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DIVISION III

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NO. 38945-2-II

STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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

Appellants/Plaintiffs,

v.

INSURANCE CORPORATION OF BRITISH COLUMBIA,

Appellee/Defendant.

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**BRIEF OF APPELLEE/DEFENDANT  
INSURANCE COMPANY OF BRITISH COLUMBIA**

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**ORIGINAL**

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## **I. INTRODUCTION**

COMES NOW Appellee Insurance Corporation of British Columbia ("ICBC") in response to Appellant's request for reversal of Judge Richard Brosey's Order dismissing this action against ICBC pursuant to CR 12(b)(2) for lack of personal jurisdiction. Judge Brosey correctly found that the Tepei Appellants<sup>1</sup> failed to fulfill their burden in presenting sufficient evidence to justify the exercise of personal jurisdiction over ICBC, a foreign crown corporation formed under the laws of British Columbia ("B.C.") and owned by the province of B.C. ICBC also submits that even if Judge Brosey's decision regarding a lack of personal jurisdiction was error, the undisputed facts make clear that Washington Courts lack subject matter jurisdiction over Plaintiffs claims against ICBC. Therefore, dismissal of the instant action against ICBC was proper and Plaintiffs' appeal should be denied.

## **II. STATEMENT OF THE CASE**

### ***1. Factual Background of Claims by Plaintiffs***

On October 27, 1996, the Tepei Plaintiffs were passengers in a 1991 Toyota Privia driven by their husband and father Petru Tepei. Plaintiffs were injured in a single vehicle rollover accident while proceeding in the northbound lanes of Interstate 5 in Lewis County, Washington.<sup>2</sup> Plaintiffs sustained serious personal injuries.<sup>3</sup>

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<sup>1</sup> (hereinafter "Plaintiffs" pursuant to RAP 10.4(e)).

<sup>2</sup> Appellants' Complaint for Declaratory Relief at ¶¶ 2.1-2.2. Appellants have not designated the Amended Complaint in the Clerk's Papers, the Amended Complaint does not appear on the official docket of the Lewis County Superior

Petru Tepei was insured by ICBC, a Crown Corporation whose shares are owned by the government of B.C. ICBC is charged with administering B.C.'s compulsory basic auto insurance program (known as "AutoPlan").<sup>4</sup> ICBC operates exclusively in B.C. with its principal offices in North Vancouver.<sup>5</sup> Pursuant to ICBC's liability coverage of Mr. Tepei, and given the severity of the injuries and the high likelihood that a suit would be filed in Washington, ICBC retained an experienced Washington trial attorney, Mark Scheer, as Mr. Tepei's counsel soon after the accident.

Plaintiffs also retained counsel near the same time to represent them in their potential claims related to the injuries they suffered in the 1991 accident. Plaintiffs' counsel approached ICBC prior to filing suit and requested that ICBC provide Plaintiffs with a loan of funds to allow Plaintiffs to successfully prosecute a claim against Michelin of North America and Uniroyal Tire (collectively "MNA"), the tire manufacturer of the blown out tire on Mr. Tepei's vehicle.<sup>6</sup> Plaintiffs' counsel believed that not only did Plaintiffs have a legitimate claim against MNA, but pursuing the claim in Washington state under Washington law was much

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Court and, therefore, is not properly before this Court for consideration. The operative Complaint is that which was filed May 16, 2007. CP 1437-1447. In ICBC's Answer to Plaintiffs' Complaint for Declaratory Relief, filed August 8, 2008 (CP 1261-1266) as affirmative defense number three, ICBC asserted that the Court did not have personal jurisdiction (CP 1265).

<sup>3</sup> Complaint at ¶ 2.4. (CP 1439).

<sup>4</sup> Decl. of Dan Burnett in Support of Defendant ICBC's Opposition to Plaintiffs' Motion for Leave to Amend ("Burnett Decl."), p.1; §A. (CP 821).

<sup>5</sup> Complaint ¶¶ 1.2, 2.5. (CP 1438-1439).

<sup>6</sup> Burnett Decl. at p.2, §D. (CP 822).

more favorable and filing suit in Lewis County, versus B.C., would be best for Plaintiffs.<sup>7</sup>

Recognizing that Plaintiffs had suffered serious injuries, and also recognizing that there was a potential claim against MNA which would reduce and/or eliminate liability against Mr. Tepei, ICBC authorized the negotiation on Mr. Tepei's behalf with Plaintiffs counsel for an advanced loan agreement.<sup>8</sup> At all times, however, ICBC was acting in its capacity as Mr. Tepei's insurer and sought to ensure the protection of Mr. Tepei's rights. While ICBC was willing to fund the ALA in order to ensure that Mr. Tepei's was protected from a judgment in excess of the liability coverage, ICBC was advancing significant capital on Mr. Tepei's behalf. In order to ensure that the protection was achieved for his client, ICBC introduced terms that allowed ICBC to recover its costs in the event that MNA was found completely liable and Plaintiffs recovered their damages in full. The purpose of the ALA, however, remained ensuring that ICBC protected its insured from an excess judgment.<sup>9</sup>

Having received the funds via the ALA, Plaintiffs filed suit in the Lewis County Superior Court against the driver, Petru Tepei, on a negligence theory and against MNA on a product liability theory.<sup>10</sup> On April 23, 2004, the jury returned a verdict in favor of Plaintiffs against the

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<sup>7</sup> *Id.* at at p.3, §E. (CP 823).

<sup>8</sup> *Id.* (CP 823).

<sup>9</sup> *Id.* (CP 823).

<sup>10</sup> Complaint at ¶ 3.7. (CP 1441).

driver, Petru Tepei, and further found that MNA was not liable to Plaintiffs. Judgment was entered on that award on August 25, 2004.<sup>11</sup>

ICBC was not a party to the Lewis County litigation and its nexus to that litigation was limited to the selection, retention, and payment of defense counsel and for the defense of ICBC's insured, Petru Tepei and the funding of the ALA on Mr. Tepei's behalf.<sup>12</sup> This defense was afforded Petru Tepei under the terms and conditions of AutoPlan, the B.C. government mandated basic liability insurance which is administered by ICBC on the province's behalf.<sup>13</sup>

In addition to liability coverage under AutoPlan, B.C. law requires ICBC to provide Underinsured Motorist Protection ("UMP").<sup>14</sup> Under the applicable B.C. regulations, this UMP coverage was potentially available to the Tepei Plaintiffs because they were residents in the household of Petru Tepei, owner of the ICBC insured vehicle.<sup>15</sup> However, UMP coverage was only available when it became clear that the Plaintiffs had been injured by an "underinsured driver."<sup>16</sup> This required that either ICBC agree that Mr. Tepei was fully liable for the harm to Plaintiffs or that Plaintiffs file a claim against all other potentially liable parties and pursue them to judgment. Because Plaintiffs believed that MNA was

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<sup>11</sup> Complaint ¶ 5.9. (CP 1444).

<sup>12</sup> Burnett Decl. at p.3, §E. (CP 823).

<sup>13</sup> Declaration of Sandra Farrell in Support of Defendant ICBC's Motion for Summary Judgment of Dismissal ("Farrell Decl.") at ¶¶ 2-3. (CP 1362).

<sup>14</sup> Burnett Decl. at p.2, §B. (CP 822).

<sup>15</sup> Farrell Decl. at ¶4. (CP 1363).

<sup>16</sup> Farrell Decl. at ¶5. (CP 1363).

liable under a products liability theory, a position ICBC agreed with, Petru Tepei could not be determined to be an “underinsured driver” until the resolution of the Lewis County action against MNA.

Following the August 2004 verdict, ICBC paid the \$200,000 (CND) of liability coverage to Plaintiffs.<sup>17</sup> After this, Plaintiffs sought to negotiate a settlement with ICBC of their claimed UMP benefits (which had become “perfected” upon the Lewis County’s determination Petru Tepei was 100% liable as the driver of the vehicle and the damages of the Plaintiffs exceeded the liability coverage of \$200,000 (CND)).<sup>18</sup> Plaintiffs filed a formal claim to ICBC for these benefits.<sup>19</sup> While Plaintiffs’ UMP coverage was limited to \$6,000,000 (CND), Plaintiffs sought to recover the \$9,100,000 (US) as was awarded by the Lewis County jury. ICBC refused based upon the applicable B.C. regulations dictating that damages (quantum) calculations are based on B.C. law considerations and not those of Washington State.<sup>20</sup>

Because Plaintiffs and ICBC were unable to reach agreement, an arbitration proceeding was commenced by Plaintiffs in British Columbia on September, 9, 2004, pursuant to the UMP provisions of the Revised Regulations (1984) of the Insurance (Motor Vehicle) Act, I.S.B.C. 1996 c 231.<sup>21</sup>

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<sup>17</sup> *Id.* at ¶9. (CP1363).

<sup>18</sup> *Id.* at ¶10. (CP 1363).

<sup>19</sup> *Id.* (CP 1363).

<sup>20</sup> Burnett Decl. at p.4, §F. (CP 824).

<sup>21</sup> *See also* Farrell Decl. at ¶6. (CP 1363).

The parties agreed to go forward with arbitration pursuant to the rules of the British Columbia International Commercial Arbitration Centre and a Canadian barrister was duly agreed upon by counsel and appointed to serve as arbitrator.<sup>22</sup> In pursuing the UMP arbitration, counsel for Plaintiffs argued that ICBC should be bound by the verdict of the jury in the Lewis County Court as to causation and quantum (damages).<sup>23</sup> ICBC argued that the Arbitrator was not bound by the Lewis County jury's determinations.

On August 8, 2006, the British Columbia UMP arbitrator issued his ruling that ICBC was not bound by the Lewis County jury verdict either as to causation or damages.<sup>24</sup> Joseph Boskovich, the British Columbia arbitrator, concluded in an extensive and well-reasoned opinion that the principles of *res judicata* were not applicable because the damages, as decided in the Lewis County trial, were governed by different laws and policy considerations than those of the British Columbia UMP process.<sup>25</sup> For example, Regulation §148.2(5)(b)—which governs UMP claims in British Columbia—provides that a trier of fact must measure damages by hearing testimony; seeing the evidence of the parties; and by assessing, adjusting, or apportioning damages in accordance with the laws of British Columbia.<sup>26</sup> Mr. Boskovich found that the following unique

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<sup>22</sup> *Id.* at ¶7. (CP 1363)

<sup>23</sup> *Id.* at ¶12. (CP 1364).

<sup>24</sup> *Id.* Exhibit A (Arbitration Determination of Joseph Boskovich). (CP 1365-1390).

<sup>25</sup> *Id.* (CP 1365-1390); *see also id.* at ¶9. (CP 1363).

<sup>26</sup> *Id.* (Exhibit A). (CP 1365-1390).

provisions under British Columbia law particularly compelling when considering the Lewis County Jury's determination of damages: a. Upper limit for non-pecuniary damages; b. Factors such as pre-existing or subsequent events or injuries; c. The Thin v. Crumbling Skull Rules (*i.e.*, egg shell plaintiff); d. Mitigation; e. Positive and negative contingencies with respect to issues such as employment; and f. Evidence regarding the applicable deductible amounts.<sup>27</sup>

Finally, Mr. Boskovich found that once an amount is determined pursuant to the aforementioned guidelines, then UMP liability of ICBC is determined by applying other restrictions set forth in §148.1(5)(d)(e) and (f) of the Revised Regulations of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c.231.<sup>28</sup>

In essence, the arbitrator agreed with the legal position taken by ICBC that the UMP arbitrator, acting as trier of fact, was entitled to hear all evidence involving damages anew, but would be obligated to follow the Lewis County Jury's determination of liability.<sup>29</sup> Again, this decision was a result of the unique statutory scheme of UMP compensation and the compensation system adopted by the government of B.C.<sup>30</sup>

Unhappy with this result, counsel for the Tepei Plaintiffs challenged the decision of the Canadian arbitrator, not based upon the merits of his decision, but on the alleged possible bias due to a pre-

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<sup>27</sup> *Id.* (CP 1388-1390).

<sup>28</sup> *Id.* (CP 1388-1390).

<sup>29</sup> *Id.* (CP 1388-1390).

<sup>30</sup> *Id.* at ¶4. (CP 1363).

existing financial relationship between ICBC and the arbitrator's law firm.<sup>31</sup> In April of 2007, The Tepei Plaintiffs initiated a proceeding under the Insurance (Motor Vehicle) Act, and the Commercial Arbitration Act for removal of the arbitrator, Boskovich, and for the vacation of all rulings and orders made by that arbitrator. This matter was presented to the Vancouver Registry of the Supreme Court of British Columbia (B.C.'s court of original jurisdiction) before the Honorable Mr. Justice Cullen. In October of 2007, Justice Cullen concluded that, while there was no evidence of actual bias, there was sufficient evidence to give rise to a reasonable apprehension of bias.<sup>32</sup> Justice Cullen specifically found that there was **no evidence in the proceedings of actual bias nor and evidence that the ruling was not "otherwise done with integrity."**<sup>33</sup> Nonetheless, because of the apprehension of bias, the arbitration was vacated along with all rulings of the arbitrator.<sup>34</sup> This proceeding was on appeal at the time of ICBC's 12(b)(2) motion to the British Columbia Court of Appeals.<sup>35</sup>

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<sup>31</sup> Burnett Decl. at p.4, §F. (CP 824).

<sup>32</sup> See generally *Tepei v. ICBC*, 2007 BCSC 1694, Reasons for Judgment by The Honourable Mr. Justice Cullen; attached as Exhibit B to the Declaration of Sandra Farrell. (CP 1393-1436); *id.* at pp. 40-42. (CP 1434-1436).

<sup>33</sup> *Id.* at p.42. (CP 1445).

<sup>34</sup> *Id.* at p.42. (CP 1445).

<sup>35</sup> Decl. of Farrell, ¶20. (CP 1364). The decision of Justice Cullen was affirmed and a new UMP arbitration process is now underway in B.C. regarding Appellants UMP benefits. The new UMP arbitrator has reached a decision nearly identical to that of Mr. Boskovich, regarding the application of Washington law to issues of liability and B.C. law to issues of quantum (damages). Because this ruling occurred after the dismissal by Judge Brosey, a copy of this opinion is attach as Appendix A for this Court's consideration.

As this challenge in B.C. was being initiated by Plaintiffs, they also filed the instant Complaint for Declaratory Judgment seeking to have the Lewis County court issue a declaration and/or an injunction prohibiting the UMP tribunal from making its evaluations under B.C. UMP laws and regulations.<sup>36</sup>

Given the impractical and inappropriate nature of this request, ICBC immediately moved to dismiss.<sup>37</sup> In the face of this motion, Plaintiffs sought leave to amend.<sup>38</sup> While Judge Brosey indicated he was amendable to such an amendment, Plaintiffs never formally amended. ICBC then renewed its attempt to have the matter dismissed, this time on a CR 12(b) motion for lack of personal jurisdiction.<sup>39</sup> ICBC's motion was granted.<sup>40</sup> ICBC then made a timely motion for its fees pursuant to RCW 4.28.185(5) which was granted and a judgment entered.<sup>41</sup>

### **III. ISSUES PRESENTED ON APPEAL**

1. Did Judge Brosey correctly determine that the retention of a Washington attorney to defend ICBC's insured, Petru Tepei, in Lewis County was insufficient contact with Washington to justify exercising personal jurisdiction? (Yes).

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<sup>36</sup> Complaint for Declaratory Relief, pp. 9-10. (CP 1446-1447).

<sup>37</sup> *See generally* Defendant ICBC's Motion for Summary Judgment of Dismissal. (CP 1312-1343).

<sup>38</sup> Plaintiff's Motion for Leave to Amend. (CP 828-830).

<sup>39</sup> Defendant ICBC's 12(b)(2) Motion to Dismiss. (CP 686-703).

<sup>40</sup> Order Granting Defendant ICBC's 12(b)(2) Motion to Dismiss. (CP 5-7).

<sup>41</sup> Judgment Pursuant to RCW 4.28.185(5). (CP 2-4).

2. Have Plaintiffs failed to show a connection between the alleged contacts by ICBC in Washington State and their articulated causes of action in their Complaint for Declaratory Relief which would justify specific personal jurisdiction over ICBC? (Yes).

3. Does this Court lack Subject Matter Jurisdiction over Plaintiffs' claims against ICBC, an agency of the sovereign Province of British Columbia, by operation of the Foreign Sovereign Immunity Act, 28 U.S.C. §1604? (Yes).

4. Did ICBC present sufficient evidence in its Summary Judgment of Dismissal to establish that Plaintiffs failed to state a claim upon which relief could be granted under the Declaratory Judgment act and by operation of the Priority of Action Rule? (Yes).

5. Upon finding a lack of personal jurisdiction, did Judge Brosey correctly award ICBC its fees and costs associated with defense of Plaintiffs actions in a Washington Court? (Yes).

#### **IV. DISCUSSION**

Plaintiffs have failed to present sufficient prima facie evidence that ICBC acted in a manner which would confer specific personal jurisdiction to Washington courts. In an attempt to fabricate the requisite contacts with Washington State to justify an exercise of personal jurisdiction, Plaintiffs attempt to break a single fact—the appointment of Washington counsel by ICBC to defend its insured Petru Tepei in a Lewis County tort action—into multiple acts and contacts. The Court should not be fooled by this tactic and instead find, as Judge Brosey correctly did, that ICBC's

passive fulfillment of its contractual obligations to its insured does not constitute purposeful availment and, therefore, personal jurisdiction is lacking.

