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DIVISION II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ADRIAN TEPEI, ANGELICA TEDESCU (nee TEPEI), BENJAMIN
TEPEI, CAMELIA COLCER (nee TEPEI), DAN TEPEI and DINA
TEPEI,

Appellants,

v.

INSURANCE CORPORATION OF BRITISH COLUMBIA,

Respondent.

Appeal from Superior Court of Lewis County
Honorable Richard L Brosey
NO. 07-2-00596-8

APPELLANTS' REPLY BRIEF

GREG SAMUELS, CROSS BORDER LAW CORPORATION

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I. The Foreign Sovereign Immunity Act provides no “safe harbor” for ICBC’s alleged conduct in this action.

For the first time on appeal, ICBC has suggested that the Washington courts lack subject matter jurisdiction over this action by virtue of the *Foreign Sovereign Immunity Act* (“FSIA”), specifically 28 U.S.C. § 1603-05. While ICBC is undoubtedly correct that RAP 2.5(a) and CR 12(h)(3) provide this court the authority to review fresh challenges to subject matter jurisdiction, their substantive argument is without merit. The application of the FSIA to Canadian provincial auto insurers in circumstances identical to those posed by this case has been expressly rejected by a prior decision of the Eighth Circuit -- a decision which ICBC relied upon in oral argument related to the ruling presently on appeal. The reasoning of this Eighth Circuit decision, *Dumont v. Saskatchewan Government Insurance (SGI)*, 258 F.3d 880 (2001) was adopted by the federal court for the Western District of Washington in a case where ICBC was the movant in another FSIA-centered jurisdictional challenge. See *Western Protectors Insurance Company v. Insurance Corp. of British Columbia*, 2009 U.S. Dist. LEXIS 4568 (W.D. Wa.). Both *Dumont* and *Western Protectors* bear further scrutiny here, as they serve both to refute ICBC’s objections to subject matter jurisdiction, and to provide additional persuasive justification for why *personal* jurisdiction over ICBC should be found on these facts.

28 U.S.C. § 1330(a) provides the federal courts with original jurisdiction over “*any nonjury civil action against a foreign state as*

defined in section 1603 (a) of this title". In turn, 28 U.S.C. §1603(a) incorporates the "agency or instrumentality of a foreign state" language which was discussed by ICBC in its response. See Response Brief at 38-40. We take no issue with ICBC's assertion that it satisfies the "agency or instrumentality" test of §1603. It has been held to satisfy the prerequisites of that rule in a host of other recently reported decisions. See *Western Protectors*, supra at 5-6; see also *State Farm Mutual Automobile Ins. Co. v. Insurance Corp. of British Columbia*, 2009 U.S. Dist. LEXIS 124233 (D. Or. 2009) at 7, citing *Clow v. Insurance Corp. of British Columbia*, 2007 U.S. Dist. LEXIS 58334 (D. Or.)(accord).

As an "instrumentality" of a foreign state, ICBC would be immune from suit before the United States courts pursuant to 28 U.S.C. § 1604 unless one of the exceptions to immunity enumerated at §1605 applies. The Tepeis contend that the "commercial activity" exception of §1605(a)(2) unquestionably applies to this action, consistent with the holdings in *Dumont* and *Western Protectors*, supra.

In oral argument before the Lewis County Superior Court on the challenged motion to dismiss, counsel for ICBC relied upon a decision of "the circuit court of appeals of the Eighth Circuit arising out of North Dakota" with respect to the application of a Saskatchewan UIM provision to a North Dakota accident. VRP(1/20/09) at 19. Counsel for ICBC will undoubtedly acknowledge that the decision referred to in oral argument was *Dumont*, a case which had arisen in prior briefing before both the

Lewis County Superior Court and the British Columbia underinsurance tribunal. In *Dumont*, the Eighth Circuit confronted issues related to underinsurance benefits owing to Saskatchewan residents arising out of a North Dakota collision following a tort action in North Dakota. *Id.* at 881-83. The Eighth Circuit criticized the district court for finding its jurisdiction in the federal diversity provisions of 28 U.S.C. §1332, holding instead that the court’s jurisdiction was established by the “commercial activity” exception of the FSIA:

“Diversity jurisdiction does not exist in this case because all members of the Dumont/Smith Families are Canadian citizens and SGI is a corporation created by a political subdivision of Canada. 28 U.S.C. §1332(a). However, subject matter jurisdiction in this action exists pursuant to the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C. § 1300. This is so because SGI is a corporation created by a political subdivision of Canada that, in writing the Policies, acted outside the territory of the United States in connection with a commercial activity of SGI that caused a direct effect in the United States. 28 U.S.C. §1630, 1605(a)(2). The direct effect being the provision of automobile liability and family security insurance coverage to Ernest Smith, Helen Smith and Mary Dumont while they traveled by automobile in the United States.”

Id. at 883, fn. 6 (emphasis added)(internal case citations omitted).

In *Western Protectors*, *supra*, ICBC sought dismissal of an action against it in federal district court in Washington on the basis of the FSIA. In finding that the subrogation dispute between Western Protectors and ICBC was too attenuated to satisfy the “direct effect” requirements of the “commercial activity” exception of §1605(a)(2), the court noted approvingly of the holding in *Dumont*, concluding that a “direct effect” in the United States was typically satisfied by the fact that “*suit by the*

survivors of the insureds was based upon insurance coverage in the United States procured by the named insureds in Canada.” Id. at 11. Western Protectors supports the proposition that the “commercial activity” exception to the FSIA is limited to suits brought by parties actually insured under the relevant policies, and that immunity would apply in the case of subrogated parties whose connection to the “commercial activity” inherent in the contract of insurance were more tenuous. Id. at 12.

In yet another action by ICBC seeking dismissal of a subrogation dispute under the FSIA, the federal district court in Oregon summarized the reasoning from *Dumont* and *Western Protectors* thusly:

“Given that [plaintiff] State Farm is a stranger to the issuance of the ICBC insurance policy, this court finds the logic of Western Protectors persuasive. In Dumont, in contrast, the parties were the intended beneficiaries of the contract of insurance SGI provided to its insureds in Canada. When those insureds died on a highway in the United States, it triggered the coverage SGI had promised to provide. Thus, the policy had a “direct effect” in the United States by providing coverage to its insureds for an event which occurred in the United States.”

State Farm v. ICBC, supra, at 26.

