IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *S.A. (Re),*
2020 BCSC 1323

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In the Matter of the *Insurance (Vehicle) Act,* R.S.B.C. 1996 c.231 and The *Commercial Arbitration Act*, R.S.B.C. 1996 c.55 and Amendments thereto

In the Matter of S.A.

Before: The Honourable Mr. Justice A. Ross

On judicial review from: A decision of an arbitrator, dated December 18, 2018.

Reasons for Judgment

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[1] This matter comes before the court by way of a judicial review of an arbitrator's decision. The respondent on this appeal, S.A., who was the claimant at the arbitration, was injured in a car accident in 2004 (the "Accident"). For the reasons set out below, he claimed against the Insurance Corporation of British Columbia ("ICBC"), seeking an award under his Underinsured Motorist Protection ("UMP") coverage.

[2] The arbitrator's decision, dated December 18, 2018, was restricted to one issue: Whether S.A.'s benefits under the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 [*WCA*] are deductible from his UMP award.

[3] At the time of the Accident, ICBC was entitled to deduct the WCB benefits. However, between the date of the Accident and the hearing of the arbitration, the applicable Regulation was amended. The amended version was more generous to S.A.

[4] The question for the arbitrator was whether the older or the newer version of the *Regulation* applied to S.A.'s claim. The arbitrator found that the earlier version applied, but also found that applying it would lead to an "extremely inequitable" outcome. For that reason, he interpreted the earlier version in light of the more generous amendment.

[5] The result of the arbitrator's decision is that ICBC is not entitled to deduct from the UMP award approximately $550,000 of benefits payable under the *WCA*.

[6] ICBC argues that the arbitrator made an error in law by disallowing the deduction of WCB benefits. In response, S.A. argues that the arbitrator's decision was not only reasonable, it was correct.

[7] My role on this appeal is to determine whether the arbitrator's decision was reasonable.

[8] For the sake of clarity, in these reasons I refer to S.A. by his initials, or as the "claimant". I refer to ICBC by its initials.

[9] For further clarity, I note that, effective June 1, 2007, the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 was repealed and replaced by the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. At the same time, the *Insurance (Motor Vehicle) Regulation*, B.C. Reg. 447/83 was replaced by the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83. There were numerous substantive amendments in this transition. In these reasons, I refer to both Acts as the "*Act*" but distinguish between them by referring to the "Old *Act*" and the "New *Act*." Similarly, I refer to both sets of Regulation as the "*Regulation*" but distinguish between them by referring to the earlier version the "Old *Regulation*" and the post-June 1, 2007 version, the "New *Regulation*".

Standard of Review

[10] The parties agree that the issue on this appeal relates to a question of law. They also agree that the standard of review for this hearing is "reasonableness". That standard was explained in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32:

> [1] In British Columbia, the scope of appellate intervention in commercial arbitration is narrow in two key ways. First, there is limited jurisdiction for appellate review of arbitration awards because that jurisdiction is statutorily limited to questions of law (*Arbitration Act*, R.S.B.C. 1996, c. 55, s. 31). Second, even where such jurisdiction exists, our Court recently held that a deferential standard of review — reasonableness — "almost always" applies to arbitration awards (*Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 75, 104 and 106). Together, limited jurisdiction and deferential review advance the central aims of commercial arbitration: efficiency and finality.

[11] The Supreme Court of Canada recently commented on the nature of the reasonableness standard in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. The majority decision states:

> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

> …
>
> [15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

[12] The majority continued:

> [99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.
>
> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[13] This standard of review requires deference to the original decision-maker, in part, recognizing that arbitrators have specialized knowledge in their fields of practice.

[14] The test for me to consider is not whether I would come to a different conclusion than the arbitrator, but whether the decision of the arbitrator is fully explained and falls within a range of reasonable outcomes.

[15] I note there is no quarrel between the parties on two sub-issues discussed in *Vavilov*:

a) First, the parties agree that the error of law alleged by ICBC constitutes the crux of the arbitrator's decision. Hence, it has sufficient importance.

b) Second, neither party takes issue with the clarity or completeness of the reasons of the arbitrator. They agree that the arbitrator's decision was well explained and clearly written.

[16] Thus, the sole issue on this appeal relates to ICBC's submission that the arbitrator made an error in law in disallowing the deduction. ICBC says that the decision is not reasonable.

[17] The onus is on ICBC to establish the unreasonableness of the arbitrator's decision.