In addition, ICBC submits that both the Lewis County Court and this Court do not have jurisdiction over the subject matter of this case under the federal Foreign Sovereign Immunity Act, 28 U.S.C. §1604. This Court is obligated to ensure that proper subject matter jurisdiction existed (and currently exists on appeal) and a question of subject matter jurisdiction can be raised at any time, including for the first time on appeal.<sup>42</sup>

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<sup>42</sup> RAP 2.5(a) ("[A] party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction ... A party or the court may raise at any time the question of appellate court jurisdiction; CR 12(h)(3) ("[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *see also* 20 Am. Jur. 2d Courts § 56:

"Jurisdiction" has been defined as the power of a court to hear and determine a cause of action presented to it. "Jurisdiction of a particular case" means the right, authority, and power to hear and determine a specific case within that class of cases over which a court has subject matter jurisdiction. Jurisdiction transcends all procedural considerations and involves the fundamental power and authority of the court itself. Jurisdiction does not relate to the rights of the parties but to the power of the court. There are three separate elements of the jurisdiction of a court: (1) jurisdiction over the person, (2) jurisdiction over the subject matter; and (3) jurisdiction to render the particular judgment sought, or, as is sometimes said, jurisdiction of the particular case.

[...]

**A court may raise the question of subject matter jurisdiction, sua sponte, at any time during the pendency of the action,**

Finally, ICBC submits that the Lewis County Court lacked jurisdiction to render the particular judgment sought, or, as is sometimes said, jurisdiction of the particular case.<sup>43</sup> ICBC raised all of these deficiencies in its Motion for Summary Judgment of Dismissal on July 2, 2008, only two months after Plaintiffs filed their Complaint for Declaratory Relief.<sup>44</sup> ICBC sought dismissal based upon a lack of subject matter jurisdiction, a lack of personal jurisdiction and dismissal based upon the fact that Appellant's Complaint failed to state a claim upon which relief could be granted under the Declaratory Judgment Act and the Priority of Action Rule (given that a separate UMP action concerning the same subject matter was pending in B.C. when Plaintiffs filed the instant action).<sup>45</sup>

Judge Brosey, while showing a full understanding of the "complete jurisdiction" challenge and arguments by ICBC, stated that he would entertain a motion by Plaintiffs to amend their complaint and gave them

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**even on appeal.** Nevertheless, the question of jurisdiction should be considered by the court before it looks at other matters involved in the case, such as whether the parties are entitled to a jury trial. It may, and must, do this on its own motion. Courts are bound to take notice of the limits of their authority, and if a want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order. (emphasis added).

<sup>43</sup> *State v. Golden*, 112 Wn. App. 68, 73 47 P.3d 587 (2002); see also 20 Am. Jur. 2d Courts § 56 (cited above).

<sup>44</sup> See ICBC's Motion for Summary Judgment of Dismissal, filed 07/02/08 ("Summary Judgment") (CP 1312-1343); Decl. of Thomas J. Collins in support of ICBC's Motion for Summary Judgment of Dismissal, filed 07/02/08 (CP 1344-1361); Farrell Decl. (CP 1362-1437).

<sup>45</sup> Summary Judgment. (CP. 1312-1343).

30 days to make the requisite motion.<sup>46</sup> While Plaintiffs made a motion for leave to amend, Judge Brosey did not enter an Order granting Plaintiffs the leave they sought and Plaintiffs never filed a signed and final version of their Amended Complaint.<sup>47</sup> All procedural irregularities and deficiencies of the Record presented aside, ICBC's legal arguments and supporting evidence are sufficiently in the Record before this Court on appeal.<sup>48</sup> Pursuant to RAP 2.5(a), ICBC requests that these arguments also be considered as another alternative means to uphold Judge Brosey's appropriate dismissal of Plaintiffs' claims.<sup>49</sup>

**A. *It Was Plaintiffs' Burden To Establish Personal Jurisdiction And They Failed To Do So.***

It is well established that the party wishing to have a court exercise personal jurisdiction over a foreign defendant bears the burden of establishing that such exercise would be proper under the law.<sup>50</sup> Here,

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<sup>46</sup> Transcript of 09/12/2008 Motion Hearing, pp. 18-20. (CP 865) (ICBC is unsure if Plaintiff has made a full and proper designation of the transcript as it is approximately 22 pages long, but ICBC is following Appellants designation of Court Papers).

<sup>47</sup> A copy of the Proposed Amended Complaint is found attached to the Decl. of Karen K. Koehler in Support of Plaintiffs' Motion for Leave to Amend. (CP 831-861).

<sup>48</sup> RAP 2.5 (a) (allowing the Court of Appeals to decide CR 12(b)(6) matters which are sufficiently set forth in the record).

<sup>49</sup> *See id.* (permitting an Appellee/Respondent to present alternative theories which would allow the Court of Appeals to affirm a lower court's decision on alternative grounds).

<sup>50</sup> *Raymond v. Robinson*, 104 Wn. App. 627, 633; 15 P.3d 697 (2001) ("The plaintiff bears the burden of making a prima facie showing of jurisdiction"); *see also In Re Halls Marriage*, 25 Wn. App. 530, 536; 607 P.2d 898 (1980) ("[U]pon a challenge to jurisdiction, the party asserting jurisdiction has the burden of establishing its existence.").

Plaintiffs failed to shoulder the burden of demonstrating that the exercise of personal jurisdiction over ICBC was warranted.

Plaintiffs point mainly to the drafting of the Advanced Loan Agreement ("ALA") between Plaintiffs and Petru Tepei and the negotiations regarding the same as evidence of purposeful availment by ICBC.<sup>51</sup> ICBC—as Mr. Tepei's insurance company and the source of the funds paid on behalf of Petru Tepei—was also informed of the negotiations regarding the drafting of the ALA between Mr. Scheer and Plaintiffs' counsel. ICBC's involvement, however, did not take place in Washington. Rather, ICBC, and Dan Burnett—ICBC's adjuster in charge of monitoring the defense of Mr. Petru Tepei in Washington by Mark Scheer—was in Vancouver, B.C. ICBC's involvement with the drafting was in the form of passive receipt of report letters from Mr. Scheer reporting on the negotiation process.

Plaintiffs point to one meeting which took place in Seattle, Washington, on or about April 30, 1998 (and the plans for a future meeting in Bellingham, Washington), to support their contentions of personal jurisdiction.<sup>52</sup> However, there is no indication in the email cited that the discussion was focused on the ALA, but rather spoke generally

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<sup>51</sup> A copy of the fully executed ALA is attached to Appellants' Proposed Amended Complaint as Appendix A. The Proposed Amended Complaint is contained in the Decl. of Karen K Koehler, dated 10/10/2008 (CP 831-836).

<sup>52</sup> Appellants Brief at pp. 5-8.

about the defense of Petru Tepei.<sup>53</sup> In fact, it appears that this email was sent prior to any proposal of the ALA by Plaintiffs' Counsel because the email speaks of "settlement for limits," not a loan.<sup>54</sup>

This same evidence and arguments were relied upon below and Judge Brosey rejected Appellant's claim that this contact was enough to establish purposeful availment. Instead, Judge Brosey found that this passing contact with Washington as insufficient to establish purposeful availment since it was undertaken as a part of ICBC's passive fulfillment of its insurance obligations imposed by B.C. law to defend Petru Tepei for the accident that occurred in Washington.<sup>55</sup>

Beyond this, it is uncontroverted that all other aspects of the ALA show it was to be a B.C. contract, entered into between citizens of B.C., guided by B.C. law and regulations (UMP) and paid for in Canadian funds.<sup>56</sup>

There is nothing in the document itself, or in its formation, which indicates that ICBC directed its negotiations and/or activities regarding the

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<sup>53</sup> Email from Dan Burnett to Mark Scheer, date 04/28/1998. A copy is attached to the Declaration of Karen K. Koehler in support of Plaintiffs' Opposition to ICBC's CR 12(b)(2) motion (Exhibit D). (CP 336).

<sup>54</sup> *Id.* ("Plaintiff counsel would like to discuss the possibility of settling out now for the limits [\$200,000 CND] and he [will pursue] uniroyal afterwards."). (CP 336).

<sup>55</sup> Transcript of 01/20/2009 CR 12(b)(2) Motion Hearing, by Judge Brosey, p.43-49. (CP 230).

<sup>56</sup> ALA at p.4, §§ 6-7.

drafting of the ALA into the State of Washington. Mr. Scheer, who was retained as defense counsel for ICBC's insured, Mr. Petru Tepei, was involved in the drafting on behalf of Mr. Petru Tepei (ICBC's insured) and did not represent ICBC.<sup>57</sup> Moreover, as Judge Brosey correctly found, Plaintiffs' counsel originated the idea of the ALA and its purpose was to be a mechanism to fund the litigation against MNA which otherwise may not have occurred due to lack of funding.<sup>58</sup>

Plaintiffs provide no evidence to contradict these facts. The only evidence which Plaintiffs point to regarding the relationship between Mr. Scheer and ICBC, was nothing more than standard communications between retained counsel and an insurance carrier informing the carrier of the best defense available to the insured.<sup>59</sup> These interactions, as Judge Brosey correctly found, are not the type and quality of contacts which establish purposeful availment and justify and exercise of personal jurisdiction over a foreign defendant.<sup>60</sup>

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<sup>57</sup> Appellants attempt to interpret provisions of the ALA to fabricate representation of ICBC by Mark Scheer. This is without merit. Throughout the ALA it is clear that Mark Scheer is Petru Tepei's attorney and that ICBC is not represented by counsel, but rather is the funding source for the loan made on Mr. Tepei's behalf. The inclusions of anti-windfall provisions were meant merely to protect the money of the B.C. government (and ultimately the people of B.C.) which is entrusted to ICBC.

<sup>58</sup> Transcript of 01/20/2009 CR 12(b)(2) Motion Hearing, by Judge Brosey, p.43-49. (CP 230).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

**B. Lewis County Does Not Have Personal Jurisdiction over ICBC.**

As a general rule, state law determines the jurisdiction of state courts.<sup>61</sup> Here, that jurisdictional grant exists in the Washington Long Arm Statute, RCW §4.28.185. However, one important limitation on any State's power to exercise personal jurisdiction is the Due Process Clause of the Fourteenth Amendment to the United States Constitution (hereinafter "Due Process Clause").<sup>62</sup> Therefore, an evaluation of personal jurisdiction is a two-part inquiry.<sup>63</sup> First, a court must ascertain whether jurisdiction over an out-of-state defendant is allowed under RCW §4.28.185; second a determination must be made whether such an exercise would violate the Due Process Clause.

The Washington long arm statute, as codified by RCW §4.28.185, sets forth six specific types of conduct which may subject the actor to jurisdiction by a Washington Court.<sup>64</sup> Again, upon a challenge to jurisdiction, the party asserting jurisdiction has the burden of establishing that jurisdiction exists.<sup>65</sup>

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<sup>61</sup> See, e.g., RCW § 2.08.010 (establishing the jurisdiction of the Washington Superior Courts).

<sup>62</sup> *Grange Ins. Asso v. State*, 110 Wn.2d 752, 753; 757 P.2d 933 (1988).

<sup>63</sup> *Id.* at 756.

<sup>64</sup> RCW § 4.28.185(1) (a)-(f).

<sup>65</sup> *In Re Halls Marriage*, 25 Wn. App. 530, 607 P.2d 898 (1980).

1. *RCW § 4.28.185, Washington's Long-Arm Statute, does not grant Personal Jurisdiction over ICBC.*<sup>66</sup>

In Washington, a court must be able to show that it has either general or specific jurisdiction over a defendant. Here, Plaintiffs allege that Lewis County had specific jurisdiction over ICBC but failed to show how Plaintiffs' allegations are related directly to ICBC's alleged contacts with Washington State.<sup>67</sup>

Specific Jurisdiction arises when a defendant commits a specific act enumerated under RCW § 4.28.185(1) which gives a court jurisdiction over a case or controversy arising from that same conduct.<sup>68</sup> Not only must there be a satisfaction of one of the elements of RCW §4.25.185 in order to justify the exercise of specific personal jurisdiction but the cause(s) of action asserted must also arise from this same conduct.<sup>69</sup>

Here, as Judge Brosey correctly found, there was insufficient conduct by ICBC directed toward Washington State to satisfy RCW §4.28.185(1)(a). Plaintiffs believe that the act of ICBC fulfilling its contractual obligation to provide Mr. Tepei a legal defense somehow

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<sup>66</sup> The legal analysis under the long-arm statute is in many ways similar and applies to the Due Process clause analysis and is often undertaken as a single inquiry. *See, e.g., Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850-53 (9th Cir. 1993).

<sup>67</sup> Complaint at ¶ 1.3 ("Jurisdiction over this action lies pursuant to RCW 4.28.185(1)(a), by virtue of certain acts taken and/or directed by defendant ICBC in the context of litigation before the Courts of Lewis County, Washington.). (CP 1437-1447).

<sup>68</sup> RCW §4.28.185 (3) ("Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section"); *see also Washington Equip. Mfg. Co. v. Concrete Placing Co.*, 85 Wn. App. 240, 244; 931 P.2d 170 (1997).

<sup>69</sup> *Id.*

provides the basis of jurisdiction.<sup>70</sup> This is not correct. Even if Plaintiffs transformation of ICBC's passive fulfillment of insurance obligations into active conduct in Washington State were accepted, Plaintiffs' claims do not arise out of this alleged conduct, but rather arises from unrelated acts concerning the UMP arbitration in B.C.<sup>71</sup>

Rather than asserting a claim arising from the alleged conduct of ICBC in Washington, Plaintiffs believe that they can show conduct in the State of Washington to justify Declaratory and/or injunctive relief. This type of assertion is similar to a claim of general jurisdiction over a foreign defendant, meaning significant pervasive contacts with the forum state to justify an exercise of personal jurisdiction over a defendant for conduct not related to the contacts with the forum state.<sup>72</sup> Plaintiffs have clearly failed to present evidence which would justify general personal jurisdiction from being asserted.

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<sup>70</sup> See Complaint at ¶6.6 (stating that the conduct of ICBC gives rise to liability as a 'de facto party') (CP 1446).

<sup>71</sup> Appellants' Complaint for Declaratory Relief (the operative complaint) does not seek to redress any harm visited in Washington State (such as a contract or a tort) but rather seeks to prohibit ICBC from conducting itself in a B.C. UMP arbitration. There is no way that this relief is directly related to the alleged conduct of ICBC in Washington State to justify specific jurisdiction. RCW §4.28.185 (3).

<sup>72</sup> See *Raymond v. Robinson*, 104 Wn. App. 627, 633; 15 P.3d 697 (2001) ("General jurisdiction over a nonresident defendant is proper when the defendant's actions in the state are so substantial and continuous that justice allows the exercise of jurisdiction even for claims not arising from the defendant's contacts within the state.").

2. *ICBC had insufficient contacts with Washington.*

Judge Brosey correctly determined that ICBC had insufficient contacts with Washington State to justify and exercise of specific personal jurisdiction.<sup>73</sup> Similarly, insufficient contacts to justify personal jurisdiction were also found by the Washington Supreme Court in *Oliver v. Am. Motors Corp.*<sup>74</sup> In *Oliver*, the plaintiff purchased a car from a dealer in Oregon.<sup>75</sup> The majority of the negotiations took place in Oregon as did the sale and execution of the contract.<sup>76</sup> The only connection that the dealer had with the tort (a claimed defective condition in the car which manifested in Washington) was that the car that they sold to the plaintiff was the subject of the claim.<sup>77</sup> The Washington Supreme Court held that to exercise jurisdiction over an out-of-state defendant who had only an "attenuated connection" to a tort occurring in Washington State would offend the traditional notions of fair play and substantial justice and would not be justified by the Washington long-arm statute.<sup>78</sup>

The same conclusion was reached in *Lewis v. Bours*.<sup>79</sup> In *Lewis*, the Washington Supreme Court was asked to determine if there had been satisfaction of the long-arm statute in connection with a medical malpractice claim against an Oregon doctor for complications arising out

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<sup>73</sup> Order Granting ICBC's 12(b)(2) Motion to Dismiss. (CP 228-229).

<sup>74</sup> 70 Wn.2d 875, 879, 425 P.2d 647 (1967).

<sup>75</sup> *Id.* at 876.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 889-90.

<sup>79</sup> 119 Wn.2d 667; 835 P.2d 221 (1992).

of prenatal care which a Washington resident received in Oregon.<sup>80</sup> Again, the Court held that there must be more than a “passing connection” to the State of Washington is required in order to satisfy the long-arm statute's requirements.<sup>81</sup> The Court held that an act committed in another jurisdiction could not form the basis of specific jurisdiction in the Washington Courts.<sup>82</sup>

Judge Brosey correctly found that to be the case here. ICBC is a crown corporation owned by the government of B.C. Plaintiffs are citizens of B.C. The only fact which ties any of these foreign entities to Washington State is the fact that ICBC's insured, Mr. Tepei, was involved in an auto accident in Lewis County. It bears repeating that Plaintiffs do not allege that ICBC conducts regular business in Washington. Plaintiffs do not contend that ICBC has regular contracts with any Washington resident or that ICBC committed any other specific act within Washington State, save for providing a defense for its insured, Mr. Tepei, as ICBC was required to do under its contractual obligations. In fact, Plaintiffs cannot assert this, because ICBC did not do these activities in Washington.<sup>83</sup> As in *Oliver* and *Lewis*, these scant and ancillary contacts are insufficient to satisfy RCW §4.28.185 and the Due Process Clause.

