amounts.

[9] ICBC and Definity in seeking to prove applicable deductible amounts pursuant to subsections 148.1(1) and (5) of the Regulation, each apply to introduce new evidence that was not adduced at the trial of the Tort Action.

[10] The Claimant opposes the application on the basis that ICBC and Definity are bound by the Trial Judge's finding of residual earning capacity, and no further evidence can be led to undermine that finding.

[11] She asserts that pursuant to the terms of the respective plans for long term disability ("LTD") and Canada Pension Plan ("CPP") benefits, such residual earning capacity disentitles her to receipt of benefits thereby negating any associated deductible amount.

[12] The issue raised on this application is the extent to which a finding of fact made in a tort judgment dictates the determination of deductible amounts in an UMP arbitration, and what further evidence, if any, may be adduced. The issue must be considered within the backdrop of the statutory UMP scheme.

II. POSITION OF THE PARTIES

(a) ICBC and Definity

[13] ICBC specifically seeks two declarations, namely (1) that it has the right to prove certain deductible amounts pursuant to section 148.1(1) of the Regulation, and (2) it may tender new evidence not raised in the Tort Action.

[14] Definity seeks identical declarations to those sought by ICBC and for convenience I will refer only to ICBC unless otherwise stated. Collectively I may refer to ICBC and Definity as the "Respondents".

[15] ICBC describes the narrow legal issue as whether it "…is entitled to deduct past disability benefits paid and future disability benefits payable to the Claimant in the UMP proceeding, in light of Millman, J's finding at the trial in the Tort Action that the Claimant had residual working capacity."

[16] ICBC submits it is entitled to make deductions for future benefits so long as it can establish "…that the benefits will continue into the future [by providing] some evidentiary foundation to determine the likelihood of the continuance and certainty of such future payments."

[17] The fundamental component to ICBC's position is its submission that the common law tort regime is separate and distinct from the statutory UMP regime. In support ICBC relies upon the Supreme Court of Canada decision in *Gurniak v. Nordquist*, 2003 SCC 59 and the subsequent statement by Arbitrator Yule in *KP v. ICBC,* (Arbitration Award, April 30, 2019, Arbitrator Yule) at para. 38 that "there is no requirement for direct matching of a benefit with a particular or specific head of damages in the tort action."

[18] ICBC submits that rather than attempting to vary the Tort Judgment or findings of fact as suggested by the Claimant, it is asking the arbitrator to determine

an entirely different issue that was not before the Trial Judge. As ICBC explains in its Reply submission at para. 18:

> "What is at issue in this proceeding is not whether the Claimant has any residual capacity or what that level of capacity is, but rather, whether disability benefit payments have been paid to the Claimant and whether they will continue into the future."

[19] ICBC submits the finding of residual earning capacity by the Trial Judge is not mutually exclusive to the question of whether disability benefits will continue into the future. An individual could have 15 hours of residual working capacity and still be entitled to disability benefits, depending upon the specific benefit program at issue and facts of the case. ICBC says that to bar it from seeking to prove deductible amounts at this stage would be to prejudge the issue.

[20] In summary ICBC submits that it should be permitted to advance its claim for deductible amounts for which it carries the burden of proof, and to adduce evidence with respect thereto. Such evidence could include whether any payments have been made to date, various benefit policies and programs at issue, and the Claimant's current functioning and capacity.

[21] ICBC agrees that the Claimant should be entitled to advance her own evidence that is relevant to the issue of deductions and in particular future entitlement.

(b) Claimant

[22] The Claimant frames the relevant issue as follows:

> 12. The question to be decided on this application is whether, as a matter of law, the findings of fact made by a sitting BC Supreme Court justice after a trial can be varied by an Arbitrator presiding over a subsequent UMP arbitration. This issue must be determined before any deductions are ordered. The Claimant will ultimately take the position that no benefits

> can be deducted as a result of the Trial Decision. That argument, however, is relevant to the merits and not the procedural question at hand.

[23] In support of her argument, the Claimant relies upon sub-sections 148.1(11) and (12) of the Regulation which were enacted on June 14, 2006 and provide *inter alia* that a judgment of a British Columbia court in an action commenced by an insured against a person who may be an underinsured motorist is binding on the Respondents and the arbitrator in a subsequent UMP arbitration.

[24] The Claimant says (and it is not disputed by the Respondents) that there is a "lacuna" of case law interpreting subsections (11) and (12). Given the hierarchial structure implemented by the legislation and in the absence of any judicial guidance on the issue, the Claimant submits the arbitrator cannot make findings contrary to the Trial Decision even if he has "good reason" to do so.

