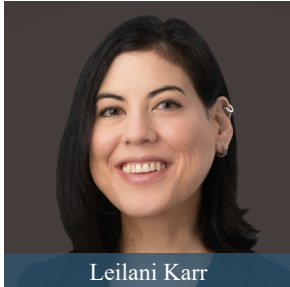




## Lost in Interpretation: Insurance Claim Arbitration Muddies the Effect of Clear Provincial Statutory Language



Leilani Karr

*By Leilani Karr, Lawyer*

*S.A. (Re)*, 2020 BCSC 1323 is relevant less for its underlying issues than for its potential impact on the ability of a court to impose a public policy analysis in the interpretation of otherwise unambiguous statutory language. This is potentially relevant in both B.C. and Alberta, where recent legislation has introduced significant changes to the provincial motor vehicle insurance regimes.

### **The Saga of S.A. v. ICBC**

On November 8, 2004, S.A. was the occupant of a parked truck owned by his employer when the truck was struck by a vehicle that itself had been struck by an oncoming vehicle driven by an uninsured motorist in a high-speed police chase. The uninsured motorist was killed. S.A. was seriously injured and became permanently disabled.

In April 2005, S.A. submitted an application for WCB benefits but elected to pursue his tort claim. ICBC, as it was entitled to under the statutory regime of the time, advised S.A. that the at-fault motorist was uninsured and that any amount received from WCB would be deducted from monies paid under UMP, B.C.'s uninsured motorist protection fund. S.A. commenced an action against the uninsured driver and others in October 2006.

On June 1, 2007, the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 and regulation ("old legislation") was repealed and replaced with the *Insurance (Vehicle) Act*, R.S.B.C. 1996 c. 231 and regulation ("new legislation"). Under the new legislation, ICBC was precluded from deducting WCB benefits in certain situations. The purpose of that change was to prevent the potential for a double deduction of benefits that existed under the old regime, a result widely acknowledged as being unfair to claimants but which nevertheless had been followed for a number of years.

Through a series of court proceedings, in June 2013, S.A.'s action against the defendants other than the uninsured motorist was dismissed by the British Columbia Court of Appeal. In 2018, S.A. re-elected to claim WCB benefits rather than proceed with his remaining tort claim. Worksafe BC became subrogated to S.A.'s tort and UMP claims. ICBC and Worksafe BC, pursuant to its right of subrogation, then participated in an UMP arbitration. The sole issue in that arbitration was whether S.A.'s WCB benefits, which were estimated to be worth between \$500,000 and \$600,000, were deductible from S.A.'s \$1 million entitlement under UMP.

ICBC's position was that because the accident occurred in 2004, the old legislation applied and, pursuant to the clear wording of that legislation, it was entitled to deduct the value of the WCB benefits from S.A.'s claim. ICBC relied on transitional provisions that clearly stated the old legislation continued to apply to proceedings commenced under that regime. S.A. did not argue that the effect of the language in the old legislation was not to permit the deduction of WCB benefits. Rather, its position was that the transitional provisions did not apply, but if they did, the old legislation should not be given effect because the potential for a double deduction of benefits was punitive to claimants.



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The arbitrator found that the transitional provisions were clear on their face and that the old legislation governed S.A.'s rights to benefits. Having done so, however, the arbitrator then embarked on an inquiry as to whether the old legislation was fair to S.A. In deciding it was not, he declined to permit ICBC to deduct S.A.'s WCB benefits from the UMP award.

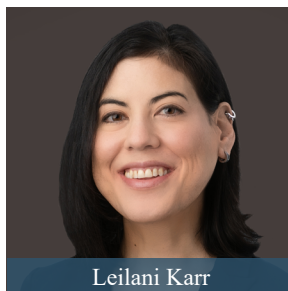
ICBC appealed and lost. In *S.A. (Re)*, 2020 BCSC 1323 at para. 88, the court held that the arbitrator "applied the Old Regulation, but interpreted it in line with the *Rizzo* principles of statutory interpretation". That is, even though the old regulation clearly mandated the deduction of WCB benefits, the court found it was entitled to consider whether to do so was in line with public policy and make an award accordingly.

### **The Effect**

Given that the arbitration involved the interpretation of language under the old *Insurance (Motor Vehicle) Act*, this particular deduction is an issue that will likely never arise again. However, if the underlying rationale of the arbitrator (which was upheld by the BCSC) is followed, the potential effect is much broader. Specifically, the court in *S.A.* appears to hold that even where the effect of the language of a statute is clear, a decision-maker may nevertheless embark on an overarching examination of extraneous (and potentially vague) considerations of public policy and fairness. The effect is to impart a new level of uncertainty to parties' rights under statute.

## **Questions?**

Should you have any questions with respect to this bulletin, or if you would like more detailed information related to motor vehicle insurance in British Columbia or Alberta, please contact the following members of the Brownlee LLP Insurance Litigation team:



Leilani Karr

(780) 497-4810

[lkarr@brownleelaw.com](mailto:lkarr@brownleelaw.com)

### **CALGARY**

1500 Watermark Tower  
530 - 8 Avenue S.W.  
Calgary, AB T2P 3S8  
T: (403) 232-8300  
F: (403) 232-8408

Toll Free: 1-800-661-9069

### **EDMONTON**

2200 Commerce Place  
10155 - 102 Street  
Edmonton, AB T5J 4G8  
T: (780) 497-4800  
F: (780) 424-3254