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 674.

<sup>82</sup> *Id.*

<sup>83</sup> Farrell Decl. at ¶¶ 17-20. (CP 1364-65).

3. *Exercising Personal Jurisdiction over ICBC as a Foreign Entity Would Violate the Due Process Clause.*

In *Quigley v. Spano Crane Sales & Serv.*, the Washington Supreme Court held there are three basic factors that must be present before a court can properly entertain an action over a foreign entity without offending due process.<sup>84</sup> The first is that the nonresident or foreign corporation must purposefully do some act or consummate some transaction in the forum state.<sup>85</sup> Second, the cause of action must arise from, or be connected with, such act or transaction.<sup>86</sup> Finally, the exercise of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.<sup>87</sup> These same factors are evaluated by the United States Supreme Court when determining the limits of personal jurisdiction.<sup>88</sup>

The first element is one of “purposeful availment.” The United States Supreme Court has described that element as “ensuring that a defendant will not be hailed into a jurisdiction solely as a result of

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<sup>84</sup> 70 Wn.2d 198; 422 P.2d 512 (1967).

<sup>85</sup> *Id.* at 202 (citing *Tyee Constr. Co. v. Dulien Steel Products, Inc.*, 62 Wn.2d 106; 381 P.2d 245 (1963)).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-78; 105 S. Ct. 2174; 85 L. Ed. 2d 528 (1985); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102; 107 S. Ct. 1026; 94 L. Ed. 2d 92 (1987); *see also Grange Ins. Asso v. State*, 110 Wn.2d 752, 758; 757 P.2d 933 (1988).

'random,' 'fortuitous,' or 'attenuated' contacts” which may exist between the foreign defendant and the forum state.”<sup>89</sup>

The rationale in *Burger King* has been adopted by Washington courts.<sup>90</sup> In this litigation, Plaintiffs do not allege that ICBC solicits any business from Washington residents. The Tepei Plaintiffs do not allege that ICBC insures Washington residents. Plaintiffs do not contend that ICBC insures any property or businesses in the State of Washington. Plaintiffs do not allege that ICBC is a registered insurer under Washington law, including RCW 48.05.010. The fact that ICBC policyholders occasionally drive within the boundaries of the State of Washington is certainly not sufficient to meet this purposeful requirement. Because ICBC is not directing its activities toward Washington state or Washington residents, ICBC has not "purposely availed" itself of the benefits and burdens of the laws of Washington State in a manner that would justify the exercise of personal jurisdiction over ICBC.

Here, the vast majority of ICBC’s activity occurred in B.C., including the negotiating of the ALA, its execution and its future consequences. No one denies that these activities had a tangential relationship with the Lewis County accident; however, ICBC's actual conduct did not occur in Washington State. ICBC's insured was sued in Lewis County and ICBC simply met its contractual obligations to provide

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<sup>89</sup> *Burger King* 417 U.S. at 475-76 (citations omitted).

<sup>90</sup> See, e.g., *Raymond v. Robinson*, 104 Wn. App. 627, 637; 15 P.3d 697 (2001) (citing *CTVC of Haw. Co. v. Shinawatra*, 82 Wn. App. 699, 710, 919 P.2d 1243, 932 P.2d 664 (1996)).

a defense to its insured. In providing this defense, ICBC was complying with B.C. insurance and contract law. As Judge Brosey found, this passive fulfillment of a B.C. contractual obligation which arose independent of Washington law is not the type of deliberate act in the forum state that is required to establish personal jurisdiction. The United States Supreme Court held that contacts such as these can, at best, be considered "random, fortuitous, and attenuated" and not the quality of contact required to satisfy the Due Process Clause.<sup>91</sup> Judge Brosey correctly found the same.

4. *The Exercise of Personal Jurisdiction over ICBC would offend traditional notions of fair play and substantial justice under the Federal Due Process Clause.*

Exercising personal jurisdiction over ICBC would offend traditional notions of fair play and substantial justice. This concept is at the heart of any due process evaluation.<sup>92</sup> Even if Plaintiffs could somehow show that ICBC had "purposefully availed" itself of the protections and benefits of Washington law—and that its claims arise from the defendant's contacts with Washington—the Court must still consider whether "the assumption of jurisdiction offends traditional notions of fair

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<sup>91</sup> *Burger King*, 471 U.S. at 475-46 (citations omitted).

<sup>92</sup> *International Shoe v. State of Washington*, 326 U.S. 310, 316; 66 S. Ct. 154; 90 L. Ed. 95 (1945).

play and substantial justice.”<sup>93</sup> As the Supreme Court held in

*International Shoe*:

Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.<sup>94</sup>

The Ninth Circuit Court of Appeals has fleshed out this statement and identified seven factors to be weighed in evaluating the reasonableness of exercising personal jurisdiction in any given case.<sup>95</sup> While no single factor is dispositive, a court should balance all seven factors in making its determination regarding the existence of personal jurisdiction.<sup>96</sup> In this case, the balancing of these factors establishes that

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 319.

<sup>95</sup> *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1442 (9th Cir. 1987) (holding that when making a decision regarding whether personal jurisdiction is constitutional, a court should consider:

(1) the extent of the defendants’ purposeful interjection into the forum state’s affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants’ state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the Appellant’s interest in convenient and effective relief; and (7) the existence of an alternative forum.).

<sup>96</sup> *Id.* at 1442.

this Court's exercise of personal jurisdiction over ICBC would not comport with Due Process.<sup>97</sup>

***C. Plaintiffs' Brief fails to articulate a new or valid theory of personal jurisdiction***

Plaintiffs set forth six separate allegations regarding ICBC's conduct which they claim give rise to personal jurisdiction over ICBC. These same arguments were presented to, and rejected by, Judge Brosey when considering ICBC's CR 12(b)(2) Motion to Dismiss.<sup>98</sup>

***1. Plaintiffs allege that ICBC "wrongfully denied" Petru Tepei's liability.***

Plaintiffs' first allegation is that ICBC improperly denied that its insured was liable for the Lewis County accident and by this act, ICBC "induced" Plaintiffs to institute litigation.<sup>99</sup> This allegation is completely unsupported by the Record.

First, it was believed by Plaintiffs' counsel—as well as counsel for Mr. Tepei—that there was a legitimate chance that a portion, if not all, liability could have been assigned to Michelin of North America and Uniroyal under a product liability theory. This is evidenced by Mr. Samuels' solicitation of ICBC for an advanced loan to prosecute such a

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<sup>97</sup> ICBC has set forth a full evaluation of these factors in its original CR 12(b)(2) motion to dismiss, therefore, here they will not be addressed. *See* ICBC's CR 12(b)(2) Motion to Dismiss at pp. 8-13. (CP 686-703).

<sup>98</sup> Response in Opposition to ICBC's CR 12(b)(2) Motion to Dismiss ("Response") at pp. 3-4. (CP 273-303).

<sup>99</sup> Appellants' Brief at p. 4; *see also* Response p.3. (CP 273-303).

claim and his clients' choice to prosecute their claim in what was perceived to be the more favorable venue of Lewis County, as opposed to British Columbia ("B.C.").

Second, ICBC was obligated under the applicable regulations to require that all liability against other possible at-fault entities to be resolved prior to addressing UMP coverage (*i.e.*, a determination that Mr. Tepei was actually "underinsured" as defined by the regulation.<sup>100</sup> This was not a deliberate choice, a scheme or sinister plot by ICBC as Plaintiffs allege, but rather compliance with the mandate set forth in the applicable regulations which ICBC was bound to follow.

2. *Plaintiffs allege that Mark Scheer's retention and "pre-litigation defense" of Mr. Petru Tepei was calculated to harm the Plaintiffs*

Plaintiffs attempt to import a sinister purpose behind ICBC's act of providing Mr. Petru Tepei with defense counsel when it was clear a claim was imminent and would likely be filed in Lewis County. Nothing could be further from the truth. This accident resulted in serious injuries to Plaintiffs. There was no doubt that a claim was going to be made against Mr. Tepei. ICBC's retention of Mr. Scheer was not only proper and timely, but was indisputably in the best interest of Mr. Tepei, given the

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<sup>100</sup> Samuels Decl. in Support of Plaintiff's Opposition to ICBC's 12(b)(2) Motion to Dismiss (Exhibit D) (Revised Regulations to the Insurance (*Motor Vehicle*) Act, §148) (Hereinafter "Revised Regulations"). (CP 358-620).

particular facts of this case. As far as Plaintiffs' assertions of improper motive and intent by ICBC, these allegations are completely unsupported. Plaintiffs use amorphous words like "wrongfully directed" and "calculated" but fail to provide any specific facts to support such allegations.

3. *Plaintiffs allege that ICBC was actively involved in forming the ALA*<sup>101</sup>

Plaintiffs allege that ICBC was involved in a "joint venture" in the Lewis County litigation. This contention lacks evidentiary support. Plaintiffs provide no authorized statements by ICBC substantiating this charge. The terms of the ALA do not support this contention and even the inadmissible evidence submitted in support of their Response fails to support this contention.<sup>102</sup> In fact, the letters and memorandum indicate that ICBC's adjuster, Mr. Burnett, was simply being kept informed of the negotiations taking place by Mr. Scheer and Mr. Samuels.<sup>103</sup> This is routine in all personal injury cases when an insured is provided a defense.

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<sup>101</sup> ICBC concedes that it was a loaner under the ALA, but does not concede that this agreement was entered into in Washington. The ALA was a loan agreement entered into by B.C. parties, regarding B.C. insurance coverage, relating to B.C. property interests and paid for in Canadian funds. ICBC submits that it was, therefore, a B.C. contract.

<sup>102</sup> The signature lines of the ALA specifically set forth that Mark Scheer is Petru Tepei's attorney only, not ICBC's attorney. (CP 831-836).

<sup>103</sup> Appellants' Brief at pp. 5-6.

4. *Plaintiffs allege that Mr. Scheer was controlled by ICBC for ICBC's benefit*

Plaintiffs make the allegation that ICBC "directed" Mr. Scheer and his activities were for the sole benefit of ICBC, specifically in regards to the drafting of the ALA and attendance at damages depositions in the Lewis County action.<sup>104</sup> Again, this allegation is unsupported by evidence. First, the correspondence referenced by Plaintiffs clearly establishes that Mark Scheer at all times was looking out for and protecting the interests of Petru Tepei, his client.<sup>105</sup> Second, the provisions of the ALA clearly set forth the benefits which were received by Mr. Tepei, (as well as those received by the Plaintiffs).<sup>106</sup> Finally, it was Plaintiff's refusal to allow a bifurcated trial on issues of liability and damages, which compelled Mr. Scheer's or his associate's attendance at damages deposition. If a determination of liability were to have been reached when Petru Tepei requested, the entire issue of damages would have been removed from the case. If ICBC was truly using Mark Scheer

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<sup>104</sup> *Id.* at pp. 8-9.

<sup>105</sup> *See* Koehler Decl. in Support to Plaintiff's Opposition to ICBC's CR 12(b)(2) Motion to Dismiss (Exhibit C) (Letter from Mr. Scheer to Mr. Tepei Dated January 13, 1999) (detailing exactly why the ALA was beneficial to both Mr. Tepei and his family moving forward in their claims against the tire manufacturer); *see also id.* (Exhibit E) Letter from Mr. Scheer to Dan Burnett dated December 7, 1998, p.2) ("The main problem with the agreement as revised by claimants is that it does not protect Mr. Tepei from later attacked by Uniroyal under joint and several liability.") (CP 305-357).

<sup>106</sup> ALA Recitals #5 and #6. (CP 831-836).

as its agent to gather damages information, there would be no reason for Mr. Scheer to make a motion to bifurcate. Moreover, Mark Scheer was obligated to attend depositions in the case, even if Mr. Tepei's liability was limited under the ALA, simply because he was counsel of record and had a responsibility to his client to attend all proceedings.

Plaintiffs point to the fact that this information was then transmitted to Dan Burnett as the adjuster and attempt to import a nefarious motive. This argument was properly rejected by Judge Brosey when presented below and Judge Brosey found that these were ordinary interactions between an appointed defense attorney and the adjuster on the file.<sup>107</sup>

5. *Plaintiffs fault ICBC for appointing Dan Burnett as the adjuster*

Contrary to Plaintiffs unsupported contention, Dan Burnett was appointed as the adjuster for the liability claim only during the formation of the ALA as well as the underlying tort litigation. This is because, while ICBC recognized the potential for future UMP claims by Plaintiffs, there had been no determination that Mr. Tepei was both at fault and "underinsured" within the meaning of the applicable B.C. regulations. Only after the judgment was entered in Lewis County and liability

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<sup>107</sup> Transcript of 01/20/2009 CR 12(b)(2) Motion Hearing, by Judge Brosey, p.43-49. (CP 230).

imposed upon Mr. Tepei, in an amount in excess of the maximum amount of his liability insurance, did the UMP claim officially arise. It was at that point that Dan Burnett assumed the role of the UMP adjuster.<sup>108</sup> The claim that ICBC intentionally directed Mr. Burnett to leverage third-party and first-party claims and settlements does not match the reality of the situation. The reality is that Plaintiffs received the full liability limits (\$200,000 CND) and are now currently in the process of attempting to recover UMP benefits in the pending B.C. arbitration proceeding.

6. *Plaintiffs erroneously state that ICBC refused to abide by the Lewis County Jury determination*

ICBC has consistently stated to Plaintiffs, the B.C. Arbitrator, and to this Court, that it is bound by the liability determination by the Lewis County Jury. ICBC, however, is obligated under B.C. Regulations to apply the law of the Province to issues of damages (quantum) in the UMP arbitration.<sup>109</sup> Contrary to Plaintiffs' assertions, ICBC had no intention of

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<sup>108</sup> Mr. Burnett's role as the liability claim adjuster ended upon the entry of the verdict and payment of the remainder of the \$200,000 (CND) liability policy limits. ICBC submits, and Appellants have failed to show otherwise, that Mr. Burnett was never handling issues of liability coverage at the same time that he was handling UMP coverage issues. Appellants, in fact, admit that this is the procedure in B.C. regarding UMP in their Complaint at ¶2.7 (CP 1439) ("Unlike the analogous 'UIM' claim in Washington State, a British Columbia UMP claim **cannot be made by a claimant prior to the resolution of any outstanding third party liability claim...**") (emphasis added).

<sup>109</sup> Decl. of Greg Samuels in Support of Plaintiffs' Opposition to ICBC's 12(b)(2) Motion to Dismiss (Exhibit D) (§148.2(6) of Revised Regulations) (CP 358-620).

violating the "sanctity and respect" of Washington law, but rather was following B.C.'s clear provisions regarding UMP benefits.

What is more, Plaintiffs explicitly agreed in the ALA that UMP provisions of B.C. law would be applicable to any future UMP claim.<sup>110</sup>

The argument advanced by Plaintiffs that the ALA was adverse to their interests is remarkable since the creation of the ALA was the idea of their counsel to begin with, and provided Plaintiffs with the funds which they funded their suit against MNA.<sup>111</sup>

***D. Plaintiffs erroneously argue that the simple fact that ICBC's conduct had a connection to Washington State is sufficient to justify a Washington Court to issue a declaratory judgment or injunction.***

A court must look at the "quality and nature of the defendant's activities, not the number or acts or mechanical standards."<sup>112</sup> Contrary to Plaintiffs' contentions, "[a] state does not acquire that jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved by considering the acts of the defendant."<sup>113</sup> Plaintiffs, have focused solely upon their claim that Washington is the "center of gravity"

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<sup>110</sup> ALA at §E6 and E7. (CP 831-836).

<sup>111</sup> *Id.* (§E7). (CP 831-836).

<sup>112</sup> Responses at p.9 (citing *CTVC of Haw. Co. v. Shinawatra*, 82 Wn. App. 699, 710; 919 P.2d 1243 (1996)).

<sup>113</sup> *Id.* at 710 (citing *Hanson v. Denckla*, 357 U.S. 235, 253; 78 S. Ct. 1228; 2 L. Ed. 2d 1283 (1958)) (internal editing omitted).

of the controversy (*i.e.*, the accident and tort litigation occurred in Lewis County), yet they fail to recognize that, without more, these facts do not constitute purposeful availment by ICBC of the benefits and burdens of the laws of Washington State.