There is no meaningful distinction between the procedural posture of the parties in the *Dumont* case and that presented by the parties in this appeal.¹ In both cases, Canadian residents insured by a provincially-established Canadian monopoly auto insurer suffered injuries as a result

¹ The Tepeis do contend that one significant *substantive* distinction must be made between the *Dumont* case and the present action. In *Dumont*, SGI offered to waive any requirement that the families obtain a tort judgment in North Dakota as a precondition to seeking underinsurance benefits. *Dumont* at 883. In the present action, the Tepeis contend that ICBC’s refusal to acknowledge Petru Tepei’s status as an “underinsured motorist” compelled the institution of the Tort Action before the Washington courts.

of an auto accident in a United States jurisdiction. A tort action was tried to judgment in the United States, and subsequent disputes arose over the relationship between the findings in the U.S. tort action and the plaintiffs' entitlement to underinsurance benefits under a Canadian contract. The Eighth Circuit found subject matter jurisdiction clearly existed to hear the action in the United States forum, and grounded that jurisdiction in the "commercial activity" exception to the FSIA. The reasoning of that decision was cited approvingly in federal district court decisions in Washington and Oregon to which ICBC was a party, yet none of these adverse authorities were noted by ICBC in extending this FSIA-centered argument for the first time on appellate review.

The Tepeis contend that a more compelling question for this court's consideration is whether the authorities rejecting FSIA immunity for Canadian provincial auto insurers in suits brought by their insureds arising out of "commercial activity" having a "direct effect" in the United States is in fact persuasive authority for concluding that *personal* jurisdiction must lie over such insurers as well. 28 U.S.C. §1330(b) states that where subject matter jurisdiction is established by virtue of an exception to FSIA immunity, personal jurisdiction will likewise be found to lie over the defendant provided that service of process was properly effected under the statute. See also *Western Protectors*, supra at 12, fn. 1 (discussing the relationship between subject matter and personal jurisdiction in the FSIA context). The Tepeis neither brought this action

in federal court, nor asserted the FSIA as their basis for personal jurisdiction before the Washington state courts. However, the evaluation of whether a party has “transacted business” in Washington state under the long-arm statute (RCW 4.28.185 (1)(a)) has been found to be coextensive with the due process analysis conducted in a federal court personal jurisdiction challenge. See *Stairmaster Sports/Medical Prods. v. Pacific Fitness Corp.*, 916 F. Supp. 1049, 1052 (W.D. Wash. 1994), citing *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850-51 (9th Circ. 1993). The Tepeis contend that *Dumont*, *Western Protectors* and the plain language of 28 U.S.C. §1330(b) stand for the proposition that both subject matter *and* personal jurisdiction flow from a finding of “commercial activity” with a “direct effect” in the United States sufficient to overcome the FSIA’s presumption of immunity. The question of whether such a finding of “commercial activity” and “direct effect” under 28 U.S.C. §1605(a)(2) would be coextensive with the definition of “transacting business” under this State’s long-arm statute is a matter of first impression for this court. A decision in the affirmative would appear to be consistent with the substantial case authority suggesting that an insurer whose policy coverage extends into a state where an insured risk occurs has purposefully availed itself of that forum with respect to litigation arising from its forum-directed conduct and activities. See, e.g., *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911, 913 (9th Circ. 1990)(Canadian insurer/defendant); see also CP

at 284-85 (arguments made on this issue to the Lewis County Superior Court in respect of the motion presently on appeal).

II. Pursuant to CR 44.1, the trial court should not have accepted counsel's testimony on a key issue of foreign law when that testimony contradicted admissions made in ICBC's answer and other evidence contained in the record.

In its response, ICBC misreads CR 44.1(c). The mere fact that evidence of foreign law is submitted in “open court” does not conclude the inquiry into whether an argument supported by that evidence was worthy of adoption. The key provision of CR 44.1 (c) at issue here is whether the trial court gave “due regard for the trustworthiness” of counsel’s oral assertions about the prerequisites to making a claim under British Columbia’s UMP scheme, when those assertions contradicted admissions made by ICBC in its answer.

Counsel asserted in oral argument that a lawsuit in Washington State was a mandatory “first step” to establishing UMP entitlement. VRP(1/20/09) at 15-16. ICBC had previously admitted in its answer that the relevant British Columbia statutory scheme gave it the power to waive the requirement of a tort trial, and agree that a claimant’s damages were caused by an “underinsured driver”. *Compare* CP at 1439 (plaintiff’s statement) *with* CP at 1262 (ICBC’s admission). The trial court accepted the former statement despite the latter admission. The Tepeis contend that the trial court’s decision to accept counsel’s testimony about foreign law

in the face of a contradictory prior admission falls short of the requirements of CR 44.1(c).

This distinction matters because the trial court clearly believed it mattered. Judge Brosey concluded that, since ICBC was contractually obligated to defend Petru Tepei once a Washington action was filed, any actions taken in furtherance of that defence could not constitute “purposeful availment” of the Washington forum. VRP(1/20/09) at 44. The trial court thus found that the ALA functioned merely as a mechanism to finance litigation which the Tepeis had no choice but to file under the relevant statutory scheme if they sought to “prove up” their entitlement to underinsurance benefits in Canada. VRP(1/20/09) at 46. In the trial court’s analysis, the decision to sue in Washington State was a tactical litigation decision made by the Tepeis alone.

The Tepeis contend, and ICBC’s answer appears to support, that a Washington tort lawsuit was *not* an absolute prerequisite to establishing UMP entitlement. Instead, the Washington lawsuit was triggered by ICBC’s refusal to acknowledge to the Tepeis what it had acknowledged to itself for its own internal adjusting purposes – that Petru Tepei was clearly an “underinsured motorist”. *See* CP at 355; *see also* CP at 357. Notably, the definition of “underinsured motorist” in the relevant UMP regulations, which were before the trial court as exhibits to the written briefs, says *nothing* about the potential liability of third parties foreclosing the initial determination into whether an insured such as Petru Tepei qualified as an

“underinsured motorist”. See CP at 422 (“*underinsured motorist*” means an owner or operator of a vehicle who is legally liable for the injury or death of the insured but is unable, when the injury or death occurs, to pay the full amount of damages recoverable by the insured....”). Simply put, the only reason a Washington tort action was required to establish UMP entitlement in this case was because, in the face of clear evidence to the contrary which it accepted for its own adjusting purposes, ICBC issued a complete denial of its insured’s legal liability in April 1997 in favor of a “product defect” theory which was ultimately found to be meritless. See Appellant’s Brief at 8-9. At any time, ICBC could have done precisely what the Canadian insurer in *Dumont*, supra, offered to do – acknowledge coverage under the first party policy, waive any requirement to a foreign jury trial, and invite the claimants to proceed to arbitration in Canada to determine benefits owing under the contract. *Dumont*, supra at 883. When viewed in this light, the facts before the trial court paint a remarkably different picture of ICBC’s role in triggering the initiation of the Washington tort litigation than that provided by counsel’s assertions in oral argument. The Tepeis believe the trial court’s adoption of counsel’s argument over admissions and evidence on a key point of foreign law constituted reversible error under CR 44.1.

