

IN THE MATTER OF AN ARBITRATION
PURSUANT TO s.148.2(1) OF THE REVISED REGULATIONS
TO THE *INSURANCE (VEHICLE) ACT* (BC REG. 447/83 AND
THE *ARBITRATION ACT*, R.S.B.C. 1996, c. 55

BETWEEN

CLAIMANT

AND

INTACT INSURANCE COMPANY and
ECONOMICAL INSURANCE GROUP

RESPONDENTS

Arbitrator: Kenneth Glasner, Q.C.
Counsel for the Claimant: Kevin F. Gourlay
Counsel for Intact Insurance: Jordan A. Bank
Counsel for Economical Insurance: Matthew Bujar
Dates of Hearing: November 29, 2019 and
January 7, 2020
Place: Vancouver, BC

DECISION ON A PRELIMINARY ISSUE

Background

[1] The Claimant, Mr. _____, an Ontario resident, insured by Intact Insurance Company (“Intact”) rented a Ford E450 CanaDream Motorhome (“RV”), (Alberta license plate number J34199). The RV was insured under an Alberta automobile insurance policy issued by the Respondent, Economical Insurance Group (“Economical”).

[2] Mr. _____ was involved in a motor vehicle accident on Highway #1 in British Columbia on July 4, 2011 with a motor vehicle (Idaho license plate number _____) driven by _____, an American.

[3] Mr. _____ was an underinsured driver at the time of the accident.

[4] At the time of the accident, both the Intact and Economical policies were in effect.

[5] Mr. _____ was driving a vehicle covered by an American insurer. The American insurer paid its third party liability limits of \$250,000(USD).

Issue

[6] Mr. _____ is entitled to UMP coverage. The issue in the application before me is which policy, Intact or Economical is primary for UMP coverage.

[7] Economical's counsel phrases the issue as follows:

“a. Is _____ entitled to SEF 44 or UMP coverage under the Economical CanaDream Policy, and/or OPCF 44R or UMP coverage under the Intact Pardo Policy?

b. If there is more than one policy under which _____ is entitled to family protection coverage, is one of the policies primary and if so, which one?”

(emphasis added)

[8] I note that b. above allows for the possibility that both parties share equally on the issue of primary coverage.

[9] The issue is between two out-of-province insurers. ICBC is not involved.

Application

[10] The application was heard on November 29, 2019 and January 7, 2020. Mr. Pardo's counsel took no active part in the application.

Legislation

[11] The relevant British Columbia legislation binding the insurers include: *Insurance Company Vehicle Liability Insurance Regulation* B.C. Reg. 84/91 (the "ICVLI Regulation"); section 148.2(1) of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the "Insurance Regulations"); and the *Insurance (Vehicle) Act*, (the "Act").

[12] The Insurance Regulations provides universal compulsory vehicle coverage. PART 10 provides, where applicable, a process by which a claimant, in this case Mr. Pardo, can claim compensation – UMP legislation.

[13] Restrictions are placed on out-of-province insurers under section 2.(2) of the ICVLI Regulation as follows:

Conditions on insurers contracting motor vehicle
liability insurance

- 2 (1) Each of subsections (2) and (3) is a condition of every business authorization issued to, or held by, an insurance company or extraprovincial insurance corporation.
- (2) In an action brought in British Columbia against an insurance company or its insured or an extraprovincial insurance corporation or its insured under a policy evidencing a contract of vehicle insurance made outside British Columbia that provides third party liability insurance coverage, the insurance company or extraprovincial insurance corporation
- (a) shall appear,
- (b) shall not set up any defence to the action, including a defence as to the limit or limits of liability under the contract made outside British Columbia that might not be set up of the contract were evidenced by a vehicle liability policy issued in British Columbia, and
- (emphasis added)

[14] The effect of this legislation is that out-of-province insurers cannot set up defences not available to ICBC.

Facts

[15] Economical provided coverage to CanaDream at the time of the accident (the “CanaDream Policy”), the details of which are set out in tab 8 of the Respondent’s book of the documents. Those terms included:

“IN CONSIDERATION OF THE PAYMENT OF THE PREMIUM AND OF THE STATEMENTS CONTAINED IN THE APPLICATION FOR INSURANCE, THE CONTRACT PROVIDES INSURANCE AS MENTIONED IN ITEM 4 OF THIS CERTIFICATE FOR WHICH A PREMIUM IS SPECIFIED, AND NO OTHER.”