Plaintiffs are again correct to note that, "when analyzing where a contractual obligation is sufficient to establish 'purposeful availment' by a nonresident defendant, the Court should consider 'the entire business transaction, including the prior negotiations, contemplated future consequences, the terms of the contract and the parties' actual course of dealing.'"<sup>114</sup>

However, a review of the full paragraph from *MBM* as quoted by Plaintiffs reveal a fundamental item which Appellant's counsel fails to point out and is missing here. The full passage reads:

The mere execution of a contract with a resident of the forum state does not alone automatically fulfill the "purposeful act" requirement [citation omitted] Instead, the entire business transaction, including the prior negotiations, contemplated future consequences, the terms of the contract and the parties' actual course of dealing must be evaluated in determining whether the defendant purposefully established minimum contacts by entering into a contract **with a resident of the forum state.**<sup>115</sup>

In the present case, there is no resident of the forum state which is a party to a contract. All parties to the ALA are resident of British

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<sup>114</sup> Appellants' Brief at p.17 (citing *MBM Fisheries, Inc. v. Bollinger Machine Ship & Shipyard, Inc.* 60 Wn. App. 414, 423; 804 P.2d 27 (1991))

<sup>115</sup> *MBM Fisheries*, 60 Wn. App at 423 (emphasis added).

Columbia, Canada. Plaintiffs have no connection to Washington State other than the fact that they had the misfortune of being involved in an accident in Lewis County. This fact is crucial.

In summary, Judge Brosey correctly determined that (1) the fact that ICBC retained an attorney in Washington state to represent Mr. Tepei; (2) that Plaintiffs' counsel petitioned the Lewis County Court for appointment of a Guardian as Litem for each of the minor Tepei children;<sup>116</sup> and (3) that the auto accident occurred in Washington, did not convert the ALA into a Washington contract or otherwise create specific personal jurisdiction over ICBC in this case. This decision was correct and should be affirmed.

***E. Plaintiffs' argument regarding improper application of foreign law under CR 44.1 is without merit.***

Plaintiffs argue that Judge Brosey improperly evaluated the provisions of British Columbia law when deciding in ICBC's favor and finding a lack of personal jurisdiction. However, the Tepei Plaintiffs fail to heed to the explicit provisions of CR 44.1 which states in pertinent part:

(c) Other Jurisdictions. The court, in determining the law of any jurisdiction other than a state, territory, or other jurisdiction of the United States, may consider any relevant written material or other source, including testimony, having due regard for their trustworthiness, whether or not submitted by a party and whether or not admissible under

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<sup>116</sup> Even the minor children were B.C. residents and it was Appellants own initiative to seek the appointment of Guardians ad litem in Washington and not in B.C.

the Rules of Evidence. If the court considers any material or source **not received in open court**, prior to its determination the court shall:

- (1) Identify in the record such material or source;
- (2) Summarize in the record any unwritten information received;
- and
- (3) Afford the parties an opportunity to respond thereto.

The court's determination shall be treated as a ruling on a question of law.<sup>117</sup>

Plaintiffs make much of the fact that Judge Brosey improperly questioned ICBC's counsel during oral argument on the motion to dismiss regarding the functioning of B.C.'s insurance regulations and assert that this evidence was a determination of foreign law made in violation of CR 44.1. This is incorrect for two reasons.

First, the discussion between the Court and counsel regarding UMP law and regulations was not undertaken to determine application of UMP law to the case. Rather, the discussion of how UMP law operated was used to evaluate whether ICBC's defense of its insured, Petru Tepei, constituted a "purposeful act" in Washington or if it was merely passive fulfillment of its obligations under B.C. Law. Judge Brosey correctly determined that it was the later. Therefore, contrary to Plaintiffs' contentions, there was no application of foreign law which needed to be determined by the Court.

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<sup>117</sup> CR 44.1(c) (emphasis added)

Second, even if there had been a determination of foreign law by Judge Brosey, the evidence complained of was received in open court by the Judge Brosey and is, therefore, excluded from the purview of CR 44.1. Moreover, Plaintiffs were clearly provided "reasonable written notice" of the interplay of foreign law in this matter and in fact presented elements of foreign law in their own declarations in support of their opposition to ICBC's 12(b)(2) motion.<sup>118</sup>

Finally, Plaintiffs admit in their Complaint that they were required to "prove up" or "perfect" their liability claims prior to seeking UMP coverage.<sup>119</sup> Therefore, Plaintiffs' arguments regarding improper determination of foreign law under CR 44.1 are without merit and should be ignored.

***F. This Court, and the Lewis County Superior Court, Lacks Subject Matter Jurisdiction pursuant to the Foreign Sovereign Immunity Act***

CR12(h)(3) states that "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."<sup>120</sup> The Foreign Sovereign Immunity

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<sup>118</sup> See Samuels Decl. Exhibits B, E, G, H and I. (CP 358-620) See also *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 208; 875 P.2d 1213 (1994) (holding that it was reasonable written notice to the opposing party that there was an issue of foreign law, under CR 9(k), even though foreign law was raised for the first time in response to a motion for summary judgment.)

<sup>119</sup> Complaint at ¶2.7 ("Unlike the analogous 'UIM' claim in Washington State, a British Columbia UMP claim **cannot be made by a claimant prior to the resolution of any outstanding third party liability claim...**"). (CP 1439).

<sup>120</sup> WA CR 12(h)(3); see also *First Union Management v. Slack*, 36 Wn. App. 849, 854; 679 P.2d 936 (1984) (holding that "subject matter jurisdiction may be challenged at any time and cannot be waived.") (citing CR 12(h)(3)).

Act ("FSIA") was created to provide a grant of immunity from suit to foreign sovereigns (and political subdivisions thereof), their organs, agencies and/or instruments, in any court of the United States.<sup>121</sup> It is the sole mechanism for creating subject matter jurisdiction over a sovereign in any court, federal or state.<sup>122</sup> When a sovereign state (or political subdivision thereof), its organ, agency or instrumentality is named as defendant in a case in any court in the United States, immunity under the FSIA is presumed unless a plaintiff can show the application of codified exceptions to this rule are under 28 U.S.C. §§ 1605-1607.<sup>123</sup> Once a defendant makes a showing to the court that it is entitled to immunity under the FSIA, the party seeking to apply an exception to the FSIA bears the burden of establishing that one applies.<sup>124</sup> Here, this is Plaintiffs burden.

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<sup>121</sup> 28 U.S.C. §1604 states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States **and of the States** except as provided in sections 1605-1607 of this chapter [28 U.S.C. §§ 1605-1607]. (emphasis added).

<sup>122</sup> 28 U.S.C. §1330; *see also* *Adler v. Federal Republic of Nig.*, 107 F.3d 720, 723 (9th Cir. 1997) ("[28 U.S.C.] Section 1330 'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.'") (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989)); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 304 (9th Cir. 1997).

<sup>123</sup> 28 U.S.C. §1605 (setting forth several discrete exceptions, including; waiver of immunity; particular commercial activities conducted in, or directly affecting, the United States; maritime liens; and/or interests in real property in violation of international law; and limited non-commercial torts).

<sup>124</sup> *See Adler v. Federal Republic of Nig.*, 107 F.3d 720, 728 (9th Cir. 1997) (holding that the initial burden of establishing that defendant is a sovereign state

1. *ICBC is a "foreign state" under the FSIA and entitled to immunity*

Here ICBC clearly falls within multiple definitions of a "foreign state" under 28 U.S.C. 1603.<sup>125</sup> The Province of B.C. is a political subdivision of the sovereign state of Canada and therefore a "foreign state" under 28 U.S.C. 1603(a).<sup>126</sup> ICBC is an "agency or instrumentality"

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is upon the defendant, but upon such a showing, the defendant is presumptively immune and the Appellant then has the burden of going forward that an FSIA exception applies).

<sup>125</sup> 28 U.S.C. §1603 states: For purposes of this chapter [28 USCS §§ 1602 et seq.]

(a) A "foreign state", except as used in section 1608 of this title [28 USCS § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 USCS § 1332(c) and (e)] nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

<sup>126</sup> *Id.*

of B.C. because it is: 1) a separate, legal, corporate entity as a B.C. crown corporation; 2) an organ of the Province of B.C.;<sup>127</sup> 3) the express agent of the province of B.C.<sup>128</sup> and; 4) as a crown corporation, ICBC's shares are solely owned by the Province of B.C.<sup>129</sup>

In *Cal. Dep't of Water Res. v. Powerex Corp.*, the Ninth Circuit Court of Appeals held that B.C. Hydro (and its subsidiary Powerex Corp.) was a "foreign state" under the FSIA and subject to immunity.<sup>130</sup> The Ninth Circuit Court stated that, when deciding whether a defendant is an organ of a sovereign state, "courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law."<sup>131</sup> The Court also held that "an entity may be an organ of a foreign state even if it has some autonomy from the foreign government."<sup>132</sup>

ICBC was created to administer several aspects of B.C.'s public functions regarding automotive administration, including licensing,

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<sup>127</sup> See *Eie Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640 (9th Cir. 2003) ("In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government.") (citing *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *cert. granted in part*, 122 S. Ct. 2657 (2002)).

<sup>128</sup> Insurance (*Corporation*) Act, §13(2)) ("The Corporation [ICBC] is an agent of the government [of B.C.]"). A copy of the Insurance (*Corporation*) Act is attached as Appendix B for the Court's consideration.

<sup>129</sup> *Id.* ¶¶ 3-6 (discussing the creation and functions of ICBC on behalf of the B.C. Government); see also *Eie Guam Corp.*, 322 F.3d at 640.

<sup>130</sup> 533 F.3d 1087, 1098-1100 (9th Cir. 2008).

<sup>131</sup> *Id.* at 1098 (citations omitted).

<sup>132</sup> *Id.*

registration of vehicles and the administration of the B.C. auto insurance program. ICBC was created by the B.C. government under the *Insurance Corporation Act*.<sup>133</sup> Its board of directors, the CEO, and ICBC management govern ICBC in accordance with the provisions of the *Insurance Corporation Act*, the *Insurance (Vehicle) Act* and regulations thereto, and other legislation applicable to ICBC.<sup>134</sup> All "rates" applicable to ICBC's basic (or mandatory) vehicle insurance coverage are approved, or set by, the B.C. Utilities Commission.<sup>135</sup> ICBC only insures residents of B.C. and/or automobiles operating in B.C.<sup>136</sup> ICBC is financed and controlled by the B.C. government.<sup>137</sup> It is without question that ICBC is an agent, organ and instrument of the sovereign Province of British Columbia.

2. *There are no exceptions which encompass both ICBC's activities and each cause of action articulated by Plaintiffs*

Appellant cannot point to an exception under the FSIA, 28 U.S.C. §§ 1605-1607, because ICBC was engaged in the administration of sovereign functions of the Province of B.C. in administering its state-run insurance program and not in private activity as a participant in the market.<sup>138</sup> Plaintiffs must be able to show that not only did ICBC commit

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<sup>133</sup> Insurance Corporation Act [RSBC 1996] Chapter 228 at p.2 (§2).

<sup>134</sup> *Id.* at pp. 2-5(§3, §4, §7).

<sup>135</sup> *Id.* at pp. 13-14 (§44).

<sup>136</sup> Farrell Decl. ¶¶ 17-20. (CP 1364-65).

<sup>137</sup> Insurance Corporation Act [RSBC 1996] Chapter 228. at p.9 (§21).

<sup>138</sup> 28 U.S.C. §§ 1605-1607 (setting forth exceptions to sovereign immunity when a foreign state engages in "private conduct" as opposed to "public conduct"); see *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-360; 113 S. Ct. 1471; 123 L. Ed. 2d

an act which would subject it to an exception to the FSIA, but must also show that each of Plaintiffs' causes of action arise from, or are directly related to, such acts.<sup>139</sup>

Therefore, Plaintiffs are required under the FSIA to show that **each** of their causes of action against ICBC fit into an exception under the FSIA.<sup>140</sup> ICBC contends that they cannot make such a showing. Plaintiffs do, however, have every right to pursue their claims under B.C. law in the courts of B.C. without fulfilling the requirements of the FSIA.

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47 (1993) ("Under the restrictive, as opposed to the 'absolute,' theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)."); *see also Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1098-1100 (9th Cir. 2008) (finding that B.C. Hydro, a B.C. crown corporation similar to ICBC, was engaging in "sovereign functions" rather than "commercial conduct," and thus immune from suit under the FSIA, despite the sovereign activities being those which could be performed by private actors under a different political system); *see generally Rodriguez v. Republic of Costa Rica*, 139 F. Supp. 2d 173 (D.P.R. 2001) (providing a general discussion of the exceptions and definitions of terms in the FSIA).

<sup>139</sup> *See, e.g.*, 28 U.S.C. 1605(a)(2) ("...in which the action **is based upon** a commercial activity...") (emphasis added); *see also Rodriguez v. Republic of Costa Rica*, 139 F. Supp. 2d at 191-192 ("the only reasonable reading of the term 'based upon' calls for something more than a mere connection with, or relation to, commercial activity ... 'based upon' requires a degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is considerably greater than common law causation.") (citations omitted).

<sup>140</sup> 28 U.S.C. §§ 1605-1607. *See also id.* at §1603(d) ("A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."); *see also id.* at §1603(e) ("A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having **substantial contact** with the United States.") (emphasis added).

The FSIA is the exclusive source of subject matter jurisdiction over all suits involving foreign states and/or their instrumentalities and as such, Plaintiffs must make a showing that an exception to the general rule of sovereign immunity applies. Here, they cannot make such a showing. Therefore, ICBC respectfully requests that this Court dismiss all claims made against ICBC pursuant to the FSIA.

***G. Given the lack of Personal Jurisdiction, Judge Brosey Correctly awarded ICBC its fees under RCW 4.28.185(5).***

Judge Brosey correctly determined that ICBC was entitled to recover expense under RCW §4.28.185(5).<sup>141</sup> ICBC would not have had to defend in Washington but for Plaintiffs unsupported claims of jurisdiction. The award was appropriately limited to the fees incurred in defending the Personal Jurisdiction portion of the claim. Plaintiffs present no argument why such an award was not properly entered. Therefore, the judgment of fees should be left undisturbed on appeal.<sup>142</sup>

## **V. CONCLUSION**

Plaintiffs have failed to fulfill their burden of establishing, with competent evidence, that this Court can exercise personal jurisdiction over ICBC. Without such a showing, any exercise of personal jurisdiction would violate the Washington Long Arm Statute and violate the Due Process Clause of the United States Constitution. In addition, ICBC is an

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<sup>141</sup> Order Granting Defendant ICBC's Motion for Attorney Fees. (C.P. 5-7); Judgment Pursuant to RCW 4.28.185(5).

<sup>142</sup> ICBC will also make a claim for its fees and costs on appeal in the event that this Court affirms Judge Brosey's dismissal pursuant to RAP 18.1 and RAP 14.1.

agency of a foreign sovereign as defined by the Foreign Sovereign Immunity Act and is therefore immune from prosecution in Washington Courts. Finally, Plaintiffs fail to state a claim upon which relief can be granted under the Declaratory Judgment Act as well as the Priority of Action Rule (as set forth in ICBC's Motion for Summary Judgment of Dismissal (CP 1312-1343) and incorporated herein) and under RAP 2.5(a) this Court should consider those arguments and the supporting record as an alternative grounds to affirm the proper dismissal of Plaintiffs' Claims.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of March, 2010.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By   
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L:\999\1249\PLEADINGS\APPEAL\Respondent's Brief (final)

## **APPENDIX A**

**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 TELESCU (nee TEPEI), BENJAMIN TEPEI,  
CAMELIA COLCER (nee TEPEI), DAN TEPEI and DINA TEPEI,**

**CLAIMANTS**

**AND:**

**THE INSURANCE CORPORATION OF BRITISH COLUMBIA**

**RESPONDENT**

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**ARBITRATION DETERMINATION  
PRELIMINARY HEARING**

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**DATE OF HEARING:**

**August 28, 2009**

**PLACE OF HEARING:**

**Vancouver, British Columbia**

**J.J. CAMP, Q.C.**

**Arbitrator**

**Camp Fiorante Matthews  
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Vancouver, BC V6C 0A3**

**ISSUE TO BE ARBITRATED:**

1. The parties have agreed, pursuant to s. 148.2 of the Revised Regulations (1984) of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "Act"), and *The Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 to submit this matter to arbitration.
2. A preliminary hearing was heard on August 28, 2009 to address the issue as to what impact, if any, the underlying tort decision in Washington State has on the claimants' Underinsured Motorist Protection ("UMP") claims. More specifically, was the underlying tort decision determinative of not only liability but of damages pursuant to s. 148.1 of the Act, such that each claimant would be entitled to the applicable amount set out in s. 148.1(5) (\$1,000,000) less applicable deductible amounts, leaving the only issue to be determined by way of arbitration the sum of those applicable deductible amounts.
3. The parties have agreed that I have jurisdiction to determine this issue.
4. The issue at hand is the same matter which was previously determined by arbitration by Joseph A. Boskovich on March 16, 2006. His ruling has since been vacated by court order. Although I have read Mr. Boskovich's reasons, with the approval of the parties, they have not influenced my decision.

**FACTS:**

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 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 the Insurance Corporation of British Columbia ("ICBC") pursuant to Part 6 of the *Act*. Mr. Tepei carried no excess policy of third party liability insurance on the vehicle.

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 Act.