III. ICBC avoids any discussion of the central issue raised in this appeal – whether the Washington courts possess personal jurisdiction to consider whether the Finney/Fisher rule applies to these facts.

ICBC's silence on *Finney/Fisher* is deafening. While the procedural history of the litigation arising from the Tepeis' October 1996 accident on both sides of the U.S.-Canadian border has been tortured and complex, the precise issue before this court on appeal is straightforward. Washington law presumes that an underinsurer who has notice and opportunity to intervene in a tort action involving its insureds will be bound by the findings, conclusions and judgment entered in that action. *Fisher v. Allstate Insurance Co.*, 136 Wn.2d 240, 246, 961 P.2d 350 (1998). While the parties disagree over whether ICBC's conduct in the formation of the ALA constituted independent actionable bad faith under Washington law, it cannot reasonably be denied that ICBC had far more than "notice and opportunity to intervene" with respect to the Tort Action. *See* Appellant's Brief at 7-13. Despite its extraordinary level of involvement in and awareness of issues litigated in the Tort Action, and its provision of a defense to its insured Petru Tepei throughout that Action, ICBC maintains the position that it need not abide by the *Finney/Fisher* rule, and that the Washington courts are powerless to compel them to do so. At its heart, the Tepeis' present action sought answers for two basic questions: "Should *Finney/Fisher* apply to ICBC based on the precise constellation of facts presented by the Tort Action, and if so, what can the Washington courts do if ICBC persists in its refusal to comply with the rule?" Without

reference to *Finney/Fisher*, the trial court sidestepped the latter question of remedies, and held that it lacked jurisdiction even to consider the threshold issue of whether this well-established rule of Washington law should be applied.

In its response, ICBC makes the extraordinary assertion that “[w]hile Plaintiffs’ UMP coverage was limited to \$6,000,000(CDN), Plaintiffs sought to recover the \$9,100,000 (US) as was awarded by the Lewis County jury.” Respondent’s Brief at 5. ICBC is well aware this allegation is false. Contemporaneously with the entry of the \$9.1 million (U.S.) judgment in the Tort Action in August of 2004, counsel presented a written proposal to ICBC regarding the Tepeis’ UMP entitlement. See August 19, 2004 letter to Dan Burnett, attached as Appendix Exhibit 1. The Tepeis proposed using the judgments obtained in the Tort Action as the “baseline” from which ICBC’s contractual obligations would be evaluated. Using such an approach, the Tepeis asserted that the *maximum* amount collectively owing to them under the UMP contract would be \$4,473,522 (CDN). See Exhibit 1 at p.5. Not only is this sum far less than the \$9.1 million (US) awarded in the Tort Action, the determination of the “baseline” figure is consistent with the principles embodied in the *Finney/Fisher* rule. Under *Finney/Fisher*, a tort judgment does not serve as a proxy for the underinsurer’s contractual obligations (i.e., it cannot increase the limits of the underinsurance policy). However, it does foreclose the underinsurer from relitigating issues determined in the tort

action such as “Who caused the accident?” (liability), “What losses did the accident cause?” (causation), and “What is the monetary value of those losses?” (damages). *See generally Fisher*, supra, at 246-49 (establishing rule and discussing rationale behind it).

For the last six years, ICBC has sought to use the British Columbia UMP arbitration process, a system designed to determine amounts payable and owing under a Canadian statutory contract of indemnity, to relitigate determinations of causation and damages conclusively made by the Lewis County jury in the Tort Action. *Finney/Fisher* presumptively forbids an underinsurer from doing this, so long as the requirements of notice and opportunity to intervene in that action were met. Indeed, in *Finney v. Farmers Insurance Co.*, 21 Wn. App. 601, 586 P.2d 519 (1978), *aff'd* 92 Wn.2d 748, 600 P.2d 1272 (1979), this court suggested that attempts by an underinsurer to rely on contractual arbitration provisions to relitigate issues determined in a tort action where it had elected to “sit on the sidelines” were profoundly disfavoured in Washington law. *Finney*, 21 Wn. App. at 619-20.

Further, the Washington Supreme Court has previously suggested that the *Finney/Fisher* rule should presumptively apply to a fact pattern curiously inverse to the one presented here. In *Mulcahy v. Farmers Insurance*, 152 Wn.2d 92, 95 P.3d 313 (2004), the Court “note[d] in passing” the *Finney/Fisher* presumption, implying that the rule might well extend to bind a Washington underinsurer to the findings and conclusions

emodied in a British Columbia *settlement* of which it had notice and an opportunity to participate. *Mulcahy*, 152 Wn.2d at 105, fn. 9. While the Court's comment suggests that the *Finney/Fisher* principle is to be broadly applied, it ultimately left the issue "*in the able hands of the trial court on remand to determine whether this general rule is applicable in this particular case.*" *Id.* In the present case, the trial court's dismissal on personal jurisdiction grounds foreclosed further inquiry into the scope and applicability of the general rule – a surprising determination, given the comity and respect Washington underinsurers are expected to extend to determinations made in British Columbia tort proceedings, as reflected by the *Mulcahy* decision.

Finally, ICBC uses the Appendix to its response brief to imply that the ruling from arbitrator JJ Camp on jurisdictional issues has conclusively affirmed their right to disregard *Finney/Fisher*. *See* Respondent's Brief, Appendix Exhibit A. Setting aside the issue of whether a ruling from a Canadian arbitration tribunal can determine Washington's interest in this issue as reflected by a rule of Washington law, the arbitration proceedings serve primarily to underscore the challenges which the Tepeis yet face as they continue their Sisyphean efforts to obtain a fair measure of compensation for their 1996 injuries. ICBC's intention to relitigate issues determined in the Tort Action to its own advantage continues unabated. A subsequent decision of arbitrator Camp, which forbade ICBC from requiring Angelica Tepei to submit to further defense medical exams to

“reprove” the damages she had already established in the Tort Action, was met with a letter from ICBC decrying the “natural justice” concerns raised by the arbitrator’s ruling, and implying that appeal surrounding these issues was a distinct possibility. *See* JJ Camp Ruling dated January 19, 2010, attached as Appendix Exhibit 2; see also letter from ICBC counsel Avon Mersey dated January 21, 2010, attached as Appendix Exhibit 3. Given ICBC’s six year record of intransigence, even the most limited of remedies sought by the Tepeis’ in their original complaint (declaratory judgment regarding the application of *Finney/Fisher* to these facts) could have useful persuasive effect in any further British Columbia litigation on these issues.