[25] To do so would amount to the arbitrator sitting on appeal of the Trial Judge's decision. The Claimant submits that such result would amount to a collateral attack on the Trial Decision and "…contrary to the legislative scheme binding an arbitrator to the findings of the trial judge."

[26] The Claimant advances the alternative submission that if the Respondents' submission is accepted, she should be permitted to lead evidence regarding her future earning capacity and present functioning to demonstrate "…the catastrophic nature of her injuries and entitlement to considerable damages."

III. UMP COMPENSATION SCHEME

[27] It is necessary to review what UMP compensation is and is not.

[28] UMP is a statutory contract of first party insurance which provides compensation to an insured person in the event an at-fault motorist has insufficient or no liability insurance or other assets with which to pay a judgment: *Lake v. ICBC*

(Arbitration Award June 28, 2001, Arbitrator Yule) at para. 58; *S.A. (Re)*, 2020 BCSC 1323 at paras. 20, 24.

[29] The statutory provisions governing UMP are contained in Division 2 of Part 10 of the Regulation and titled First Party Coverage.

[30] Section 148.1 (5) of the Regulation provides that the liability of the corporation (defined in section 1(1) of the Act as ICBC) shall not exceed $1 million as set out in section 13 of Schedule 3 minus the defined deductible amounts:

> (5) The liability of the corporation under this Division for payment…of all claims…including a claim for
>
> (a) prejudgment interest under the *Court Order Interest Act*…,
>
> (b) post-judgment interest under the *Interest Act* (Canada)…,
>
> (c) costs awarded by a court or an arbitrator,
>
> must not exceed
>
> (d) the total amount of damages awarded in respect of the accident…
>
> (e) the amount determined under section 148.2(1), or
>
> (f) the applicable amount set out in section 13 of Schedule 3,
>
> whichever is least, minus the sum of the applicable deductible amounts. *
>
> …
>
> **UMP coverage**
>
> **13** For the purpose of Division 2 of Part 10, the limit of coverage for underinsured motorist protection is $1 million per insured person.

*****All underlining hereinafter is added for emphasis unless otherwise noted

[31] Deductible amounts are defined in section 148.1 (1) of the Regulation and include:

> **"deductible amount"** means an amount
>
> > (a) paid or payable by the corporation under section 20 and 24 of the Act…,
> >
> > …
> >
> > (c) paid or payable under Part 7…,
> >
> > (d) paid directly by the underinsured motorist as damages,
> >
> > …
> >
> > (f.1) to which the insured is entitled under the *Employment Insurance Act* (Canada),
> >
> > (f.2) to which the insured is entitled under the *Canada Pension Plan,*
> >
> > (g) paid or payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist,
> >
> > …
> >
> > (i) paid or payable to the insured under any benefit or right to indemnity, or
> >
> > (j) paid or able to be paid by any other person who is legally liable for the insured's damages;
> >
> > …

[32] The UMP compensation scheme is "benefit-conferring" to be interpreted in a broad and generous manner. It provides "…some compensation for those insureds who cannot recover their "full compensation" from inadequately insured tortfeasors.": *KP,* supra. at para 48.

[33] The concept underlying UMP compensation and benefits provided through section 20 (uninsured vehicles) and 24 (hit and run accident) of the Act was described by Justice A. Ross in *S.A. (Re)* as falling somewhere between first party insurance and social safety net:

> [24] The concept behind the coverage provided by these provisions (as well as the hit-and-run provisions coverage under s. 24) falls somewhere between first party insurance and social safety net. In general, the idea behind the coverages is that no insured person who suffers an injury caused by an uninsured, or underinsured motorist in BC should be left without insurance coverage of at least $1,000,000 to compensate for his or her damages. If an at-fault driver has insufficient third party insurance, or no third party insurance at all, the victim can seek compensation under UMP in their own policy, up to a maximum of the lesser of the value of his or her claim or $1,000,000.

[34] Arbitrator Glasner in *EFP v. ICBC* at para. 158 (Arbitration Award November 2, 2021) similarly described the fundamental principle of UMP as being "…to provide a safety net for the motorists who are seriously injured by underinsured motorists."

[35] It is important to recognize that without the safety net provided by first party UMP insurance and sections 20 and 24 statutory benefits, the injured party would be left without remedy, or at best a limited remedy.