8. In September 1999, after many months of negotiations, an agreement was reached between the claimants, Mr. Tepei and ICBC called an Advance Loan Agreement and Covenant Not to Execute the provisions of which included:

- a payment of CDN \$150,000 from ICBC to the claimants;
- a denial of liability by the defendant Petru Tepei;
- a covenant not to execute any judgement entered against the defendant Petru Tepei by a Washington court in excess of CDN \$200,000;
- an agreement by the claimants to pay ICBC the lesser of 10% of any Washington state judgment or the full costs of the defendant Petru Tepei's defence in the event that the tire manufacturer was held liable; and
- an acknowledgement by all the parties to the agreement that nothing in the agreement would impair the rights of the claimants to proceed with UMP claims in BC regardless of the outcome of the Washington action.

9. 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.

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

11. 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.

12. The tort trial before a jury commenced in March, 2004 and lasted approximately 45 days. The defendant Michelin brought a number of interlocutory motions including:

- an application in February 2001 to dismiss the claims on the ground of *forum non conveniens*. The basis of the application was that the action should be decided in the courts of Canada – the country having the closest relationship with the parties of this dispute.

- an application in September 2003 to apply British Columbia law with respect to liability and quantum.

13. Both the claimants and the defendant Tepei opposed these applications and both applications were denied by the court in Washington State

14. 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
▪ Dian Tepei:	US \$ 1,179,991
▪ Camelia Colcer (nee Tepei:)	US \$ 136,798

15. On June 30, 2004, as per the terms of the Advance Loan Agreement and Covenant Not to Execute, the balance of the third party liability coverage was paid to the claimants.

16. I note that the record before me was very substantial including some transcripts of depositions, the exhibits at the trial of the action in Washington state, and very comprehensive written submissions and authorities from both parties. Both counsel provided very helpful oral submissions as well.

**ANALYSIS:**

17. In my opinion, I must conduct a two step process to answer the question to be arbitrated. The first step is to interpret the meaning of s. 148.2(6) of the *Act* as it read at the time of this motor vehicle accident. The second step is to determine whether this section is overridden, given the facts and circumstances of this case, by various principles including res judicata, issue estoppel and abuse of process.

18. To properly interpret s. 148.2(6), this section must be read in the context of the legislation as a whole and the surrounding germane sections. The important sections and definitions to put this matter in context include:

"insured" in s. 148.1 which is defined as follows:

- (a) an occupant of a motor vehicle described in the owner's certificate,
- (b) a person who is
  - (i) named as the owner or lessee in the owner's certificate where that person is an individual, or
  - (ii) a member of the household of a person described in subparagraph
- (b.1) a person who is
  - (i) an insured as defined in s. 42 and who is not in default of premium payable under s. 45, or
  - (ii) a member of the household of an insured described in subparagraph (i), or
- (c) a person who, in the jurisdiction in which the accident occurred, is entitled to maintain an action against the underinsured motorist for damages because of the death of a person described in paragraph (a), (b) or (b.1), and, for the purpose of the payment of compensation under this Division, includes the personal representative of a deceased insured,

"underinsured motorist" in s. 148.1 which is defined as follows:

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

s. 148.1(2) Where death or injury of an insured is caused by an accident that

(a) arises out of the use or operation of a vehicle by an underinsured motorist, and

(b) occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America,

the corporation shall, subject to subsections (1), (5) and (6) and s. 148.4, compensate the insured, or a person who has a claim in respect of the death of the insured, for any amount he is entitled to recover from the underinsured motorist as damages for the injury or death,

s. 148.1(5) The liability of the corporation under this Division for payment under an owner's certificate or driver's certificate of all claims arising out of the same occurrence, including a claim for

(a) prejudgment interest under the *Court Order Interest Act* or similar legislation of another jurisdiction,

(b) post-judgment interest under the *Interest Act* (Canada) or similar legislation of another jurisdiction, and

(c) costs awarded by a court or an arbitrator,

shall not exceed

(d) the total amount of damages awarded in respect of the accident to all persons insured under that owner's certificate or driver's certificate,

(e) the amount determined under s. 148.2 (6), or

(f) the applicable amount set out in s. 13 of Schedule 3,

whichever is least, minus the sum of the applicable deductible amounts,

s. 148.2(1) The determination as to whether an insured provided underinsured motorist protection under s. 148.1 is entitled to compensation and, if so entitled, the amount of compensation, shall be made by agreement between the insured and the corporation, but any dispute as to whether the insured is entitled to compensation or as to the amount of compensation shall be submitted to arbitration under the *Commercial Arbitration Act*,

s. 148.2(6) Subject to subsection (1), where an accident for which a claim is made under s. 148.1 occurs in another jurisdiction,

(a) the law of the place where the insured suffered the injury for which the claim is made shall, whether or not death results from that injury, be applied

(i) to determine if the insured is legally entitled to recover damages and, if he is, the degree to which he is so entitled, and

(ii) in any arbitration proceedings arising out of a difference between the insured and the corporation as to whether the insured is legally entitled to recover damages or the degree to which he is so entitled, and

(b) the law of the Province shall be applied

(i) to determine the measure of any damages recoverable by the insured and to assess the amount of compensation payable to the insured, and

(ii) in any arbitration proceedings arising out of a difference between the insured and the corporation respecting the measure of any damages or the amount of compensation.

19. It is trite law that the UMP entitlement scheme is remedial legislation and as such must be accorded such fair, large and liberal construction and interpretation as best to ensure the attainment of its objectives. It is equally trite law that a proper interpretation requires a purposive approach.

20. Generally speaking, these sections establish that the claimant or claimants must prove to ICBC's satisfaction that they have suffered compensable loss at the hands of an underinsured motorist, must establish the liability of the underinsured motorist for the damages sustained, must resolve any issues of contributory negligence and must establish that the damages attributable to the fault of the underinsured motorist exceeds the insurance limits and assets available to compensate the claimants.

21. On the facts of this case ICBC concedes the claimants have satisfied all of the prerequisite requirements laid down for UMP coverage. Hence, it is conceded that the Washington jury verdict established liability on the underinsured motorist, resolved issues of contributory negligence and established that the damages attributable to the fault of the underinsured motorist exceeded the insurance limits and assets available to compensate the claimants. Put another way, it is conceded that the Washington jury verdict determined that the claimants are "insureds" and Petru Tepei is an "underinsured motorist" for the purposes of the UMP scheme.

22. In the majority of cases, in my experience, the parties (ICBC and the claimants) agree that the prerequisites for UMP coverage have been satisfied and the parties arrive at a settlement pertaining to UMP compensation. Where the parties cannot agree, ICBC can follow one of two courses of action. ICBC can either require that the claimant(s) proceed to a tort trial to determine the prerequisites necessary for UMP arbitration, or they can agree that those prerequisites have been met and proceed to an UMP arbitration by consent.

23. In this case, the evidence satisfies me that ICBC required a tort trial to determine the prerequisites necessary for UMP arbitration. The claimants chose Washington State as the most favourable jurisdiction to proceed with the tort trial, for good and valid reasons which are not germane to the arbitration issue before me.

24. Stepping back, there can be little doubt that the UMP provisions were intended to provide benefits to a broad range of victims of motor vehicle accidents who were injured or killed in circumstances where the person at fault is uninsured or underinsured. The UMP compensation has waxed and waned over the years but at the time that this accident

occurred, each of the claimants was entitled to \$1 million in UMP coverage less the deductible amounts set forth in s. 148.1.

25. Turning to the specific sections, s. 148.2(1) is quite straightforward and provides that any dispute relating to eligibility for UMP compensation or as to the amount of UMP compensation is to be submitted to arbitration. Similarly, in my opinion s. 148.1(5) is also straightforward. It is a limiting provision that stipulates that the UMP compensation shall not exceed the total amount of the damages awarded in the tort action, **the amount assessed under s. 148.2(6)** or \$1 million whichever is the least, minus the sum of the applicable deductible amounts. There can be no doubt, in my mind, that I must give meaning to the reference to s. 148.2(6) in the limiting provisions of s. 148.1(5).

26. I now turn to an interpretation of s. 148.2 (6) which, for ease of reference, is set out again as follows:

Subject to subsection (1), where an accident for which a claim is made under s. 148.1 occurs in another jurisdiction,

- (a) the law of the place where the insured suffered the injury for which the claim is made shall, whether or not death results from that injury, be applied
  - (i) to determine if the insured is legally entitled to recover damages and, if he is, the degree to which he is so entitled, and
  - (ii) in any arbitration proceedings arising out of a difference between the insured and the corporation as to whether the insured is legally entitled to recover damages or the degree to which he is so entitled, and
- (b) the law of the Province shall be applied
  - (i) to determine the measure of any damages recoverable by the insured and to assess the amount of compensation payable to the insured, and
  - (ii) in any arbitration proceedings arising out of a difference between the insured and the corporation respecting the measure of any damages or the amount of compensation.

27. First, so far as I am aware, there is no jurisprudence squarely on point, that is to say, there is no case that squarely decides what effect is to be given to the outcome of a damages award made by a judge or jury in a foreign North American jurisdiction on the amount of UMP compensation.

28. Section 148.2(6)(a) relating to legal entitlement to UMP coverage is relatively straightforward. It says that where an accident for which UMP compensation is being sought occurs in another jurisdiction, the law of the place where the injury or death was suffered shall be applied to determine whether the claimants are legally entitled to recover UMP compensation and if a difference arises as to that legal entitlement, that difference shall be arbitrated under the Commercial Arbitration Act of British Columbia. It is s. 148.2(6)(b) relating to the measure of any damages and the assessment of the amount of UMP compensation payable that is at the nub of this arbitration.

29. Having said that there is no case squarely on point, there is a helpful British Columbia Supreme Court and British Columbia Court of Appeal decision in *Kreaker Estate v. Insurance Corp. of British Columbia*, [1991] I.L.R. 1053 (B.C.S.C.) and *Kreaker Estate v. Insurance Corp. of British Columbia* (1992), 93 D.L.R. (4th) 431 (B.C.C.A.). A deceased was killed in a motor vehicle accident in Washington state. The defendant carried minimum third-party liability insurance and had no other means of satisfying the claim. The deceased had UMP coverage but if the law of British Columbia applied, there would be no claim as the deceased left no dependents, whereas under Washington state law, the estate of a deceased who left no dependents could pursue a claim. A petition was launched for a declaration concerning which law was to be applied under an earlier version of s. 148.2(6) with almost identical language. Mr. Justice McKenzie (as he then was) said as follows:

The respondent submits that the intention of the legislature in enacting [s.148.2(6)(a)] was to confirm that foreign law would determine all issues of liability, and in enacting [s.148.2(6) (b)] that B.C. law would be applied to determine all issues of quantum. Thus, on the facts herein Underinsured Motorist Protection coverage should be read as only providing compensation to the levels awarded by B.C. courts.

ICBC documented the recent legislative changes to these sections and submitted that the present wording reflects the legislature's intention to avoid claims made on Underinsured Motorist Protection for exemplary and punitive damages not recoverable in B.C., and to avoid the extravagant mega judgments sometimes awarded in foreign jurisdictions.

I agree with the respondent's interpretation of the two subsections. I disagree with the petitioner's interpretation that the

words "measure of damages" in [s.148.2(6)(b)] neither explicitly nor by necessary implication covers a determination of what types of damages are available, and disagree that the words deal only with the procedural issue of measuring or quantifying damages.

The more I read the two subsections the more I am impressed with the simplicity and clarity of their message. They make a clear and explicit division between the issues of liability in [s.148.2(6)(a)] and quantum in [s.148.2(6)(b)] without ambiguity and therefore the issues of liability must be determined by Washington law and the issues of quantum by British Columbia law.

This decision was appealed to the British Columbia Court of Appeal and Mr. Justice Goldie dismissed the appeal and employed the following language:

I think it clear the intention of [s.148.2(6)] was to provide compensation to a British Columbia resident which would neither fluctuate according to the substantive law of damages of the place of the accident nor depart too greatly from that which would be received if the accident had taken place in British Columbia. I cannot read into the words in clause (a) of [s.148.2(6)] "... is legally entitled to recover damages ..." the adoption of the substantive law of another jurisdiction by which the measure of damages is to be assessed or the codification of a tort common law conflict rule. I think "legally entitled to recover damages" means "has a right of action for damages". Nor do I think the succeeding clause in (a) relates to quantum. These directions are confined to the issues of the legal liability of the wrongdoer and the contributory negligence, if any, of the insured.

To the result determined under clause (a) there is to be then applied, by virtue of clause (b), the substantive law of the Province - the "measure of damages" - to arrive at what the insured could recover if the accident had occurred in the Province. The final direction, stated in the words "and to assess the amount of compensation payable to the insured", then requires the arbitrator to subtract what is stipulated elsewhere in the regulations to be subtracted, including what can be or has been recovered from the wrongdoer and so to arrive at what the insurer must pay the insured.

30. Before turning to the argument of ambiguity, I wish to deal with the Supreme Court of Canada decision in *Sommersall v. Friedman*, 2002 SCC 59. Mr. Justice Iacobucci for the majority said at paragraph 33:

I must, then, reject the view very briefly expressed in the case of *Nielsen*, *supra*, that a release of the tortfeasor in exchange

for his small insurance limit eliminated any excess the insured was "legally entitled to recover" under the SEF 44. Similarly, I cannot agree with the conclusion in *Kraeker Estate v. Insurance Corp. of British Columbia* (1992), 93 D.L.R. (4th) 431 (B.C.C.A.).

It was argued that this reference to the British Columbia Court of Appeal decision in *Kraeker Estate v. Insurance Corp. of British Columbia* (1992), 93 D.L.R. (4th) 431, undermines the legal efficacy of that decision vis-à-vis the facts and circumstances of the subject case. I do not believe this to be the case.

31. The conclusion in the *Kraeker Estate*, with which Mr. Justice Iacobucci disagreed was Mr. Justice Goldie's statement that "legally entitled to recover damages" means "has a right of action for damages". What the majority in the Supreme Court of Canada held is that a claimant can satisfy the requirement of "legal entitlement" in an underinsured motorist protection clause by proving the tortfeasor was at fault and by proving the resulting damages, and that this does not mean that the claimant had to prove that he or she "has a right of action for damages" as suggested by Mr. Justice Goldie. Put another way, the majority of the Supreme Court of Canada found that a claimant was not required to have right of action against the tortfeasor for the claimant to be legally entitled to recover damages under the underinsured motorist insurance provisions at issue in that case. Hence, I continue to place considerable weight on the *Kraeker Estate* decisions.

32. Although counsel for the claimants argued that there was ambiguity which would invoke the *contra proferentum* rule, I do not find any ambiguity which would permit this rule to be applied, assuming that this rule could be applied to legislative provisions. Certainly, Mr. Justice McKenzie found no ambiguity in this language. To the contrary, he was impressed with the simplicity and clarity of the language. Similarly, the British Columbia Court of Appeal did not find any ambiguity in their reading of the subject language.

33. Turning to my interpretation of s. 148.2 (6), I find that the section is 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. I am fortified in coming to this interpretation because of the linkage between s. 148.2(6) and s. 148.1(5). Section 148.1(5) constitutes a

limiting provision and the limitation only works or works much better if the interpretation of s. 148.2 (6)(b) is interpreted such that the issues pertaining to the quantum of damages shall be determined by the law of British Columbia.

34. Turning to the remaining issues including res judicata, issue estoppel and abuse of process, there is no doubt in my mind that these doctrines can be applied if the facts and circumstances support such application. However, I am not persuaded that the facts and circumstances in this case do support the application of any of these doctrines.

35. Turning first to the res judicata argument, I am satisfied that the tort action in Washington neither decided the "same question" as the UMP action will decide in British Columbia nor are the parties the "same parties" or their privies in the two actions. The Washington State tort action decided issues of liability and quantum in the context of the third-party tort trial whereas the UMP action is a first party action that is contractual in nature where, among other things, the arbitrator must take into account deductibles that are not germane in the third-party tort action. So far as the parties are concerned, although ICBC wears two hats, one hat as a third-party insurer in the tort action and one hat as a first party insurer in the UMP action (however uncomfortably those hats may sit), ICBC wears two hats as dictated by legislative mandate and that cannot be gainsaid.

36. Turning to the issue estoppel argument, it also fails for essentially the same reasoning that causes the res judicata argument to fail.

37. Turning to the abuse of process argument, I have reviewed the evidence carefully and I simply find that there was no abuse by ICBC on the facts and circumstances of this case. The strongest argument raised by counsel for the claimants was that the Advance Loan Agreement and Covenant Not to Execute struck between the claimants and ICBC for a partial advance of the third-party liability limits had a provision that allowed ICBC to recover an escalating amount of costs if the action had been successful against the tire manufacturer and dependent upon the amount of damages recovered. In return, among other consideration, the claimants agreed not to execute against the estate of the defendant driver. In my opinion, the bargain that was struck benefited both sides and no conflict of interest could be said to arise on the face of the document as it was executed.

38. I will deal briefly with the argument on behalf of the claimants that s. 10 of the *Law And Equity Act* which posits that all matters in controversy between the parties should be completely and finally determined and all multiplicity of legal proceedings should be avoided. It is my opinion that this section can have no application in the facts and circumstances of this case where the Act lays down a requirement for further proceedings in British Columbia to resolve UMP differences.

