



## **WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL**

### **DECISION NO. 2925/07**

**BEFORE:**

M. Crystal: Vice-Chair

**HEARING:**

December 13, 2007, November 18, 2008, November 19, 2008, and  
November 20, 2008 at Toronto  
Oral hearing

**DATE OF DECISION:**

December 16, 2008

**NEUTRAL CITATION:**

2008 ONWSIAT 3273

### **APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE**

**APPEARANCES:**

**For the applicants:**

Ms. Sandi Smith, legal counsel for the applicants Dana Trucking  
Ltd. and Ramanjot Singh and the Insurance Corporation of British  
Columbia

Mr. Victor T. Bulger, legal counsel for the applicants  
Tavinder Singh Toor and R.S. Carrier Inc.

Mr. David Zarek and Ms. Tanya Zygomannis, legal counsel for the  
applicant Marion Sherwood

Ms. Courtney Leyland, legal counsel for the applicants  
Stephen Condran and ABCO Kingswood

Ms. Ashley McInnis and Ms. Colleen Arsenault, legal counsel for  
the applicants William McFarlane and Forbes Motors Inc.

**Workplace Safety and Insurance  
Appeals Tribunal**

505 University Avenue 7<sup>th</sup> Floor  
Toronto ON M5G 2P2

**Tribunal d'appel de la sécurité professionnelle  
et de l'assurance contre les accidents du travail**

505, avenue University, 7<sup>e</sup> étage  
Toronto ON M5G 2P2

**APPEARANCES (continued):**

**For the applicants (continued):**

Ms. Miriam Tepperman and Bianca Matrundola, legal counsel for the applicants Kayle Moore and GE Capital Leasing

Ms. Diane Craig, legal counsel for the applicants Sterling D. Macdonald and ERB Transport Ltd.

Mr. Michael T. Duda, legal counsel for the applicants Marty C. Fick and SM Freight Inc.

Ms. Leigh Harrison-Wilson, legal counsel, and Ms. Bonnie Huen, student-at-law, for the applicant David J. White

Mr. G. G. Wade, legal counsel for the applicant Judith Peister-Robertson (did not participate in the hearing)

Mr. Jeffrey Goldberg, legal counsel for the applicants Jasvir Singh Gill and Eldorado Logistics Systems

Mr. Joel Levine, legal counsel for the applicant Boyce Parrill (did not participate in the hearing)

**For the respondent(s):**

Mr. Thomas Zwiebel, legal counsel for the respondent Gurjit Jhagra

**Interpreters:**

Nasar Shaik, Punjabi (on December 13, 2007)  
Razia Siddiqui, Punjabi (on December 13, 2007)  
Ata Tahir, Punjabi (on November 18 -20, 2008)

## REASONS

### (i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* by the defendants, Tarvinder Singh Toor, R.S. Carrier Inc., David J. White, Ramanjot Singh, Dana Trucking Ltd., Marion Sherwood, Stephen Condran, ABCO Kingswood, Judith A. Peister-Robertson, Jasvir Singh Gill, Eldorado Logistics Systems, Boyce Parrill, William McFarlane, Forbes Motors Inc., Kayle Moore, GE Capital Leasing Ltd., Sterling D. Macdonald, ERB Transport Ltd., Marty C. Fick and SM Freight Inc., in an action filed in the Ontario Superior Court of Justice as No. 05-CV-288441 PD1 (“the action”), and the Insurance Corporation of British Columbia, the insurer for Dana Trucking Ltd. and Ramanjot Singh.

[2] The respondent to the application is the plaintiff in the action, Mr. Gurjit Jhagra.

[3] Testimony was given on December 13, 2007, by the defendant/applicants, Mr. Moore, Mr. Fick, Mr. Toor, and Mr. Singh. Testimony was also provided on that date by Mr. Fick’s employer, and by an individual alleged to be one of the owners of R. S. Carrier Inc. at the time of the subject accident. Mr. Singh continued with his testimony on November 18, 2008. The safety manager for Dana Trucking Ltd, also testified on that date. Mr. Jhagra, the plaintiff/respondent, and Mr William McFarlane, one of the defendant/applicants, provided testimony on November 19, 2008.

[4] Submissions were provided on November 20, 2008 by Ms. Smith, Mr. Bulger, Ms. Zygomanis, Ms. Leyland, Ms. Arsenault, Ms. Matrundola, Ms. Craig, Mr. Duda, Ms. Huen, Mr. Goldberg and Mr. Zwiebel.

### (ii) The issues

[5] The issues to be determined in this application are:

- i) Whether the plaintiff/respondent’s right to sue any of the defendant/applicants has been taken away by the *Workplace Safety and Insurance Act, 1997* (“the Act”);
- ii) If the plaintiff/respondent’s right to sue any of the defendant/applicants has been taken away by the Act, against which of the defendant/applicants has the right to sue been taken away;
- iii) Whether any of the defendant/applicants are entitled to a declaration, made pursuant to section 31(1)(b) of the Act, that the amount that they may be liable to pay in an action is limited by the Act; Whether any of the defendant/applicants are entitled to a declaration, made pursuant to section 31(1)(c) of the Act, that the plaintiff is entitled to claim benefits under the insurance plan.

### (iii) A brief outline of the application

[6] The accident which is the subject of this application occurred on January 13, 2004. On that date, the plaintiff/applicant, Mr. Jhagra, was travelling in a transport tractor/trailer which was operating under the authority of Dana Trucking Ltd. (“Dana”). The truck was being driven by Mr. Singh at the time of the accident, who was the owner of the truck. The purpose of the trip

was to haul and deliver produce in a refrigerated transport tractor/trailer. The trip commenced on or about January 6, 2004 from Brampton, Ontario, continued on to Vancouver, British Columbia, and returned back to Ontario. The accident occurred in Ontario close to the conclusion of the trip. A central question to be determined in this application is whether, at the time of the accident, Mr. Jhagra was in the course of employment, or alternatively, a person who was not in the course of employment.

[7] At the time of the accident, weather conditions were poor. The accident was a multi-vehicle collision that occurred on Highway 401 in Ontario, between London and Windsor, involving 12 vehicles, including 6 transport tractor/trailers. Mr. Jhagra was injured as a result of the accident, and was hospitalized for about one week subsequent to the accident.

[8] The applicants alleged that, at the time of the accident, Mr. Jhagra was a worker employed by a Schedule 1 employer (i.e., either Dana or Mr. Singh), within the meaning of the Act, was in the course of his employment, and that his right to sue, in relation to the accident, is taken away by the Act in relation to Schedule 1 employers, workers employed by Schedule 1 employers, or directors or executive officers of Schedule 1 employers. Trucking is an industry which is included in Schedule 1 of the Act.

[9] Counsel on behalf of Mr. Jhagra advanced the view that, at the time of the accident, Mr. Jhagra was not in the course of employment, and that, in any event, at the time of the accident, he was not a worker of a Schedule 1 employer. Counsel indicated that Mr. Jhagra was travelling along with Mr. Singh, in order to obtain experience hauling a full load, and to determine whether trucking was an occupation that suited him. Counsel advanced the view that Mr. Jhagra did not have an employment relationship with either Mr. Singh, or with Dana. Accordingly, it is Mr. Jhagra's position that his right to sue any of the applicants has not been taken away by the Act.

#### **(iv) The evidence**

##### **Testimony of Mr. Singh**

[10] At the hearing, Mr. Singh testified that he resides in Toronto, and that he has resided in Toronto since prior to the January 2004 accident. He stated that he has worked as a truck driver since about 2001. Mr. Singh stated that in or about 2003 he purchased a truck, but that prior to that time, he was employed as a driver for other trucking companies, driving their vehicles. He stated that after he purchased his truck, he worked with Dana as an "owner/operator". Mr. Singh stated that he was introduced to Dana by his cousin, who lived in the Vancouver area. Dana had its head offices in Surrey, B. C.

[11] Mr. Singh stated that, in order to work with Dana, he was required to complete an application form provided by Dana. The case materials included a package of documents, which together, appear to be Mr. Singh's application form. These documents included:

- A "Checklist for Qualification of new Drivers", which provided Mr. Singh's name and address, indicated that he was applying as of December 2, 2003, indicated that he had an Ontario driving record, and also indicated the names of his previous employers, in order to

facilitate reference checks. The document indicated that the references had been completed;

- A “Driver’s Application for Employment”, which provided Mr. Singh’s contact information, employment history, education history, and the type of driving experience he had had;
- A “Fair Credit Reporting Act Disclosure statement”;
- A “Request for Driving Record”, which would allow Dana to obtain a copy of Mr. Singh’s driving record;
- A “Driver’s Statement of On-Duty Hours” which disclosed Mr. Singh’s driving hours during the previous 7 days;
- A “Consent Form” for drug and alcohol testing; and
- A copy of Mr. Singh’s “Driver Abstract”, disclosing his Ontario Commercial Vehicle Driving Record;

[12] In several of these documents, Dana was specified as “Employer”.

[13] The package of documents also included an eight page document, signed by Dana’s safety manager and by Mr. Singh, entitled “Dana Trucking Ltd. & Owner Operators”. The document included information under several subheadings, including, “Dana Trucking Preferred Requirements are:”, “General Company Policies & Owner/Operators Responsibilities”, and “Expedited Freight” which set out penalties for late delivery. The “Preferred Requirements” included:

- A minimum of two years experience;
- A good driving record;
- Possession of a recent model tractor, with a sleeper; and
- Proof that payments and fees associated with the tractor were current.

[14] The “Company and Owner/Operators Responsibilities” were numerous, and included:

- Owner/Operators were to report to work regularly and on time;
- Owner/Operators were to be in good health and maintain a neat appearance;
- Instructions given by supervisors and dispatchers were to be strictly observed;
- Drug use and alcohol use while driving would be severely disciplined;
- No unauthorized passengers or pets were allowed;
- Phone into dispatch was required every day before 10:00 a.m.;
- Pre-trip inspection was required before every trip;
- Drivers were to haul trailers as directed by the carrier;
- The carrier would determine the routes driven;

- The carrier would have the sole right to utilize the equipment supplied by the contractor, which shall bear the name of the carrier;
- “All payment of wages, workers compensation, insurance payments or other expenses of the contractor or his employees shall be the sole responsibility of the contractor”; and
- Either party could cancel the agreement upon 30 days notice;

[15] The latter part of the document appears under the heading “Memorandum of Agreement”. It states that the agreement is between Dana (“the carrier”) and Mr. Singh (“the contractor”). The make and serial number of Mr. Singh’s truck are specified in the agreement. The agreement includes a number of terms. The first 21 terms are numbered, however the remaining terms are not numbered. The terms of the agreement addressed many of the same matters which were addressed in the earlier part of the document. The document was signed by Mr. Singh and by the safety manager, following the “Expedited Freight” section, and signed again at the end of the “Memorandum of Agreement” portion of the document. The document was dated December 2, 2003.

[16] Mr. Singh testified that he understood that it was necessary to provide the necessary documentation and to sign the applications and agreements in order to drive for Dana. He stated that he completed the application form in Ontario and that he sent it to Dana in B.C. Mr. Singh stated that he also underwent an interview in Surrey B.C., at which time he discussed the manner in which he would be paid. He stated that he agreed to be paid on the basis of a percentage of the total value of the hauling contract, and that he was to be paid 88% of the value of total revenue from a contract. He stated that Dana was to be paid the remaining 12% of the value of the contracts. He testified that Dana set the price to be paid for the trip and that he was not able to influence or negotiate that price. Different prices were set for different destinations. Mr. Singh testified that he was to drive mainly between Vancouver and Toronto, but that trips to Windsor and Montreal might also be included. Mr. Singh testified that he was required to keep a log book, which would set out the number of hours he had driven on any particular day. He stated that he kept the log, and gave a copy to Dana.

[17] Mr. Singh testified that while driving for Dana he had no other work, but that Dana never explicitly told him that he was prohibited from working for anyone else. He stated, however, that Dana wanted to know if he did work other than that provided by Dana. He stated that Dana guaranteed him one trip per week.

[18] Mr. Singh stated that he was required to attend a two day orientation. He stated that he was required to call in to Dana every day, often early in the morning, due to the fact that B.C. was in an earlier time zone. He stated that he communicated by cell phone. Mr. Singh stated that he was also required to place signage on his truck indicating the name “Dana Trucking”. He stated that he understood that if dispatch directed him to pick up or haul a load, he was not permitted to refuse the load, and that if he failed to follow the directions of dispatch, he could be disciplined by being given less work, or a different kind of work. Mr. Singh stated that if he was not able to drive due to illness, truck breakdown or bad weather, he was required to call into Dana. He stated that in the case of a breakdown, if necessary, Dana might send another truck to complete the delivery. Mr. Singh indicated that, as a general proposition, he felt that he was performing his work under the control of Dana. Mr. Singh stated that he understood that, in his

relationship with Dana, he was responsible for paying the cost of fuel, vehicle insurance and maintenance. He stated that he used a fuel credit card provided by Dana, and that insurance premiums were paid by Dana at first instance, but that these expenses were charged back to him as deductions from his monthly pay provided by Dana.