Viewed in the light most favorable to the non-moving party, the quantum of ICBC’s conduct and involvement in the Tort Action far surpasses that typically required for the *Finney/Fisher* rule to apply. The Tepeis contend that this quantum of conduct likewise vests the Washington courts with jurisdiction to evaluate *whether* the rule should apply on these facts, and how best to remedy ICBC’s ongoing disregard of the presumptive rule if it in fact does apply. The Tepeis ask this Court to overturn the trial court’s dismissal on personal jurisdiction grounds, void the statutory award of attorney’s fees made pursuant to RCW 4.28.185, and remand this matter for a determination of whether *Finney/Fisher* applies to these facts, and if so, what appropriate remedy the trial court should grant to ensure ICBC’s compliance with the rule.

Respectfully submitted this 27th day of April, 2010.

GREG SAMUELS,
CROSS BORDER LAW CORPORATION

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Greg Samuels, WSBA #19497
Of Cross Border Law Corporation
Attorneys for Appellants/Plaintiffs

APPENDIX 1

Our File: 1141

August 19, 2004

Dan Burnett
Bodily Injury Manager
Insurance Corporation of British Columbia
13072 88th Avenue
Surrey, BC V3W 3K3

Re: *Tepei v. Uniroyal & Tepei*
Your File No: H071774.4

Dear Mr. Burnett:

I write to initiate negotiations regarding the Tepeis' Underinsured Motorist Protection ("UMP") claims against the Corporation, as proposed in your letter to me of June 30. As you are aware, on April 23, 2004 a Lewis County, Washington jury found Petru Tepei liable for the injuries sustained by the Tepei family in their October 1996 automobile accident near Chehalis, Washington. The jury also evaluated the damages evidence presented by the Tepei plaintiffs, and awarded both general and special damages to the plaintiffs of approximately \$US 9.1 million. Having received the maximum sums available from Petru Tepei under his liability insurance policy with the Corporation and the terms of the July 1997 advance loan agreement between Petru Tepei, the Tepei plaintiffs and the Corporation, my clients now claim under their UMP coverage..

Section 148.1(5) of the Regulations suggests that the liability of the Corporation under UMP coverage is limited to the lesser of (1) the damages awarded in respect to the accident, (2) amounts determined by an UMP arbitration pursuant to section 148.2(1), or (3) the statutory limits of \$CDN 1,000,000 coverage per person. Once the "upper limit" of available coverage is determined, a reduction is then made for applicable offsets (or "deductible amounts") to the UMP award identified in section 148.1(1).

Effective settlement of this claim in lieu of further litigation can only be accomplished by reaching agreement on two distinct issues. First, the Tepeis and the Corporation would need to come to an agreement as to the scope and effect of the Washington jury verdict on the determination of the damages and liability issues arising from the 1996 accident – in essence, determining the baseline value of each claim from which the s.148.1(1) offsets would be taken. Second, the parties would need to reach an agreement as to the

present-day value of the applicable "deductible amounts" for Part 7, EI, CPP benefits and the like. The British Columbia courts have long upheld the principle that the burden of proving the value of applicable deductible amounts under section 148.1(1) falls on the Corporation, not on the claimant. See Burleigh v. Semkow, (1995) 12 B.C.L.R. (3d) 111 @ para. 31; Just v. B.C., (1991) 60 B.C.L.R. (2d) 209 @ para. 72; Lynn v. Pearson (1998) 5 C.C.L.I. (3d) 290 (B.C.C.A. @ para. 18). Some deductions – such as an offset for the \$CDN 200,000 received by the plaintiffs under Petru Tepei's third-party liability policy – will be self evident. Others, such as the present day value of benefits available under CPP, may be subject to some interpretation.

In light of the principles above, and in recognition of the fact that we must first reach agreement on the baseline value of the Tepei claims before moving forward to negotiate over the size of applicable offsets, this letter will outline the Tepeis' position with respect to the effect of the Washington jury's award, and the role that award may play in limiting the scope of an UMP arbitrator's jurisdiction to reevaluate the damages sustained in the 1996 collision. This will provide a starting point for discussion of these issues with an eye towards arriving at a baseline damage figure for each plaintiff, from which applicable offsets may then be subtracted. If we can agree on such a baseline figure, I would then expect the Corporation to propose the amount of such offsets, consistent with applicable case law. If we fail to agree on the baseline value of the claims, or on the scope of authority the arbitrator may have to reassess such damages, then it seems we should proceed forward with the UMP litigation process, and deal with the calculation of offsets later.

The Preclusive Effect of the Washington Jury's Verdict on the UMP Arbitration

The plaintiffs believe that the baseline amounts for damages to which each plaintiff is entitled can be determined by reference to the Washington jury's verdict, and that the jury verdict is binding on any subsequent UMP arbitration with respect to the factual issues determined in the Washington trial, to the extent consistent with Canadian law. Put another way, a competent jury in Washington has allocated fault and assessed the merits and the monetary value of the plaintiffs' damage claims. Contrary to your earlier assertions during our failed mediation in Seattle, I believe that British Columbia law (as expressed most directly in the decision of Dahl v. Whitehill, discussed below) prevents the Corporation from using UMP arbitration to require the plaintiffs to prove their damages again, or have the monetary value of those damages recalculated based on ranges of damages normally awarded for similar injuries in actions tried in British Columbia. An evaluation of the Regulations themselves in tandem with applicable case law suggests that while an UMP arbitrator would retain the authority to calculate applicable offsets under section 148.1(1) and to ensure any award complies with British Columbia law, an UMP arbitrator lacks the authority to substitute its judgment for that of a trial jury with respect to the nature and extent of the damages suffered.

As you are well aware, the Corporation and claimants engage in two distinct types of UMP arbitrations. In cases where the claimant can establish to the Corporation's satisfaction that (1) the claimant's injuries exceed the at-fault driver's insurance

coverage, and (2) that the at-fault driver lacks personal assets to satisfy a judgment against him, the Corporation will often consent to the claimant settling with the at-fault driver for his insurance limits, and proceeding directly to an UMP arbitration without a judgment being obtained against the at-fault driver. In such circumstances, the UMP arbitrator functions as a "court of first resort" – entering findings of fact and making determinations as to liability, comparative fault and damages to allow determination of both the baseline level of damage sustained and the amounts payable under UMP. The UMP arbitrator's authority to function in this broadened capacity is implicit in the consent of the parties to proceed directly to UMP.