39. The claimants also argued that s. 88 (b) of the *Insurance (Vehicle) Act* offers substantial persuasive support to the claimants argument that re-litigation of the quantum issues sought by ICBC should be forbidden. It is my opinion that this section pertains to third-party liability issues and not to first party UMP issues and therefore offers no support for the contention made on behalf of the claimants.

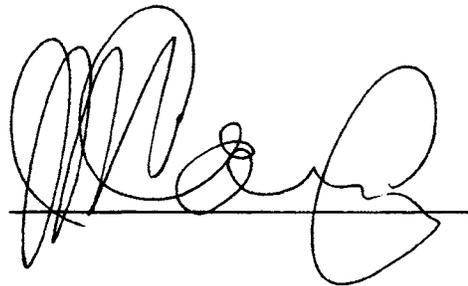
40. It was also argued on behalf of the claimants that their contentions were supported by the doctrine of comity. I disagree. This argument also founders on the fact that the claimants are seeking recovery from ICBC under a form of first party UMP insurance as opposed to ICBC acting in response to third-party liability coverage in the Washington state action.

### CONCLUSION

41. I find that s. 148.2 (6) is 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.

42. I cannot leave this matter without commenting upon the passage of time, over 12 years, from the time of the accident to the date of this award. I am not intending this comment to be critical of any party but rather to ask the parties to move with dispatch so that this matter can be concluded once and for all.

Dated: Sept. 17, 2004

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

## **APPENDIX B**

**INSURANCE CORPORATION ACT**

## CHAPTER 228

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**Definitions**

(Am) Jun 01/07

**1. In this Act:**

"**adjuster**" and "**agent**" have the meaning, except in section 12, given them in the *Financial Institutions Act*;

"**board**" means the board of directors of the corporation;

(Add) Jun 01/07

"**commission**" means the British Columbia Utilities Commission continued under section 2 of the *Utilities Commission Act*;

"**contract**" means, except in sections 10 and 11, a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and also includes a binding oral agreement;

"**corporation**" means the Insurance Corporation of British Columbia;

"**general manager**" means the corporation's general manager;

"**insurance**" means the undertaking by one person to indemnify another person against loss or liability for loss for a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event;

"**municipality**" includes a regional district;

(Sub) Jun 01/07

"**optional vehicle insurance**" means vehicle insurance other than universal compulsory vehicle insurance under the *Insurance (Vehicle) Act*;

"**policy**" means the document evidencing a contract and includes a certificate of membership relating in any way to insurance;

"**president**" means the president of the corporation;

"**superintendent**" means the Superintendent of Financial Institutions under the *Financial Institutions Act*;

(Am) Jun 01/07

"**universal compulsory vehicle insurance**" has the same meaning as in the *Insurance (Vehicle) Act*.

RS1979-201-1; 1989-47-347; 1998-14-57; 2003-35-1; 2003-94-43,59 (B.C. Reg. 166/2008)

**PART 1 – Operation of Corporation****Corporation continued**

2. (1) The corporation known as the Insurance corporation of British Columbia is continued.

(Sub) Aug 18/01

(2) The corporation consists of at least 3 members appointed by the Lieutenant Governor in Council.

(Rep) Aug 18/01

(3) *Repealed.* [2001-31-2]

(4) The Lieutenant Governor in Council may appoint a person to be a member to serve the unexpired term of a member who dies or resigns.

RS1979-201-2; 2001-31-2

**Directors**

3. (1) The members appointed under section 2, during the term of their respective appointments, are the directors of the corporation.

(2) The Lieutenant Governor in Council must designate a director as chair of the board.

(3) A director is entitled to be reimbursed by the corporation for reasonable travelling and other out of pocket expenses necessarily incurred by the director in discharging his or her duties.

(Am) Jul 28/87

(4) In addition, a director, other than the general manager, may, subject to subsection (6), be paid and may accept as remuneration for the director's services the daily or periodic amounts set by the Lieutenant Governor in Council.

(5) A majority of the members constitutes a quorum at a meeting of the directors or of the corporation.

(6) Despite the *Constitution Act*, a director who is a member of the Legislative Assembly

(a) may accept payments under subsections (3) and (4), and

(b) does not become ineligible as a member of the Legislative Assembly and is not disqualified to sit and vote in the Assembly because the member accepts payments under subsections (3) and (4).

(7) Despite the *Public Service Act*, a public officer may accept payments under subsections (3) and (4).

RS1979-201-3; 1997-29-17.

#### President, general manager and staff

4. (1) Subject to the approval of the Lieutenant Governor in Council, the directors must appoint a president and a general manager to hold office during pleasure and, despite any Act, the directors must set their salary.
- (2) The directors must define the duties of the president and general manager.
- (3) Despite the *Public Service Act*, the directors or, if authorized by the directors, the president or the general manager, may do the following:
- (a) appoint the officers and employees they consider necessary to carry on the corporation's business;
  - (b) determine their duties and remuneration;
  - (c) provide a system of organization to fix responsibility and promote efficiency.
- (4) The *Public Service Act* does not apply to the officers and employees of the corporation.
- (5) *Repealed.* [1999-44-63]
- (6) The corporation may, alone or in cooperation with other corporations, ministries, commissions or other agents of the government, establish, support or participate in one or more of a pension or a group insurance plan for the benefit of its officers and employees and their dependants.
- (7) Despite this or any other Act the establishment or support of, or participation in, a pension plan referred to in subsection (6) must not be the subject of a collective agreement between the corporation and its employees.
- (8) The corporation may require a bond under the *Bonding Act* from the officers and employees it may designate.

(Rep) Apr 01/00

RS1979-201-4; 1999-44-63.

#### Joint management agreement

- 4.1 (1) In this section:
- "agreement" means the joint management agreement referred to in subsection (2);
- "pension fund" means the trust fund established under the pension plan;
- "pension plan" means the Retirement Plan for Employees of the Insurance Corporation of British Columbia.
- (2) Despite section 4 (7), the corporation may enter into a joint management agreement with the trade unions that represent its employees for the joint trusteeship of all or part of the pension plan and pension fund, or for any other matter relating to the pension plan or pension fund on which agreement is reached.
- (3) The corporation and the trade unions must establish appropriate mechanisms whereby the views and interests of the corporation's non-unionized employees and retirees are fairly represented in the negotiation of the agreement.
- (4) The agreement must not require any change to the pension plan or pension fund that would render the pension plan ineligible for registration under the *Pension Benefits Standards Act* or the *Income Tax Act* (Canada).
- (5) When the agreement is entered into, the corporation must adopt those plan rules and other instruments that are necessary to amend and continue the pension plan and pension fund in accordance with the agreement and, thereafter, the pension plan and pension fund
- (a) must be administered as provided by the agreement,

(Add) Jul 15/89

- (b) may be amended as provided by the agreement, and
- (c) are not subject to section 4 of this Act.

(6) Despite subsection (2), the non-unionized employees and the retirees of the corporation not represented by the trade unions may benefit from and be made subject to the agreement, and the corporation and the trade union representatives have the power to enter into the agreement on behalf of those persons and, if entered into, the agreement is binding on those persons.

1999-42-2.

#### Transferred employees' pensions and benefits

(Am) Apr 01/00

5. (1) Despite section 4 (4), the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, applies to persons who, immediately before any transfer date that the Lieutenant Governor in Council may set by order, are employees of the government, within the motor vehicle branch, and who
- (a) are designated by order of the Lieutenant Governor in Council as persons carrying out functions under this Act that on and after the transfer date are to be carried out by the corporation,
  - (b) elect to become employees of the corporation, and
  - (c) on the relevant transfer date set under this section, begin employment as employees of the corporation.

(Sub) Apr 01/00

(2) The Public Service Pension Plan applies to the corporation in its capacity as the employer of the persons to whom that plan applies under this section.

(Sub) Apr 01/00

(3) The corporation must pay to the trustee of the pension fund under the Public Service Pension Plan the employer's contributions in amounts equivalent to the amounts required under that plan.

(Am) Apr 01/00

(4) Until, but not after, the end of the day on a date to be set by order of the Minister of Transportation and Highways, the *Public Service Benefit Plan Act* applies to the employees of the corporation to whom the Public Service Pension Plan applies under this section.

(5) The discretion under this section to set a transfer date or to make a designation referred to in subsection (1) (a) may be exercised from time to time as the occasion requires.

RS1979-201-4.1, 1996-14-58, 1999-44-64.

#### Head office and branch offices

6. (1) The corporation's head office is to be at the place designated by regulation.
- (2) The corporation may establish branch offices at places designated by the directors.

RS1979-201-5.

#### Objects, power and capacity

7. It is the function of the corporation and it has the power and capacity to do the following:
- (a) subject to the approval of the Lieutenant Governor in Council, engage in and carry on, inside and outside of British Columbia, the business of insurance and reinsurance in all its classes;
  - (b) subject to the approval of the Lieutenant Governor in Council, operate and administer plans of insurance, including universal compulsory vehicle insurance, authorized under any other enactment;
  - (c) engage in and carry on the business of repairing insured property and of salvaging and disposing by public or private sale property insured and acquired under a contract by which the corporation may be liable as an insurer, or make agreements with other persons for those purposes;
  - (d) subject to the *Medical Practitioners Act* and the *Hospital Act*, engage in and carry on the business of providing medical and hospital services to a person insured under a contract by which the corporation may be liable as an insurer, or make agreements with other persons for those purposes;

(Am) Jun 01/07

- (e) for its own use and benefit, acquire or expropriate, and hold or take options on land required for its business, conveyed, mortgaged or hypothecated to it by way of security, acquired as an investment, or conveyed to it in full or partial satisfaction for debts and judgments, and may dispose of the whole or part of the land;
- (f) acquire some or all of the shares or business and property of an insurer, agent, adjuster or motor vehicle repairer, or make an agreement to carry on jointly a class of insurance with another insurer, inside or outside of British Columbia, and the *Insurance Act* and the *Financial Institutions Act* do not apply to the agreement;
- (g) carry out any powers, duties and functions in relation to the *Motor Vehicle Act* or the *Commercial Transport Act*, or to any program of the government or of an agency of the government, that may be authorized under the *Motor Vehicle Act*, the *Commercial Transport Act* or another enactment respecting motor vehicles or vehicles, or that may be assumed by the corporation by agreement with the government or an agency of the government;
- (h) receive, hold, manage and collect, for and on behalf of the government,
  - (i) revenue from fines in connection with violation tickets under the *Offence Act*, for contravention of enactments referred to in the regulations under that Act, including revenue from fines imposed by the Provincial Court for contraventions for which violation tickets have been issued, and
  - (ii) revenue from licence, permit and other fees under the *Motor Vehicle Act*, the *Commercial Transport Act* or another enactment respecting motor vehicles or vehicles;
- (i) promote and improve highway safety.

RS1979-201-6; 1982-72-10; 1989-47-348; 1998-14-59; 2003-35-3; 2003-94-60 (B.C. Reg. 166/2006).

#### Special authorization

8. (1) Despite section 7, the corporation may carry on business as insurer in those classes of insurance and reinsurance only as are designated by regulation.
- (2) The Lieutenant Governor in Council may make regulations authorizing the corporation to engage in and carry on any class of insurance as defined in the *Insurance Act* and its regulations, or any insurance plan and the regulations may provide that some provisions of this Act or the regulations do not apply to a particular class of insurance or insurance plan carried on under this section.
- (3) On being authorized by regulation, the corporation has the right to engage in and carry on, in British Columbia, the class of insurance or the insurance plan so authorized without further authority than this Act and the regulations, as fully as if authorized to carry on insurance business under the *Financial Institutions Act*.

RS1979-201-7; 1989-47-348.

#### Records and proof

(Am) Dec 01/07

- 8.1 (1) If a record is kept by the corporation under this Act or the *Insurance (Vehicle) Act*, the corporation may
- (a) have the record photocopied,
  - (b) have the record or its contents stored in electronic format,
  - (c) have the record or its contents reproduced on a record that enables the information to be subsequently displayed or immediately accessible in visible form, or
  - (d) keep the record or its contents in any other prescribed manner.
- (2) If information from a record to be kept by the corporation is converted into another format under subsection (1), the corporation may destroy the paper format of the record and the information, in the format into which it has been converted, is deemed to be the record so converted.
- (3) If records are kept by the corporation otherwise than in paper format, the corporation must provide, in intelligible form, any copy of those records that, under this Act or the *Insurance (Vehicle) Act*, the corporation is required to provide.

(Am) Dec 01/07

(Am) Dec 01/07

(4) A copy of, or extract from, a record kept in a format other than an electronic format by the corporation under this Act or the *Insurance (Vehicle) Act*, certified to be a true copy or extract by an officer of the corporation, is

- (a) evidence of the record or of the part of the record extracted and of the facts stated in the record or the part of the record, and
- (b) conclusive proof that the corporation is the keeper of the record, in fulfillment of the corporation's responsibility under this section.

(5) A reproduction in paper format of a record kept in electronic format by the corporation is evidence of the record and of the facts stated in the record, and is conclusive proof that the corporation is the keeper of the record, in fulfillment of the corporation's responsibility under this section, if

- (a) the reproduction is certified to be a true copy by an officer of the corporation, or
- (b) the reproduction contains a statement to the effect that the reproduction is an authentic reproduction of information stored in a database in electronic format by the corporation.

(Am) Dec 01/07

(6) A record of information, based on the records kept by the corporation under this Act or the *Insurance (Vehicle) Act*, is evidence of the facts contained in the record if

- (a) the information is contained in a certificate of an officer of the corporation, or
- (b) the record contains a statement to the effect that the record is an authentic reproduction of information stored in a database in electronic format by the corporation.

(Am) Dec 01/07

(7) Proof is not required of the signature or official position of a person certifying the truth of a copy or extract, or giving a certificate under this section, and a facsimile signature purporting to be the signature of a person required to sign or certify a record under this Act or the *Insurance (Vehicle) Act* is evidence of the signature and of the authority for the use of the facsimile signature.

(8) A certificate or other record referred to in subsection (4), (5) or (6) must be received in all courts for the purposes of those subsections without proof that the certificate or other record was kept or provided with lawful authority.

(9) This section is in addition to and not in substitution for any provision of this or any other enactment respecting the retention, certification or use of records by the corporation including, without limitation, any provision that

- (a) allows the corporation to retain records in any format,
- (b) allows for certification of records by the corporation in any manner, or
- (c) allows any record to stand as evidence of any fact or matter.

1997-29-18; 2003-94-43 (B.C. Reg. 166/2006); 2007-14-129 (B.C. Reg. 354/2007).

(Add) Jun 01/07

#### Corporation to maintain accounts

8.2 The corporation must keep and maintain separate and distinct accounts in which it must record

- (a) all money paid to the corporation for premiums and all other money, including investment income, paid to the corporation for the purposes of the *Insurance (Vehicle) Act*, and
- (b) all payments by the corporation of benefits, insurance money, damages, compensation, costs and capital expenditures and operating expenses for the purposes of the *Insurance (Vehicle) Act*.

2003-94-61 (B.C. Reg. 166/2006).

(Add) Jun 01/07

#### Directors to account for income and expenditures

8.3 If the corporation receives income, including investment income, or if the corporation makes an expenditure partly for the purpose of the *Insurance (Vehicle) Act* and partly for another business or purpose of the corporation, the directors must apportion and account for that income and expenditure accordingly.

2003-94-61 (B.C. Reg. 166/2006).

(Add) Jun 01/07

**Reserve**

- 8.4 Subject to the regulations and any orders of the commission under section 46, the corporation must maintain for the purposes of the *Insurance (Vehicle) Act* reserves in amounts the corporation considers advisable in the interest of owners of vehicles and drivers of vehicles, and in the interest of good management of the business of vehicle insurance, so that the corporation has at all times sufficient funds to meet the payments under the *Insurance (Vehicle) Act* as they become payable.

2003-94-61 (B.C. Reg. 166/2006)

**Additional powers**

(Sub) Aug 12/03

9. (1) The corporation may do all acts and things necessary or required for the purpose of carrying out its functions and powers, and, for that purpose, has all of the powers and capacity of an individual of full capacity.
- (2) Without limiting subsection (1), the corporation may do any of the following:
- (a) conduct surveys and research programs and obtain statistics for its purposes and to establish and administer any insurance plan;
  - (b) enter into an agreement with, or retain agents or adjusters to solicit and receive applications for insurance, to collect premiums, adjust claims, and do other things on its behalf it considers necessary;
  - (c) prescribe forms for application, contracts, policies and other matters it considers necessary;
  - (d) prescribe the detail required to be set out on a form;
  - (e) evaluate damages and losses and pay claims under a contract by which the corporation may be liable as an insurer;
  - (f) reinsure the whole or part of a contract of another insurer, and reinsure its risks under the whole or part of a contract with another insurer, whether or not the other insurer is inside or outside of British Columbia, or is authorized under the *Financial Institutions Act*;
  - (g) do anything necessary to settle, adjust, investigate, defend and otherwise deal with, under this Act, the *Insurance Act* or the *Financial Institutions Act* so far as is applicable, claims made on contracts by which the corporation may be liable as insurer or on a plan established under sections 7 and 8 (1);
  - (h) make bylaws and pass resolutions, not contrary to law or this Act, it considers necessary or advisable for the conduct of its affairs including the time and place of its meetings, procedure at meetings and generally the conduct of its affairs in all ways;
  - (i) carry out either alone or with a board, commission, corporation, ministry or agency of government, or a person, agency or association, a research, education, training, competition or similar program relating to highway safety;
  - (j) promote or carry out programs of research into causes of accidents and the equitable distribution of losses resulting from highway traffic accidents;
  - (k) establish and maintain repair shops to investigate and apply techniques used in the repair of vehicles and to analyze the cost of repairs;
  - (l) negotiate with persons engaged in vehicle repairs to establish fair and reasonable prices for vehicle repairs for which payments may be made under the *Insurance (Vehicle) Act*.