Chronology of Events

[18] The evidentiary basis of the arbitrator's decision was set out in an Agreed Statement of Facts. The relevant events in this matter transpired on the following dates:

a) S.A. was injured in a motor vehicle accident on November 8, 2004. He was working at the time, sitting in a parked truck owned by his employer. An uninsured motorist, being chased by the police, lost control and struck another vehicle. That other vehicle struck the vehicle in which S.A. was seated.

b) The uninsured motorist died in the Accident. Two other persons were injured in the same accident. Pursuant to s. 20 of the *Act* and s. 105 of the *Regulation*, which provide "uninsured" (as opposed to "underinsured") motorist protection, ICBC's total "uninsured" liability for all claims arising from the Accident was limited to $200,000, less payments for property damage claims. That $200,000 "uninsured" limit would be shared *pro rata* by S.A. and the two other persons injured in the accident. (As noted the UMP provisions are in addition to the "uninsured" provisions.)

c) S.A. suffered serious injuries and became permanently disabled.

d) On April 6, 2005, S.A. submitted a provisional application for WCB benefits, and indicated that he was electing to pursue his tort claim.

e) Also in April 2005, ICBC advised S.A.'s counsel of its position that, because the at-fault motorist was both an uninsured and an underinsured motorist, any amount that S.A. was entitled to receive under the *WCA* would be deductible under his claim for uninsured motorist coverage and UMP coverage.

f) In October 2006, S.A. submitted an application under s. 257 of the *WCA* for a determination of the employment status of himself, two police constables, an RCMP dispatcher, and the Minister of Public Safety and Solicitor General (the "Minister").

g) Also in October 2006, the claimant commenced an action against all of the above parties as well as the estate of the uninsured motorist.

h) As noted above, effective June 1, 2007, the *Insurance (Motor Vehicle) Act* was repealed and the new statute, the *Insurance (Vehicle) Act* replaced it. At the same time, the *Insurance (Motor Vehicle) Regulation* was repealed and the *Insurance (Vehicle) Regulation* substituted. The relevant amendments are discussed below.

i) In June 2008, the Workers' Compensation Appeal Tribunal ("WCAT") issued a certificate finding that all of the defendants, except the Minister (and presumably the uninsured motorist), were employees or employers within the meaning of Part 1 of the WCA at the time of the Accident. The provisions of the WCA bar any action against employees and employers.

j) In February 2009 and January 2010, S.A. sought benefits from WCB, notwithstanding his ongoing tort action. WCB declined to pay any benefits insisting on strict compliance with s. 10(5) of the *WCA*.

k) ICBC made advance payments to S.A. in May 2011, December 2011, November 2012, June 2013, November 2013, and December 2015. All

advances were made pursuant to his claim for uninsured motorist protection under s. 20 of the *Act*.

l) On February 22, 2012, the claimant's tort action against all defendants was dismissed with the exception of the uninsured motorist and the Minister. In the usual course, ICBC will not consider uninsured, or underinsured, motorist claims until it is clear that the only person who is legally liable for the claimant's loss is the uninsured and underinsured motorist.

m) The Minister appealed the February 22, 2012 decision. In June 2013, the British Columbia Court of Appeal allowed the appeal and dismissed the claim as against the Minister.

n) As a result of the Court of Appeal's decision, as of June 2013, the only remaining defendant in the action was the uninsured motorist. By definition, the uninsured motorist did not have any insurance. Any judgment rendered against him or his estate would be dry.

o) In February 2017, the parties agreed to adjourn the trial of the tort action against the uninsured motorist and proceed to an UMP arbitration. As of that date, the parties also agreed that S.A.'s entitlement under s. 20 (uninsured motorist benefits) would be insufficient to satisfy pay his damages claim.

p) The parties eventually agreed that S.A.'s personal injury claim, inclusive of costs and disbursements, would exceed $1,000,000.

q) In February 2018, the claimant re-elected to claim WCB benefits (*i.e.*, he re-elected against seeking tort damages). This re-election was approved by WCB. As a result of this re-election, WCB became subrogated to the claimant's tort and UMP claims. WCB continued the UMP claim on S.A.'s behalf.

r) The parties proceeded to the arbitration on November 13, 2018. The arbitration decision was released on December 18, 2018.

[19] It is from that arbitration decision that ICBC appeals.

The Legislative Background

[20] As noted, S.A. claimed under two types of coverage available under the *Act*: Uninsured Motorist Protection and Underinsured Motorist Protection. The arbitrator properly distinguished the underlying nature of these two claims:

- An Uninsured Motorist claim is considered a "statutory benefits" claim under s. 20 of the *Act*. Pursuant to Part 8 of the *Regulations*, ICBC's total liability is limited to $200,000 per incident, divided between all claimants.

- An Underinsured Motorist claim is considered a first-party insurance claim pursuant to s. 148.1 of the *Regulations*. In cases involving uninsured motorists, this coverage pays damages in excess of the amount available under the uninsured motorist protection coverage and up to $1,000,000.

[21] The arbitrator noted that the difference between these coverages is that the former constitutes a "statutory benefit" provided in the *Act*, while latter forms part of a contract of insurance, contained in the *Regulation*.

[22] The foundation of ICBC's argument is the position that the UMP insurance contract is set out in the *Regulation*, as worded on the date of purchase or renewal. The terms of that policy, it is argued, are fixed. Conversely, "statutory benefits" do not form part of an insurance policy. Where those benefits improve over time, the newer version can be applied to damages suffered in earlier accidents.

[23] As discussed below, the provisions of the *Regulation* relating to claims for uninsured motorist benefits and hit-and-run benefits, in Part 8, were also amended on June 1, 2007 to remove the same WCB deductions for claims under those sections. I return to discuss this distinction below.

[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.