[19] Mr. Singh stated that, although he owned his vehicle outright, while it was used in hauling goods for Dana, the vehicle was registered in Dana's name. He stated that he had no relationship with the customers from whom he picked up or delivered goods, and that these were Dana's customers. He did not advertise for customers. He stated that he completed the paperwork that was required by Dana and that he got paid by cheque at the end of every month.

[20] Mr. Singh testified that he required approval from Dana in order to take a passenger on a trip with him, and that he was only allowed to take a co-driver with him on trips. He indicated that he had to notify Dana that he had a co-driver, and that the co-driver had to be approved by Dana. He stated that Mr. Jhagra was his co-driver at the time of the January 2004 accident. Mr. Singh testified that it was his understanding that Dana required him to have a co-driver, but that in any event, driving would be more efficient and profitable if a co-driver came along, in that, trucking regulations limited the number of hours a driver could drive in a day, and with a co-driver, one driver could sleep or rest while the other carried on driving, thereby limiting the need for lengthy rest stops.

[21] Mr. Singh stated that he had had previous co-drivers, whom he identified and obtained through discussion with friends, or otherwise through "word-of-mouth". He stated that he knew Mr. Jhagra because they lived near one another in India, prior to their immigration to Canada. He stated that he spoke to Mr. Jhagra over the telephone about the possibility of him working as a co-driver, and that about a week prior to their trip he obtained an application form from Dana for Mr. Jhagra, so that he could drive for Dana. Mr. Singh stated that Mr. Jhagra completed the application form, and that he submitted it to Dana. He stated that he understood that Mr. Jhagra had the necessary truck driving licence to do the work. He indicated that he agreed with Mr. Jhagra that Mr. Jhagra would be paid \$500 for first trip as a co-driver, from the Toronto area to the Vancouver area, and returning back to Ontario. Mr. Singh stated that \$500 was the standard fee that would be paid to a new driver for such a trip. He stated that Mr. Jhagra was supposed to have an orientation session from Dana, but that it did not occur, due to the occurrence of the accident on January 13, 2004. Mr. Singh also testified that, alternatively, had Mr. Jhagra continued to drive with him, Mr. Jhagra might be paid \$2000 per month. He stated that he typically drove four trips per month for Dana. Accordingly, payment of \$500 per trip represented about the same level of remuneration for Mr. Jhagra as \$2000 per month.

[22] Mr. Singh testified that he did not discuss with Mr. Jhagra any intended duration for their relationship, in which he would be Mr. Singh's co-driver. He stated that it would be up to Mr. Jhagra as to whether he would be continuing on with further trips, but that if Mr. Jhagra decided to drive on a further trip, he would be paid \$500 for that trip as well.

[23] Mr. Singh stated that Mr. Jhagra's duties were to drive safely, and maintain safety regulations. He stated that he decided when Mr. Jhagra would drive, and that he would direct Mr. Jhagra to drive when the weather was good. He stated that he understood that Mr. Jhagra was new to truck driving, and that the trip to Vancouver was an opportunity for Mr. Jhagra to

obtain experience and training. Mr. Singh stated that he recorded his own driving, as well as the driving performed by Mr. Jhagra in the logbook. He stated that he considered himself to be Mr. Jhagra's boss or employer, and that Mr. Jhagra was required to do as he was told by Mr. Singh. He indicated that he was required to report to Dana if Mr. Jhagra was not following any of the rules set by Dana, and that Mr. Jhagra would be subject to discipline if he broke the rules.

[24] Mr. Singh stated that he provided training to Mr. Jhagra in that he provided him with instructions on how to drive the route between Toronto and Vancouver. He testified that he instructed Mr. Jhagra to drive generally where the road went in a straight line. He indicated that Mr. Jhagra helped him load and unload the goods on the truck. Mr. Singh testified that they completed the portion of their trip to Vancouver, and that they headed back to Ontario, but that there was a mechanical problem with the refrigeration unit ("the reefer") on the truck, and that a stop in Calgary was required to make the repair to the unit. He stated that he and Mr. Jhagra unloaded goods at Leamington, Ontario, on their return trip, prior to the occurrence of the accident.

[25] The case materials included a cheque, dated May 17, 2004, payable to Mr. Jhagra, in the amount of \$500. The cheque was written on a joint account belonging to Mr. Singh and his wife, and was signed by his wife. The "memo line" in the bottom left corner of the cheque indicated that the cheque was made in relation to "PAY". The copy also includes the back of the cheque which is endorsed by Mr. Jhagra, indicating that he cashed the cheque. Mr. Singh testified that the payment of the cheque to Mr. Jhagra was made several months after the trip due to the fact that payment to him by Dana for the trip had been delayed. He stated that he paid Mr. Jhagra for the trip once he had been paid by Dana.

[26] Mr. Singh testified that he understood that it was his responsibility to ensure that Mr. Jhagra either obtained disability insurance or elected to obtain coverage under a worker's compensation insurance plan, and that he intended to obtain such coverage, one way or the other, according to Mr. Jhagra's wishes. He stated that because this trip was Mr. Jhagra's first trip, and their first trip together, he did not obtain coverage for Mr. Jhagra. He indicated that one of the purposes of the trip was to determine whether Mr. Jhagra found cross-country transport truck driving to be work that was suitable or enjoyable, and that he did not consider it appropriate for Mr. Jhagra to obtain insurance coverage unless or until he decided that he intended to continue on with truck driving, on an ongoing basis. Mr. Singh stated that he intended to discuss the matter with Mr. Jhagra at a future time, but that, since they did not continue to drive together after the January 2004 accident, the matter was never discussed between them.

[27] In cross-questioning by Mr. Zwiebel, Mr. Singh indicated that he is able to read and write English to an extent, but that he often requires assistance. He stated that he is married and that his wife reads and writes English well. He indicated that if he has an important letter or contract sent to him, he enlists the help of his wife to explain such documents to him. He stated that his wife assisted him with the completion of his application to Dana, but he could not recall how much assistance she provided, or whether there were particular parts of the application package with which she provided greater assistance.



[28] Mr. Singh testified that he owned the tractor portion of the truck he was driving for Dana, but that the trailers could be changed from time to time. He stated that the problem with the “reefer” was in relation to the tractor he was hauling when he left B.C., and that this tractor was owned by Dana. He stated that Dana told him where to get the problem repaired and that Dana paid for the repair. He stated that, although he owned the tractor portion of the truck, the licence plates on the truck belonged to Dana, and that accordingly, he was driving under Dana’s registration. He stated that it was his understanding that, while he had Dana’s plates on his truck, he was obligated to drive exclusively for Dana. He stated that if another company made him “a better offer”, he would terminate the relationship with Dana, give Dana back its plates, and work for the other company.

[29] Mr. Singh testified that he was paid by Dana at the end of every month, on the basis of a trip sheet that he submitted to Dana. He stated that he submitted the trip sheet that had been provided by Dana, attached expense receipts to the form and submitted it to Dana for payment. He indicated that he had told Dana that he wanted payment to be made to a company that he had incorporated, and that Dana made the payments payable in the name of that company rather than to Mr. Singh in his personal capacity. He testified that this company had been incorporated and that the company filed a separate income tax return. He stated that he owned the company, and that his wife had signing authority for the company. Mr. Singh stated that the \$500 cheque, dated May 17, 2004, that was made payable to Mr. Jhagra, was a personal cheque rather than a cheque from his company, because the personal cheque was “near” or handy to him, and so it convenient to use that cheque.

#### **Testimony of Dana’s safety manager**

[30] An individual who, in January 2004, was Dana’s safety manager, testified at the hearing. He testified that, at the time of the hearing, he was no longer working for Dana and that he was employed as a safety manager for another company. He indicated that, in January 2004, Dana shared offices with another trucking company, and that, although there was some business connection between that company and Dana, he was not able to clearly describe the nature of the connection. He testified that Dana and the other trucking company were separately owned, but Dana operated “under the umbrella” of the other company. He stated that the other company shared offices and other resources, including his services, with Dana. He testified that Dana ceased operating in 2005, at which time he worked exclusively for the other company.

[31] The safety manager testified that he was responsible for hiring drivers for Dana. He stated that before he could hire a driver, he needed to obtain documentation including a Driver Abstract, the individual’s driving licence, a criminal record check and a social insurance number. He also testified that he was responsible for providing training to new drivers, and that this included showing video presentations to new drivers on topics such as defensive driving, winter driving, driving while fatigued, and mountain driving. He stated that such training was both standard and mandatory. The safety manager testified that Mr. Jhagra underwent Dana’s training program.

[32] The safety manager reviewed the application package, included in the case materials, provided by Mr. Singh, referred to above, as well as the application package, included in the case materials, provided by Mr. Jhagra, referred to below. He noted that the application forms were

standard, and that the materials submitted by Mr. Jhagra and Mr. Singh were similar to those submitted by all drivers. He noted that it was necessary to have a driver's employment history in order to facilitate a reference check. He also stated that he obtained consent forms for drug tests, but that testing was not mandatory unless drivers would be travelling through the United States. He confirmed that while drivers were driving with Dana's plates, under Dana's registration and authority, drivers were not permitted to drive for other companies.

[33] The safety manager testified that drivers were advised where to go to pick up their loads by Dana's dispatcher. He stated that the involvement of drivers with Dana's customers was minimal, but that drivers were required to call in to Dana to report if they were going to be late arriving at a customer's premises. He stated Dana booked the job with the customers, negotiated the rate to be paid for hauling the load, determined whether refrigeration would be required for the load, and if so, the specifications for the refrigeration, and determined whether a dangerous goods application needed to be made. Arrangements for insurance were made by Dana, however, the cost of insurance was charged back to owner/operator drivers. Owner/operators were required to keep their trucks in good repair, and to affix a sign to their trucks indicating that it was operating for Dana. He stated that in some cases, the signage might also indicate the name of the owner/operator. He stated that the sign could be easily peeled off a truck, should the owner/operator stop working with Dana.

[34] The safety manager stated that there were a few different options for payment of drivers. He stated that Dana had some "company drivers", who were paid by the mile for their driving, and for whom Dana had the responsibility of paying for their worker's compensation premiums on a mandatory basis. As an alternative to being paid by the mile, drivers might be paid a percentage of the value of the hauling contract. It was his recollection that Mr. Singh was paid a percentage of the value of the hauling contracts that he undertook. He testified that Mr. Singh's cheques were made payable to his company, rather than to himself personally. He stated that other drivers had incorporated companies in a similar manner, and that such an arrangement to pay a company designated by a driver was common.

[35] The safety manager testified that the "Owner/Operators" document that was included in the case materials with Mr. Singh's application package had to be completed by all drivers, and that their cheques could be held back if this paperwork was not submitted to Dana. He stated that Dana was required to provide the paperwork to a government agency. He noted that, in addition to the application package, drivers were required to submit regular log book sheets, which were kept by the company with a copy back to the driver.

[36] The safety manager stated that drivers were required to obey the rules that were set out in the "Owner/Operators" document. In particular, he noted that drivers were required to haul trailers as directed by Dana, and that they were required to phone into the office before 10:00 a.m. This was necessary in order to keep track of the drivers, and to advise them about their next assignments. He stated that drivers could be disciplined if they were lax in carrying out their responsibilities to Dana, and that they could be terminated for certain infractions such as stealing or damaging property, consuming alcohol while on duty, or having a positive drug test. He noted that 30 days notice had to be given by a driver if he was leaving Dana, and that when that occurred, the signage was removed from the driver's truck and he handed in the licence plates which were registered to Dana. He stated that if a driver wanted time off for vacation, the driver

would let Dana know about the period to be taken as vacation, and Dana would not book any assignments for the driver during that period.

[37] The safety manager testified that drivers typically knew which routes were to be taken to deliver a load, but if they were new drivers, routes might be discussed between the driver and dispatch. He stated that alternate routes could be used by drivers if there was an accident on the road which could be avoided by using an alternative route, but that a route through the United States could only be taken with permission from Dana, and this was to be avoided.

[38] The safety manager stated that if a truck broke down, Dana would advise the customer that there could be a delay. If the delay was to exceed 24 hours, another truck could be sent as a replacement.

[39] The safety manager stated that both Mr. Singh and Mr. Jhagra were required to follow Dana's rules, as set out in the "Owner/Operators" document, notwithstanding the fact that Mr. Jhagra did not sign such a document. They were both required to follow the instructions provided by Dana's dispatcher, drive safely, and ensure that the goods being transported were safely stowed.

[40] The safety manager testified that owner/operators were responsible for obtaining their own disability insurance or worker's compensation coverage. He stated that he believed that the relationship between Dana and an owner/operator was properly characterized as one between a principal and an independent contractor. He testified that he also believed that the relationship between an owner/operator and the owner/operator's co-driver was also properly characterized as one between a principal and an independent contractor. He stated that owner/operators generally did not withhold taxes or take other deductions from the remuneration that they paid to their co-drivers, and he thought that this was a key factor in determining whether a relationship should be properly characterized as one between a principal and an independent contractor.