(Am) Dec 01/07

(Add) Jun 01/07

(Add) Jun 01/07

(Add) Jun 01/07

(Add) Jun 01/07

RS1979-201-8, 1989-47-350, 2003-35-4, 2003-94-62 (B.C. Reg. 166/2006), 2007-14-130 (B.C. Reg. 354/2007)

(Add) Jun 01/07

**Costs incurred for damaged vehicle**

- 9.1 (1) If a vehicle has been damaged as a result of an accident and has been delivered into the custody of the corporation with the consent of the owner or person in charge of the vehicle at the time of the accident or under the direction of a peace officer under the *Motor Vehicle Act*,
- (a) the corporation has a lien on the vehicle for the amount of the costs and charges for removal, towing, care or storage of the vehicle unless the corporation is responsible for payment of the amount of those costs and charges, and

- (b) that amount is a debt owing by the registered owner to the corporation.
- (2) The corporation may give a written notice to the registered owner of the vehicle requiring the registered owner to
- (a) pay the costs and charges referred to in subsection (1), and
  - (b) remove the vehicle from the place where it is stored within 7 days from the date of receipt of the notice.
- (3) A notice under subsection (2) may be given by serving it personally on the registered owner or by mailing it to the registered owner's address as shown in the records of the corporation and, if mailed, the notice is deemed to have been received on the eighth day after the date of mailing.
- (4) If the registered owner does not pay the costs and charges owing to the corporation and remove the vehicle within 14 days after receiving a notice given under subsection (2), the corporation may, without further notice, offer the vehicle for sale by public auction or tender.
- (5) On the sale of a vehicle under this section, the corporation may deduct all costs and charges owing to it, including the costs of the sale, and must for 2 years after that hold any balance in trust for the owner of the vehicle and other persons having a registered interest in the vehicle and if the balance is unclaimed within the 2 years it becomes the property of the corporation.
- (6) If a vehicle offered by the corporation for sale by public auction or by tender is not sold, the corporation is deemed to be the purchaser of it for the amount of the costs and charges owing and the corporation may dispose of it as the corporation considers appropriate.
- (7) When the corporation sells a vehicle or is deemed to be the purchaser of it by this section, the indebtedness of the owner to the corporation for the costs and charges referred to in subsection (5) in respect of the vehicle is extinguished.

2003-94-63 (B.C. Reg. 166/2006)

→ (Add) Jun 01/07

### Appointment of agents

- 9.2** (1) The corporation may, in writing, appoint agents it considers necessary for the purposes of either or both of universal compulsory vehicle insurance and optional vehicle insurance.
- (2) The corporation must not appoint an agent unless he or she holds or has applied for a licence under the *Financial Institutions Act* as an insurance agent for the place specified in the appointment.
- (3) Despite subsection (2), for the purpose of universal compulsory vehicle insurance, the corporation may appoint as an agent
- (a) a government agent, or
  - (b) a person authorized in writing by the minister.
- (4) The provisions of the *Financial Institutions Act* regarding insurance agents do not apply to the persons appointed under subsection (3) of this section.
- (5) An agent must not have his or her appointment in respect of universal compulsory vehicle insurance or optional vehicle insurance terminated without just cause.
- (6) Subject to any orders of the commission under this Act or the *Utilities Commission Act* as applied by this Act or a regulation under section 47 or 51, the corporation, after consultation with an agent, may establish annually the commission and other remuneration to be paid to the agent.

(7) An appointment of an agent made under the *Insurance (Motor Vehicle) Act* before September 27, 1977, that has not been suspended, cancelled or revoked, and a subsisting agreement made with respect to it, continues in force to the extent consistent with this section, until terminated by the corporation or the agent.

2003-94-63 (B.C. Reg. 166/2006)

### Contracts

10. (1) A contract that, if made between natural persons would be by law required to be in writing and under seal, may be made on behalf of the corporation in writing under seal and may, in the same manner, be varied or discharged.
- (2) A contract that, if made between natural persons would be by law required to be in writing signed by the parties to be charged, may be made on behalf of the corporation in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.
- (3) A contract that, if made between natural persons would by law be valid although made orally and not reduced to writing, may be made in like manner on behalf of the corporation by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.
- (4) All contracts made according to this section are effectual in law, and bind the corporation and its successors and all other parties to them.
- (5) A bill of exchange or promissory note is deemed to have been made, accepted or endorsed on behalf of the corporation if made, accepted or endorsed in the name of, on behalf of or on account of, the corporation by any person acting under its authority.

RS1979-201-9.

### Signatures

11. (1) A director or the general manager sufficiently signs a document on behalf of the corporation if his or her signature is written on the document.
- (2) If a document relating to the corporation's business bears a signature and if required, a countersignature, purporting to be that of a director, general manager, officer or an authorized person, the document is deemed to be validly made and the signature, countersignature and seal, if any, deemed to be validly signed and sealed by persons authorized by the corporation.
- (3) It is not necessary to prove the seal of the corporation, the handwriting or the authority of the person signing, sealing or countersigning the document, or, in the case of a document signed under subsection (1), authenticity of the facsimile of the signature of a director or the general manager.

RS1979-201-10.

### Corporation as agent

12. (1) The corporation, its officers or full time salaried employees may, for this Act, act as an agent or adjuster.
- (2) The *Financial Institutions Act* does not apply to such an agent or adjuster.

RS1979-201-11, 1989-47-351.

### Corporation an agent of the government

13. (1) All property and money acquired or administered by the corporation is deemed to be the property of the government for all purposes, including exemption from taxation.
- (2) The corporation is an agent of the government.
- (3) Money, funds, investments and property acquired or administered by the corporation may not be taken, used or appropriated by the government for any purpose whatever, except under subsection (5), section 26 (1) or to repay advances by or money borrowed from the government and the interest on it.

(4) Subsection (3) does not apply to the revenue referred to in section 7 (h) that is received by the corporation.

(5) The corporation must pay to the government any tax or impost that, but for subsection (3), would be assessed or levied against the corporation, its business or property under any other Act, except income tax under the *Income Tax Act*.

RS1979-201-12; 1996-14-60

#### Grants in place of taxes

14. The Lieutenant Governor in Council may, by order, direct the corporation to pay grants of money to a municipality in which property of the corporation is located.

RS1979-201-13

#### Temporary borrowing and guarantee of government

15. (1) Subject to any restriction placed by order of the Lieutenant Governor in Council, the corporation may borrow or raise money for its temporary purposes by way of overdraft, line of credit, loan or otherwise, on the credit of the corporation for the amounts, terms and periods determined by the corporation.

(2) The government may, on terms that may be approved by the Lieutenant Governor in Council, guarantee payment of the principal and interest on the borrowing of the corporation.

RS1979-201-14

#### Advances from consolidated revenue fund

(Am) Apr 01/04

16. To the extent permitted by any Act, the Lieutenant Governor in Council may authorize the Minister of Finance to advance money to the corporation for its temporary purposes out of the consolidated revenue fund, to be repaid on terms approved by the Lieutenant Governor in Council.

RS1979-201-15; 2003-54-27

#### Corporation's costs for services under other enactments

17. (1) Despite the *Financial Administration Act*, the corporation may retain, out of the revenue referred to in section 7 (h) of this Act that is received by the corporation, the corporation's permitted costs of its services in

- (a) receiving, holding, managing, collecting and accounting for the revenue, and
- (b) carrying out its powers, duties and functions referred to in section 7 (g) of this Act.

(2) For the purposes of subsection (1), the Treasury Board must prescribe the corporation's permitted costs of its services.

RS1979-201-15.1; 1996-14-61

#### Borrowing power

18. (1) Subject to the prior approval of the Lieutenant Governor in Council and to subsection (2), the corporation, as agent of the government, may, for its purposes, raise money in lawful money of Canada by way of loan on the credit of the corporation.

(Am) Apr 01/04

(2) Through the Minister of Finance as its agent for the purpose of this section or section 15 or 16, the corporation may do any of the following:

- (a) issue notes, bonds, debentures or other securities of the corporation;
- (b) dispose of the securities so issued at the prices considered advisable;
- (c) mortgage or pledge its property;
- (d) raise money by way of loan on the securities.

RS1979-201-16; 2003-54-27

**Form, etc., of securities**

19. (1) The notes, bonds, debentures and other securities issued under section 18 must be in the form, bear the rate of interest and be payable or redeemable in advance of maturity, for principal, interest and premium, in the currencies of the countries, in the amount or price, in the manner, and at the times, as the Lieutenant Governor in Council may determine.
- (2) The notes, bonds, debentures and other securities authorized by section 18 must bear the seal of the corporation, which may be impressed or engraved, or otherwise mechanically reproduced on them and, together with any coupons attached, must bear the manual, engraved or otherwise mechanically reproduced signatures of the chair and of the secretary of the corporation.
- (3) A mechanically reproduced seal or signature is, for all purposes, valid and binding on the corporation if the note, bond, debenture or other security or the coupon bearing it is countersigned by an officer appointed by the corporation for that purpose,
- (a) even though the person whose signature is reproduced may not have held office at the date of the security or of its delivery, and
- (b) even though the person who holds the office at the time when the signature is affixed is not the person who holds that office at the date of the security or of its delivery.
- (4) A recital or declaration in a resolution or minutes of the corporation authorizing the issue or sale of notes, bonds, debentures or other securities to the effect that the amount of securities so authorized is necessary to realize the net sum authorized or required to be raised is conclusive evidence of that fact.

RS1979-201-17.

**Government guarantee**

20. (1) The government may, on terms as may be approved by the Lieutenant Governor in Council, guarantee the payment of principal, interest and premium, if any, of any notes, bonds, debentures and other securities issued by the corporation.
- (2) The guarantee must be in a form and manner the Lieutenant Governor in Council may approve.
- (3) The guarantee must be signed by the Minister of Finance or an officer designated by the Lieutenant Governor in Council.
- (4) On the guarantee being signed, the government is liable for the payment of the principal, interest and premium, if any, of the notes, bonds, debentures and securities guaranteed, to the extent of the guarantee.
- (5) In the hands of a holder of any such security of the corporation, a guarantee so signed is conclusive evidence that this section has been complied with.
- (6) The Lieutenant Governor in Council may discharge any liability resulting from the guarantee out of
- (a) the consolidated revenue fund, or
- (b) the proceeds of securities of the government issued and sold for the purpose.
- (7) The signature of the Minister of Finance or a designated officer may be engraved or otherwise mechanically reproduced.
- (8) The mechanically reproduced signature is for all purposes the signature of that person and is binding on the government,
- (a) even though the person whose signature is reproduced may not have held office at the date of the security or of its delivery, and
- (b) even though the person who holds the office at the time when the signature is affixed is not the person who holds that office at the date of the security or of its delivery.

RS1979-201-18; 2003-54-27.

(Am) Apr 01/04

(Am) Apr 01/04

**Money of corporation**

(Am) Dec 01/07

21. (1) Money required by any Act or regulations to be paid to the corporation, premiums and other consideration payable for insurance provided by the corporation, and any other money that may be due and payable to the corporation must be paid to the corporation, and may be retained by it to be used and dealt with only to carry out the powers of the corporation under this or any other Act.

(Am) Jun 01/07

(2) The Lieutenant Governor in Council may, by order, direct the Minister of Finance to pay to the corporation for the purposes of the *Insurance (Vehicle) Act*, out of the consolidated revenue fund, the amounts considered advisable but not to exceed the equivalent of

(Am) Jun 28/04

- (a) a tax of 2.2¢/litre on each litre of fuel taxable under the *Motor Fuel Tax Act*, and
- (b) the portion considered advisable, of the fees payable under the *Motor Vehicle Act*, *Commercial Transport Act* and *Passenger Transportation Act*.

RS1979-201-19; 1981-15-110; 1985-76-64; 2003-54-27; 2004-39-73; 2003-94-43 (B.C. Reg. 166/2006); 2007-14-131 (B.C. Reg. 354/2007).

**Money in safekeeping**

22. The corporation's uninvested money and securities held by it must be kept for safekeeping in the banks or institutions determined by the directors.

RS1979-201-20.

**Reports**

(Am) Aug 12/03

23. (1) The corporation must annually prepare and provide to the minister, for the preceding fiscal year,

(Am) Apr 01/04

- (a) a report of the corporation on its operations,
- (b) a financial statement showing the corporation's operations, as well as its assets and liabilities at the end of the year in the form that may be required by the Minister of Finance, and

(Am) Jun 01/07

- (c) if the corporation is engaged in the business of optional vehicle insurance,
  - (i) a report, prepared by an actuary who is not an employee of the corporation, as to whether the corporation's optional vehicle insurance policy liabilities and universal compulsory vehicle insurance policy liabilities have been valued in accordance with accepted actuarial practices, and
  - (ii) a report, prepared by an accountant who is not an employee of the corporation, as to whether
    - (A) the corporation's optional vehicle insurance costs have been attributed to optional vehicle insurance in accordance with generally accepted accounting principles and in compliance with section 49 (1) and any orders made under section 49 (2), and
    - (B) the corporation's universal compulsory vehicle insurance costs and its non-insurance costs related to driver and vehicle licensing and road safety have been attributed to universal compulsory vehicle insurance in accordance with generally accepted accounting principles and in compliance with section 49 (1) and any orders made under section 49 (2).

(2) The books and accounts of the corporation must be audited at least once in every year by an auditor appointed by the Lieutenant Governor in Council, who must report to the minister on the annual financial statement.

(Am) Aug 12/03

(3) The minister must lay the reports and financial statement received by the minister under subsection (1) before the Legislative Assembly on a date within 60 days next following the end of the year for which the report and statement are made if the Assembly is then in session, otherwise on a date within 15 days after the opening of the next following session.

(4) The financial statement referred to in subsection (1) must be prepared in accordance with generally accepted accounting principles.

(Am) Jun 01/07

(5) If the corporation is engaged in the business of optional vehicle insurance, the financial statement referred to in subsection (1) must include the following:

(Am) Jun 01/07

- (a) a financial statement for the optional vehicle insurance operations of the corporation;
- (b) a financial statement for the remainder of the operations of the corporation.

RS1979-201-21, 1987-12-9, 2003-35-5, 2003-54-27, 2003-94-64 (B.C. Reg. 166/2006).

#### Report to superintendent

24. (1) The corporation must file with the superintendent each year an annual report on its condition and affairs for its immediately preceding fiscal year.
- (2) The report must be prepared in a manner determined by the superintendent and filed within 30 days after the date on which the financial statement for the corresponding fiscal year is laid before the Legislative Assembly under section 23.

RS1979-201-22.

#### Inspection by Comptroller General

(Am) Apr 01/04

25. (1) The Comptroller General must, as often as he or she considers advisable, inspect the records of the corporation to satisfy himself or herself that revenues collected by the corporation on behalf of the government have been accurately recorded and remitted promptly to the Minister of Finance.
- (2) The Minister of Finance may at any time direct the Comptroller General to examine and report to the Treasury Board on the financial or accounting operations of the corporation.

(Am) Apr 01/04

RS1979-201-23, 2003-54-27.

#### Disposition of surplus

26. (1) If the financial statement under section 23 shows that the assets of the corporation at the end of the year for which the statement is made exceed its liabilities, the minister must first present the statement to the Lieutenant Governor in Council, who may, by order, direct the corporation to make a payment to the government promptly after the statement, amended as set out in subsection (3), has been laid before the Assembly.
- (2) The payment must be
- (a) an amount of money not greater than the amount the corporation would, if liable for income tax under the *Income Tax Act*, pay under that Act, and
  - (b) that portion of the remaining excess determined by the Lieutenant Governor in Council, but not so as to reduce the balance of the excess of assets over liabilities below the greater of \$10 million, or 125% of the total of unearned premiums on all its outstanding unmatured policies, calculated in proportion to the time expired, together with the amount of matured claims and all its other liabilities of every kind.
- (3) A payment that the Lieutenant Governor in Council directs to be made under this section must be shown in the statement of liabilities included in the financial statement to be laid before the Legislative Assembly as an amount owing by the corporation.
- (4) The excess of assets over liabilities must reflect that increase in the liabilities.

RS1979-201-24.

#### Additional reports

27. The Lieutenant Governor in Council may, at any time, by order, require additional reports the Lieutenant Governor in Council may consider necessary from the corporation.

RS1979-201-25.

**Excess of liabilities**

(Am) Aug 12/03

28. If the financial statement or report referred to in section 23 (1) (a) or (b), as the case may be, or an additional report under section 27, shows that the liabilities exceed the assets, or indicates that the liabilities, exclusive of the liability for the repayment of money, if any, paid to the corporation under this section or section 16 or 38, may, at any time in the coming year, exceed the assets, the Lieutenant Governor in Council may, by order, direct that the amount or estimated amount of the excess be paid to the corporation out of the consolidated revenue fund.

