

# ICBC UMP ARBITRATION - THE BASICS

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## ICBC UMP ARBITRATION - THE BASICS

### I. What is UMP?

Underinsured motorist protection (UMP) is mandatory first party coverage provided by the Insurance Corporation of British Columbia (ICBC) intended to compensate an insured in the case of injury or death caused by an at fault motorist who does not have any, or any adequate liability insurance, or personal assets to pay the full amount of compensation assessed against the motorist. The UMP provisions are set out in Division 2 of the Part 10 of the *Insurance (Vehicle) Regulation (BC Regulation 447/83)* in s.148.1 to s.148.4. The amount of mandatory UMP coverage provided by ICBC as part of basic coverage is \$1.0 million per insured person (I(V)R, Schedule 3, s.13). An additional \$1.0 million of UMP coverage is offered by ICBC as optional insurance.

The above description involves three restrictions on coverage. It is only available to an “insured” which raises the question who is an “insured”? *Regulation* s.148.1(1) contains a separate definition of “insured” for UMP purposes. UMP is provided as part of every Owner’s Certificate and Driver’s Certificate (Driver’s License). Coverage is extended to members of the household of the person named in the Owner’s Certificate or Driver’s License. Coverage is also extended to an occupant of a B.C. insured vehicle (“Household” is defined in the *Regulation* s.1(1) to mean: “every person ordinarily residing in the same dwelling unit”). Most people therefore will be an insured for UMP purposes. A person who lives alone, does not have a car or Driver’s License, and is struck either as a pedestrian or cyclist by a vehicle will not be insured for UMP.

The second restriction for coverage is that there must be an underlying at fault motorist. This requirement arises from the definition of “underinsured motorist”. Accordingly UMP is not available to a person who is injured as the result of the sole fault of a car repairer, car manufacturer, highway maintenance contractor or a dog owner (whose negligence allows the dog to escape onto the road causing an accident).

The next restriction is that the at fault motorist must be “unable, when the injury or death occurs, to pay the full amount of damages recoverable by the insured”. This requires an investigation of the personal assets of the at fault motorist. Where the tortfeasor’s insurer is offering its full but inadequate policy limits in exchange for a release of the tortfeasor, from the claimant’s point of

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view a statutory declaration should be obtained from the tortfeasor respecting personal assets and ICBC's consent is required prior to concluding any such settlement (*Regulation*, s.148.2(4)(b)). Since it is a pre-requisite to the entitlement to UMP compensation that there be an underinsured motorist, this suggests that the onus is on the claimant to establish that the tortfeasor is unable to pay the full compensation. A statutory declaration from the tortfeasor ordinarily is satisfactory to ICBC.

### II. Exclusions

There are 5 noteworthy exclusions. First, UMP coverage does not apply to a hit and run accident unless the accident occurs on a highway (*Regulation*, s.148.1(4)(a)) and where the hit and run accident occurs in the Yukon, Northwest Territories or the United States, there must be actual physical contact between the two vehicles (*Regulation*, s.148.1(4)(b)). Second, there is no UMP coverage for an occupant of a vehicle that is in fact not licensed unless the occupant has reasonable grounds to believe the vehicle is licensed (*Regulation*, s.148.1(3)(a)). Third, there is no UMP coverage for an operator of or a passenger in a vehicle that the operator or passenger knew or ought to have known was being operated without the consent of the owner (*Regulation*, s.148.1(3)(b)). Fourth, ICBC is not liable to an insured who without the written consent of ICBC and to its prejudice settles or prosecutes to judgment an action against someone who may be liable to the insured (*Regulation*, s.148.2(4)(b)). Fifth, UMP coverage is not part of an Owner's Certificate for a bus, taxi or limousine. This means, for example that the occupant of a bus or taxi does not have entitlement to UMP by virtue of being an occupant in that vehicle. The occupant may however have entitlement to UMP from another source ie. their own Owner's Certificate or Driver's License or that of a household member.

### III. How to Initiate an UMP Claim

UMP claims may be initiated with or without the consent of the UMP insurer. UMP claims are most frequently initiated by consent. Both parties agree that the preconditions to entitlement to UMP compensation are satisfied (the claimant is an "insured" for UMP purposes; the tortfeasor is legally liable; the tortfeasor cannot pay the full damages) and the only issue in dispute is the quantification of the claim and the determination of applicable deductible amounts. Where both parties agree to proceed to arbitration, they usually select an arbitrator who is essentially

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appointed by letter. Once the arbitrator accepts the appointment, responsibility to move the process forward by convening a pre-hearing meeting is on the arbitrator.