[41] The safety manager testified that he knew Mr. Jhagra had applied to Dana to be a co-driver with Mr. Singh. He stated that Mr. Jhagra was required to participate in Dana's training program, but that applicants who resided in eastern Canada were permitted to drive the first part of their trip to Vancouver without the training, and that the training would be provided to them when they came to Vancouver to deliver the load. As noted above, he testified that Mr. Jhagra took Dana's training program when he arrived in Vancouver. This was not consistent with the testimony provided by Mr. Singh.

[42] He stated that it was not Dana's policy to require that an owner/operator obtain a co-driver, although it appeared to be in everyone's interest for that to occur. He testified that the arrangements for the payment of remuneration by owner/operators to co-drivers was strictly a matter between those parties, and that Dana did not get involved in the matter.

[43] The safety manager testified that owner/operators were required to provide Dana with a worker's compensation registration number, or proof that the owner/operator had obtained private disability insurance. He stated, however, that Mr. Singh had not provided that information to Dana, and that he had intended to follow up with Mr. Singh on that matter, but had not done so because he had been distracted by other matters. He stated that Dana did not

require information relating to worker's compensation or disability insurance coverage for co-drivers, and that that was a matter between the particular owner/operator and the co-driver.

### **Testimony of Mr. Jhagra**

[44] At the hearing, Mr. Jhagra testified that he was born in India, but immigrated to Canada in 1998. He was 33 years old at the time of the hearing. He testified that subsequent to the January 2004 accident, he was married in July 2006, and that he had a child who, at the time of the hearing was about 18 months old. He stated that he had obtained the equivalent of a Grade 12 education in India, but that he received no further education since coming to Canada. He worked as an auto mechanic in India. He provided his testimony through an interpreter, although he acknowledged that he was able to speak English, at least to some extent. He stated, however, that his ability to read and write English was limited and that he relied on friends to explain written documents to him. He indicated that his wife also had very limited English language skills.

[45] Mr. Jhagra testified about his employment history. He stated that prior to the January 2004 accident, after arriving in Canada, he was a farm worker, a general labourer for an auto parts company, an assembler for a company that made cabinetry, and a loader/shipper for a department store. He stated that he began working as a packer for a furniture manufacturer in or about September 2002, and that he continued to be employed in that job at the time of the January 2004 accident. He testified that he was on a paid vacation from his employment with the furniture company at the time that the January 2004 accident occurred. He testified that he earned about \$2500 per month in his employment with the furniture company, and that after two years of service, he became entitled to take two weeks paid vacation.

[46] Mr. Jhagra stated that he was acquainted with Mr. Singh because, prior to their immigration to Canada, Mr. Singh had lived in a village that was located near Mr. Jhagra's village in India. Mr. Jhagra indicated that he had met Mr. Singh on a few occasions prior to his arrival in Canada. Mr. Jhagra stated that he became reacquainted with Mr. Singh in or about 2000, while Mr. Singh was working at a gas station. Mr. Jhagra indicated that, subsequent to their meeting in 2000, from time to time, Mr. Singh would drop in at Mr. Jhagra's place of employment "to say hi" and to have a short visit.

[47] Mr. Jhagra stated that in his initial discussions with Mr. Singh, Mr. Singh recommended that Mr. Jhagra obtain a licence to drive a transport truck. Mr. Jhagra stated that Mr. Singh told him that driving a transport truck was a good job, and that Mr. Jhagra could increase his income and improve his lifestyle if he obtained this type of work. Mr. Jhagra stated that he subsequently took lessons and passed the necessary tests and examinations to obtain his "A - Z" licence, which included an endorsement for the operation of air brakes.

[48] Mr. Jhagra testified that he paid about \$2000 for his general lessons, about \$400 or \$500 more for lessons relating to the operation of air brakes, and a further fee of \$75 to obtain the licence. Mr. Jhagra testified that he passed a written exam for the licence in or about March 2003, and that the lessons began subsequent to that. He stated that his work schedule with his employer permitted him to take the lessons without missing any work, and that the furniture company that employed him was not aware that he was seeking to obtain a truck

driver's licence. Mr. Jhagra also testified that he did not inform Mr. Singh that he was taking truck driving lessons. He testified that he obtained the licence on December 11 or December 12, 2003.

[49] Mr. Jhagra testified that one day he received a telephone call from Mr. Singh who inquired whether Mr. Jhagra had obtained his trucking licence, and Mr. Jhagra advised him that he had obtained the licence. Mr. Jhagra testified that Mr. Singh then told him to get ready to travel with him. Mr. Jhagra stated that he advised Mr. Singh that he wished to spend Christmas week 2003 with his family, but that he was willing to travel with Mr. Singh after that. Mr. Jhagra testified that Mr. Singh advised that he would obtain another person to be his co-driver for a trip that was upcoming immediately, but that he would make arrangements for them to go together on Mr. Singh's next trip after that. Mr. Jhagra testified that the furniture company would be closed over Christmas, and that he asked for approval for two weeks vacation beginning on December 29, 2003, which was approved. Mr. Jhagra testified that he intended to return to his employment with the furniture company after his trip with Mr. Singh, but that did not occur because he was injured in the accident that occurred in January 2004, and because the furniture company, for unrelated reasons, closed its business shortly after the accident.

[50] The case materials included an application package from Mr. Jhagra to Dana, similar in most respects to the application package completed by Mr. Singh, referred to above. A significant difference between the package apparently from Mr. Jhagra, and the package apparently from Mr. Singh is that the package from Mr. Jhagra does not include the document entitled "Dana Trucking Ltd. & Owner Operators" which included a Memorandum of Agreement. As noted above, the package from Mr. Singh included that document, which was signed by Dana's safety manager and Mr. Singh. As outlined above, this document sets out company policies provided by Dana, and includes Dana's rules for owner/operators.

[51] In addition to not including the document entitled "Dana Trucking Ltd. & Owner Operators", the application package, apparently submitted by Mr. Jhagra to Dana, included a copy of Mr. Singh's Ontario Health Card, as well as a copy of Mr. Singh's Ontario Driver's Licence. These latter two documents, belonging to Mr. Singh, were included in Mr. Jhagra's application package, but were not included in Mr. Singh's own application package, or at least were not included in the copy of that package that was included in the case materials.

[52] The documents in the application package apparently submitted to Dana by Mr. Jhagra included:

- A "Checklist for Qualification of new Drivers", which provided Mr. Jhagra's name and address, indicated that he was applying as of January 2, 2004, indicated that he had an Ontario driving record, and also indicated the name of the furniture company as a "previous employer". The document indicated that references had been received;
- A "Driver's Application for Employment", which provided Mr. Jhagra's contact information, employment history, education history, and the truck driving experience he had had (i.e., no experience was indicated);
- A "Fair Credit Reporting Act Disclosure statement";

- A “Request for Driving Record”, which would allow Dana to obtain a copy of Mr. Jhagra’s driving record;
- A “Driver’s Statement of On-Duty Hours” which disclosed Mr. Jhagra’s driving hours during the previous 7 days;
- A “Consent Form” for drug and alcohol testing; and
- A copy of Mr. Singh’s “Driver Abstract”, disclosing his Ontario Commercial Vehicle Driving Record;

[53] Mr. Jhagra’s package also included a copy of his “A - Z” trucking licence (which appears to be a temporary licence), a copy of his social insurance card, and the documentation relating to Mr. Singh, referred to above.

[54] At the appeal hearing, Mr. Jhagra testified that, although he signed documents included in the application, he did not understand that he was signing a work application with Dana. He stated that he thought he would be driving with the company that was related to Dana, described by the safety manager in his testimony (i.e., the company that shared space and resources with Dana). He testified that he understood that he was required to provide his “A - Z” trucking licence, and documentation relating to his driving record to the company, and that he dropped this documentation off to Mr. Singh’s wife.

[55] Mr. Jhagra stated that when he dropped off the documents, he had a short visit with Mr. Singh’s wife, and that she served him a Coke. Mr. Jhagra stated that Mr. Singh’s wife presented him with the papers that were included in his application package, and that she told him to sign the documents because they were required for insurance purposes. He stated that Mr. Singh’s wife told him where to sign the documents and that he signed them. When asked whether the meaning or significance of the documentation included in the application package was explained to him, he indicated that he could not remember. He also indicated that he could not remember whether the documents were filled in before he signed them, or whether he signed blank documents. He stated that he believed Mr. Singh’s wife asked him about his employment with the furniture company, but he could not recall if she completed information about his employment history in the documentation. He stated that he recognized the copy of his social insurance card, but that he could not recall when he provided it.

[56] Mr. Jhagra testified that following his visit with Mr. Singh’s wife, he made arrangements with Mr. Singh to go on his trip with him. He stated that he went to a location in or near Brampton where transport trucks were parked, and that he got into the truck with Mr. Singh. He stated that he brought a small bag with him which included his clothes and personal effects. Mr. Jhagra stated that Mr. Singh told him that they would be taking the truck to Vancouver, and that they would be returning to the Toronto area in one week.

[57] Mr. Jhagra testified that in his discussions with Mr. Singh, prior to their departure on or about January 6, 2004, Mr. Singh had told him that since this was his first experience driving a truck, he would only be asked to drive on stretches of the road that were easy to drive. Mr. Jhagra indicated that Mr. Singh did not mention the Workplace Safety and Insurance Board (“the Board”) in their discussions. He stated Mr. Singh advised him that if he decided after the trip that the work suited him, he would be required to obtain disability insurance. Mr. Jhagra

stated that he did not have a written agreement with Mr. Singh. He stated that he had never before acted in the capacity of a co-driver and had never worked in the trucking industry. He stated that, from his perspective, the purpose of the trip was to allow him to obtain experience that would help him in the future, and that he was relying on his friend, Mr. Singh, to help him obtain such experience. He testified that he understood that he was required to obey instructions provided by Mr. Singh, but that he was free to leave the trip at any time.

[58] Mr. Jhagra stated that he observed Mr. Singh while he was driving the truck so that he could learn more about driving. He indicated that he watched how Mr. Singh changed gears, and that this was helpful to him. He indicated that hauling a loaded trailer was different from the truck driving he had done during his lessons. Mr. Jhagra indicated that although he received some training on the trip from Mr. Singh, he felt that he only received about 5% of the training that he required. Mr. Jhagra stated during the trip he and Mr. Singh also discussed matters relating to their earlier time in India.

[59] Mr. Jhagra stated that Mr. Singh advised him that he would be completing the log book on Mr. Jhagra's behalf, and Mr. Jhagra did not learn how to complete the log. Mr. Jhagra stated that he had learned about how to conduct a pre-trip inspection of the vehicle during his truck driving lessons, and that he assisted Mr. Singh with the pre-trip inspection. Mr. Jhagra indicated that, from time to time, he observed Mr. Singh making and receiving telephone calls on his cell phone, and he knew that some of the calls received were from the dispatcher. He stated that he did not believe that the Mr. Singh's calls were any of his concern. He indicated that Mr. Singh never asked him to call into dispatch, and that during the trip, he never made or received calls from dispatch.

[60] Mr. Jhagra testified that Mr. Singh had advised him that if he liked this type of work and agreed to continue in it, he would be paid \$2000 per month. Mr. Jhagra testified that he could only remember the offer of \$2000 per month, if he continued on with the work, but was not sure about any arrangements made in relation to remuneration for the one trip that he took.

[61] Mr. Jhagra testified, during his examination-in-chief, that when Mr. Singh dropped off the \$500 cheque to him in May 2004, Mr. Singh stated the money was "your share" of the payment made for the trip in January 2004. In cross-questioning, however, Mr. Jhagra stated that he could not recall that Mr. Singh had indicated that the \$500 was payment for the trip.

[62] Mr. Jhagra testified that he and Mr. Singh then drove to the Vancouver area, they unloaded their truck, they took the truck to a garage, and that they subsequently went to the head office of the company that was associated with Dana. Mr. Jhagra stated that they went to this office to rest and to find out where they would be picking up their next load to haul back to Ontario. Mr. Jhagra had a poor recollection of events that occurred at the office. He was unable to recall if he received any training at the office, or whether he met with Dana's safety manager. He stated that he remembered saying hello to one person, but that otherwise, he could not recall whether he talked to any of the people who worked at the office.

[63] Mr. Jhagra stated that he was not sure about the connection between Dana and the related company. He stated that the name of the related company was printed on the truck he and Mr. Singh were driving, but that he had heard Mr. Singh refer to the name Dana Trucking. In

cross-questioning, Mr. Jhagra indicated that he believed that the name of the related company was printed on the trailer, although he could not recall whether Dana's name was printed on the truck.