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LEGAL LIABILITY FOR BODILY INJURY TO OR DEATH OF ANY PERSON OR DAMAGE TO PROPERTY (exclusive of costs and past judgement interest) for loss or damage resulting from bodily injury to or the death of one or more persons, and for loss or damage to property, regardless of the number of claims arising from any one accident.”

[16] The Economical policy of Insurance did not contain a Family Protection Endorsement (“SEF 44”) for Alberta.

[17] Mr. _____ also had coverage through his insurer, Intact, under an Owner’s policy for vehicles registered in Ontario (the “Intact Policy”). The Intact Policy contained an Ontario 44R Endorsement.

[18] Intact argues that an out-of-province insurer must provide no less a coverage than what is required if ICBC was the insurer no matter the form of the policy – in this case \$1 Million in UMP coverage.

[19] The insurer is barred from setting out certain defences: see Section 2(2) of the ICVLI as set out in paragraph 13 herein. See *Park*.

[20] Intact argues a “certificate” being a specific document has no bearing here as ICBC has no involvement.

[21] Intact submits that one should look at the comparative reading of the two policies arguing that the terms of the Intact policy when comparing it to Economical's obligation. See *Family Insurance*.

[22] OPCF 44R Family Protection Coverage states:

MULTIPLE COVERAGES

18. The following rules apply where an eligible claimant is entitled to payment under family protection coverage under more than one policy:
- (a) (i) if he or she is an occupant of an automobile, such insurance on the automobile in which the eligible claimant is an occupant is first loss insurance and any other such insurance is excess;
 - (ii) if he or she is not an occupant of an automobile, such insurance in any policy in the name of the eligible claimant is first loss insurance and any other such insurance is excess
- (b) all applicable first loss family protection coverage shall be apportioned on a pro rata basis, but in no event shall the aggregate payment under all such insurances exceed the highest limit of coverage provided by any one of such first loss insurances,
- (c) the applicable first loss insurance shall be exhausted before recourse is made to excess insurances,
- (d) all applicable excess family protection coverage shall be similarly apportioned on a pro rata basis, but in no event shall the aggregate payment under all such insurances exceed the highest limit of coverage as defined in section 5 of this change form, which is provided by any one of such excess insurances.

(emphasis added)

[23] These terms are commonly referred to as “other insurance” clause – a clause which is not found in the Economical policy. The language of OPCF 44R is clear and unequivocal

[24] Economical argues that SEF 44 coverage is not mandatory in Alberta. There is no SEF 44 coverage attached to the Economical policy. Intact’s coverage includes a SEF 44 coverage (OPCF 44R) and therefore Intact should be considered the primary insurer.

[25] Counsel for Economical then directed me to how one should review and interpret policies of insurance including how to deal with implied terms. I have relied on the case law set out in these reasons.

[26] I have considered all of the extensive submissions, including the nuances adjunct to the main arguments. In doing so I have distilled the salient points in these reasons.

The Law

[27] I have also reviewed all of the cases provided by counsel.

[28] In applying the case law to the facts I am guided by the following cases:

1. *Jevco Insurance Company v. Barry Drews and Insurance Corporation of British Columbia* 2003 BCSC 721 (“Jevco”)

2. *Christina H. Park v. Insurance Corporation of British Columbia and Royal & Sun Alliance Life Insurance Company of Canada*; 2002 BCSC 1114, (“Park”)
3. *Mazur v. The Citadel General Assurance Company*, 2005 BCSC 1371 (“Mazur”)
4. *Family Insurance Corporation v. Lombard Canada Ltd.* [2002] 2 S.C.R. 695 (“Family Insurance”)

[29] In *Jevco*, the court dealt with the system of universal compulsory automobile insurance. The court makes comment on the protection afforded to a claimant where the coverage arises either from an owner’s or driver’s certificate.

[30] The court states:

[6] In this province, as is well known, there is a system of universal compulsory automobile insurance. The *Insurance (Motor Vehicle) Act* R.S.B.C. 1996, c. 231, s. 7, requires that ICBC administer a plan of universal compulsory automobile insurance. The interpretation section of the B.C. Reg. 447/83, passed pursuant to that *Act*, states that “universal compulsory automobile insurance” means insurance providing coverage under Parts 6, 7, and 10. Part 10 is the section dealing with under-insured motorist protection.

[7] Under-insured motorist protection can arise either from an owner’s certificate of a vehicle or from a driver’s certificate which is issued to those who, like Drews, hold a British Columbia drivers license.