[25] In general, both uninsured and underinsured protection are considered coverages of last resort. If the injured party is eligible for damages from another party, or benefits from another source (as provided in the *Regulation*), ICBC is entitled to deduct those other benefits from its own obligation under UMP.

The "Double Deduction" Issue

[26] In order to understand the underlying issue faced by the arbitrator, some background on the legal process is required.

[27] The dispute in this case arises in relation to the deductibility of WCB benefits. Because S.A. was a worker at the time of the Accident, he was entitled to pursue either a WCB claim or a tort claim against the other motorist and any negligent party. S.A. submitted a provisional claim for WCB benefits, but elected to pursue his tort claim. As long as there was a potential tortfeasor who might be liable to pay any judgment that S.A. obtained in court, ICBC was not under any obligation to pay out under either the uninsured or underinsured coverage.

[28] I note that S.A. made an argument at the arbitration about the timing of this "triggering" event and its effect on the applicable Regulation. However, that argument was dismissed by the arbitrator. The basis of that argument is discussed below.

[29] The tort litigation continued from 2006 to 2017 when the tort claim as against all of the potentially insured defendants was dismissed. That left only the uninsured motorist. When S.A. re-elected to claim WCB benefits in February 2018, WCB became subrogated to S.A.'s tort and UMP claims.

[30] Prior to the June 1, 2007 amendments to the *Act* and *Regulation*, WCB's position was that if an eligible "worker" was injured by a non-worker, and if the worker elected to seek recovery from WCB, then WCB was subrogated to the rights of that worker. In motor vehicle accident cases, that usually meant that WCB was subrogated to the claim against ICBC. WCB stood in the shoes of the worker to the extent that it had paid, or would pay, benefits to the worker. As a result, when the tort claim (or UMP claim) was eventually resolved, WCB was entitled to receive the funds paid out by ICBC. Pursuant to a formula created by WCB, WCB would quantify the value of the worker's WCB claim, deduct (i.e. keep) a percentage of that amount and then pay the remainder of the award to the worker/claimant.

[31] At the point in time when S.A. and ICBC agreed that the value of his UMP claim would exceed $1,000,000 (the maximum UMP benefit award), the only question to determine related to which other benefits should be deductible from the $1,000,000 UMP limit. That issue led to the arbitration.

[32] ICBC argues that because the accident occurred in 2004, under the Old *Regulation*, it was entitled to deduct the value of the WCB benefits from S.A.'s claim under s. 148.1(1)(f) of the Old *Regulation*. The parties agree that that, if allowable, the deduction would be in the range of $500,000–$600,000.

[33] S.A.'s position was that the Old *Regulation* was punitive to claimants because it resulted in a "double deduction". That "double deduction", and the process by which it would occur, can be explained as follows (using hypothetical figures and ignoring related claims, fees, and deductions):

a) A claimant establishes that he or she is entitled to an UMP award of $1,000,000, less deductions. Assume the only deduction is the value of the WCB claim.

b) The claimant would also make a claim for WCB benefits. That claim (past and future) would be quantified. WCB would be subrogated to the claimant's UMP claim. For this example, assume the WCB claim is quantified at $550,000.

c) ICBC would deduct the quantified value of the WCB benefits from the UMP award. Hence, the UMP award would be reduced by the same $550,000.

d) Because WCB held the subrogated claim, ICBC would pay the net UMP award to WCB (say, $450,000).

e) As a result, WCB would be holding $450,000. WCB would then apply its own recovery formula to the UMP award and deduct an amount representing WCB's net cost to pay the necessary benefits incurred by the claimant.

f) WCB's deduction would be based on the fact that WCB had recovered $450,000 from ICBC. However, WCB would not acknowledge that ICBC had already deducted $550,000 representing the value of the WCB benefits.

g) After applying its recovery formula, WCB would then pay the net amount, if any, to the claimant.

[34] In other words, WCB would deduct the amount to which it was entitled (to cover the benefits payable to S.A.) and pay the remainder to S.A., even though ICBC had already deducted that same amount before paying the award to WCB.

[35] The net result of this process, S.A. argued, would be that S.A. received almost nothing from the entire award. In the example above, ICBC deducted $550,000 from the UMP award because S.A. was entitled to receive that amount from WCB. Then, WCB received the net amount of $450,000, and based on the recovery formula, deducted the amount that it would be required to pay for S.A.'s benefits. WCB would pay S.A. the remainder, but that was a very small amount. S.A. would be left with virtually nothing, apart from a claim for WCB benefits. S.A. described this situation as a "double deduction".

[36] It is common ground that this was the scheme prior to June 2007 and that the New *Regulation* fixed this problem by removing WCB benefits from the deductible amounts in certain circumstances.

[37] The New *Regulation* amended the definition of ”deductible amount” in s. 148.1(1). The amendment excluded WCB benefits where WCB pursued its right of subrogation. The revised definition stated, in part, that “deductible amount” means an amount:

> (f) to which the insured is entitled under the *Workers Compensation Act* or a similar law of the jurisdiction in which the accident occurs, unless
>
> > (i) the insured elects not to claim compensation under section 10 (2) of the *Workers Compensation Act* and the insured is not entitled to compensation under section 10 (5) of that Act, or
> >
> > (ii) the Workers' Compensation Board pursues its right of subrogation under section 10 (6) of the *Workers Compensation Act*,

[38] To the extent that the “double deduction” situation arose from a battle of priorities between ICBC and WCB, the June 2007 amendment conceded that WCB’s interests should prevail. ICBC was no longer entitled to deduct the value of the WCB benefits in circumstances where WCB was subrogated.