[64] Mr. Jhagra stated that after one day in Vancouver, he and Mr. Singh headed back to Ontario with a new load. He stated that he did some of the driving on the trip back to Ontario. Mr. Jhagra stated that he estimated that he performed 20-25% of the driving during the return trip from Toronto to Vancouver. He stated that he recalled that there had been a problem with the "reefer" on the way back. He recalled that Mr. Singh was speaking with people on his telephone about this problem, and that they stopped in a garage in Calgary to repair the problem. Mr. Jhagra stated that he was sleeping while the unit was being repaired.

[65] Mr. Jhagra stated that he was asleep shortly before the accident, but that he woke up about three or four minutes before the accident occurred. He stated that after the accident occurred, someone put him in another truck and he was ultimately taken to hospital where he stayed for about one week. Mr. Jhagra testified that, as a result of the accident, he suffered injuries to his right knee, his right hand, his right eye, his forehead, teeth and back. Mr. Jhagra stated that, while in hospital he was visited by Mr. Singh, but that Mr. Singh did not discuss payment of moneys or insurance benefits with him at the hospital.

[66] The case materials also included a document which was apparently an application, dated January 28, 2004, made by Mr. Jhagra, for Accident Benefits. The form stated that the accident did not occur while Mr. Jhagra was at work, and that he had not filed a claim with the Board. The form stated that the accident occurred while Mr. Jhagra was a "passenger when Tractor Trailer in accident". The portion of the form headed, "Income Replacement Determination" indicated that from January 3, 2004 to January 13, 2004, Mr. Jhagra's employer was "Dana Trucking Cmpy" and that his position was "Trucker". That portion of the form also indicated that from August 2002 to January 2004 Mr. Jhagra's employer was the furniture company, referred to above. It stated that Mr. Jhagra's position with that company was "Factory work".

[67] At the hearing, Mr. Jhagra stated that he recalled that he had made an application for Accident Benefits, and that the signature on the application form was his. He stated that he believed that his sister's cousin assisted in the completion of the form, but that he could not remember any details concerning the form, or whether the meaning or significance of any of the information on the form had been explained to him before he signed it.

[68] Mr. Jhagra testified that, beginning in December 2006, he drove a truck for a different company, on about two or three round trips between Toronto and Montreal. He stated that the truck he drove between Toronto and Montreal was similar to the truck that he travelled in with Mr. Singh. He stated that following the driving he did between Toronto and Montreal, he drove a truck for yet another company, within the Toronto area. He stated that he performed this work between July and November 2007, and that he drove five days per week in this job. He stated that at the time of the hearing in 2008, he had stopped working as a truck driver, and that he was working as a taxi driver.



[69] The case materials included a handwritten statement, dated February 24, 2004, that was signed by Mr. Jhagra. The statement provided details concerning Mr. Jhagra's accident and injuries, and indicated that it was prepared with the assistance of a Punjabi interpreter at the offices of his lawyer. The statement indicated that Mr. Jhagra was a passenger in Mr. Singh's truck, and that "Because I was sitting with him, he would pay me [page 2 of the statement]". The statement prepared by Mr. Jhagra stated "I had not been driving any of the trip [page 3 of the statement]." It also stated "I had been thinking of driving trucks so I had taken the courses at [name of driving school] in August 2003 and passed for my A licence. This is why I was driving along with my friend to gain some experience [page 9 of the statement]." At the conclusion of the statement it indicated that the statement had been read to Mr. Jhagra, and that it was true and correct to the best of his knowledge.

### **Testimony by other witnesses**

[70] In addition to the testimony provided by Mr. Singh, Mr. Jhagra and Dana's safety manager, testimony was also provided at the hearing by Mr. Moore, Mr. Fick, Mr. Toor, Mr. McFarlane, Mr. Fick's employer at the time of the accident, and an individual alleged to be one of the owners of R. S. Carrier Inc. at the time of the accident. The testimony provided by these additional witnesses was, in every case, related to the question of whether the witness, or a company related to the witness, was a Schedule 1 employer, or a worker or an executive officer of a Schedule 1 employer. As will be noted below, in several instances, that issue was resolved through agreement among the parties. Because the testimony of these additional witnesses, in each case, addresses a relatively narrow issue, this additional testimony will be referred to in course of the analysis and determination of status of the parties, set out below.

### **(v) Applicable law**

[71] The accident which is the subject of this application occurred on January 13, 2004. Accordingly, the disposition of the application is governed by the *Workplace Safety and Insurance Act, 1997* ("the Act").

[72] Section 28 of the Act sets out the circumstances in which a worker is not entitled to commence an action. It states:

**28(1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

**(2)** A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

**(3)** If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

[73]

Section 29 of the Act addresses the question of how the amount that a person may be liable to pay in an action may be limited by the Act. Section 29 states:

**29(1)** This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

(2) The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

(3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

[74]

Section 30 of the Act addresses circumstances when a worker is entitled to benefits and may also be entitled to commence an action. Section 30 states, in part:

**30(1)** This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.

(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected.

....

[75]

Section 31 of the Act describes the role of the Appeals Tribunal in circumstances where a party's right to sue is in issue. It states:

**31(1)** A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

- (a) whether, because of this Act, the right to commence an action is taken away;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
- (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

(3) A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.

(4) Despite subsections 22(1) and (2), a worker or survivor may file a claim for benefits within six months after the tribunal's determination under subsection (1).

(5) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

**(vi) Analysis**

**A) Whether Mr. Jhagra was a worker employed by a Schedule 1 employer, in the course of employment, at the time of the accident**

[76] In their submissions, counsel for the applicants advanced the view that, at the time of the January 2004 accident, Mr. Jhagra was a worker employed by a Schedule 1 employer, in the course of employment. According to their submissions, Mr. Jhagra's right to commence an action in relation to the accident is therefore taken away by section 28 of the Act in relation to a Schedule 1 employer, or a director, executive officer or worker employed by any Schedule 1 employer ("protected parties"). Ms. Smith, who was counsel on behalf of Mr. Singh and Dana, and the insurer Insurance Corporation of British Columbia, made the submission that, at the time of the accident, Mr. Jhagra was a worker in the course of his employment, employed by a Schedule 1 employer in that Mr. Jhagra was a worker within the meaning of the Act, and he was employed by Mr. Singh, Dana or both of them. It was her submission that either Mr. Singh, Dana, or both of them, were Schedule 1 employers for the purposes of this application. Several counsel representing other applicants indicated that they adopted the submissions made by Ms. Smith.

[77] Before beginning on the main analysis of issues in this application, it is worth noting a few parameters of the application, which did not appear to be contentious among the parties at the hearing:

- Mr. Singh and Mr. Jhagra both testified that, in January 2004, Mr. Jhagra was new to the truck driving industry, and that he was learning and obtaining experience on his trip with Mr. Singh in January 2004. A "learner" is defined in section 2 (1) of the Act as "a person who, although not under a contract of service or apprenticeship, becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work". A "worker" is also defined in the section 2(1) which states that "worker" means "a person who has entered into or is employed under a contract of service or apprenticeship and includes... [among other things] a learner."
- It is alleged by the applicants that Mr. Jhagra was a co-driver with Mr. Singh at the time of the accident. It is not disputed that Mr. Jhagra was not driving at the time of the accident. Tribunal jurisprudence provides that, if Mr. Jhagra was in fact, otherwise, a co-driver in an employment relationship, the fact that he was not driving at the time of the accident does not take him out of the course of employment (see *Decision No. 1770/07*, among other decisions).
- The analysis set out below considers whether Mr. Jhagra was a worker in the course of his employment, alternatively, with Dana and/or Mr. Singh. Neither Dana nor Mr. Singh were registered as Schedule 1 employers with the Board. The fact that a party is not so

registered does not prevent them from being considered a Schedule 1 employer. Dana regularly carried on its trucking routes in Ontario, and Mr. Singh resided and regularly worked in Ontario. There was a sufficient connection between both Dana and Mr. Singh for them to be considered Schedule 1 employers within the meaning of the Act, should that be otherwise determined according to the merits of the application (see *Decision No. 820*).

**Whether Mr. Jhagra's relationship with Mr. Singh was that of a worker employed by a Schedule 1 employer**

[78] I find that Mr. Jhagra was a worker within the meaning of the Act, and that he was employed by Mr. Singh, who was a Schedule 1 employer. I find that Mr. Jhagra was in the course of his employment with Mr. Singh at the time of the January 2004 accident. Accordingly, I conclude that Mr. Jhagra's right to sue is taken away by the Act in relation to protected parties.

[79] In her submissions, Ms. Smith referred to the Tribunal's *Decision No. 1720/03*. That decision considered the question of whether the plaintiff/respondent in that case, a truck driver, was a worker employed by a Schedule 1 employer. The decision cited the Board's *Operational Policy Manual* (OPM) Document No. 12-01-03 (Document No. 12-01-01 in the Board's current OPM) on the subject of "Workers and Independent Operators". The decision noted that section 126(1) of the Act requires the Appeals Tribunal to apply Board policy in appeals, but that there is no similar requirement for applications under s. 31. The decision concluded however that, "Nonetheless, it is important for reasons of consistency that the same criteria be applied to the determination of a person's status as a worker, whether in an appeal from a final decision of the Board or by way of application under s. 31." I agree that, although the Board's policy documents are not binding on the Appeals Tribunal in the context of an application under section 31, they may provide persuasive authority in that context. In my view, the criteria set out in OPM Document No. 12-01-01 for determining whether an individual is a worker or an independent operator are persuasive in the context of this application. The policy document provides, in part:

An "independent operator" is a person who carries on an industry set out in Schedule 1 of the *Workplace Safety and Insurance Act* (the Act) and who does not employ any workers for that purpose.

**Guidelines**

**General** A "contract of service", or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.

Workers - those who work under contracts of service -are automatically insured and entitled to benefits if injured at work. In addition, their employers must pay premiums to the WSIB.

A "contract for service", or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.

Independent operators –those who work under contracts for service -are not automatically insured or entitled to benefits unless they voluntarily elect to be considered "workers" and apply to the WSIB for their own account and optional insurance. (See: 12-03-02, *Optional Insurance*.) Independent operators may not be insured through the hiring company's (payer's) WSIB account.

The organizational test recognizes features of control, ownership of tools/equipment, chance of profit/risk of loss, and whether the person is part of the employer's organization, or operating their own separate business.

#### **Characteristics of workers and independent operators**

The following list compares worker/independent operator characteristics. The statements on the left are more characteristic of the behaviour or situations of workers, while those on the right characterize the behaviour of independent operators. No one statement determines a person's status. The seven questionnaires do not necessarily include all the characteristics listed since they are designed to capture key elements of business relationships in specific industries.

Decision-makers consider the statements on the questionnaires, and any other information relevant to the terms and conditions of employment.

	<b>Workers</b>	<b>Independent Operators</b>
<b>Instructions</b>	Comply with instructions on what, when, where and how work is to be done.	Work on their own schedule. Do the job their own way.
<b>Training / Supervision</b>	Trained and supervised by an experienced employee of the payer.  Required to take correspondence or other courses.  Required to attend meetings and follow specific instructions which indicated how the payer wants the services performed.	Use their own methods and are not required to follow instructions from the payer.
<b>Personal Service</b>	Must render services personally. Must obtain payer's consent to hire others to do the work.	Often hires others to do the work without the payer's consent.
<b>Hours of work</b>	The hours and days of work are set by the payer.	Work whatever hours they choose.
<b>Full-time work</b>	Must devote full-time to the business of the payer.  Restricted from doing work for other payers.	Free to work when and for whom they choose.
<b>Order or sequence of work</b>	Performs services in the order or sequence set by the payer. Performs work that is part of a highly co-ordinated series of tasks where the tasks must be performed in a well-ordered sequence.	Perform services at their own pace.  Work on own schedule.

	<b>Workers</b>	<b>Independent Operators</b>
<b>Method of payment</b>	<p>Paid by the payer in regular amounts at stated intervals.</p> <p>Payer alone decides the amount and manner of payment.</p>	<p>Paid by the job on a straight commission.</p> <p>Negotiate amount and method of payment with the payer.</p>
<b>Licenses</b>	Payer holds licenses required to do the work.	Person holds licenses required to do the work.
<b>Serving the public</b>	<p>Does not make services available except on behalf, or as a representative, of the payer.</p> <p>Invoices customers on employer's behalf.</p>	<p>Has own office.</p> <p>Listed in business directories and maintains business telephone.</p> <p>Advertises in newspapers, etc.</p> <p>Invoices customers on own behalf.</p>
<b>Status with other government agencies</b>	<p>Terms of the relationship are governed by a collective agreement.</p> <p>Canada Customs and Revenue Agency either makes no ruling on the person's status, or rules that the person is a worker under the <i>Canada Pension Plan (CPP)</i> and the <i>Employment Insurance Act (EIA)</i>. (A ruling is made after the relevant parties complete the form, "Request for a ruling as to the status of a worker under the CPP or EIA".) Collects and pays GST and other applicable taxes on payer's behalf. Payer deducts EI, CPP, insurance, income tax, etc. from pay.</p>	<p>Terms of the relationship not governed by a collective agreement.</p> <p>Canada Customs and Revenue Agency has made an official ruling that the person is not a worker under the CPP and the EIA.</p> <p>Collects and pays CST and other applicable taxes on own behalf. Takes no deductions from pay for EI, CPP, insurance, income tax, etc.</p>

**Profit or Loss** To determine what the opportunities are for the person to earn a profit or suffer a loss in doing the work, the decision -maker must consider:

what assets (labour, materials, tools, and equipment) are used, operated, or put into action when doing the work, e.g., a lathe. These are to be distinguished from assets that are the subject of the work, or that are acted upon in doing the work, e.g., the table leg that is "turned" on the lathe.

what costs are incurred in doing the work, including:

costs of the acquisition, maintenance, operation and repair of assets;

financing and loan arrangements with respect to the work; and

licensing and insurance fees

who pays these costs -the employer or the person

if the person pays the costs, does the person purchase items directly or indirectly from the employer or through an arrangement with the employer.

what decisions influence the costs and to what extent

who makes and has the right (legal or otherwise) to make these decisions - the person or the employer

the market mobility of the person or the demand that exists for these services.

