

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, SECTION 268 and *REGULATION 283/95***

**AND IN THE MATTER OF THE *ARBITRATION ACT*,
S.O. 1991, c. 17;**

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CERTAS DIRECT INSURANCE COMPANY

Applicant

- and -

INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

ARBITRATION AWARD

COUNSEL:

Robert Plate for the Applicant

J.A. Michael Wolfe for the Respondent

ISSUE IN DISPUTE:

1. Is Kamaljeet Singh deemed to be a “named insured” under the ICBC policy insuring the Freightliner truck under section 66 of the *Statutory Accident Benefits Schedule*, by virtue of RTS Enterprises having made the vehicle available for his regular use ?

RESULT:

- (a) RTS Enterprises did not make the Freightliner truck available for Mr. Singh's regular use, and he is therefore not a named insured under the ICBC policy.

Certas' claim is therefore dismissed.

HEARING:

This matter proceeded to arbitration on December 10, 2008 in Toronto, Ontario, before me, Shari L. Novick, pursuant to section 7(1) of Regulation 283/95 of the *Insurance Act*, and the provisions of the *Arbitration Act, 1991*.

The parties executed and filed an Arbitration Agreement prior to the commencement of the hearing.

BACKGROUND:

Kamaljit Singh was injured when he was involved in a motor vehicle accident on April 6, 2006, while a passenger in a Freightliner truck. The accident occurred near Blind River, Ontario, while he and another truck driver were en route from Toronto to Vancouver, delivering a load of freight. At the time of the accident, Mr. Singh was sleeping in the rear cabin, while Mr. Paramjeet Dhot, his co-driver, was driving the truck. The truck was insured by the Insurance Corporation of British Columbia ("ICBC").

Mr. Singh applied for accident benefits from Certas Direct Insurance Company "(Certas)", the insurer of his personal vehicle. Certas paid these benefits, and the claim has now been resolved on a full and final basis. Certas contends in this arbitration that ICBC is in higher priority under section 268(2) of the *Insurance Act* to pay Mr. Singh's claim, and seeks reimbursement for all amounts paid out. Specifically, Certas claims that Mr. Singh is deemed to be a "named insured" under the ICBC policy pursuant to section

66 of the *Statutory Accident Benefits Schedule*, as RTS Enterprises Ltd. (“RTS”), the company that he was hauling freight for, made the Freightliner truck available for his regular use.

Mr. Singh acquired the truck in 2001. Approximately four years later, he entered into an owner-operator agreement with RTS to use the truck to haul freight between Toronto and Vancouver. The determination of which insurer is in higher priority to pay his claim turns on whether or not the particular facts of these parties’ arrangements can be said to result in RTS making the truck available to Mr. Singh, or whether Mr. Singh, as owner-operator of the truck in question, actually made the vehicle available to RTS for its regular use.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Section 66(1) – Statutory Accident Benefits Schedule

66. (1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(a) the insured automobile is being made available for the individual’s regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or

(b) the insured automobile is being rented by the individual for a period of more than 30 days

Section 268(2) – Insurance Act

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

Section 268(5.2) – Insurance Act

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

EVIDENCE:

The parties filed an Agreed Statement of Facts prior to the hearing. Mr. Singh and Mr. Dhot were examined under oath in advance of the arbitration, and the transcripts of their evidence were referred to and relied on by counsel at the hearing.

The relevant facts are as follows: Kamaljit Singh lived in Brampton, Ontario at the relevant time. In June 2001 he entered into a “lease to own” agreement with a financing company called Financial Transport Inc. (“Financial Transport”) with respect to the purchase of a 2000 Freightliner truck. While there was some discussion at the hearing about whether this was a true lease or a capital asset purchase, it is clear that Mr. Singh

made monthly payments of \$1900 to Financial Transport towards the purchase of the truck, and that as of the date of the accident, he had made all but one payment.

In January 2003, Mr. Singh incorporated a company named J.P. Xpress Transport Inc. He was the sole shareholder of the corporation and its directing mind.

On July 1, 2005, either J.P.Xpress or Kamaljit Singh in his personal capacity, entered into an “owner-operator agreement” with RTS Enterprises to haul freight between Toronto and Vancouver using the Freightliner truck referred to above. Mr. Singh typically drove one round-trip per week. Unfortunately, the parties were not able to locate a copy of the agreement, so it is not known whether it was executed in Mr. Singh’s name or in the name of his company. I find that nothing turns on this fact.