[39] The parties further agree that the 2007 amendment was made to avoid situations like S.A.’s. Under the New *Regulation*, ICBC concedes that where WCB would be claiming a right of subrogation, ICBC would not deduct the value of the WCB benefits to which the injured party was entitled; it placed itself behind WCB in the priorities battle.

[40] The only question put to the arbitrator was whether the WCA benefits payable to S.A. are a deductible amount from his UMP compensation. As discussed below, based on multiple considerations, the arbitrator found that, on a plain language interpretation, the Old *Regulation* would apply. However, by applying public policy considerations, and considering the context and purpose of the UMP scheme, the arbitrator ruled that ICBC was not entitled to deduct the value of the WCA claim.

[41] I note that, as part of its submission, ICBC argues that, on the facts of this case, it is not known whether WCB will ultimately deduct the amounts paid by ICBC. ICBC notes that the claim has not been adjudicated by WCB.

[42] While that may be the case, ICBC's argument on this point is clearly an issue that revolves around the factual matrix of the claim. The arbitrator accepted that, on the facts, the double deduction would be made. It is not my role on this appeal to say whether that finding was incorrect. My considerations are limited to errors of law.

The Arbitrator's Decision

[43] The arbitrator's decision was divided into two parts. Broadly speaking, in the first part he found that the Old *Regulation* applied to S.A.'s claim. In the second part, he turned to S.A.'s argument on "public policy".

[44] ICBC takes no issue with the first part of the decision. This appeal relates to the second, or "public policy", portion of the decision.

[45] In the first part of the decision, the arbitrator found that the Old *Regulation* applied because it was clear that the legislative intent was that the 2007 amendments should be prospective in nature. Included in that discussion was an analysis of s. 81(1) of the *Insurance (Motor Vehicle) Amendment Act*, S.B.C. 2003, c. 94*,* which contained the transitional provisions. He wrote (at para. 74):

> UMP coverage of course is provided pursuant to Section 148.1 of the Regulation, although it is part of the mandatory coverage under the plan. These provisions, together with the specific language of Section 81(1) in my view make it clear that the legislative changes in June 2007 to the Act and Regulation were prospective in nature.

[46] In addressing that issue, the arbitrator discussed the reasoning in *Kovacs v. Insurance Corp. of British* Columbia, 1994 CanLII 560 (B.C.S.C.). In that case, the claimant, Mr. Kovacs, purchased UMP coverage in August 1987. On January 1, 1988, the UMP regulations were amended making them less beneficial to Mr. Kovacs. He was then injured in an accident on June 30, 1988. The question for the arbitrator was whether the January 1, 1988 amendments applied to his UMP claim. The court found that, whatever terms were in the policy at the time of purchase of the insurance had the force of contract between the parties. Those terms would not be changed until the next renewal. At the time of the purchase of the UMP coverage, Mr. Kovacs obtained coverage "inchoate and contingent though

it may have been". Similarly, ICBC incurred a corresponding contingent obligation. The accident merely triggered those rights and obligations.

[47] Relying on the reasoning in *Kovacs* and the transitional legislation, the arbitrator found that, on a plain reading of the Regulation, the Old *Regulation* applied.

[48] The arbitrator then proceeded to the second part of his decision. The second part addressed S.A.'s submission regarding the nature of B.C.'s universal compulsory insurance program. The arbitrator introduced that issue in para. 77:

> 77. The conclusion that the analysis in *Kovacs* in the case of a pre-existing contract of insurance is correct and the Old Regulation requiring deduction of WCB benefits remains part of the contract, does not end the analysis. There remains for consideration the Claimant's submission that the context of the legislative scheme to provide a universal compulsory insurance program and access to compensation for those who suffer losses from motor vehicle accidents must be taken into account both in interpreting the transitional legislative provisions and in considering the enforceability of a contractual term.

[49] The arbitrator then went on to do the following:

a) He applied the statutory interpretation approach outlined in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27*.* That approach notes that a plain language analysis alone, may be incomplete. The words of an Act must be read in their entire context.

b) On that basis, he declared that a plain language analysis was an incomplete analysis.

c) He reasoned that the June 2007 regulatory amendments were intended to benefit injured persons who were insured by ICBC by eliminating the prospect of (the unfairness of the) double deduction.

d) He then cited three cases in which the Court of Appeal had interpreted the *Regulation* in a manner that gave effect to the purpose of the sections within the entire scheme of the legislation. He noted that, in those cases, the court

gave a reading of the *Act* and *Regulation* that did not apply the clear literal meaning.

e) On that basis, he decided that it would be "extremely inequitable and hence an absurd consequence" (at para. 88) to apply the Old *Regulation*, with its double deduction, to S.A.'s claim.

[50] I discuss below the three cases addressed by the arbitrator.