Workers have the right to make decisions that, in comparison to those that the employer makes (or has the right to make), have an insignificant or lesser influence on the workers' opportunity to make a profit or suffer a loss in doing the work.

Independent operators have the right to make decisions that, in comparison to those that the hiring company makes (or has the right to make), have a significant influence on their opportunity to make a profit or suffer a loss in doing the work.

#### **Other applicable Criteria**

To determine what other applicable criteria suggest about the status of the person, decision-makers consider the paired statements that follow. None of these statements, on its own, leads to the determination of status. Before making a determination, decision-makers must consider each statement in reference to all other features of the work relationship.

	<b>Workers</b>	<b>Independent Operators</b>
<b>Continuing need for type of service</b>	Payer has a continuing need for the type of service that the person provides. A payer has a continuing need for service if all persons who perform such services collectively spend more than 40 hours a month on average doing the work, or if the work continues full-time for more than four months.	Payer does not have a continuing need for the type of service that the person provides.
<b>Hiring / Supervising / Paying assistants</b>	Hires, supervises, and pays workers, on direction of the payer (acts as a supervisor or representative of the payer).	Hires, supervises and pays workers, on own accord and as the result of a contract under which the person agrees to provide materials and labour and is responsible for the results.
<b>Doing work on purchaser's premises</b>	Payer owns or controls the worksite.	Works away from payer's premises uses own office space, desk, and telephone.
<b>Oral and written Reports</b>	Required to submit regular oral or written reports to payer.	Submits no reports.

	<b>Workers</b>	<b>Independent Operators</b>
<b>Right to sever relationship</b>	Either the person or the payer can end the work relationship at any time without legal penalty for breach of contract.	Agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to pay for damages or loss of income that the payer sustains because of the failure to satisfactorily complete the work.
<b>Working for more than one firm at a time</b>	Usually works for one payer.	Works for more than one payer at the same time.

[80] In the circumstances of this appeal, it does not appear to be contentious that Mr. Singh was working in the industry of trucking. Trucking is an industry that is listed in Schedule 1 to the Act. The more contentious question is whether there was a “worker-employer” relationship between Mr. Singh and Mr. Jhagra. Applying the criteria set out in the policy document above, the following factors cause me to conclude that Mr. Jhagra was a worker within the meaning of the Act and that Mr. Singh was his employer:

**Mr. Singh was in control and gave instructions to Mr. Jhagra**

[81] Mr. Singh gave instructions to Mr. Jhagra in relation to the work to be performed by Mr. Jhagra. Mr. Singh testified that he considered himself to be Mr. Jhagra’s employer and boss. Mr. Jhagra testified that he believed that, while driving, he was required to obey Mr. Singh’s instructions to him. He testified that he followed his instructions in performing tasks such as checking the tire pressure of the truck. He also stated that he took over as driver of the truck when Mr. Singh considered it appropriate, and according to his instructions. Although Dana’s safety manager provided less direct evidence on this point, he indicated that Mr. Singh was responsible for costs, such as fuel and insurance, and that he was the “boss” of the truck. There was no persuasive evidence to support a conclusion that Mr. Jhagra was free to make any independent decisions about when, where or how to drive the truck, or to decide even the most minor variation in the truck’s route.

[82] The fact that Mr. Singh gave instructions to Mr. Jhagra in relation to all aspects of driving the truck, and the fact that Mr. Jhagra was not free to make independent decisions about how this was to be done, is in my view, the most significant factor in determining that Mr. Jhagra was a worker for Mr. Singh, and Mr. Singh was Mr. Jhagra’s employer.

**The payment for Mr. Jhagra’s services**

[83] The payment for Mr. Jhagra’s services was to be made directly by Mr. Singh. Mr. Singh testified that his arrangement with Mr. Jhagra was that he would pay him to be his co-driver at the rate of \$500 per trip or \$2000 per month. The safety manager testified that the matter of payment of remuneration between a principal driver and a co-driver, was a matter to be determined directly between two such parties, and was not a matter in which Dana would



become involved. The safety manager stated that Dana did not require that drivers obtain a co-driver, and I conclude that Dana had no concern about the amount Mr. Jhagra was paid, or whether he was paid at all.

[84] There was some inconsistency between the evidence provided by Mr. Singh and Mr. Jhagra concerning the issue of remuneration. Mr. Singh stated that there was agreement between the two men that Mr. Jhagra would be paid \$500 for the single trip, or alternatively, if Mr. Jhagra stayed on as Mr. Singh's co-driver for future trips, he would be paid at the rate of \$2000 per month. Mr. Jhagra agreed in his testimony that, had he stayed on as Mr. Singh's co-driver, he was to be paid \$2000 per month, however, he indicated that there was no clear arrangement concerning remuneration in the event that the trip in January 2004, which, in the circumstances, ended with the accident, turned out to be Mr. Jhagra's only trip.

[85] I note that the main thrust of submissions by Mr. Zwiebel, counsel for Mr. Jhagra, was not that Mr. Jhagra was acting as an independent operator at the time of the accident (although there was some evidence related to that issue, which will be addressed below), but rather that the January 2004 trip was not a work trip for Mr. Jhagra, and that at the time of the accident, Mr. Jhagra was not working, either in a capacity as an independent operator (i.e., in a contract for service) or as a worker (i.e., in a contract of service) within the meaning of the Act. If it were demonstrated that Mr. Singh did not intend to pay Mr. Jhagra for the trip, and Mr. Jhagra did not expect to be paid for the trip, this would provide significant evidence to support the conclusion that there was neither a contract for service, nor a contract of service between the two men. I find, however, that it is probable that Mr. Singh intended to pay Mr. Jhagra for the trip, and that Mr. Jhagra expected to be paid.

[86] First, as noted above, Mr. Singh testified that he had agreed with Mr. Jhagra that Mr. Jhagra would be paid \$500 for the trip. Mr. Singh paid this amount to Mr. Jhagra and indicated that this was Mr. Jhagra's share of the proceeds from the trip. Mr. Jhagra also testified that Mr. Singh told him the \$500 paid was for his share of the trip, although he subsequently stated that he did not remember testifying to that, and that he could not remember any details relating to the payment of the amount by Mr. Singh. The cheque indicated on its face that it was paid in respect of "PAY".

[87] Further, however, there was apparently agreement between the testimony of both Mr. Jhagra and Mr. Singh that if Mr. Jhagra continued on for a month, he would be paid \$2000 for the month. Further, Mr. Singh testified that he usually drove four trips per month for Dana, and that evidence was not contradicted. In my view, it is improbable that the two men would agree that remuneration of \$2000 was fair and appropriate for four trips that would occur over a month, but that if Mr. Jhagra discontinued the relationship after only one trip, no payment was to be made. It appears likely to me that there was explicit agreement that \$500 would be paid to Mr. Jhagra for a single trip, however, if there was not such an agreement, it was implicit in the agreement that \$2000 be paid for four trips in a month, that a single trip would attract remuneration of \$500.

[88] I make this finding with the knowledge that the trip in question was Mr. Jhagra's first trip, that he would benefit from the experience he gained on the trip, and that, at the commencement of the trip, he had not decided whether to carry on with trucking as an ongoing

vocation. Nevertheless, it is common and expected practice that individuals be paid remuneration for the initial period of a work assignment, notwithstanding the fact that they have not made a full commitment to the work, and are learning as they go. This is particularly true in the circumstances of this case, where Mr. Jhagra was foregoing a week of personal vacation time to go on the trip. There was no evidence of an agreement that, should Mr. Jhagra not wish to continue on with Mr. Singh, Mr. Jhagra would not be paid anything for his time. In the absence of such evidence, in the circumstances, I find it more probable that it was implicitly understood between Mr. Jhagra and Mr. Singh that the price to be paid for a single trip would be a pro-rated amount of the monthly price, than that it was their understanding he was not to be paid anything at all for a full week of his time. In keeping with my comments set out above, however, I find it even more probable that there was an explicit agreement between the men that Mr. Jhagra would be paid \$500 for the trip.

[89] Finally, I find that Mr. Jhagra's evidence was generally unreliable, and I am not able to attribute significant weight to his testimony that there was no agreement between himself and Mr. Singh that he be paid for the trip. As noted above, Mr. Jhagra initially indicated in his testimony that when Mr. Singh gave him the \$500 cheque in May 2004, Mr. Singh stated that it was payment of Mr. Jhagra's share of the proceeds from the trip. Shortly thereafter, during cross-questioning, he stated that he could not recall details concerning the circumstances relating to the delivery of the cheque, and he did not remember indicating in examination-in-chief that the cheque represented his share of the proceeds.

[90] I also note that when he was asked about the circumstances under which he signed his application documents in the application package to Dana, or his application for Accident Benefits from his insurer, he was not able to recall details of the circumstances. I was not able to conclude that Mr. Jhagra had a particular problem in relation to his overall memory of events, and it seems unlikely to me that he would be able to remember some details of circumstances, such as the fact that Mr. Singh's wife gave him a Coke during his visit with her, but unable to remember other details, such as whether the forms he signed on that occasion were signed in blank, which would appear to me to be of likely greater significance to him. Even if Mr. Jhagra has limited ability to read English, he would be able to discern whether, when he signed them, the forms were completed or blank.

[91] For these reasons, I find Mr. Jhagra's testimony to be unreliable, and I do not attribute significant weight to his testimony that there was either no agreement between Mr. Singh and himself concerning remuneration for a single trip, or that he could not remember the terms of such agreement.

### **Other factors**

[92] The main factors which cause me to conclude that Mr. Jhagra was a worker for Mr. Singh, as noted above, are the control exercised by Mr. Singh over Mr. Jhagra in instructing on all aspects of his duties, and the fact that Mr. Jhagra was paid an agreed upon amount by Mr. Singh for his services. The fact that payment was made by Mr. Singh to Mr. Jhagra does not, by itself, determine that the relationship between the two men was a contract of service, rather than a contract for service, however, in my view, it does address the fact that Mr. Jhagra's primary relationship was with Mr. Singh. In my view, the fact that Mr. Singh controlled

virtually all aspects of Mr. Jhagra's activities while driving Mr. Singh's truck, establishes that their relationship was most appropriately characterized as a contract of service, or an employment relationship.

[93]

Apart from these two factors, there are other factors, enumerated in the policy document referred to above and discussed in Tribunal jurisprudence, which are consistent with a finding that Mr. Jhagra was a worker for Mr. Singh, who was a Schedule 1 employer. These include:

- Mr. Singh provided training to Mr. Jhagra. That was a purpose of the trip. There was some inconsistent evidence on whether Dana also provided some training, however, I conclude that as between Dana and Mr. Singh, Mr. Singh had a much greater role in providing training to Mr. Jhagra. The fact that one party provides training to another, although a factor to be taken into account, is not determinative of the nature of their relationship. In this regard, I note that a driving school provided a greater amount of training to Mr. Jhagra than did Mr. Singh;
- Mr. Singh owned the truck in which he and Mr. Jhagra were driving, and he thereby had control of the worksite;
- Mr. Jhagra was hired by Mr. Singh. Although Mr. Jhagra needed to meet standards set by Dana, the choice of Mr. Jhagra was made by Mr. Singh; and
- Mr. Jhagra did not have an opportunity to participate in financial profit, or suffer financial loss in relation to the trip. I have found that a fixed price for payment to Mr. Jhagra was set by Mr. Singh, and this was the amount to be received by Mr. Jhagra in any event. If a profit or loss was to occur due external factors, such as increased or decreased expenses incurred during the trip, these would be experienced by Mr. Singh.