Where there is no mutual consent, then *Regulation s.148.2(1)* requires that the matter be arbitrated under the *Arbitration Act*. Section 22 of the *Arbitration Act* provides that unless the parties agree otherwise, the *Domestic Commercial Arbitration Rules of Procedure* of the B.C. International Commercial Arbitration Centre (BCICAC) (*BCICAC Rules*) for the conduct of domestic commercial arbitrations apply. Section 10 of the *BCICAC Rules* provides that an arbitration “is deemed to have commenced” when a notice of request to arbitrate or a notice of submission to arbitrate has been filed with the BCICAC and the requisite administrative fee has been paid. The *BCICAC Rules* also set out the procedure for selecting an arbitrator.

### IV. Pre-Arbitration Meeting

Once an arbitration proceeding has been commenced by the appointment of an arbitrator, a pre-hearing meeting either with counsel in person or by conference call is normally arranged by the arbitrator. Section 18 of the *BCICAC Rules* requires the arbitrator to convene a pre-hearing meeting within 21 days of appointment. The pre-arbitration meeting in practice operates very much like a case management conference. Often the parties fix a date and place for the hearing, provide an estimate of hearing length, schedule dates of the delivery of pleadings, discovery of information, exchange of documents, preparation of an agreed statement of facts and delivery of experts reports. A proposed agenda for the pre-hearing meeting suggested by the Arbitration Centre is attached as Appendix “A”. If the arbitrator is appointed through the Arbitration Centre, then the arbitrator will be required to complete a certificate of independence and impartiality. If the arbitrator is appointed by consent, then any circumstances involving the arbitrator that might lead to a reasonable apprehension of bias should be disclosed.

### V. BCICAC Rules or Supreme Court Rules

The *BCICAC Rules* presumptively apply unless varied by agreement of the parties. There are substantive differences between the *BCICAC Rules* and the *Supreme Court Rules*. The *BCICAC Rules* contemplate the evidence of every witness (including parties) being presented in written form and exchanged no less than five days prior to the hearing with the witnesses attending if required to do so on no less than two days’ notice. Expert reports are to be delivered 14 days

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prior to the hearing. There is no explicit right of an oral examination for discovery nor an independent medical exam. The BCICAC *Rules* have their own provisions respecting costs, but no explicit rule respecting the effect of a “successful” settlement offer on costs and no provision for double costs. Counsel often agree to adopt the *Supreme Court Rules*.

### VI. Pleadings

There may or may not be pleadings in an underlying tort proceeding that set out all of the injuries and damages sought. If there are no such pleadings, then a form of notice of civil claim and response to civil claim in the arbitration proceeding must be delivered. Those pleadings must also be appropriate to the issues in the UMP arbitration, which include from the claimant’s point of view allegations that the claimant is an “insured” for UMP purposes and has been injured by an at fault underinsured motorist. From the respondent’s point of view, any applicable deductible amounts need to be pled. The proper parties to the arbitration are the injured person as claimant and ICBC (or private UMP insurer) as respondent.

### VII. Examinations for Discovery and Independent Medical Exams

The BCICAC *Rules* do not provide as of right, for either an examination of the claimant under oath or for independent medical exams. An early UMP decision, *Newell v ICBC* 11 September 1990; additional Reasons 1 November, 1990) held that the arbitrator had no jurisdiction to order a discovery. A subsequent decision in *Hayward v ICBC* (30 September 2005) based on the (current) 1998 BCICAC *Rules* held that an arbitrator does have jurisdiction to order an examination under oath. In *Hayward*, there was a judgment in a B.C. action against the tortfeasor and the discovery in the arbitration proceeding was allowed only with respect to events or circumstances arising after the tort trial date. Where the arbitration is proceeding by consent, it is worthwhile, as part of the agreement to arbitrate, to address whether prior discovery transcripts may be used and whether there will be further discoveries. If a lawsuit has been commenced elsewhere, eg. in Washington State, and the claimant and other witnesses have been deposed by U.S. counsel, the agreement to arbitrate should set out what use, if any, is to be made of those depositions. In my experience, in most cases, there is agreement that prior discoveries or depositions of the claimant may be used in the UMP arbitration and there is often, but not always, an agreement for a further discovery of the claimant.

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The BCICAC Rules do not expressly provide for any independent medical exams. A 1990 decision in *Newell v ICBC* (Arbitration, September 11, 1990; additional Reasons 1 November, 1990) held that an arbitrator did not have jurisdiction to order an independent medical exam. The Rules do permit an arbitrator to appoint an expert on specific issues (Rule 27(4)). However, in a recent decision, *N.Z. v ICBC* (Arbitration, 20 Dec 2013) the arbitrator found jurisdiction to order independent medical exams based on the obligation under Rule 19(1) to treat each party fairly and give each party full opportunity to present its case. There is still no right to an independent medical exam. Any order is discretionary, and may depend upon the extent of medical information previously available to the UMP insurer.