[51] In *Niedermeyer v. Charlton*, 2014 BCCA 165, the court considered a situation where the plaintiff signed up for a zip-lining adventure at Whistler. The adventure involved vehicle transportation to and from the location of the zip-lines. The defendant required the plaintiff to sign a waiver, which he did. The plaintiff was injured when, after the zip-lining had finished, the bus transporting him back to the Village of Whistler ran off the road and crashed. The plaintiff sued for damages. The defendant raised the waiver of liability as a defence. The waiver defence was successful at summary trial. The plaintiff appealed and argued "public policy" (among other arguments). The Court of Appeal found at para. 72 that:

> [72] In my opinion, it is contrary to public policy to permit the owner and /or operator of a motor vehicle to contract out of liability for damages for personal injuries suffered in a motor vehicle accident in British Columbia. British Columbia has a statutory scheme of compulsory universal insurance coverage for damages for personal injury arising from motor vehicle accidents, as well as other types of insurance not pertinent to this discussion. In the face of the legislature's intention in enacting that statutory scheme, and for the reasons that follow, I believe it would be contrary to public policy to permit the respondents to enforce the release of liability for a claim that arose not from an injury that occurred in the course of the Ziptrek activity, but rather in the course of transportation to the site of that activity.

[52] The court found that the intention of the legislature was to create a "statutory scheme of compulsory universal insurance coverage for damages for personal injury". That intention created a context within which it was against public policy to allow parties to contract out of automobile liability. Hence, there was authority for the proposition that public policy considerations could affect contractual relations between parties.

[53] The arbitrator then considered the reasoning in *Symons v. Insurance Corporation of British Columbia*, 2016 BCCA 207. In that case, the Court of Appeal considered Ms. Symons' entitlement to Part 7 disability benefits. In April 2008, she was injured in an accident and was off work for two weeks. She received disability benefits from ICBC pursuant to Part 7 of the *Regulation*. She then returned to work until May 2011 when she underwent spinal surgery to repair a disc herniation. She was off work until September 2011. She suffered a further set-back in February 2012 when the disc herniation reoccurred. She remained off work thereafter. In January 2013, she requested Part 7 disability benefits from ICBC. ICBC denied her claim on the basis that the plain language of the eligibility requirements in s. 86 of the *Regulation*, required that a claimant's injuries must continue to disable her at the end of 104 weeks of benefits. The trial judge found for Ms. Symons. ICBC appealed, and lost. The Court of Appeal's reasoning considered the legislative intent, and not simply the plain language, of the Regulation:

> [16] The regulation at issue is made under the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. This Court considered the scheme of the *Act* in *Niedermeyer v. Charlton*, 2014 BCCA 165, leave to appeal ref'd [2014] S.C.C.A. No. 285. It found that the legislative intent behind the statutory scheme was to provide universal compulsory vehicle insurance in the province. It determined that the public policy animating this insurance scheme was road safety and access to compensation at paras. 84-85 and 89-90: [Quotation omitted.]
>
> [17] Thus, the regulations in question should be considered in the context of the legislative scheme "to provide a universal, compulsory insurance program … and access to compensation for those who suffer losses" from motor vehicle accidents: see *Felix v. Insurance Corporation of British Columbia*, 2015 BCCA 394 at para. 32, leave to appeal ref'd [2015] S.C.C.A. No. 472.
>
> [18] The legislation is benefits-conferring legislation. In *Rizzo*, the Court stated that benefits-conferring legislation "ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant" (paras. 36, 40). The Court held that the "consequences or effects" of an interpretation cannot be incompatible with the object of the enactment in question (para. 27). Iacobucci J. continued by explaining the interpretive principle against absurdity and defined what would constitute absurd consequences at para. 27:
>
> > … It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.… [A]n interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable,

> if it is illogical or incoherent, or if it is incompatible with other provisions or the object of the legislative enactment…. Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile…

[54] Citing para. 18 of *Symons*, the arbitrator found that "this reasoning applies in the present case" (at para. 83 of his reasons). He concluded that the *Regulation* should be interpreted in a broad and generous manner and any doubt should be resolved in favour of the claimant. Further, the consequences of an interpretation cannot be incompatible with the object of the *Regulation*. Here, the object of the *Regulation* was to ensure a minimum amount of compensation is available to claimants in UMP claims, but the consequences of applying the Old *Regulation* would divest S.A. of the financial benefit of his coverage. The arbitrator decided that this result was incompatible with the legislative intent, and such an interpretation could not stand.

[55] The arbitrator further noted the comments of the Court of Appeal in *Felix v. Insurance Corporation of British Columbia*, 2015 BCCA 394:

> [32] Thus, the legislation needs to be considered in the context of the legislative scheme to "provide a universal, compulsory insurance program… and access to compensation for those who suffer losses" from motor vehicle accidents.

[56] The arbitrator then considered the situation addressed in *Rizzo* where the Court concluded that a plain language analysis alone was an incomplete analysis. In *Rizzo* at para. 27, the Court states:

> 27 … It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences … [A]n interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or the object of the legislative enactment ... Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile …

Hence, he reasoned, statutory interpretation should avoid absurd consequences and ridiculous, unreasonable, or inequitable outcomes.