The parties agree that the contract included the following terms:

- (a) RTS Enterprises Ltd. would add the Freightliner to its fleet insurance policy held with the Insurance Corporation of British Columbia;
- (b) a license plate owned and registered by RTS Enterprises Ltd. would be affixed to the Freightliner;
- (c) RTS Enterprises Ltd. would arrange the routes (that is, the pick-up and drop-off locations) for Kamaljit Singh;
- (d) an RTS Enterprises Ltd. decal would be affixed to the doors of the Freightliner;
- (e) Kamaljit Singh was not required to wear a uniform;
- (f) Kamaljit Singh/J.P. Xpress would be paid by RTS Enterprises Ltd. by the kilometer travelled;
- (g) Kamaljit Singh/J.P. Xpress was responsible for paying for the Freightliner’s maintenance;
- (h) Kamaljit Singh/J.P. Xpress was responsible for paying for the Freightliner’s fuel;
- (i) Kamaljit Singh/J.P. Xpress was responsible for paying the Freightliner’s financing costs;

- (j) while under the contract Kamaljit Singh/J.P. Xpress was not permitted to use the Freightliner to haul freight for other hauling companies; and
- (k) it was an open contract, meaning that there was no specific term, and Kamaljit Singh/J.P. Xpress could end the contract at any time by giving the industry-standard two week's notice to RTS Enterprises.

In addition to the above, Mr. Singh testified at the examination that he was not permitted to operate the Freightliner for personal reasons. When he was not hauling loads for RTS, the truck was parked in a parking lot in Mississauga, the cost of which he paid for.

Mr. Singh also advised that while the truck was insured under RTS' fleet policy with ICBC, and RTS was responsible for paying the insurance premiums to ICBC, he paid RTS \$600 per month to cover the cost of this insurance. He also testified that he was responsible for paying Mr. Dhot, the other driver, from the payments that he received from RTS.

It is also agreed that RTS and Financial Transport (the financing company) were listed as "owner" on the Owner's Certificate of Insurance and Vehicle License, and as "registered owner" on the Vehicle Registration issued by ICBC. Despite this fact, Mr. Singh testified to his belief that "RTS owned the plates, but he owned the tractor".

Mr. Singh was asked at his examination whether he was obliged to take all of the assignments given to him by RTS. He answered that he was obliged to do so, but stated that if he was sick, he would simply advise the company that he was unable to drive. The evidence also indicates that Mr. Singh did not haul any freight for RTS between January 25, 2006 and February 22, 2006, when he was in India for a family wedding.

The accident occurred on April 6, 2006. The truck was declared a total loss as a result of the damage it sustained in the accident. ICBC issued a cheque for approximately \$28,000 to Financial Transport, the financing company. As Mr. Singh had paid all but one of the monthly payments at that time, Financial Transport subtracted the final payment of \$1900

still owing, and paid Mr. Singh approximately \$26,000, representing the salvage value of the Freightliner.

ARGUMENTS & ANALYSIS:

Counsel for Certas contends that RTS made the Freightliner truck available for Mr. Singh's regular use, and as such, he is deemed to be a named insured under its fleet policy with ICBC. He acknowledges that Mr. Singh is also a named insured under the Certas policy covering his personal vehicle, but notes that section 268(5.2) of the *Insurance Act* provides that an insured in this circumstance must claim from the insurer who holds the policy for the vehicle in which he was an occupant at the time of the accident.

Certas submits that the question of who exercises control over the vehicle is central to the determination of whether or not section 66 of the *SABS* applies in these circumstances. Counsel noted that it was undisputed that RTS was the registered owner of the truck's license plates, and was listed as an owner of the vehicle on the Certificate of Insurance and the ICBC Vehicle Licence. He emphasized that Mr. Singh was not permitted to drive the truck for personal use, or to haul freight for another company. He submitted that while Mr. Singh may have had control over the Freightliner at one point, it is clear from the evidence that once he entered into the contract with RTS he relinquished control over it, and that it was therefore RTS that made the vehicle available to him for his regular use.

Mr. Wolfe, on behalf of ICBC, took the opposite view. He contended that RTS did not make the truck available to Mr. Singh, and that in fact it was Mr. Singh who made the Freightliner available to RTS. He cited three cases with similar facts, and noted that the arbitrators hearing them had determined that section 66 did not apply, finding that it was the individual owner-operator who made the trucks available to the hauling companies. He urged me to come to the same conclusion in this case.

In *AXA Insurance Company v. Markel Insurance Company of Canada* (unreported decision of Arbitrator Fidler, December 9, 1996, affirmed by Ont. Ct. of Justice (Gen'l Div'n), May 29, 1997), an owner-operator of a truck contracted with a hauling company to use his truck to haul their freight, He was injured when the truck was involved in an accident. The arbitrator was asked to decide whether or not the driver was deemed to be a named insured under the policy held by the hauling company, pursuant to section 66.

Arbitrator Fidler found that the essence of the parties' agreement in that case was that in return for the company providing loads to transport and for paying the driver to do so, the driver agreed to use the truck exclusively to haul freight for that company. The registration of the truck's license plate was transferred into the company's name, although the registration of the vehicle itself remained in the name of the owner-operator. The driver was responsible for paying all expenses related to the operation of the truck, such as fuel, financing costs and repairs. He was also entitled to turn down any load offered by the company, and could use the truck for his own personal use if he chose to. The arbitrator determined that the company was not making the truck available for the driver's regular use, but rather that he had made the vehicle available for the company's use, and was therefore not deemed to be a named insured under their policy. On appeal, the court agreed with the arbitrator's decision.