[8] An out-of-province insurance company that wishes to sell insurance within this province must sign an undertaking by which it agrees, among other things, to abide by B.C. Reg. 84/91 quoted above.

[31] In *Park*, the court dealt with limitations for out-of-province insurers at paragraphs 27 and 28

[27] Royal is bound, when conducting business in British Columbia, not to set up any defence that might not be set up if the contract were evidenced by a motor vehicle liability insurance policy issued in British Columbia. The definition of “motor vehicle liability policy” in the *ICMVL I Regulation* is wide; it encompasses the form, the coverages, and the amounts required by law. According to *Anderson*, it is not open to Royal to argue that this might mean the type of policy issued by a private insurer under the *Insurance Act*. This means the type of policy issued by ICBC.

[28] Subsection 2(2)(b) of the *ICMVL I Regulation* is also comprehensive in its application; it is not restricted to limits of coverage. It encompasses “any defence.”

[32] *Mazur* dealt with three out-of-province insurers, each containing an “other insurance clause.” The court grappled with the issue of priority among “other insurance” clauses. The case before me one policy had an “other insurance clause” - the second did not.

[33] The court also dealt with the universal compulsory automobile insurance scheme at paragraph 8:

[8] The *Revised Regulation (1984) under the Insurance (Motor Vehicle) Act*, B.C. Reg. 447/83 (the “Regulations”) sets out the universal compulsory automobile insurance scheme available in this province, and includes Part 10, Division 2, the Underinsured Motorist Protection (“UMP”) provisions.

[34] Of note, the court then considered section 2(2)(b):

[34] The Court then considered whether s. 2(2)(b) was in harmony with the provisions of the legislative scheme governing insurance in the province of Alberta. It concluded at p. 8 that the purpose of the Alberta legislation was “to have an insured outside Alberta obtain insurance benefits to the same extent as if the insured was covered by a policy issued in that other Province”.

[35] *Mazur* goes on to consider both the *Jevco* and *Park* decision as follows:

[39] The Court in *Jevco*, following the trial decision in *Park*, concluded that *Jevco* “cannot set up a defence which would not be available to ICBC on a policy which it issued in this province.” For that reason, the arbitrator was correct to conclude that the insurer must provide UMP coverage to the insured and that such coverage was primary

[36] The Supreme Court of Canada in *Family Insurance* dealt with the issue of “other insurance clauses” within the context of primary liability.

[37] *Family Insurance* dealt with (see page 695):

Two policies of insurance covering same risk – Both insurers relying on “other insurance” clauses to avoid primary liability

[38] The court at page 696 held that:

The insurer may seek to limit its liability in the provisions of the policy, unless the policy itself is the proper instrument to determine the liability of each insurer.

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The policies here are clear and unambiguous and the insurers’ intentions are unequivocal.

[39] At page 701 the court reviews the judicial history of the case citing McEwan J. as follows:

McEwan J. first noted that the wording of the two clauses was not identical. Thus the first step was to determine whether the two clauses could be reconciled by determining the intent of the two insurers as revealed by the content of their respective policies: *Simcoe & Erie General Insurance Co. v. Kansa General Insurance Co.* (1994), 93 B.C.L.R. (2d) 1 (C.A.).

[40] The court at page 703 refers the cardinal rule of construction in that:

The cardinal rule of construction is that the intention of the parties must prevail. But the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words which the parties have themselves chosen to express their meaning. The Court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances.

(emphasis added)

[41] At page 707 the Supreme Court says:

The intention which the court seeks to determine is found by looking at the means by and extent to which each insurer has sought to limit its liability to the insured when the insured has purchased other policies covering the same risk. Thus, the interpretation exercise is concerned with determining the intentions of the insurers *vis-à-vis* the insured. In *Seagate Hotel Ltd. v. Simcoe & Erie General Insurance Co.* (1981), 27 B.C.L.R. 89 (C.A.),

[42] Had both Intact and Economical policies contained an “other insurance clause” then a further view of *Mazur* and *Family Insurance* may have been warranted.

Decision

[43] Having reviewed the law as it applies to the facts and considering the submissions, I find that Economical Insurance Group is the primary insurer for UMP coverage.

[44] I reserve on the question of costs and await input from counsel.

Vancouver, British Columbia
January 27, 2020

Kenneth Glasner, Q.C.
Arbitrator