[57] The arbitrator then turned to the application of the *Regulation* to the facts of this case. He wrote:

> 88. In the present case a similar absurdity occurs. An insured who took out a contract of automobile insurance on June 1, 2007 would not have WCB benefits deducted from their UMP claim. An insured who took out a contract of automobile insurance on May 31, 2007 would have WCB benefits deducted from their UMP claim notwithstanding the legislative change removing the deduction because of its acknowledged unfairness.
>
> 89. To adopt the language of *Rizzo,* it would be extremely inequitable and hence an absurd consequence to apply a deduction that the legislation has just removed as being unfair to injured UMP claimants.
>
> 90. What distinguishes the present case from Kovacs is that the amending legislation in Kovacs was detrimental to the interests of the insured because it added an additional deductible amount. In the present case, the legislative change was conferring a benefit on insureds by relieving them of the inequity of a double deduction of WCB entitlement in UMP claims.
>
> 91. I note that another change to UMP coverage brought about in the same June I, 2007 reenactment was to add yet another deductible amount, namely an amount "(j) paid or able to be paid by any other person who is legally liable for the insured's damages". That is clearly a change detrimental to the insured. In my view, applying the *Kovacs* analysis and the transitional Section 81(1), that change would not apply to claims under contracts of insurance in existence prior to June 1, 2007.
>
> 92. In my view, to require the deduction of WCB entitlement in this case under the Old Regulation would be inconsistent with the overall scheme of providing universal compulsory automobile insurance and in particular the purpose of deductible amounts in calculating UMP compensation; it would also be contrary to the principles of statutory interpretation requiring a broad and generous manner of interpreting benefits conferring legislation; and it would be unfair and unjust to this Claimant to saddle him with a deduction that the legislature has abolished for other UMP claims.

[58] In doing so, the arbitrator reasoned that the amendment in 2007 remediated the "double deduction" issue. He decided that it would be unfair, and absurd, that a person injured the day before the amendments came into force would receive almost nothing from an UMP award, whereas a person suffering the same injuries a day later, would receive a substantially higher award. Thus, when interpreting the purpose of the whole scheme of legislative automobile insurance, it would be unfair to allow the deduction from the UMP claim, knowing that the result would leave S.A. under-compensated for his injuries.

[59] It is the second part of the arbitrator's decision with which ICBC takes issue.

S.A.'s Submissions

[60] In his argument on this appeal, S.A. pointed to several cases where the court considered other amendments to the *Act* and *Regulation* that were similar or analogous to the amendment to s. 148.1 of the Regulation. S.A. relied on those decisions in support of his argument that the arbitrator's decision was not only reasonable, but correct.

[61] The trouble with those arguments is that they were also made to the arbitrator, who considered and distinguished them. As such, it would be an error of law for me to accept those arguments as being correct at this step in the process. However, in this hearing those arguments can be considered in a different light. They provide context for whether the arbitrator's decision was reasonable.

[62] In *Hicks v. Bieberbach Estate*, 2011 BCSC 226, Adair J. considered whether WCB benefits were deductible from a claim involving an uninsured motorist. In that case the accident occurred in April 2005. The plaintiff elected to claim WCB benefits, whereupon WCB became subrogated to his cause of action. The action was commenced in October 2006. On June 1, 2007, the *Regulation* was amended. The claim for s. 20 benefits was submitted in January 2008. These facts created the "old regulation" vs "new regulation" issue for Mr. Hicks' claim.

[63] In *Hicks*, Adair J. based her reasoning on her finding that ICBC's obligation to pay benefits under s. 20 did not arise until Mr. Hicks submitted the claim form.

[64] The crux of the *Hicks* decision is found at paras. 80 and 92: The 2007 change was intended to be a benefit and to eliminate the possibility of double deduction of WCB benefits. Thus, the requirement for ICBC to deduct WCB benefits is inconsistent with the overall scheme of providing universal compulsory automobile insurance.

[65] In *Ayres v. John Doe* 2008 BCSC 48, the court applied the same reasoning. It found that the Ayers had not actually claimed against ICBC under the "hit and run"

provisions until he had obtained a judgment against ICBC as the nominal defendant. Due to the delayed "triggering" date, the later (more generous) regime applied.

[66] As noted, the arbitrator distinguished the facts and applicable provisions of the *Regulation* in coming to his decision. As discussed below, I find his rejection of these arguments to be instructive.

ICBC's Submissions

[67] ICBC argues that the clear legislative intent of the amendment was that the New *Regulation* would apply prospectively. ICBC acknowledges that the arbitrator correctly found (in the first part of his decision) that the Old *Regulation* applied to S.A.'s UMP claim.

[68] Having made that finding, ICBC argues, it was not open to the arbitrator to decide that the WCB benefits were not deductible. By making that ruling, ICBC argues, "he necessarily applied the New Regulation".

[69] ICBC submits that the arbitrator "supported his conclusion" by embarking on an inquiry into the concept of fairness, without any legal basis to do so.

[70] On that basis, ICBC argues the arbitrator made three errors of law:

(1) He ignored the applicable legislation.