#### **Mr. Jhagra's relationship with Dana**

[94]

Having found that Mr. Jhagra was a worker employed by a Schedule 1 employer, namely Mr. Singh, in order to determine whether Mr. Jhagra's right to sue protected parties has been taken away by the Act, it is not necessary for me to determine whether he was a worker for Dana. The fact that he was a worker employed by a Schedule 1 employer resolves this aspect of the application without going further. Nevertheless, in my view there is value in providing analysis in relation to the nature of the relationship between Mr. Jhagra and Dana. Although Ms. Smith stated in her submissions that it was possible for Mr. Jhagra to be a worker in relation to both Mr. Singh and Dana, in my view, in the circumstances of this application, it is unlikely that Mr. Jhagra would be a worker under the control of both Mr. Singh and Dana, and in the course of his employment for them both, at the time of the accident. For reasons that are provided below, I have concluded that, at the time of the accident, Mr. Jhagra was not a worker, within the meaning of the Act, employed by Dana. In my view, this conclusion provides support for the determination that Mr. Jhagra was a worker employed by Mr. Singh.

[95] There was some evidence before me which, at least nominally, indicated that Mr. Jhagra was an employee for Dana, and that Dana was Mr. Jhagra's employer. This included:

- Material in Mr. Jhagra's application package, which included a document entitled "Driver's Application for Employment", signed by Mr. Jhagra, and other documents signed by Mr. Jhagra which indicated that Dana Trucking Ltd. was "the employer"; and
- Mr. Jhagra's Application for Accident Benefits, which indicated that from January 3, 2004 to January 13, 2004, Dana was Mr. Jhagra's employer, and that he was employed as a "Trucker".

[96] Although these documents nominally indicate that Dana was the employer of Mr. Jhagra, in my view, when the full body of evidence in this application is considered, it does not support the conclusion that Mr. Jhagra was a worker employed by Dana. When the "business reality test" or "organizational test" which is reflected in the policy document referred to in *Decision No. 1720/03*, above, is applied, it is apparent to me that Mr. Jhagra was neither a worker employed by Dana, nor an independent operator who had contracted with Dana.

[97] In my view, in the course of Mr. Jhagra's truck driving, Dana exercised very little control, if any, over Mr. Jhagra. It did not tell him when to drive, how to drive or whether to drive. These factors were controlled by Mr. Singh. Further, Dana did not make any payment of remuneration to Mr. Jhagra. It made payments to Mr. Singh. It was up to Mr. Singh to determine the amount of Mr. Jhagra's remuneration, and according to Dana's safety manager, that was a matter to be determined exclusively between Mr. Jhagra and Mr. Singh. The agreement signed between Dana and Mr. Singh stated explicitly that wages and worker's compensation payments, among other things, were "the sole responsibility" of Mr. Singh.

[98] It was noted in submissions, however, that Mr. Jhagra was required to observe Dana's rules that were set out in the "Owner/Operators" document, and that in this way Mr. Jhagra was subject to the control of Dana in a manner consistent with an employment relationship. I am not able to agree that such was the case.

[99] First, I note that the "Owner/Operators" document, which set out Dana's rules, although part of Mr. Singh's application package, was not part of Mr. Jhagra's package. One would expect that if the need for Mr. Jhagra to follow such rules was a significant concern for Dana, it would have had him sign a document signifying his agreement to obey the rules. I have taken into account the evidence from Dana's safety manager that co-drivers, such as Mr. Jhagra, were also required to obey the rules, however many of the rules, such as those pertaining to the maintenance of equipment, were inapplicable to Mr. Jhagra since he did not provide any equipment. I also conclude that Mr. Jhagra was not required to obey some of the other rules, such as the need to call into dispatch every day before 10:00 a.m. Mr. Jhagra testified that he never called into Dana's dispatcher, although he heard Mr. Singh doing so. It would not make sense to require Mr. Jhagra to call in to dispatch, when Mr. Singh was already required to do so, and Mr. Jhagra and Mr. Singh were travelling together in the same truck.

[100] I accept the fact that there were other rules set by Dana, which Mr. Jhagra was required to follow, such as rules related to driving safely, not drinking alcohol or taking drugs, maintaining a neat appearance, and refraining from abusive and dishonest behaviour. I accept that Dana had a

role of setting minimum standards for drivers who drove trucks carrying Dana's plates, and that there could be negative consequences for a co-driver who failed to maintain the standards. In my view, however, it does not follow that because Dana set these standards that it exercised control over Mr. Jhagra in the manner that an employer exercises control over a worker, or, in this particular case, in the manner that Mr. Singh exercised control over Mr. Jhagra. I note that the Ontario Ministry of Transportation set standards and rules for Mr. Jhagra in issuing him an "A-Z" licence, and that there would be negative consequences should he not meet such standards. The Ministry of Transportation did not, however, control the day-to-day activities of Mr. Jhagra, or pay him remuneration in the manner of an employer. The fact that Dana set rules and standards for Mr. Jhagra does not cause me to conclude that it was his employer or that Mr. Jhagra had an employment relationship with Dana. Rather, I conclude that that relationship was with Mr. Singh. I conclude that it was part of Mr. Singh's obligation to Dana to ensure that Mr. Jhagra followed minimum rules, but this does not imply that Mr. Jhagra was Dana's employee, rather than Mr. Singh's.

### **Whether Mr. Jhagra had the status of an independent operator**

[101] I have taken into account the fact that Dana's safety manager stated in his evidence that he believed that Mr. Jhagra was an independent operator vis-à-vis Mr. Singh. He stated that his reason for coming to this conclusion was the fact that Mr. Singh did not make deductions or withholdings from payments to Mr. Jhagra. It does not appear that the safety manager was aware of the "business reality" or organizational tests, referred to above, in expressing the view that he believed that Mr. Jhagra's relationship with Mr. Singh was that of an independent contractor. It does appear to me that the safety manager considered only one factor of many in reaching his conclusion, and I am not able to attribute weight to his view.

[102] I conclude that Mr. Jhagra's relationship to Mr. Singh was not one in which Mr. Jhagra was an independent operator. My reasons for this conclusion are closely related to my reasons for concluding that Mr. Jhagra was a worker employed by Mr. Singh, in that reasons for concluding that a relationship reflects a contract of service may well be the same reasons that cause one to conclude that the relationship does not reflect a contract for service. In this sense, my conclusion that the activities performed by Mr. Jhagra in connection with truck driving during their trip, were controlled and determined by Mr. Singh. The degree of control and supervision exercised by Mr. Singh over Mr. Jhagra, as outlined above, the fact that Mr. Jhagra did not bring any equipment to the assignment (i.e., the truck was owned by Mr. Singh), the fact that Mr. Jhagra was not exposed to profit or loss that deviated from the rate of remuneration determined with Mr. Singh, and the fact that Mr. Singh provided training to Mr. Jhagra, were all inconsistent with a relationship between Mr. Singh and Mr. Jhagra in which Mr. Jhagra was an independent contractor.

[103] At the hearing, Mr. Jhagra testified that he felt that he was free to leave the trip to Vancouver at any time during the trip. Mr. Jhagra may have felt that he was free to leave the trip because he was a worker, and workers can quit their jobs. He may have believed that he had no obligations to remain on the trip because he did not have a business relationship with Mr. Singh. There are legal consequences for independent operators who fail to complete a contract to which they have committed, however, such contractors are nevertheless free to leave a job. In my view, the fact that Mr. Jhagra felt that he was free to leave the trip to Vancouver at any time during the

trip, does not shed any light on the issue of whether Mr. Jhagra was a worker employed by a Schedule 1 employer, an independent operator, or whether there was no business relationship between Mr. Jhagra and Mr. Singh.

**Whether there was “no business relationship” between Mr. Jhagra and Mr. Singh**

[104] At the appeal hearing, the main thrust of Mr. Zwiebel’s submissions did not appear to be directed towards the conclusion that Mr. Jhagra was an independent operator in his relationship with either Dana or Mr. Singh. Rather, the main thrust of his submission on the question of whether Mr. Jhagra’s right to sue protected parties had been taken away by the Act, was that Mr. Jhagra was not in any business relationship with either Dana or Mr. Singh.

[105] It was Mr. Zwiebel’s submission that Mr. Jhagra was a friend of Mr. Singh, that he was primarily a passenger in Mr. Singh’s truck, and that he was taking up an offer made by his friend to provide him with some experience in the field of trucking, a field in which Mr. Jhagra was interested. It was Mr. Zwiebel’s submission that there was no clear agreement on remuneration to be paid to Mr. Jhagra for the single trip. He submitted that, although the payment of \$500 was made in May 2004 from Mr. Singh to Mr. Jhagra, it was paid at a time when Mr. Jhagra was recovering from his injuries, was in need of money, and that the payment should not necessarily be characterized as having been paid by Mr. Singh or received by Mr. Jhagra in compensation for services provided by Mr. Jhagra.

[106] I understand the submission to mean that the trip was an activity between friends, and it was not a business venture between them, although it might evolve into such a venture in the future. Accordingly, Mr. Jhagra was not a worker employed by Mr. Singh, in that there was no employment or other business relationship between them. Mr. Zwiebel indicated that this was supported by Mr. Jhagra’s testimony that the worker had an ongoing employment relationship with the furniture company from which he had taken vacation leave, and that Mr. Jhagra was content with that employment.

[107] Mr. Zwiebel also pointed out that there was no historical employment or business relationship between Mr. Jhagra and Mr. Singh or Mr. Jhagra and Dana. He characterized the enterprise between Mr. Singh and Mr. Jhagra as a “one-off arrangement”. He submitted that the Tribunal jurisprudence and the criteria set out in the Board’s policy, which provide guidance on the circumstances in which a relationship should be characterized as an employment or, alternatively, an independent operator relationship, are not applicable, or less applicable, in circumstances where there is no history of a relationship between the parties, which can be examined and against which the criteria can be applied. Mr. Zwiebel noted that, although Mr. Jhagra signed an application package with Dana, there was no evidence, either from Mr. Singh or from Dana’s safety manager, that the forms in the package were explained to Mr. Jhagra, or that Mr. Jhagra understood the significance of what he was signing.

[108] Although I accept the submission that the arrangement between Mr. Jhagra and Mr. Singh may be properly characterized as a “one-off” arrangement, and that there is no long-term historical relationship which can be the subject of review and scrutiny to determine

how the relationship between the two men should be characterized, this does not cause me to conclude that jurisprudence and policy guidance are inapplicable, or less applicable, to the case.

[109] The history of the relationship between Mr. Jhagra and Mr. Singh is quite brief, in that it is confined to the January 2004 trip, the arrangements that were made between the men in anticipation of the trip, and the payment made after the trip. This may make the adjudicative determinations required by this application somewhat more difficult to make, in that there is less evidence to consider than would have been the case had the relationship between the men extended over a longer period of time. The brevity of their relationship does not, however, in my view, make it probable that there was no business relationship between them. As I have stated above, I conclude that there was an employment relationship, or an implicit contract of service between Mr. Singh and Mr. Jhagra, for reasons that are set out in detail above, and which primarily relate to the degree of control exercised by Mr. Singh over Mr. Jhagra in relation to truck driving during the trip, and to the fact that, on the evidence, it is probable that Mr. Singh and Mr. Jhagra had an agreement about the remuneration that Mr. Singh was to pay to Mr. Jhagra for the trip.

[110] In my view, the fact that Mr. Jhagra had ongoing employment with the furniture company, is a relatively neutral factor, in making a determination of whether Mr. Jhagra was in the course of employment with Mr. Singh at the time of the accident. Unless they are prohibited from doing so by the terms of their employment, individuals are free to enter into employment relationships with a different employer, while on a break from ongoing employment. There was no evidence that Mr. Jhagra was prohibited by the furniture company from pursuing other employment during his Christmas break in late 2003 and early 2004. To the contrary, Mr. Jhagra testified that he took his truck driving lessons during free time, while he was employed by the furniture company, and that what he did in his free time was no concern of the furniture company.

[111] I conclude that it was more likely that the relationship between Mr. Jhagra and Mr. Singh was an employment relationship than that there was no business relationship between them. I have reached this conclusion for the following reasons, some of which are explained in greater detail above:

- For reasons given above, I have concluded that there was an arrangement between Mr. Singh and Mr. Jhagra, either implicit or explicit, that Mr. Jhagra be paid \$500 by Mr. Singh for the trip;
- Mr. Jhagra stated that he drove about 20 -25% of the trip. Driving a loaded transport tractor/trailer is work which has commercial value, is subject to safety regulations and would normally attract remuneration. This would probably be true even in circumstances where the individual performing the work was a novice, and was learning on the job. Given that there was commercial value for the work, and given the circumstances which have been described in detail, it is more likely that Mr. Jhagra and Mr. Singh had a business relationship between themselves, than it is that Mr. Jhagra gave up his free time to perform the work without an expectation of remuneration, or outside some type of business relationship; and

- Mr. Jhagra was required to sign forms and obtain documentation, such as his driving record and his social insurance number, that he provided to Dana and Mr. Singh through Mr. Singh's wife. Even if Mr. Jhagra did not understand the full significance or meaning of the forms that he signed, it is probable that he understood from the fact that he was required to sign forms and provide documentation that there was a level of formality associated with the enterprise upon which he was about to embark, and that it was not just a friendly trip.