In traditional UMP claims, such as the one pursued by the Tepeis here, the claimant first obtains a judgment against the at-fault party. Only after a judgment is entered against the at-fault driver, and that judgment exceeds the at-fault driver's ability to pay, does the entitlement to UMP arise. Simply put, there can be no underinsured motorist claim without a judicial determination of damages against the at-fault party that exceeds that party's insurance/assets.

However, in the traditional UMP claim scenario, the UMP arbitrator does not function as the "court of first resort" as it does in the consensual UMP claim scenario. If a trial court or jury has already determined, by way of an underlying action against the at-fault party, the liability and damages issues raised in the case, the UMP arbitrator lacks the authority to reevaluate these issues anew in the context of UMP. Instead, the arbitrator's jurisdiction is limited to calculation of the applicable "deductible amounts" under section 148.1(1).

The case of Dahl v. Whitehill, (1996) 17 B.C.L.R. (3d) 226, is illustrative of the principle expressed in the above paragraph. In Dahl, the claimant sought damages arising from a 1992 motor vehicle accident. The at-fault party was denied insurance coverage by the Corporation owing to his intoxication at the time of the accident, and it became clear that the at-fault party's assets would be insufficient to satisfy any judgment obtained by the claimant. The Corporation gave consent for the claimant to proceed directly to UMP – but the Corporation sought to have the UMP arbitrator determine not only quantum of damages but a claim of contributory negligence against the claimant (for voluntarily accepting transportation from an intoxicated driver). In rejecting the Corporation's claim that the UMP arbitrator had jurisdiction to determine issues of contributory negligence, Hogarth J. outlined the scope of an UMP arbitrator's authority as established by the Regulations:

"In my view subsection 148.2 [of the Regulations] does not apply until it has already been determined that the person claiming, the "insured", is claiming as a consequence of an accident with an "underinsured motorist", that is, someone who is unable to pay the full damages awarded to the insured. This amount can only be claimed in the action and after a trial or assessment. The Third Party [the Corporation] can defend the action in the stead of the Defendant if it so desires and raise the question of contributory negligence, but before any claim can be made under the provisions of UMP the final amount in the action is to be

determined, as until then there is no "underinsured motorist. The amount that is to be arbitrated is the amount finally determined in the action as it is affected by the "deductibles" and other sums mentioned in section 148.1."

Id., at para. 13-14 (emphasis added).

Further, Hogarth J. explicitly rejected the proposition that an UMP arbitrator possessed the right under section 148.2 to determine the extent and value of the claimant's damages and then proceed to calculate the appropriate deductible amounts under section 148.1. Id. at para. 12.

The effect of the Dahl decision on the facts presented in our situation are clear. We are faced with a traditional UMP arbitration, not a consensual one. The UMP arbitrator's jurisdiction in this matter is limited to taking the damage assessment made by the Washington jury, and calculating the applicable section 148.1 offsets. Such an approach is supported not only by Dahl, but by recognized principles of *res judicata* and collateral issue estoppel which have long been acknowledged in Canadian law. Thus, the right to UMP arbitration (and the UMP arbitrator's jurisdiction under the *Regulations*) does not arise under section 148.2 until an at-fault party has been determined to be an "underinsured motorist", by way of a trial or assessment. Once such a trial or assessment has taken place, the arbitrator's jurisdiction is limited to calculation of offsets.

Applying Dahl to Arrive at "Baseline Damage" Amounts for the Plaintiffs

Under the approach outlined above, each of the Tepei plaintiffs would be entitled to collect the lesser of (1) the jury verdict with respect to their damages, or (2) \$CDN 1,000,000, less any applicable offsets under section 148.1. Considering the jury's award in light of the present exchange rate (\$US 0.76 = \$CDN 1.00), a strict *res judicata* application of the jury's award would result in the following baseline amounts for each plaintiff from which deductions would then be taken:

<u>Claimant</u>	<u>WA Jury Verdict</u>	<u>Baseline Figure (per s.148.1(5))</u>
ADRIAN TEPEI	\$US 1,129,271	\$CDN 1,000,000
ANGELICA TEPEI	\$US 1,497,266	\$CDN 1,000,000
BENJAMIN TEPEI	\$US 1,553,921	\$CDN 1,000,000
CAMELIA TEPEI	\$US 136,798	\$CDN 179,997
DAN TEPEI	\$US 3,605,832	\$CDN 1,000,000
DINA TEPEI	\$US 1,179,991	\$CDN 1,000,000
TOTAL	\$US 9,103,079	\$CDN 5,179,997

While in my view ample support can be found in Canadian law for a strict *res judicata* application of the Washington jury verdict to the determination of the UMP entitlement, the plaintiffs are willing, *for the purposes of settlement discussion only*, to accept a

reduction in the non-economic damages awards given by the Washington jury to ensure that such awards do not exceed the "rough upper limit" for nonpecuniary damages established in the *Andrews* trilogy. Reducing all nonpecuniary awards made by the Washington jury to a level of \$CDN 300,000/\$US 228,000 (which we have used as an approximation of the current level of the "rough upper limit") would reduce the baseline figures for the plaintiffs as indicated below:

<u>Claimant</u>	<u>WA Jury Verdict with CA Non-Pec Cap</u>	<u>Baseline Figure (per s.148.1(5))</u>
ADRIAN TEPEI	\$US 1,129,271	\$CDN 1,000,000
ANGELICA TEPEI	\$US 987,766	\$CDN 1,000,000
BENJAMIN TEPEI	\$US 636,088	\$CDN 836,958
CAMELIA TEPEI	\$US 136,798	\$CDN 179,997
DAN TEPEI	\$US 3,605,832	\$CDN 1,000,000
DINA TEPEI	\$US 232,991	\$CDN 306,567
TOTAL	\$US 6,728,746	\$CDN 4,323,522

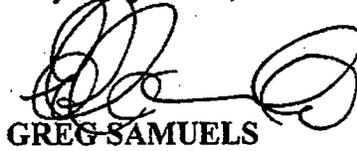
Finally, we would also need to factor in the consideration of litigation expenses – both in the underlying Washington action and any subsequent UMP litigation – into the settlement of these claims. We acknowledge, *again for the purposes of settlement discussion only*, that the \$CDN 1,000,000 baseline limit for UMP is a "hard cap" inclusive of litigation costs and disbursements. Leaving the issue of "taxable costs" aside, the Tepeis have incurred approximately \$CDN 300,000 in litigation *expenses* to date pursuing their claims in Washington. We further acknowledge that those plaintiffs whose baseline figures exceed the \$CDN 1,000,000 (Adrian, Angelica and Dan Tepei) would not be entitled to recover further expenses, leaving three plaintiffs with room under the "hard cap" to recoup expenses. Adding the \$CDN 150,000 in disbursements attributed to these three plaintiffs (Ben, Camelia and Dina Tepei) to the sums identified above would result in a total baseline figure for all six plaintiffs of \$CDN 4,473,522, plus taxable costs (again, acknowledging that Adrian, Angelica and Dan have no room remaining under the "hard cap" such to compensate an award of further costs from the Washington action). We propose using this figure as the baseline UMP entitlement, from which any proposed deductions under section 148.1(1) would be calculated.