(2) He failed to apply the Old *Regulation* to the contract of insurance under which S.A. was insured in 2004.

(3) He applied the principles of statutory interpretation set out in *Rizzo* to the wrong piece of legislation.

[71] Although ICBC enunciates the propositions as three errors of law, it is evident from its submissions, and from my analysis below, that there is substantial overlap between each of the alleged errors. In other words, ICBC's position can be stated as: The arbitrator ignored, and thus failed to apply the Old *Regulation,* by applying the principles of statutory interpretation to the New *Regulation*.

[72] I deal with each submission below.

Ignored the Applicable Legislation

[73] Although I understand the basis of ICBC's argument on this issue, it is clear that the arbitrator did not ignore the applicable legislation. As outlined above, his decision made a specific finding that the Old *Regulation* was applicable, subject to the public policy considerations.

[74] Further, it should be self-evident that if he had ignored the Old *Regulation*, and only considered the New *Regulation*, then the arbitrator would have found that the WCB benefits were not deductible. That is the obvious result of applying the plain language of the New *Regulation*. If he pursued that line of reasoning, there would have been no need to consider public policy or fairness considerations.

[75] It is clear from the arbitrator's decision that he applied the Old *Regulation*, but interpreted it in light of the amendment and fairness principles, which added context to his interpretation.

[76] I note ICBC's submission argues that, by embarking on an inquiry into fairness principles, the arbitrator was seeking a position that "supported his conclusion". I infer from that language that ICBC is suggesting that the arbitrator was looking for a route to arrive at a conclusion that he felt was fair. Any such "result oriented" analysis would be unreasonable and an error of law.

[77] However, it is clear to me that, in going through the process, the arbitrator was not looking for a way to "back into" or "reverse-engineer" the result that he wanted. Instead, the arbitrator applied a principled approach to the interpretation of the Regulation.

[78] I discussed above the principles of statutory interpretation enunciated in *Rizzo*. The Supreme Court of Canada commented on those principles in the context of judicial review in *Vavilov* at paras. 117–121:

> [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a

statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and Bell ExpressV*u Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[79] It follows from the reasoning in *Vavilov* that I should be wary of indications that the arbitrator simply "reverse engineered" the result that he wanted.

[80] However, I find support for the arbitrator's application of statutory interpretation in all of the above-cited paragraphs of *Vavilov*. Where, as here, the Regulation is "precise and unequivocal", the words "will usually play a more significant role in the interpretive exercise." However, even in those cases, the interpretation must be "consistent with the text, context and purpose of the provision." Hence, as the arbitrator noted, a plain language reading is not necessarily a complete reading.

[81] In my opinion, it is clear that the arbitrator did not use (or misuse) the principles of statutory interpretation to back into, or "reverse engineer" a desired outcome. Instead, he applied his analysis to understand and apply the full context and purpose of the *Act* and *Regulation*.

[82] On the issue of "reverse engineering", I noted above that S.A.'s counsel made submissions relating to several cases where the court had considered analogous issues in claims arising from uninsured motorist and hit-and-run motorists. The arbitrator had available to him the reasoning in those cases (including *Hicks* and *Ayres*) where the trial judges found that, because ICBC's obligation to pay benefits arose (or was "triggered") after the amendments to the legislation came into force, the later version of the *Act* or *Regulation*, being more generous, was applicable to their claims.

[83] As discussed above, the arbitrator considered, but distinguished, S.A.'s arguments based on the reasoning in those cases. He noted that the decisions in *Hicks* and *Ayres* related to claims for uninsured motorist and hit-and-run benefits. As previously noted, those coverages, under ss. 20 and 24 of the *Act*, are considered "statutory benefits" whereas the UMP coverage is considered to be a contract of insurance.

[84] My point here is that if the arbitrator wanted to "reverse-engineer" a finding that the New *Regulation* applied, he could have simply applied the reasoning in *Hicks* and *Ayres*, and similar cases. He could have ruled that there was no

substantive difference between the effect of the amendments to “statutory benefits” and s. 148.1 benefits. They are both governed by the *Act* and *Regulation* and the same amendments were made as of June 2007. He could have found that ICBC’s obligation was not “triggered” until after June 2007. As a consequence, he could have ruled on that basis that the New *Regulation* applied.

[85] However, the arbitrator chose not to follow S.A.’s argument on that point. He determined that there was a substantive difference between the rights occasioned by s. 20 and s. 24 of the *Act* (uninsured and hit-and-run, respectively) and s.148.1 of the *Regulation*.

[86] Again, if he was trying to reverse-engineer a result, those cases would have given him a pathway.

[87] Instead, the arbitrator decided the issue on the basis of statutory interpretation applying public policy considerations to complete the context and purpose of the *Regulation*. The fact that he followed that path indicates that the arbitrator was not reverse-engineering the result at which he wanted to arrive.

[88] In arriving at that result, the arbitrator applied the Old *Regulation*, but interpreted it in line with the *Rizzo* principles of statutory interpretation. Hence, he did not ignore the Old *Regulation*.

[89] On that basis, I do not accept the Petitioner’s first argument that the arbitrator ignored the applicable legislation.