[36] In the circumstance of an uninsured or unidentified tortfeasor, there is no contract of insurance for the injured party to access. In the UMP situation, the tortfeasor has insufficient insurance coverage or assets to satisfy the loss.

[37] UMP is coverage of last resort in that the insured "…must obtain recovery from all other listed sources, which amounts are deducted, so that the total amount received from all sources does not exceed the limit of UMP coverage.": *Hosseini-Nejad v. ICBC* at para. 67, (Arbitration Award, December 21, 2000, Arbitrator Yule).

[38] The reality of the latter point is best explained by example. If the sum of all deductible amounts prescribed by section 148.1(1) of the Regulation is equal to the lessor of a court judgement, arbitration determination, or limit of UMP coverage, no UMP compensation is payable.

[39] It is the total dollar value of the collective deductible amounts that is important, not how they are sourced or allocated. It is only if there is a shortfall that UMP compensation is payable.

[40] In respect to what UMP is not, Arbitrator Boskovich in *A.P.S. v. ICBC*, (Arbitration Award February 27, 2009), stated the following:

> 95. UMP compensation is not a substitute for the tortfeasor's inadequate insurance coverage in the sense that the compensation it attracts is assessed as though the tortfeasor had a higher third party liability policy limit. UMP compensation is not measured the same way that tort damages are assessed. Under UMP the deductible amounts make no distinction between different heads of damage and it is completely irrelevant whether any particular head of damage has been paid in full or in part.

[41] In *Podovinikoff v. ICBC* (Arbitration Award, October 6, 1994) Arbitrator Yule at page 10 while discussing an earlier version of the statutory scheme, succinctly described the issue as follows:

> I am mindful that what is payable under the scheme of compensation established by the underinsured motorist protection regulations is neither "full compensation" nor the same compensation that would be recoverable in a tort action against a fully insured tortfeasor. Instead, what is recoverable is what the statutory scheme establishes and permits. (Cowden v ICBC (1981) 32 B.C.L.R. 312 (Legg, J.))

[42] UMP compensation does not require matching between the heads of damage in the tort claim and the deductible amounts listed in section 148.1(1) of the

Regulation. The deductible amount need only be "related in some relevant and meaningful way to the claim for damages against the underinsured motorist": *K.P.* at para. 59.

IV. ANALYSIS

(a) Are the Respondents bound by the findings of fact of the Trial Judge?

[43] I will first address the Claimant's argument that pursuant to subsections 148.1(11) and (12) of the Regulation, the Respondents and the arbitrator are bound by the Trial Judge's finding of residual earning capacity and no evidence can be led for the purpose of challenging that finding in respect to the issue of deductible amounts.

[44] Subsections 148.1(11) and (12) read as follows:

> (11) If an insured commences an action in British Columbia against a person who may be an underinsured motorist, the corporation may apply to the court to be added as a party to that action.
>
> (12) If the laws of British Columbia applied to an action referred to in subsection (11), a judgement in the action by a court in British Columbia is binding on the corporation and on an arbitrator under section 148.2, whether or not the corporation makes an application under subsection (11).

[45] First it is notable that subsection 11 provides the opportunity for the corporation (ICBC) to apply to the court to add itself as a party to an action commenced by an insured against a person who may be an underinsured motorist.

[46] I note that Rule 1-1 of the Supreme Court Civil Rules defines "**action**" as meaning "a proceeding started by a notice of civil claim".

[47] In my view the term "insured" in subsection (11) refers to a person who is an insured for the purpose of UMP as defined in subsection 148.1(1), and who brings an action by way of notice of civil claim against a tortfeasor who may be an underinsured motorist. In the case of an unidentified driver/owner, that action must be brought against ICBC as the nominal defendant pursuant to section 24 of the Act, as the Claimant did here.

[48] The clear purpose of subsection (11) is to provide ICBC in its capacity as UMP insurer with the opportunity of defending the tort claim that may well turn into an UMP claim pursuant to section 148.1 of the Regulation.

[49] Subsection (11) does not require ICBC to apply to be added as a party. However, if it chooses not to do so, it must proceed without complaint. Subsection (12) mandates that a judgment in the action is binding on ICBC and the arbitrator in a subsequent UMP arbitration brought under section 148.2 of the Regulation, whether or not an application is made under subsection (11).

[50] No issue arose in the Claimant's action because ICBC from the outset was a named defendant, albeit in a different capacity as nominal defendant in place of the unidentified driver, with the full and complete opportunity to defend the tort action as it saw fit.