Conclusion

As you can imagine, we are enthusiastic about pursuing all reasonable options available to resolve this matter short of further litigation. However, the long years of effort which culminated in the April 2004 verdict has likewise hardened our resolve to ensure that the plaintiffs are not forced to reestablish the merit and extent of their damages claims through the UMP process. Any approach to UMP which would require these plaintiffs to resubmit medical evidence or reestablish their entitlement to damages according to British Columbia precedents, and to incur additional "nonrecoverable" legal expense in

so doing, is contrary to the law and would be wholly unacceptable to our clients. I await your reply.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'G. Samuels', with a large, stylized flourish at the end.

GREG SAMUELS

GLS:mwp

cc: Matthew Fahey
Clients

APPENDIX 2

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

AND

***THE COMMERCIAL ARBITRATION ACT,*
R.S.B.C. 1996, C. 55**

BETWEEN:

**ADRIAN TEPEI, ANGELICA TELESU (nee TEPEI), BENJAMIN
TEPEI, CAMELIA COLCER (nee TEPEI), DAN TEPEI and DINA TEPEI**

CLAIMANTS

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

**ARBITRATION DETERMINATION ON
PRELIMINARY MOTION FOR INDEPENDENT MEDICAL EXAMINATIONS**

**DATE OF HEARING:
PLACE OF HEARING:**

By way of written submission

J.J. CAMP, Q.C.
Camp Fiorante Matthews
400-555 West Georgia Street
Vancouver, BC V6B 1Z6

Arbitrator

GREGORY L. SAMUELS
Cross Border Law
Suite 204 – 1730 West 2nd Avenue
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Counsel for the Claimants

**AVON M. MERSEY
MARTHA VON NIESSEN**
Fasken Martineau LLP
Barristers & Solicitors
Suite 2900-550 Burrard Street
Vancouver, BC V6C 0A3

Counsel for the Respondent

ISSUE TO BE ARBITRATED

1. The Respondent, the Insurance Corporation of British Columbia ("ICBC") brings a motion to have one of the claimants, Angelica Telescu, attend an independent medical examination by an orthopedic specialist, a functional capacity specialist and a vocational specialist. ICBS also seeks a direction that it be permitted to introduce into evidence and use the independent medical expert report of orthopedic surgeon Dr. Aitken, dated August 29, 2003.

2. It is common ground that this arbitration is governed by the *Commercial Arbitration Act*, R.S.B.C., 1996, c. 55 (the "Act") and the Domestic Commercial Arbitration Rules of Procedure (as amended June 1, 1998) (the "Rules").

3. Rule 19, Conduct of the Arbitration, reads as follows:

"19. Conduct of the Arbitration

- (1) Subject to these Rules, the arbitration tribunal may conduct the arbitration in the manner it considers appropriate but each party shall be treated fairly and shall be given full opportunity to present its case.
- (2) The arbitration tribunal shall strive to achieve a just, speedy and economical determination of the proceeding on its merits."

FACTS

4. The facts pertaining to this arbitration are more fully set out in my earlier ruling on August 28, 2009. At this juncture, I set out a shortened version of the facts germane to this motion.

5. The single vehicle accident that is the subject of this arbitration occurred on October 27, 1996 near Chehalis, Washington. The British Columbia vehicle involved in the accident was being driven by Petru Tepei. He had six family members with him. One of the tires on the vehicle rapidly deflated causing Mr. Tepei to lose control of the vehicle. It rolled over several times causing injuries to the claimants.

6. At the time of the accident, Mr. Tepei was a resident of British Columbia and was insured under a third party liability policy of insurance with a limit of \$200,000 issued by ICBC.

7. At the time of the accident, each claimant was a resident of British Columbia and a member of the same household as Mr. Tepei and as such each had first party coverage pursuant to Part 10, s. 148.1 of the Regulations to the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231.

8. On October 26, 1999, the claimants filed a Complaint for Damages For Negligence and Product Liability in the Superior Court of Washington for Lewis County against the defendants, the Uniroyal Goodrich Tire Company, Uniroyal Goodrich Tire Company Inc., Michelin North America and Petru Tepei (the "Complaint"). The claim against the defendant Tepei was for negligent maintenance and operation of his motor vehicle. The claim against the remaining defendants was for defective design or defective manufacture of the tires on the vehicle.

9. The Complaint alleged the customary array of heads of damage.

10. On November 14, 1999, counsel for the claimants served a copy of the Complaint on ICBC and notified ICBC that the damages suffered by the claimants were likely to exceed the \$200,000 third party liability insurance.

11. The trial before a jury commenced in March, 2004, and lasted approximately 45 days. It dealt with issues of both liability and damages. On April 23, 2004, the jury delivered a verdict, dismissing the product liability case. The jury also found that, although the defendant Tepei was not negligent in his operation of the vehicle, he was negligent in failing to maintain the tire in proper working order and in this regard his negligence was the proximate cause of the plaintiffs' injuries. The jury awarded damages of approximately \$9.1 Million (U.S.) to the plaintiffs as follows:

▪ Angelica Telescu (nee Tepei):	US \$ 1,497,266
▪ Adrian Tepei:	US \$ 1,129,271
▪ Benjamin Tepei:	US \$ 1,553,921
▪ Dan Tepei:	US \$ 3,605,832
▪ Dina Tepei:	US \$ 1,179,991
▪ Camelia Colcer (nee Tepei:)	US \$ 136,798

12. In my earlier determination of August 28, 2009, I held that s. 148.2(6) of the Regulations to the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 was properly interpreted to mean that issues of legal entitlement shall be determined by Washington law in this case and that the issues pertaining to the quantum of damages shall be determined by the law of British Columbia.

13. The first arbitration to be conducted will be for the claimant Angelica Telescu and it is in relation to her claim that the respondent seeks the relief in the motion before me. I have been advised that this claimant was deposed in the Washington state litigation on the damages issues pertaining to her and that both parties have the transcript of this deposition. I have been further advised that this claimant underwent a form of examination for discovery in December 2009, in British Columbia, pertaining to the damages issues and that both parties have this transcript.