### VIII. Interlocutory Applications

In the event applications are required seeking particular pre-hearing orders, even where the *Supreme Court Rules* are not adopted, the practice is to require a formal Notice of Application setting out the order sought, and accompanied by Affidavit material in support of the application. The applications are heard either by counsel appearing in person, by counsel making submissions on a conference call or by submissions in writing. Decisions respecting these interlocutory applications are also included on the ICBC website for decisions after June 21, 2007. Interlocutory applications have addressed issues such as the admissibility of an expert's report, the entitlement of the respondent to further independent medical examinations and the production of documents in the possession of parties or third parties.

### IX. The Arbitration Hearing

If the *Supreme Court Rules* are adopted, then the hearing proceeds very much like a Supreme Court trial. The hours of hearing are a bit more flexible. But, otherwise, there is an opening by claimant's counsel, the evidence of the claimant and the claimant's witnesses is adduced and they are cross-examined and then the respondent's witnesses are called and their evidence led and they are cross-examined. One issue for determination is the use of a Court Reporter. A Court Reporter does not automatically attend but will attend at the request of any party. In the absence of a reporter, the "record" in the event of subsequent proceedings is presumably the arbitrator's notes. The general practice seems to be not to require a Court Reporter, at least for

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short arbitrations. ICBC is usually the party requesting a Court Reporter. A Court Reporter may be requested for the evidence of select expert witnesses only.

Depending upon the issues and evidence, it is customary, but not universal, for the hearing to be split into two segments. There is an initial hearing following which a decision is issued assessing damages. There is a subsequent hearing, with evidence *viva voce* or otherwise, or receipt of submissions oral or written with respect to applicable deductible amounts. There then follows the formal Award, and there may even be a further hearing or receipt of submissions with respect to interest and costs. (In this regard the arbitration proceeds much like a tort action, in which damages are initially assessed, but before judgment is entered there is a further proceeding to determine any reduction for no fault benefits pursuant to s.83(5) of the *Insurance (Vehicle) Act*. As with tort litigation often after the initial determination of assessed damages, the other issues are resolved between the parties).

### X. Deductible Amounts

The applicable deductible amounts are set out in s.148.1(1) of the *Insurance (Vehicle) Regulation*. The common deductible amounts are amounts paid under the tort feisor's liability policy, amounts paid with respect to an uninsured motorist or a hit and run accident, amounts payable under Part 7, Employment Insurance benefits, disability benefits under the Canada Pension Plan and amounts payable under private collateral benefit plans protecting against income loss or medical expense. The onus of proving that a deduction should be made is on the UMP insurer. The UMP insurer must establish a likelihood of future benefits being paid.

### XI. Sources of Information Regarding UMP Process and Decisions

There are several sources of information respecting UMP claims. They include:

1. Chapter 8 of the CLE publication, *BC Motor Vehicle Accident Claims Practice Manual*. The Chapter is devoted to UMP claims;
2. A CLE paper by Soren Hammerberg at the CLE Personal Injury Conference – 2002. The topic was *The Matrix of Collateral Benefits in Part 7 and UMP Claims*;
3. A TLA paper at a seminar on February 15, 2008 entitled *How Does UMP Work*;

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4. A prior CDL paper on January 14, 2010 entitled *Underinsured Motorist Protection: Basics Plus*;
5. A CLE paper on September 12, 2013 entitled *Arbitrating the UMP Claim*;
6. A CLE presentation on September 19, 2014 by Jason McDaniel, Senior Legal Counsel, ICBC, entitled *UMP Basics: An Overview of underinsured Motorist Protection Coverage*; and
7. All UMP decisions after June 21, 2007 are available on the ICBC website. You can find them by Googling "ICBC Arbitration" and clicking on "Arbitration Decisions".

There is no public repository of UMP decision prior to June 21, 2007. ICBC has a library of UMP decision as do some others.



## APPENDIX 'A'

Please be sure to copy the Centre on all written correspondence between yourself and the parties.

You may wish to address the following matters at the pre-hearing meeting:

1. identification of issues in dispute;
2. disclosure of any previous personal or professional contact with parties or counsel that might contribute to a perception of bias by the arbitrator;
3. procedures to be followed;
4. time periods for steps that will assist the arbitration to proceed in an efficient and expeditious manner;
5. agreed statement of facts;
6. discovery, if any;
7. discovery of documents, if any;
8. joint and several obligations of the parties for costs;
9. requirement for oral hearing or documents only;
10. date of the arbitration hearing;
11. estimated time for hearing;
12. the arbitrator's fees;
13. required deposits;
14. size of room required for hearing;
15. any special aids required at hearing (audio visual materials, reporter, special sitting times etc).