Failure to Apply the Old *Regulation* and Applying the Principles of Statutory Interpretation to the Wrong *Regulation*

[90] I have synthesized ICBC’s second and third arguments into one. I interpret ICBC’s argument as being: The arbitrator erred by failing to apply the Old Regulation. That error was occasioned by the arbitrator applying the principles of statutory interpretation to the wrong *Regulation* (*i.e.*, to the New *Regulation* instead of the Old *Regulation*).

[91] The main thrust of this submission is that ICBC agrees that the principles of statutory interpretation, including the avoidance of absurdities, should be applied.

However, those principles should be applied to the Old *Regulation* because it was applicable to S.A.'s claim. The New *Regulation* did not apply and should not have been considered by the arbitrator.

[92] ICBC argues that it was not open to the arbitrator to embark on a "fairness inquiry" without any legal basis to do so. In doing so, ICBC argues, the arbitrator applied the principles of statutory interpretation to the wrong *Regulation*.

[93] ICBC argues that in *Niedermeyer*, *Symons*, and *Felix*, the Court of Appeal was interpreting a provision of the applicable legislation or Regulation. The court was not considering a different, or later, version of the legislation. ICBC argues that, by arriving at the same outcome as provided in the New *Regulation*, the arbitrator was applying the statutory interpretation principles of *Rizzo* to wrong version of the Regulation.

[94] I do not accept ICBC's characterization of this issue. As noted above, if the arbitrator was applying the principles of statutory interpretation to the New *Regulation*, he would not have had much thinking to do. Under the New *Regulation*, on these facts, the WCB benefits are not deductible. That would have ended the analysis.

[95] Instead, it is clear that what the arbitrator was doing was interpreting the Old *Regulation*, in light of:

(1) the "double deduction" issue; and

(2) the June 2007 amendment eliminating the "double deduction" issue.

[96] In that context, the arbitrator ruled that a plain language interpretation of the Old *Regulation* would lead to an absurd and unfair result.

[97] Although not described as such in his decision, I interpret the arbitrator as having reasoned that, where there exists a priority dispute between two monolithic entities (a statutory agency and a crown corporation), the loser in that dispute should not be the injured individual. Such a result would be, he reasoned, absurd. That

absurdity was heightened when the legislature and ICBC amended the *Regulation* in June 2007 to eliminate the double deduction.

[98] Hence, as described above, the arbitrator was applying principled considerations of statutory interpretation to the Old *Regulation* to come to a reasoned result.

[99] In interpreting the context and purpose of the entirety of the statutory scheme, the arbitrator had in mind the prior decisions of the Court of Appeal. He noted that the court had given a purposive reading of the legislation and had not followed the plain language of the text. Those decisions, combined with the reasoning in *Rizzo*, led him to the conclusion that, in this case, the provisions of s. 148.1 of the *Regulation* should be interpreted in a manner that avoided such an absurdity.

[100] Thus, the question for me is whether following that line of thinking was reasonable. In other words, was it an outcome that falls somewhere on the spectrum of reasonable outcomes?

[101] In considering that question, I, too, note the Court of Appeal decisions where that court has given an interpretation to ICBC's governing *Regulation* that does not accord with the plain language of the section in issue. Given that the Court of Appeal made prior decisions where it followed an analogous path to an unexpected, but fair, result, I cannot say that the arbitrator's decision in this case was "unreasonable". Put another way, given the Court of Appeal's prior decisions relating to the same legislative scheme, the arbitrator's decision was not a result that was off the spectrum of possible, reasonable, results.

[102] Hence, taking into account public policy considerations as well as the context and purpose of the Regulation, I find that the arbitrator's decision was within the realm of reasonable outcomes for the arbitrator in respect of his finding that the WCB benefits are not deductible.

[103] What the arbitrator did was interpret the Old *Regulation* in light of the New *Regulation*. He saw the New *Regulation* as a correction, a remediation, of an

unfairness occasioned by the Old *Regulation*. As the arbitrator noted, the change in the *Regulation* led to the absurd result that a person injured on May 31, 2007, would receive the UMP benefits without a WCB deduction, whereas the person injured on June 1 would not. It is obvious that one of the purposes of the UMP regulations is to ensure a minimum amount of available policy limits to compensate seriously injured.

[104] On a case-by-case basis, the object of ICBC is often to pay a fair amount, but also as little as possible, for each claim that is in issue. That is the reason that claims are adjudicated. The system contemplates an adversarial process. However, that case-by-case analysis does not speak to the overall objectives and purpose of the *Act* and *Regulation*. Not every claim requires a consideration of the overarching purposes of the legislative scheme.

[105] However, the arbitrator in this case was not considering the value of S.A.'s claim, nor was he asked to do so. Instead, he was tasked with the deciding the proper application of the WCB deductions. In that regard, his decision was grounded in the proper principles of statutory interpretation.

[106] On that basis, I find that his decision was reasonable. ICBC's appeal of the arbitrator's decision is dismissed.

[107] The claimant seeks the costs of this appeal. Subject to hearing further submissions, I award costs to the respondent.

"A. Ross J."