In *Markel Insurance Company of Canada v. State Farm Mutual Automobile Insurance Company* (unreported decision of Arbitrator Hudson, April 12, 2000), the arbitrator came to a similar conclusion. The owner of a van had entered into an agreement with a freight forwarding company along the same lines as in the above case. The driver leased the van to the company, but unlike in the case above, the license plates remained registered in his own name. No restriction was placed on his personal use of the van; the only limit imposed was that he was not permitted to use the van to carry loads for other companies. The driver was involved in an accident while driving the van, and the question of whether or not section 66 of the *SABS* applied arose. The arbitrator found that the driver had maintained control over the van despite the arrangement that the parties had entered into,

and concluded that he was the one who had made the vehicle available for the company's use.

Finally, Arbitrator Samis came to the same conclusion in *AXA Assurance Company vs. ING Insurance Company of Canada (unreported decision, dated May 27, 2006)*. In that case, Michael Yelin entered into an owner-operator agreement with C & G Freight Systems. The essence of the agreement was that Yelin provided C & G with the exclusive use of his Volvo truck, and supplied other drivers, while C & G insured the vehicle and provided loads of freight for them to haul. The question before the arbitrator was whether or not the company made the vehicle available for his regular use pursuant to section 66 of the *SABS*, the result of which would be that Mr. Yelin would be deemed to be a named insured under the Axa policy. Arbitrator Samis stated –

..I am asked to determine whether or not this arrangement can be characterized as C & G Freight making Yelin's vehicle available to Yelin for Yelin's regular use. In my view, that is a characterization that the facts cannot reasonably support. Yelin comes to the transaction with the vehicle and gives to C & G rights with respect to the vehicle. While Yelin may have contractual obligations to C & G that limit the use that might be made of the vehicle, I do not think that it is an appropriate characterization to say that C & G has made this vehicle available for Yelin's use at any time. I agree that it is the contrary situation that prevails. Yelin made the vehicle available for C & G.

Arbitrator Samis cited Arbitrator Fidler's decision in *Axa v. Markel, supra*, and stated that while there were undoubtedly some distinguishing features between the two cases, the essence of the transactions were the same, and that the details that were different were "not material to the application of the legal principles".

It is clear from the above cases that unless an unusual degree of control is exerted by the hauling company over the truck or the owner-operator, it is the owner-operator of the truck that is considered to be the entity that makes the vehicle available for the company's use, as opposed to the other way around. This has been determined to be the case, despite the fact that the agreements typically provide that the driver will provide the

company with exclusive use of the truck, the license plates are registered or “owned” by the hauling companies (except in *Markel v. State Farm, supra*), and the company has the right to place its decals or other corporate symbols on the truck, all of which are indicia of control by the companies.

In this case, the relationship between the parties differed somewhat from the scenarios outlined above, and counsel for Certas contends that the above cases are therefore distinguishable. Unlike the operators in the above cases, Mr. Singh was not permitted to drive the truck for his personal use. And, while he testified at his examination that he owned the truck, the ICBC documents show that the registered owners of the vehicle were RTS and Financial Transport Inc., the financing company to which Mr. Singh made his monthly payments.

In my view, these factors are not enough to distinguish this set of facts from the scenarios outlined in the above cases. As stated by Arbitrator Samis, “the essence of the transactions remain the same”. I accept counsel for ICBC’s submission that while Mr. Singh may not have had full legal ownership of the Freightliner truck, he was the *de facto* owner of it. Financial Transport was likely “on the books” as the legal owner, because title to the truck would not formally pass to Mr. Singh until all of the payments were made. When the truck was damaged beyond repair in the accident, Financial Transport received the cheque for its salvage value from ICBC, and then turned around and wrote a cheque to Mr. Singh, less the one remaining payment. In my view, this is strong evidence of Mr. Singh having ownership of the vehicle, subject to the loan provided by the financing company.

I also note Mr. Singh’s evidence to the effect that RTS may have “owned the plates”, but he owned the tractor.

The fact that that Mr. Singh did not have personal use of the vehicle causes me some concern. However, that is only one factor of the several that I must consider, when assessing the level of control that he maintained over the vehicle. Mr. Singh paid for all

expenses including fuel, repairs and insurance, and also paid to maintain the parking spot for the truck when it was not in use. As well, he had the right to withdraw from the contract with RTS by simply providing two weeks notice. In my view, the freedom to withdraw one's services in this manner is strong evidence of control, and along with the other facts mentioned above, tips the balance in favour of Mr. Singh making the Freightliner available for RTS' use.

I therefore find that when the overall relationship between Mr. Singh and RTS is considered, it is not accurate to say that RTS made the Freightliner truck available to Mr. Singh for his use. The facts demonstrate that the opposite is true –that he made the truck available for the company's use.

Accordingly, I find that Mr. Singh is not deemed to be a named insured under the ICBC policy pursuant to section 66 of the *SABS*. The result of this finding is that Certas remains the priority insurer under section 268(5.2), and the arbitration against ICBC is dismissed.

DATED at TORONTO, ONTARIO this _____ DAY OF JUNE, 2009.

Shari L. Novick

Arbitrator