14. The injuries allegedly suffered by this claimant include head injury, right clavicle fracture, thoracic spine and interior wedge fractures, spinous process fractures, right lung contusion, scalp lacerations, and various other abrasions and contusions. A Statement of Claim has been filed on behalf of this claimant and in addition to clinical and hospital records, the evidence of eight experts will be relied upon including an orthopedic surgeon, Dr. Tarazi, vocational rehabilitation specialists, Dr. Gordon Wallace and Cloie Petgrave, and a functional capacity specialist, Paul Pakulak. The reports of all of the expert witnesses including of these three specialists are dated in 2003.

15. This claimant underwent an independent medical examination at the behest of one of the defendants in the Washington State action by Dr. Aitken, an orthopedic surgeon in British Columbia. He examined the claimant on April 24, 2003 and generated a lengthy report (14 pages) on August 29, 2003. To my knowledge, this report was not introduced at the Washington State trial but has been in the possession of and reviewed by both parties to this arbitration.

ANALYSIS

A. Should ICBC be able to introduce and use the report of Dr. Aitken?

16. I wish to deal first with the motion that ICBC be able to introduce and use independent medical reports generated by the defendants in the Washington state litigation. The only report identified in the written submissions by the parties was the report of Dr. Aitken, dated August 29, 2003. Hence, I am confining my ruling to that report.

17. I first note that this claimant underwent an independent medical evaluation by Dr. Tazari, an orthopedic surgeon apparently chosen by plaintiff's counsel, on August 30, 2003, and a report was generated by Dr. Tazari on that same day. Dr. Aitken, in his August 29, 2003 report, reviewed, at some length, the report of Dr. Tazari.

18. Both of these reports were put in front of me and I have carefully reviewed them. There can be no doubt that both of these reports are relevant and germane to the issues that I need to decide in arbitrating the damage award to this claimant. These reports are not without their differences, but I have no difficulty in concluding that they should both be reviewed by me in conjunction with submissions by able counsel. I highlight the fact that the use of the report by Dr. Aitken by ICBC should not introduce any further element of delay in concluding this particular arbitration.

19. Therefore, I conclude that ICBC should be able to introduce and use the report of Dr. Aitken.

B. Should ICBC be permitted to obtain independent medical examinations and reports?

20. ICBC moves to have this claimant undergo further independent medical examinations, an expression I use rather loosely since the motion refers to an independent functional capacity evaluation and a vocational assessment evaluation, in addition to an orthopedic evaluation.

21. I first must address the threshold issue of whether I have jurisdiction to order the independent medical examinations. Counsel for the claimant says I do not possess such jurisdiction and referred me to an earlier interlocutory decision I made in an arbitration, *Newell v. ICBC*, dated September 11, 1990, and a reconsideration of my decision dated November 1, 1990.

22. The facts in the *Newell* case bare some similarity to the facts in the underlying case. There the accident also happened in Washington state and depositions and medical reports were generated for that litigation. The claimant in that case also underwent an independent medical legal examination at the request of counsel for the defendant. Similarly, the authors of the various medical and vocational reports were deposed by Washington State defense counsel. Similar to this case, all medical legal reports in the possession of Mr. Newell were provided to the British Columbia counsel for ICBC. In the *Newell* case, ICBC argued, as they do in this case, that there were medical legal issues that needed to be addressed and that the medical legal reports generated up to that date were stale. In the *Newell* decision, I said that I searched in vain for statutory authority or any case authority to support my jurisdiction to order either a form of examination for discovery or order independent medical examinations. The predecessor Rule to Rule 19, quoted above, was put before me in the *Newell* arbitration. Nevertheless, I concluded at page 5 of my original *Newell* decision:

"In all the circumstances, and particularly given the lack of any express or implied provisions which would permit an arbitrator under the Rules with which I am governed to make the orders requested, I decline to do so. I make this decision with considerable misgivings since it seems to me the Rules should be broadened to permit an arbitrator to make the kinds of order sought by the claimant in this case in appropriate circumstances."

In my decision reconsidering my original decision, I said at page 5:

"Dealing with the unfairness argument, it is my view that there must exist at least an implied empowering mandate for an arbitrator to order that one of the parties undergo a form of examination for discovery or independent medical examination at the instance of the other party, before making such an order. None exists in my opinion."

23. The Rules that governed at the time of the *Newell* decision were amended in 1995 and again in 1998. Arbitrator Don Yule, Q.C. referred to my *Newell* decisions and the various changes to the Rules in a carefully reasoned arbitration decision, *Hayward v. ICBC*, handed down September 30, 2005. At page 5, Mr. Yule agreed that at the time of the *Newell* decision, there was no explicit power for an arbitrator to order a pre-hearing examination of a party nor was that subject matter included in the general powers of the arbitrator. He then went on to reference the fact that the 1995 rule changes specifically provided for pre-hearing oral examination for discovery under oath, either by agreement of the parties or by order of the arbitration tribunal. He found it significant that the arbitration tribunal was not required to be guided by the principle (now Rule 19(1)) which focuses on the fair treatment of each party and the granting of a full opportunity to present the party's case. Rather, he noted that the 1995 rule change required the arbitration tribunal to be guided by the goal of a just, speedy and inexpensive determination of the proceedings on its merits (now Rule 19(2)). See page 8 and 9 of *Hayward*. He then referenced the amendments to the 1998 Rules and found at page 13 that these amendments gave the arbitration tribunal the authority to order the pre-hearing examination upon oath of a party in the nature of an examination for discovery. At page 14, he said:

"By requiring an order of the arbitration tribunal for any pre-hearing oral examination on oath of a party, in the absence of the mutual consent of the parties, it seems to me the 1998 Rules are nevertheless reflecting some of the characteristics that distinguish arbitration from civil litigation. Under the 1998 rules the discretion to be exercised under Section 29(1)(j) is to be guided by the twin consideration for the conduct of the arbitration set out in Section 19, namely the requirements that each party be treated fairly and given full opportunity to present its case and that there be a just, speedy and economical determination of the proceeding on its merits. I am also mindful that UMP arbitrations may proceed in the absence of any underlying trial judgment."

He went on to say:

"Accordingly, in some circumstances it would be quite unfair to the respondent insurer to force it into an oral hearing without ever having had an opportunity to examine the claimant on oath regarding issues that are relevant to the arbitration proceeding. On the other hand, by requiring an order from the arbitration tribunal, the 1998 Rules provide a measure of protection to a party against time-consuming, expensive, irrelevant or marginally relevant examinations."

I agree with Mr. Yule's analysis and his over arching comments pertaining to the arbitration process.

24. The *Hayward* arbitration decision only addressed the right to order a pre-hearing oral examination of a party under oath, a matter that was expressly dealt with by amendments to the 1995 and the 1998 Rules.