### **Conclusion**

[112] For the reasons given above, I conclude that, at the time of the accident on January 13, 2004, Mr. Jhagra was a worker in the course of his employment within the meaning of the Act, and that he was employed by Mr. Singh who was a Schedule 1 employer. Accordingly, his right to sue any Schedule 1 employer, or any worker, director or executive officer of a Schedule 1 employer, is taken away by the Act. Given this conclusion, it is not necessary for me to consider whether Mr. Jhagra was a "learner" as defined by the Act.

### **B) Who are the parties protected under the Act?**

[113] As I have noted above, I have concluded that, at the time of the January 2004 accident, Mr. Jhagra was a worker employed by a Schedule 1 employer, and that his right to sue parties who are afforded protection by the Act is taken away by the Act. The question remains as to which of the parties are afforded such protection.

### **Mr. Singh and Dana Trucking Ltd.**

[114] For reasons provided in detail above, I conclude that the applicant/defendant Ramonjot Singh is a Schedule 1 employer. He was engaged in the industry of trucking, and at the time of the accident, he was the employer of Mr. Jhagra.

[115] I also conclude that the applicant/defendant Dana Trucking Ltd. is a Schedule 1 employer. The evidence establishes that it was engaged in the trucking industry in Ontario on a regular basis. I am also satisfied that it was an employer on the basis of evidence provided by its safety manager that it employed company drivers, and that Dana provided worker's compensation coverage to such drivers on a mandatory basis.

### **Parties in respect of whom no evidence was adduced in relation to their status**

[116] No evidence was adduced at the application hearing in relation to the status of the applicant/defendants Judith A. Peister-Robertson, or Boyce Parrill. A section 31 statement was provided on behalf of the applicant David White, however it did not provide any information about his status, and asked for a declaration that his liability be limited through the application of the Act. No further evidence was adduced in relation to his status.

[117] In the absence of evidence demonstrating that, at the time of the accident, any of the defendant/applicants Judith A. Peister-Robertson, Boyce Parrill or David J. White were a Schedule 1 employer, a worker, in the course of employment, employed by a Schedule 1 employer or a director or executive of a Schedule 1 employer, I conclude that none of them are a



Schedule 1 employer, a worker employed by a Schedule 1 employer or a director or executive of a Schedule 1 employer.

**Parties in respect of whom there was agreement among the parties in relation to their status**

[118] At the application hearing, there was agreement among the parties, including the respondent, that the applicant/defendants Marion Sherwood, Kayle Moore, Stephen Condran, Sterling D. Macdonald and Marty C. Fick were, at the time of the accident, workers, in the course of employment, employed by a Schedule 1 employer. I am satisfied that at the time of the accident, the applicant/defendants Marion Sherwood, Kayle Moore, Stephen Condran, Sterling D. Macdonald and Marty C. Fick were workers, in the course of employment, employed by a Schedule 1 employer, and I conclude that such was the case.

[119] At the application hearing, there was also agreement among the parties, including the respondent, that the applicant/defendants Forbes Motors Inc., ABCO Kingswood, Erb Transport and SM Freight were Schedule 1 employers. I am satisfied that at the time of the accident, the applicant/defendants Forbes Motors Inc., ABCO Kingswood, Erb Transport and SM Freight were all Schedule 1 employers, and I conclude that such was the case.

**GE Capital Leasing**

[120] On December 13, 2007, the first hearing date for this application, the applicant/defendant Kayle Moore testified that he was employed by a company as a technology consultant, that at the time of the accident, on January 13, 2004, he was driving to a business meeting with a distributor, and that he was in the course of employment at the time of the accident. He testified that he was driving a vehicle leased by his employer from the applicant/defendant GE Capital Leasing. He stated that he was not aware of the name of the individual who was the lessee named in the lease for the vehicle, but that he was not the lessee named on the lease of the vehicle. He testified that the vehicle was part of his employer's fleet of vehicles, and that he was not permitted to drive the car for his personal use.

[121] A Section 31 Statement was provided by the applicant/defendants Kayle Moore and GE Capital Leasing. This statement indicated at paragraph 70, that "In accordance with Section 28(4) of the Act, an exception is carved out for Schedule 1 employers who simply provide a motor vehicle but not a worker to operate it" and at paragraph 71, that "Accordingly it is submitted that Mr. Jhagra's right of action against [Mr. Moore's employer] and Mr. Moore is taken away by virtue of Subsection 28(1) but by virtue of Subsection 28(4), Mr. Jhagra's right of action against GE is not taken away."

[122] I am satisfied by the evidence provided by Mr. Moore that the applicant/defendant GE Capital Leasing was, within the meaning of section 28(4), an "employer other than the worker's employer" who "supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment" and that sections 28(1), which would otherwise provide protection from actions for Schedule 1 employers, does not provide such protection in relation to GE Capital Leasing.

[123] I therefore conclude that GE Capital Leasing does not have protection under the Act, in relation to the action which is the subject of this application.

### **William McFarlane**

[124] Mr. William McFarlane testified at the appeal hearing on November 20, 2008. He stated that he was driving one of the vehicles involved in the accident that occurred on January 13, 2004. He stated that he was employed by the applicant/defendant Forbes Motors Inc. ("Forbes"), which is an automobile dealership located in Waterloo. He stated that he was employed by Forbes as a sales manager and, in that capacity, he assists individuals who are purchasing automobiles, and he orders vehicles from the manufacturer.

[125] Mr. McFarlane testified that at the time that the accident occurred, he was on a day off, and he was travelling with his son to visit an auto show in Detroit. He said that he was interested in viewing the new automobiles for the coming season which would be on display at the show, but that it was not a requirement of his employment that he attend the show. He stated that he was not being paid to attend the show. He indicated that he did not consider himself to be working at the time that the accident occurred, and that his son does not usually accompany him while he is working.

[126] I conclude that at the time of the accident, Mr. McFarlane was not in the course of employment. I have reached this conclusion taking into account, that at the time of the accident:

- he was on a day off;
- he was carrying on an activity not required by his employment;
- he was travelling with his son, who did not usually accompany him to work;
- he was not being paid; and
- he did not consider himself to be working.

[127] Because Mr. McFarlane was not in the course of employment at the time of the accident, at that time, he was not a worker, in the course of his employment, employed by a Schedule 1 employer, and does not have any other basis to claim protection under the Act.

[128] I therefore conclude that William McFarlane does not have protection under the Act, in relation to the action which is the subject of this application.

### **Jasvir Singh Gill and Eldorado Logistics Systems**

[129] No testimony was given at the application by or on behalf of the defendant/applicants Jasvir Singh Gill or Eldorado Logistics Systems, however, Mr. Goldberg, counsel on their behalf filed a Section 31 Statement and made oral submissions at the hearing, on their behalf.

[130] The case materials included a Police Accident Report which indicated the names of the drivers and owners of the vehicles that were involved in the subject accident. The report indicated that one of the vehicles involved was driven by Mr. Gill and that the owner of that vehicle was Eldorado Logistics Systems Inc. ("Eldorado").

- [131] It was Mr. Goldberg's submission that Eldorado is a Schedule 1 employer, and that Mr. Gill was, at the time of the accident, a worker employed by a Schedule 1 employer, in the course of his employment.
- [132] Material included with the Section 31 statement included correspondence, dated January 22, 2008, from the Board to Mr. Goldberg, indicating that Eldorado is registered with the Board, that it is a Schedule 1 employer under the Act, and has been so since May 1, 2002. I am satisfied on the basis of this evidence that Eldorado is a Schedule 1 employer and is a protected party.
- [133] The case materials also included a copy of an "Owner-Operator Contract", dated May 1, 2003, between Eldorado and a person who is not a party to this application ("Mr. S.S."). The Owner-Operator Contract was in relation to "hauling services" and stated on its face that Mr. S.S. "shall be an independent contractor only and shall not be an employee of Eldorado for any purposes whatsoever." It also included terms, such as an agreement by Mr. S.S. to supply equipment owned by Mr. S.S. to Eldorado, and a promise from Mr. S.S. to be liable for expenses, such as the cost of maintenance, fuel and tolls. I am satisfied by that agreement that, in keeping with the terms of the agreement, Mr. S.S. was an independent contractor, carrying out hauling services, in relation to Eldorado.
- [134] The materials also included information about a company that is not a party to this application ("E. Inc."). The materials included a "Corporation Profile Report", dated January 4, 2008, prepared by the Ontario Ministry of Consumer and Business Services, Companies and Personal Property Security Branch. The document indicated that E. Inc. was a registered corporation and that Mr. S.S. was a director and officer of the company since 1999. The materials also included correspondence, dated January 22, 2008, from the Board to Mr. Goldberg indicating that E. Inc. had been a Schedule 1 employer under the Act, since March 1, 2001.
- [135] The case materials also included another "Corporation Profile Report", dated January 3, 2008, prepared by the Ontario Ministry of Consumer and Business Services, Companies and Personal Property Security Branch. The document indicated that another company that was not a party to this application ("J. Inc.") was a registered corporation and that Mr. Gill was a director of that company since February 26, 2003.
- [136] The case materials also included five cancelled cheques, written on the account of E. Inc. payable to J. Inc., the first of which was dated January 25, 2004 and that last of which was dated April 15, 2004.
- [137] In his submissions to me, Mr. Goldberg outlined a chain of relationship in which Eldorado contracted with Mr. S.S., who was the principle of E. Inc. E. Inc. made payments to J. Inc., presumably for hauling services, and Mr. Gill was a director of J. Inc. On the basis of this information, Mr. Goldberg submitted that I should draw the inference that Mr. Gill is a protected party, either on the basis that he is a worker employed by a Schedule 1 employer, or on the basis that he is an executive officer or director of a Schedule 1 employer.

[138] I am not able to draw that inference on the basis of the evidence before me in this application.

[139] I am satisfied on the basis of the information provided by the Board that both Eldorado and E. Inc. are Schedule 1 employers. I am also satisfied that Mr. Gill was a director of J. Inc., however, there is no evidence upon which I am able to base a finding that J. Inc. was a Schedule 1 employer. There was no evidence before me upon which I am able to base a finding that Mr. Gill was either a worker employed by Eldorado or E. Inc., or a director or executive officer of Eldorado or E. Inc.

[140] In his submissions, Mr. Goldberg indicated that the case materials did not include an agreement between E. Inc. and Mr. Gill, disclosing a relationship in which Mr. Gill was an independent operator, because there was no such agreement in existence, and that I should therefore draw an inference that there was an employment relationship between E. Inc. and Mr. Gill. I am not able to draw such an inference. First, the absence of evidence before me of a contract, does not lead to an inference that such a contract did not exist. Further, however, even if such a contract did not exist, the absence of such a contract does not lead to the inference that Mr. Gill was working in an employment relationship. In order to conclude that Mr. Gill was a worker employed by a Schedule 1 employer, I would need to consider his circumstances in the context of the organizational or business reality tests, referred to above. There was no evidence before me which would lead me to conclude that Mr. Gill should be considered to be a worker employed by a Schedule 1 employer, pursuant to that type of analysis.

[141] In the absence of evidence to support such a conclusion, I am not able to conclude that Mr. Gill was a worker employed by Eldorado or E. Inc., both of which are Schedule 1 employers, or any other Schedule 1 employer. Although Mr. Gill was a director of J. Inc., there was no evidence before me to support the conclusion that J. Inc. is a Schedule 1 employer.

[142] Accordingly, I conclude that Eldorado was a Schedule 1 employer and is entitled to protection under the section 28 of the Act. In the absence of evidence to the contrary, I conclude, on a balance of probabilities, that Mr. Gill was not a Schedule 1 employer, and that he was not a worker, director or executive officer of a Schedule 1 employer. Accordingly Mr. Gill is not afforded protection under the section 28 of the Act.

#### **Mr. Tavinder Singh Toor and R. S. Carrier Inc.**

[143] On the first day of hearing for this application, on December 13, 2007, testimony was given by Mr. Toor, one of the applicant/defendants. He stated that he was involved in the accident that occurred on January 13, 2004, which is the subject of this application. He stated that he worked as a long distance truck driver and was in the course of driving to Texas at the time that the accident occurred. He stated that he was an owner/operator who was taking dispatch from R.S. Carrier Inc., another of the applicant/defendants in this application.

[144] The case materials included a memorandum, dated November 16, 2007, prepared by a legal worker at this Tribunal addressed to the Vice-Chair or Panel who had carriage of this application (i.e., myself). The memorandum stated that it was prepared "Re: Status Check Results – WSIAT # [proceeding number]".

[145] The memo stated in part:

Status checks, provided by the Board to the Tribunal indicate:

....

R. S. Carrier Inc. – is an active Schedule 1 employer with a default effective of January 1, 2001.

[146] I am satisfied, on the basis of this evidence that the applicant/defendant R.S. Carrier was a Schedule 1 employer at the time of the accident and that it should be afforded protection from action pursuant to section 28 of the Act.