[51] In my view it is clear that pursuant to subsection 148.1(12) of the Regulation, the Trial Judgment delivered December 20, 2019 is binding upon ICBC and Definity as the UMP insurers and myself as the arbitrator in the within UMP arbitration.

[52] No issue was raised by the parties as to the meaning of "judgment" in subsection (12). At a minimum it includes the assessed damages as particularized in paragraph [139] of the Trial Judgment. In the absence of submissions to the contrary, I find that "judgment" encompasses the various

findings of fact underpinning the Trial Judgment and in particular the finding that the Claimant has residual earning capacity of fifteen hours per week.

(b) Are the Respondents entitled to lead evidence to establish deductible amounts?

[53] The Claimant submits that as a result of being bound by the Trial Judge's finding of fact as to residual earning capacity, ICBC should not be permitted to lead further evidence because prima facie such level of residual earning capacity disentitles her to receipt of LTD or CPP benefits pursuant to the terms of the respective plans resulting in there being no deductible amounts.

[54] It must first be recognized that ICBC does not concede that the terms of the respective plans negate the receipt of benefits by the Claimant.

[55] Putting that evidentiary issue to the side, ICBC in response submits that the issue of deductible amounts was not before the Trial Judge and while it may be bound by the finding of residual earning capacity from the Tort Action, that finding does not prevent it from proving deductible amounts in the UMP arbitration.

[56] ICBC submits that the tort regime and UMP regime are separate and distinct.

[57] Subsections 148.1 (11) and (12) in conjunction with section 148.2 (1) provide insight into that issue.

[58] As discussed above, subsection (11) allows ICBC in its capacity as UMP insurer to apply to be added as a party to defend the tort action. That scenario raises the question of whether the amount of UMP compensation to which the insured is entitled, which necessarily includes a determination of deductible amounts, is a matter that could be adjudicated by the trial judge hearing the tort action against the underinsured tortfeasor.

[59] The answer to that question in my view is no and found in section 148.2 (1) of the Regulation which reads 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 compensation, must 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 must be submitted to arbitration under the *Arbitration Act*.

[60] Subsections 148.1 (11) and (12) in combination with section 148.2 (1) show a clear demarcation between the tort action against the underinsured tortfeasor and the first party claim made against the UMP insurer. They are separate processes, albeit linked by the effect of subsections (11) and (12).

[61] I find support for my conclusion in *Brugger v the Trustees of the IWA*, 2016 BCCA 445, where in the analogous situation of Part 7 benefits and tort damages, the Court recognized the legal distinction between the two and necessity for separate proceedings:

> [50] The fact that Part 7 benefits are distinct from and form no part of a tort claim, and that disputes with respect to entitlement to Part 7 benefits must be addressed by separate proceedings was noted by this Court in *Baart. v. Kumar* (1985), 66 B.C.L.R. 1 (C.A.).
>
> ...
>
> [52]...in my view, the issue of whether Part 7 benefits constitute monetary compensation paid by or on behalf of a person whose acts are alleged to have caused the disability is a question of law requiring consideration of the legal distinction between first-party no-fault insurance benefits and tort damages

[62] The issue of whether an insured is entitled to UMP compensation, and if so, how much, must be referred to arbitration under the Arbitration Act. By the express wording of section 148.2 (1), those issues were not before the Trial Judge in the Tort Action and have not yet been determined.

[63] I conclude that the findings of fact made by the Trial Judge and in particular the fifteen hours of residual future earning capacity are to be carried forward into the UMP arbitration to form part of the factual matrix necessary to decide the arbitration issues defined by section 148.2 (1) of the Regulation.

[64] Given that the issue of deductible amounts has yet to be adjudicated, none of the findings of fact are determinative at this juncture.

[65] In the decision of *Schmitt v. Thomson*, 1996 CanLii 2323 (BCCA) at para. 20, the Court in considering the issue of estimating future benefits under Part 7 in the context of what was then section 24(5) of the Insurance (Motor Vehicle Act), R.S.B.C. 1979, c.204, stated there was nothing to prevent further evidence from being adduced "...on the issue of the estimate alone."

[66] I see no reason to depart from that approach when considering deductible amounts under section 148.1 of the Regulation.

[67] In conclusion the findings of fact carried forward from the Trial Judgment will be considered together with any additional evidence relevant to the narrow issue before me in the arbitration.

[68] I agree with ICBC that it is premature to prevent the Respondents from seeking to prove deductible amounts.