RS1979-201-26; 2003-35-6.

**Investments**

(Sub) Aug 12/03

29. (1) The corporation must not invest or lend its funds other than in accordance with guidelines prescribed by the Lieutenant Governor in Council.
- (2) The corporation may take any additional securities of any kind to secure repayment to the corporation of any investment or loan or to further ensure the sufficiency of the securities in which the corporation is, by this section, authorized to invest or loan its funds.

RS1979-201-27; 1989-47-352; 2003-35-7.

**Limitation of actions**

(Am) Dec 01/07

30. (1) Unless a longer period is provided in the contract or insurance plan, no action or other proceeding lies against the corporation in respect of any claim for loss or damage under a policy or plan of insurance unless the action or other proceeding is commenced within one year after the furnishing of reasonably sufficient proof of loss or claim under the policy or plan.
- (2) No action or other proceeding lies against any person other than the corporation for the purpose of enforcing a claim or right in relation to the operations engaged in or carried on under this Act or any insurance plan established under any Act.
- (3) No action or other proceeding whatever may be commenced against a person in respect of any act or omission done in good faith in connection with the administration or carrying out of this Act, regulations or any insurance plan established under any Act.

RS1979-201-28; 2007-14-132 (B.C. Reg. 354/2007).

**Requirement to insure with corporation**

31. (1) If the corporation has power, under section 8, to engage in and carry on a class of insurance or an insurance plan and the corporation establishes the class or plan, every designated association, board, commission, municipality or other corporation to which a grant or advance may be made, the borrowings of which may be guaranteed by the government, or a majority of members of which are appointed by the Lieutenant Governor in Council, must, if that class of insurance is required, apply to the corporation for the insurance of that class it may require, and must not effect the insurance with another insurer unless an application for the insurance is refused by the corporation.
- (2) This section applies only to the associations, boards, commissions, municipalities or other corporations designated by the Lieutenant Governor in Council by order.

RS1979-201-29.

**Permission to insure with corporation**

32. Subject to section 31, if, under an Act other than the *Financial Institutions Act* a class of insurance may be effected with an insurer authorized to do business in British Columbia, and the corporation is carrying on business in that class of insurance, the insurance so authorized may, despite the other Act, be effected with the corporation.

RS1979-201-30; 1987-56-62; 1989-47-353.

**Mortgagor's rights**

33. (1) Despite the terms and conditions of a mortgage or agreement, a mortgagor or purchaser may effect insurance with the corporation, whether or not the corporation is a company approved by the mortgagee or vendor.
- (2) Production of a policy issued by the corporation constitutes compliance with the terms of the mortgage or agreement respecting production of a policy of insurance.

RS1979-201-31

**Information**

34. For the purpose of evaluating the risks or class of risks that may be undertaken by the corporation, each ministry of the government, agent of the government and municipality must provide to the corporation, on request in writing, the reports and information the corporation may require.

RS1979-201-32

**Education and research**

35. The corporation, either alone or in cooperation with one or more ministries of government, persons, boards, commissions or other corporations, may introduce, supervise, finance and promote educational programs or research relating to health, rehabilitation, safety and the reduction of risk for any branch or class of insurance in which the corporation is engaged.

RS1979-201-33

(Rep) Jun 01/07

**Repealed**

36. *Repealed.* [2003-94-65 (B.C. Reg. 166/2006)]

**Agreements**

37. (1) With the approval of the Lieutenant Governor in Council, the corporation may enter into agreements with Canada or a province on any of the following:

(Rep) Jun 01/07

- (a) *Repealed.* [2003-94-65 (B.C. Reg. 166/2006)]
- (b) deposit, security and undertaking required to carry on business in other provinces;
- (c) any other matter for carrying on business, or settlement of claims in other provinces.

(Rep) Jun 01/07

- (2) and (3) *Repealed.* [2003-94-65 (B.C. Reg. 166/2006)]

RS1979-201-35; 1983-10-21; 2003-94-65 (B.C. Reg. 166/2006)

**Initial advance**

(Am) Apr 01/04

38. Out of the fund of \$5 million set aside by the Minister of Finance on March 31, 1973, the Minister of Finance must make advances to the corporation under section 16 as authorized by order of the Lieutenant Governor in Council.

RS1979-201-36; 2003-54-27

**Application of the *Financial Institutions Act***

(Sub) Aug 12/03

39. (1) Except as provided in this Act and the regulations, the *Financial Institutions Act* does not apply to the corporation.
- (2) The Lieutenant Governor in Council may make regulations specifying that the corporation must comply with any or all of the provisions of
- (a) the *Financial Institutions Act*,
- (b) the regulations under the *Financial Institutions Act*, or
- (c) similar legislation of Canada.

- (3) The Lieutenant Governor in Council may, in regulations made under subsection (2),
- (a) prescribe how the specified provisions apply and how the corporation must comply with them, and
  - (b) apply different provisions, or apply provisions differently, to different parts of the corporation's operations and different businesses operated by the corporation.
- (4) In the event of a conflict between a provision specified in a regulation made under subsection (2), or anything ordered or done under a regulation made under subsection (2), and a provision of Part 2 of this Act, or anything ordered or done under a provision of Part 2, the provision of Part 2 or the order or action under the provision of Part 2 prevails.

2003-35-8

**Application of *Business Corporations Act***

(Am) Mar 28/04

40. (1) Except as provided in this Act, the *Business Corporations Act* does not apply to the corporation.

(Am) Mar 28/04

(2) The Lieutenant Governor in Council, may, by order, direct that the *Business Corporations Act*, or a provision in it, applies to the corporation.

RS1979-201-38; 2003-70-194

**Power to make regulations**

41. (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(Add) Jul 28/87

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations respecting the manner in which records or their contents may be kept by the corporation.

RS1979-201-39; 1997-29-19

**Transition for Traffic Victims****Indemnity Fund**

42. (1) The corporation has, despite the repeals effected by the *Traffic Victims Indemnity Fund Repeal Act*, S.B.C. 1982, c. 30, the power and capacity to litigate or otherwise dispose of any claim against and the duty to discharge any liability of

(a) the Traffic Victims Indemnity Fund, and

(b) the corporation

that would otherwise be extinguished by those repeals.

(2) Despite the repeals effected by the *Traffic Victims Indemnity Fund Repeal Act*, S.B.C. 1982, c. 30, all liabilities of the Group Two members of the Traffic Victims Indemnity Fund that would otherwise be extinguished by the repeals are preserved and, subject to subsection (4), continue to exist to the same extent as if the repeals had not been effected.

(3) Nothing in subsection (1) affects or prejudices any right that any person has or may have against the Group Two members of the Traffic Victims Indemnity Fund.

(4) Nothing in this section prevents the corporation from relying on the *Limitation Act*.

(5) This section is retroactive to the extent necessary to give full effect to its provisions.

RS1979-201-40; 1982-30-2

**PART 2 – Regulation of the Corporation  
Division 1 – Interpretation**

**Interpretation**

(Rep) Jun 01/07

43. (1) *Repealed.* [2003–94–66 (B.C. Reg. 166/2006)]
- (2) In this Part, an activity has or is likely to have the effect of appreciably impeding or reducing competition if
- (a) the activity has or is likely to have a detrimental effect on existing or potential competition, and
  - (b) the detrimental effect is or is likely to be large enough to be material, even though that detrimental effect may not be large enough to constitute preventing or lessening competition substantially within the meaning of sections 79 (1) and 92 (1) of the *Competition Act* (Canada).

2003–35–9; 2003–94–66 (B.C. Reg. 166/2006).
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**Division 2 – Role of the British Columbia Utilities Commission*****Utilities Commission Act to apply***

(Am) May 01/08

44. (1) Subject to subsections (3), (6) and (7), the *Utilities Commission Act*, other than sections 3, 5 (4) to (9), 22, 23 (1) (a) to (d) and (2), 25 to 38, 40, 41, 43 (1) (b) (ii), 44.1, 44.2, 45 to 57, 59 (2) and (3), 60 (1) (b) (ii) and (2) to (4), Part 3.1, 97, 98, 106 (1) (k), 107 to 109 and 114, Parts 4 and 5 and sections 125.1 and 125.2 of that Act, applies to and in respect of the corporation as if it were a public utility, and a reference in this Part to the *Utilities Commission Act* or to a provision of that Act is deemed to be a reference to that Act or provision as it applies for the purposes of this Act.

(2) Despite subsection (1), the corporation is not a public utility.

(3) For the purposes of subsection (1),

- (a) a reference to "rate" in the *Utilities Commission Act* and in this Part is deemed to be a reference to "rate", as defined in section 1 of the *Utilities Commission Act*, as if paragraph (a) of that definition read as follows:

"(a) compensation of the Insurance Corporation of British Columbia, other than any fee or other remuneration to which that corporation is entitled for any activity it undertakes under section 7 (g), (h) or (i) of the *Insurance Corporation Act*,"

(Am) Jun 01/07

- (b) a reference to "service" in the *Utilities Commission Act* is deemed to be a reference to universal compulsory vehicle insurance, and includes

- (i) the corporation's practices and procedures related to universal compulsory vehicle insurance, and

- (ii) the corporation's performance in providing universal compulsory vehicle insurance to its customer base as a whole or to classes of its customers,

but does not include the corporation's provision of universal compulsory vehicle insurance to any one customer,

- (c) section 23 (1) (g) (i) of the *Utilities Commission Act* is deemed to read as follows:

"(i) the convenience or service of the public, or", and

- (d) section 43 (3) (a) of the *Utilities Commission Act* is deemed to read as follows:

"(a) all profiles, contracts, reports of accountants, actuaries and consultants, accounts and records in its possession or control relating in any way to its property or service or affecting its business, or verified copies of them, and".

(Am) Jun 01/07

- (4) In addition to any rights or powers that the commission may exercise under subsection (1) of this section in relation to the corporation, the commission is to supervise the corporation in accordance with sections 45 and 46 and Division 3 and, for that purpose, has all of the rights and powers that would be available to the commission were that supervisory duty imposed on it under the *Utilities Commission Act*.

(5) Despite section 11 (1) and (2) of the *Utilities Commission Act*, the fact that a commissioner or an employee of the commission obtains or is otherwise covered by insurance coverage provided by the corporation is not a contravention of the *Utilities Commission Act* and does not disqualify the commissioner or employee from acting in any matter affecting the corporation.

(Am) Jun 01/07

(6) Section 62 of the *Utilities Commission Act* does not apply to rates for optional vehicle insurance.

(7) The Lieutenant Governor in Council may prescribe provisions of the *Utilities Commission Act* that do not apply to the corporation or to one or more of the businesses in which the corporation is engaged.

2003-35-9; 2003-94-67 (B.C. Reg. 166/2006); 2008-13-18.

(Am) Jun 01/07

#### Regulation of universal compulsory vehicle insurance

45. (1) If the corporation is authorized by the Lieutenant Governor in Council to provide universal compulsory vehicle insurance, the corporation must make available universal compulsory vehicle insurance in a manner, and in accordance with practices and procedures, that the commission considers are in all respects adequate, efficient, just and reasonable.

(2) If the commission, after a hearing held on its own motion or on complaint, finds that the manner in which universal compulsory vehicle insurance is provided by the corporation does not comply with subsection (1) or that the practices and procedures in accordance with which that insurance is provided do not comply with subsection (1), the commission must

(a) determine the manner or the practices and procedures, as the case may be, that comply with subsection (1), and

(b) order the corporation to comply with that manner or with those practices and procedures.

(3) After a hearing held on the commission's own motion or on complaint, the commission may determine and set adequate, efficient, just and reasonable standards, practices or procedures to be used by the corporation in providing universal compulsory vehicle insurance and may order the corporation to comply with those standards, practices or procedures.

(4) The commission may, by order, require the corporation to report, at the times and in the form ordered by the commission, on the corporation's performance in providing universal compulsory vehicle insurance, including, without limitation, on the corporation's performance in complying with any order made under subsection (2) or (3).

(5) The commission may exercise its powers and duties under this section in relation to the provision by the corporation of universal compulsory vehicle insurance to the corporation's customer base as a whole or to classes of its customers, but not in relation to the provision by the corporation of universal compulsory vehicle insurance to any one customer.

(6) Despite this section and section 44, and despite section 110 of the *Utilities Commission Act*, the commission does not have the power to change a term or condition of any plan of universal compulsory vehicle insurance established under the *Insurance (Vehicle) Act*.

2003-35-9; 2003-94-68 (B.C. Reg. 166/2006).

#### Reserve funds

(Am) Jun 01/07

46. (1) The commission may, by order, require the corporation to maintain, for the purposes set out in section 8.4, reserves that are equal to or greater than the reserves the corporation is required to maintain under that section.

(2) The commission must take the corporation's obligation to maintain reserves into account in fixing rates of the corporation.

2003-35-9; 2003-94-69 (B.C. Reg. 166/2006); 2006-28-55 (B.C. Reg. 46/2007).

**Commission subject to direction**

(Add) Aug 12/03

47. (1) In addition to any other power the Lieutenant Governor in Council may have to issue directions to the commission, the Lieutenant Governor in Council may, by regulation, issue directions to the commission respecting the factors, criteria and guidelines that the commission must or must not use in regulating and fixing rates for the corporation, including, without limitation, one or more of the following directions:

(Am) Jun 01/07

- (a) establishing financial outcome targets for the corporation generally and for its optional insurance business in particular, including targets for the corporation's capital base, within the meaning of the *Financial Institutions Act*, and the corporation's profits, and directing the commission to accommodate those targets when regulating and fixing those rates;
  - (b) identifying circumstances in which the commission is and is not to regulate and fix rates applicable to optional vehicle insurance;
  - (c) establishing criteria on which rates may, and must not, be based;
  - (d) identifying activities the corporation may or must undertake on behalf of the government or under an enactment, and directing how those activities, and the costs related to them, are to be treated for the purposes of regulating and fixing rates;
  - (e) directing the commission to consider specified factors or criteria when regulating and fixing rates;
  - (f) authorizing the commission to determine any factor or criterion the commission considers to be relevant in relation to the regulation and fixing of rates.
- (2) In addition to any other power the Lieutenant Governor in Council may have to issue directions to the commission, the Lieutenant Governor in Council may, by regulation, issue one or more of the following directions to the commission:
- (a) setting out the basis on which and the manner in which the commission is to perform its obligations under this Part;
  - (b) directing the commission to require the corporation to prepare a plan, in the manner and form, with the content and at the time or times required by the Lieutenant Governor in Council, of the steps the corporation will take to meet the financial outcome targets referred to in subsection (1) (a);
  - (c) directing or authorizing the commission to approve and monitor compliance with the plan referred to in paragraph (b) of this subsection;
  - (d) identifying activities the corporation must undertake on behalf of the government and
    - (i) establishing requirements as to the manner in which and the practices and procedures in accordance with which those activities are to be undertaken, and
    - (ii) providing direction to the commission as to how it should regulate those activities to ensure that they are undertaken in accordance with the requirements established under subparagraph (i).
- (3) The commission must comply with any direction issued under subsection (1) or (2) despite
- (a) any other provisions of the *Insurance Corporation Act* or the *Utilities Commission Act*, or
  - (b) any previous decision of the commission.

2003-35-9; 2003-94-70 (B.C. Reg. 166/2006)

**Limitation**

(Add) Aug 12/03

48. Nothing in this Part or in the *Utilities Commission Act* gives to the commission the right or power to alter or affect any rights, remedies or entitlements that may exist at law with respect to compensation for injury or death, or loss or damage to property, that arises out of the use or operation of a vehicle.

2003-35-9

**Division 3 – Competition Regulation****Separation of businesses**

(Am) Jun 01/07

49. (1) The commission must ensure that the universal compulsory vehicle insurance business and the revenue of the corporation, other than revenue from the corporation's optional vehicle insurance business, are not used to subsidize the corporation's optional vehicle insurance business.

(Am) Jun 01/07

(2) For the purpose of subsection (1), the commission may issue any orders it considers necessary to ensure that the corporation's optional vehicle insurance business and activities are segregated from the corporation's other businesses and activities for accounting purposes, and that, in addition, any other businesses and activities of the corporation that the commission considers appropriate are segregated from the remaining businesses and activities of the corporation for accounting purposes, including, without limitation, orders

- (a) requiring reports from auditors,
- (b) requiring reports from actuaries, and
- (c) specifying cost allocation practices and other accounting practices that the corporation is to follow.

(3) Before taking any action under this section, the commission must consider any current reports ordered under subsection (2) (a) or (b).

2003-35-9; 2003-94-70.1 (B.C. Reg. 166/2006) 2006-28-56 (B.C. Reg. 46/2007).

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of this document to be delivered via United States mail, first-class postage prepaid, and via e-mail per agreement of the parties, to the following:

Greg Samuels, WSBA #19497  
Cross Border Law Corporation  
Ste. 204 – 1730 W 2<sup>nd</sup> Ave  
Vancouver, BC V6J 1H6  
CANADA

Signed at Seattle, Washington, on March 15, 2010.



Trinda Hartman, Legal Assistant

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