25. I have reviewed the Rules that govern this arbitration as amended in 1995 and 1998 and I again find no express or implied authority in an arbitrator to order that the claimant undergo an independent medical examination or evaluation. This lack of jurisdiction is underscored by the fact that the 1995 and 1998 amendments to the Rules expressly empowered an arbitrator, at his or her discretion, to order a pre-hearing oral examination of a party.

26. I am mindful of the argument by ICBC that I must treat ICBC fairly and I must give ICBC the full opportunity to present its case. I am also mindful of my obligation that I must strive to achieve a just, speedy and economical determination of this proceeding on its merits. See Rule 19.

27. This accident and the injuries to this claimant happened over 14 years ago and without being critical of any counsel, the wheels of justice in this case are grinding very slowly, some might say too slowly. This claimant has been examined by a host of medical practitioners, both treating physicians and independent medical examiners, as well as other medical oriented practitioners. She has been examined under oath on two occasions on the subject of her damages. All of this evidence is at hand. Certainly, it can be argued that there are outstanding uncertainties pertaining to her medical condition and pertaining to her future care and capacity to earn income but that will always be the case.

28. I conclude that I have no jurisdiction to order a form of independent medical examination. I also wish to add that if I did have such jurisdiction and if that jurisdiction was discretionary, in this case and in all of the circumstances pertaining to this case, I would not exercise my discretion in favour of ordering the independent medical examinations as requested by ICBC.

29. I wish to point out to the parties that I am mindful of the Rules that permit me to call a witness on my own motion and, perhaps more importantly, to appoint experts to report on specific issues. If, during the course of this arbitration, it becomes apparent to me that contrary to what I presently generally see as a level playing field, one party is "stealing a march" on the other party, I will exercise my powers to ensure that each party is treated fairly and given a full opportunity to present its case.

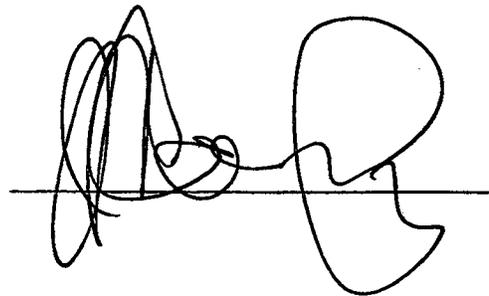
COSTS

30. Although I view the motion pertaining to my jurisdiction to order independent medical examinations to be the more important issue, this issue is novel and because of the mixed success by the parties, I order costs in the cause.

CONCLUSION

31. I order that ICBC can enter the independent medical report of Dr. Aitken, dated August 29, 2003, into evidence and use that report in the arbitration of the damages claim of Angelica Telescu. I find that I do not have the jurisdiction to order that Angelica Telescu attend independent medical examination by an orthopedic specialist, a functional capacity specialist, and a vocational specialist as requested by ICBC. I further find that if I did have such jurisdiction and it was discretionary, I would not exercise my discretion at this time and under the present circumstances of this case to order such independent medical examinations.

Dated: Jan. 19, 2010

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

APPENDIX 3

2900 - 550 Burrard Street
Vancouver, British Columbia, Canada V6C 0A3

604 631 3131 Telephone
604 631 3232 Facsimile



Avon M. Mersey
Direct 604 631 3121
Facsimile 604 632 3121
amersey@fasken.com

January 21, 2010
File No.: 257860.00160/14098

VIA EMAIL

Cross Border Law Corporation
204 – 1730 West 2nd Avenue
Vancouver, BC
V6J 1H6

Attention: Gregory L. Samuels

Dear Sirs:

Re: Tepei et al v. ICBC (UMP Arbitration) – Angelica Telescu

This letter is notice that we think that the decision of Mr. Camp dated January 19, 2010 on IMEs, is wrongly decided, particularly because the decision denied ICBC natural justice in terms of being afforded the opportunity to rebut the Claimants' claims.

It is our view that the current state of the law suggests that further recourse to this decision, as a preliminary ruling, cannot occur until a final award has been made. This includes challenges on appeal regarding a legal issue (*Commercial Arbitration Act*, s. 31), and/or seeking to have the award set aside for "arbitral error" (under *CAA* s. 30 and s. 1 (d) under definition of "arbitral error") for failure to observe the rules of natural justice.

Therefore, this letter is notice that we reserve our rights to challenge the arbitrator's decision in due course.

We also write to request that you reconsider your position and that the Claimant by *consent* attend the IME appointment with Dr. Bishop on January 27, which appointment we continue to hold.

Arbitrator JJ Camp's decision leaves open the option that he may appoint an independent medical expert under BCICAC Rule 27(4). Such examination would inevitably result in further delay. Your client's attendance by consent at this time would avert any such delays.

Please respond to our request at your earliest opportunity.

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Yours truly,

FASKEN MARTINEAU DuMOULIN LLP


for: Avon M. Mersey
AMM/MvN

FILED
COURT OF APPEALS
DIVISION II

10 APR 28 PM 3:06

STATE OF WASHINGTON

BY _____
DEPUTY

NO. 38945-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ADRIAN TEPEI, ANGELICA TEDESCU (nee TEPEI), BENJAMIN
TEPEI, CAMELIA COLCER (nee TEPEI), DAN TEPEI and DINA
TEPEI,

Appellants,

v.

INSURANCE CORPORATION OF BRITISH COLUMBIA,

Respondent.

Appeal from Superior Court of Lewis County
Honorable Richard L Brosey
NO. 07-2-00596-8

PROOF OF SERVICE OF APPELLANTS' REPLY BRIEF

GREG SAMUELS, CROSS BORDER LAW CORPORATION

Greg Samuels, WSBA #19497
Attorney for Plaintiffs/Appellants

204-1730 W. 2nd Avenue
Vancouver, B.C. V6J 1H6
(604) 742-4242

I certify under the penalty of perjury under the laws of Washington State that I am over the age of eighteen (18) years and not a party in this case. On the date given below, I served a copy of the foregoing document as follows:

Washington State Court of Appeals Division II
950 Broadway, Suite 300
Tacoma, Washington 98402-4454

- U.S. Mail
- Fax
- Legal messenger
- Electronic Delivery

Thomas Collins
MERRICK HOFSTEDT & LINDSEY
3101 Western Avenue, Suite 200
Seattle, WA 98121-1024

- U.S. Mail
- Fax
- Legal messenger
- Electronic Delivery

DATED: April 27, 2010



Kathryn McDonald
Of Cross Border Law Corporation
Vancouver, British Columbia
E-Mail: kathryn@crossborderlaw.com