(c) What further evidence may be adduced?

[69] The parties have requested guidance on what further evidence may be adduced on the issue of deductible amounts given the findings of fact made in the Trial Judgment. I of course cannot provide advance rulings as to the admissibility of specific evidence, and thus any comments I make are subject to the evidence tendered and submissions made during the arbitration.

[70] As a general statement of the exercise to be undertaken, I repeat what Arbitrator Boskovich stated in *S.P.W.* at para. 165:

> In order to determine if future payments should be considered as "applicable deductible amounts" under the Regulations the law is quite settled that there has to be some evidentiary foundation to determine likelihood of the continuance and certainty of such future payments. The onus of proof that these payments will continue is on the Respondent. While the evidence given with respect to payments having been received in the past is of assistance, it does not provide conclusive evidence that the payments will continue in the future.

[71] In my view any new evidence admissible on the issue of future deductible amounts will be limited to addressing the likelihood of continuance and certainty of the future payments in question. This will be the test guiding me on any admissibility issues.

[72] Some examples of the evidence discussed in other cases include "...the Plaintiff's injuries and there (sic) current status..." (*Piechotta,* (Arbitration Award, April 23, 1999, Arbitrator Boskovich); terms of the Canada Pension Plan (S.P.W. v. ICBC, Arbitration Award, December 10, 2007, Arbitrator Boskovich); life expectancy of claimant (*A.P.S. v. ICBC*, Arbitration Award, February 27, 2009, Arbitrator Boskovich); positive and negative contingencies that might affect Claimant's ability

to work and anticipated course with respect to accident injuries/disabilities (*M. E. v. ICBC*, Arbitration Award, October 22, 2010, Arbitrator Boskovich).

[73] I recognize that care must be taken in relying upon comments made in arbitral proceedings where there was no trial decision. Binding findings of fact from a court judgment will serve to reduce the additional evidence called and likely eliminate the need for further expert evidence other than perhaps economic opinion.

[74] On the other hand there is the potential complicating factor that more than six years have passed since the Trial Judgment was released. Depending upon the reasons for this time lapse and any change in circumstances, the additional evidence required may be greater.

[75] As a further observation, it is important to recognize that the LTD and CPP benefits in question necessarily involve third party payors who are not bound by the Trial Judgment or its findings of fact. Their obligations to pay are governed by the relevant insurance policy or plan.

[76] In determining the "likelihood of the continuance and certainty of such future payments", evidence from the LTD insurer and CPP administrator, if available, will likely be relevant and valuable. (*S.P.W.* at para. 163 and *Kovacs* 1994 CanLii 560 (BCSC) at page 32),

[77] In conclusion it is worth stating that in any estimation of a future event there will be uncertainty in predicting what might occur. As stated by Arbitrator Yule in Hosseini-Nejad, supra. at para. 69:

> "...[an] estimate of future events is involved; estimates are inherently fallible, and circumstances do change. Nevertheless the objective of the deduction process is to try to assess what is properly payable in the future and to deduct that amount. A principled approach ought to be

> applied to the determination of deductible amounts for UMP purposes."

[78] The Claimant received a total damage award including interest, fees, and costs and disbursements of $1,321,907.86. The goal is to see that she will receive $1,321.907.86 through a combination of applicable deductible amounts, and if necessary, UMP compensation.

[79] In summary, I repeat my statement in *MP v. ICBC,* (Arbitration Award, April 4, 2023):

> 78. As described in *Hosseni-Njad*, the intent of the UMP compensation was to avoid double recovery. Equally however, the legislative intent in my view was to avoid double deduction. A claimant is entitled to no more than what the UMP coverage provides, but also no less.

V. CONCLUSION

[80] I make the following declarations:

(a) The Trial Judgment and its findings of fact are binding upon the Respondents and the arbitrator;

(b) The Respondents have the right to prove certain deductible amounts pursuant to subsections 148.1(1) and (5) of the Regulation;

(c) The parties may adduce new evidence limited to the likelihood of continuance and certainty of future LTD and CPP benefits.

[81] Given the nature of the issues applicable to this interlocutory application, my preliminary conclusion is that each party should bear their own costs. However if any party wishes to make submissions, they can do so in writing within fourteen days of this Ruling, and any response to be made seven days thereafter.

[82] I wish to commend all counsel for their organization, submissions and oral presentations throughout.

Dennis Quinlan

March 19, 2026 Arbitrator – Dennis C. Quinlan, K.C.