[147] The case materials also included a copy of a document entitled “Sub-Contractor Operator Agreement”, dated June 6, 2003. The document indicated that R.S. Carrier was the “Independent Contractor” to the agreement, and that another company which is not a party to this application (“H. Inc.”) was the Subcontractor. The document also indicated that H. Inc. was the owner of a truck with a particular 17 character vehicle identification number (VIN). The materials also included a Province of Ontario vehicle permit, in relation to the vehicle with the same 17 character VIN, as referred to in the Sub-Contractor Operator Agreement. The vehicle permit indicated that the vehicle had been issued licence plates with the same plate number as the vehicle described in the Police Accident Report, which indicated that the vehicle was owned by R.S. Carrier Inc., and operated by Mr. Toor at the time of the accident. The vehicle permit indicated that the licence plates had been issued to R.S. Carrier Inc., but that a financial services company (“P. Ltd.”), not a party to this application, was the owner of the vehicle.

[148] The case materials also included a copy of a certified copy of Articles of Incorporation for H. Inc., dated May 26, 2003. That document indicated that H. Inc. was registered on that date and that the first directors of the company were Mr. Toor and a person who is not a party to this application (Mr. K.S.).

[149] The case materials also included a copy of a “Corporation Profile Report”, dated February 26, 2007, prepared by the Ontario Ministry of Consumer and Business Services, Companies and Personal Property Security Branch. The document indicated that H. Inc. was a registered corporation, beginning on May 26, 2003. A person who is not a party to this application (Mr. K. S.), was a director of that company since that date. Mr. Toor was not indicated to be a director or officer of H. Inc. The document also indicated that Mr. K.S. became the Secretary of H. Inc., beginning on February 1, 2006.

[150] At the hearing, Mr. Toor testified that H. Inc. was a company that he incorporated with his business partner, Mr. K. S., at about the same time that H. Inc. entered into its agreement with R. S. Carrier. At the hearing, Mr. Toor was shown the copy of the “Corporation Profile Report”, dated February 26, 2007, in relation to H. Inc., which as stated above, did not refer to Mr. Toor as a director of the company. Mr. Toor testified that he left the company in January or February 2006.

[151] The case materials also included a document which was “Schedule A” to a vehicle lease agreement between P. Ltd, the lessor, and Mr. Toor, Mr. K.S., and H. Inc., the lessee. The agreement provided for lease payments to be made by the lessee to the lessor, and indicated that:

Upon expiration of the lease term and payment of the all lease payments and all other amounts due [P. Ltd.] from Lessee, the Lessee may purchase the vehicle for \$2,811.31 plus applicable taxes.

[152] In his testimony, Mr. Toor testified that his company and his partner had entered into a “Lease to Own” agreement with P. Ltd. in relation to the truck which was involved in the accident, and that P. Ltd. was the owner of the truck.

[153] Mr. Toor also testified that he had a co-driver (Mr. V.N.), who was an employee of H. Inc. Mr. V.N.’s name appears in the Police Accident Report as an “involved person” in the truck driven by Mr. Toor at the time of the accident. Mr. Toor testified that he used Mr. V.N. as a co-driver when he went on long distance trips, such as the trip to Texas that was underway at the time of the accident, and that Mr. V. N. began with H. Inc. in December 2003. Mr. Toor stated that Mr. V. N. was paid by H. Inc. to drive. Mr. Toor indicated, however that he had no written documentation concerning the relationship between either himself or H. Inc. and Mr. V.N. He also stated that he did not inform the Board that Mr. V.N. was a worker for H. Inc., and that no workers’ compensation coverage had been arranged by H. Inc. in favour of Mr. V.N.

[154] Further, the case materials included a memorandum, dated October 26, 2007, prepared by a legal worker at this Tribunal addressed to the Vice-Chair or Panel who had carriage of this application (i.e., myself). The memorandum stated that it was prepared “Re: Status Check Results – WSIAT # [proceeding number]”.

[155] The memo stated in part:

Status checks, provided by the Board to the Tribunal indicate:

....

[H. Inc.] – candidate account record (only)

[156] At the hearing, testimony was also provided by one of the owners of R.S. Carrier Inc. (Mr. R.D.). Mr. R.D. testified that he was one of the owners of R. S. Carrier Inc., and that it was his signature that appeared on the Sub-Contractor Operator Agreement, dated June 6, 2003, referred to above, signing on behalf of R. S. Carrier Inc. He stated that Mr. Toor and Mr. S.K. both appeared to have authority to act on behalf of H. Inc. He stated that they both drove the truck, and that if a decision from H. Inc. was required, he believed that he could ask either of them for such a decision. He stated that when payment was made for hauling a load, the cheque was made out to H. Inc. He indicated that this arrangement reflected his understanding of the status of Mr. Toor, and Mr. S.K., in connection with their company, H. Inc., at the time of the subject accident.

[157] On the basis of this evidence, I am satisfied that, at the time of the accident, H. Inc. was an owner/operator driving under the authority of R. S. Carrier Inc. Although P. Inc. held the legal title to the truck, I am satisfied from the documentary evidence that H. Inc. held the beneficial title. Mr. Bulger, counsel for R. S. Carrier and Mr. Toor, stated in his submissions, that I should draw an inference from the information before me, that Mr. Toor is protected from action pursuant to s. 28 of the Act, because, at the time of the accident he was a director or executive officer of a Schedule 1 employer, namely H. Inc.

[158] In my view, there are two areas of concern associated with drawing this inference. First, although there is documentation in the form of the Articles of Incorporation for H. Inc., dated May 26, 2003, which demonstrates that Mr. Toor was a director of H. Inc. as of that date, the next information concerning the corporate status of H. Inc. is the Corporation Profile Report, dated February 26, 2007, which indicated that Mr. Toor was not a director of the company, as of that date. The question arises as to whether Mr. Toor was a director of the company on January 13, 2004, the date of the accident.

[159] Second, in order to be a Schedule 1 employer, it is necessary to demonstrate that H. Inc. was engaged in an industry listed in Schedule 1 of the Act, but it is also necessary to demonstrate that H. Inc. was an employer, that is, that it was an employer engaged in an employment relationship with another person. It was Mr. Bulger's submission that H. Inc. employed Mr. V.N., and that H. Inc. was therefore an employer. I am satisfied by the evidence that H. Inc. was engaged in trucking, which is an industry listed in Schedule 1 of the Act, however, a question arises about the nature of the relationship between H. Inc. and Mr. V.N., given that the only evidence concerning Mr. V.N. was the testimony from Mr. Toor that Mr. V.N. was an employee of H. Inc., that he was paid to be a co-driver, and the Police Accident Report, which indicates that Mr. V.N. was in the truck driven by Mr. Toor at the time of the accident. There was no documentation to support Mr. Toor's testimony that Mr. V.N. was an employee of H. Inc.

[160] In relation to the question of whether Mr. Toor was a director of H. Inc. on January 13, 2004, the date of the accident, I note that that issue, like all of the issues in this application, shall be decided according to the standard of proof referred to as "on a balance of probabilities". In other words, I must decide whether it is more probable that Mr. Toor was a director of H. Inc. on January 13, 2004, than not. If I conclude that that proposition is more probable than the alternative, even to a slight degree, I must conclude that, for the purposes of this application, Mr. Toor was a director of H. Inc. on January 13, 2004. For the reasons given below, I conclude that it is more probable that Mr. Toor was a director of H. Inc. on January 13, 2004, than that he was not a director of H. Inc. on that date.

[161] First, Mr. Toor testified that he was a director of H. Inc. as of the date of the accident. There is no evidence before me which is inconsistent with Mr. Toor's testimony.

[162] Second, Mr. R.D., one of the owners of R. S. Carrier, also testified that it was his understanding that, as of the accident date, he believed that he could obtain a decision on behalf of H. Inc. from either Mr. Toor or Mr. S.K., which is consistent with a finding that Mr. Toor was, at least, a "controlling mind" of H. Inc., as of the accident date.

[163] Further, I am also satisfied, from Mr. Toor's testimony, and from the Police Accident Report, that, at the time of the accident, he was driving the truck beneficially owned by H. Inc. It is possible that, at the time of the accident, he was driving the truck as a worker employed by H. Inc., as an independent contractor in relation to H. Inc., or that he was driving outside of any business relationship with H. Inc. (i.e., voluntarily and without remuneration). However, in light of the documentation referred to above relating to the registration of H. Inc., the commercial arrangements associated with H. Inc., and Mr. Toor's involvement in those matters only a few months prior to the accident, I consider it to be more probable that, as of the date of the accident, he was driving the truck as a principal of H. Inc., than that, as of the date of the accident, he had

ceased to be a director of the company and was acting according to any of the other possibilities noted above.

[164] Finally, although I do not attribute a great deal of weight to the point, I also note that the Corporation Profile Report, dated February 26, 2007, indicated that Mr. K.S., Mr. Toor's partner at the time of incorporation, became the Secretary of H. Inc., beginning on February 1, 2006. Mr. Toor testified that he left H. Inc. in January or February, 2006, that is, at about the same time that Mr. K. S. took on the position of Secretary of the company. It would not be unreasonable to conclude that these two changes to the corporate structure of H. Inc. would be effected at the same time, in that this would be more administratively convenient than to make the two changes separately. I should state that this point would not, by itself, be of much significance in relation to the issue of when Mr. Toor left the company, however, in light of the other evidence cited above, I conclude that it is consistent with the probability that Mr. Toor left H. Inc. in early 2006, as he testified, and that he remained as a director of H. Inc. at the time of the accident in January 2004.

[165] For these reasons I conclude that, it is more probable than not, that Mr. Toor was a director of H. Inc. at the time of the subject accident.

[166] The second area of concern that I have noted above, relates to the question of whether H. Inc. was a Schedule 1 employer at the time of the accident. It was Mr. Bulger's submission that Mr. Toor is entitled to section 28 protection on the basis that he was an executive or director of a Schedule 1 employer. Notwithstanding my conclusion that Mr. Toor was a director of H. Inc. at the time of the accident, if H. Inc. was not a Schedule 1 employer at the time of the accident, Mr. Toor should not be afforded section 28 protection.

[167] It was Mr. Bulger's submission that H. Inc. was a Schedule 1 employer, in that it had an employment relationship with Mr. V.N., who was, according to Mr. Toor's testimony, employed by H. Inc. to drive the truck. The fact that H. Inc. was engaged in the industry of trucking does not appear to be contentious. The more contentious question is whether Mr. V.N. was a worker employed by H. Inc.

[168] I have considered the fact that the status check carried out at the Board disclosed that H. Inc. was not registered by the Board as a Schedule 1 employer, and that it had a "candidate account (only)". Further, Mr. Toor admitted in testimony that he had not arranged WSIB coverage for Mr. V.N. As I have noted above, in these reasons, however, the fact that an employer is not registered with the Board, or that the employer has not paid premiums on behalf of an employee, should not be determinative of the question of whether the employer is a Schedule 1 employer or whether the employee is a worker. Rather, these questions should be determined according to the substance of the actual relationships.

[169] I am satisfied by the evidence provided by Mr. Toor and the Police Accident Report that Mr. V.N. was in the truck driven by Mr. Toor at the time of the accident. Mr. Toor testified that Mr. V.N. was present in the truck because he was his co-driver, that he was paid to drive, and that, in that capacity, he was an employee of H. Inc. at the time of the accident. If Mr. Toor's testimony is true, then H. Inc. was an employer at the time of the accident, engaged in an activity listed in Schedule 1 (i.e., trucking), and therefore, was a Schedule 1 employer. If that



information is true, then Mr. Toor is entitled to protection from action pursuant to section 28. I note that there is no inconsistent evidence. I have, therefore, considered whether there are other reasonable explanations for Mr. V.N.'s presence in the truck at the time of the accident?

[170] As was the case in relation to other circumstances considered in these reasons, apart from being a worker in an employment relationship, the two remaining reasonably possible alternatives to explain Mr. V.N.'s presence in the truck at the time of the accident, are that he was an independent operator, or that he had no business relationship with H. Inc. or Mr. Toor, and that he was in the truck voluntarily, along for the ride. I note that, in the case that Mr. V.N. was employed directly by Mr. Toor to drive, rather than by H. Inc., Mr. Toor would nevertheless be entitled to section 28 protection, in that he would be a Schedule 1 employer in his own right. Accordingly, the outcome would be the same whether Mr. V.N. was a worker employed by H. Inc. or by Mr. Toor, and it is therefore unnecessary to provide separate analysis on the question of whether Mr. V.N. was employed directly by Mr. Toor.

[171] Although it is possible that Mr. V.N. was "along for the ride" with Mr. Toor, on a voluntary basis and without the expectation of remuneration, in the absence of any evidence to support that possibility, I conclude that a more probable explanation for Mr. V.N.'s presence in the truck at the time of the accident, was that provided Mr. Toor; that is that he was paid a wage to assist Mr. Toor as co-driver. It is a long journey from Ontario to Texas, and in the absence of an alternative explanation, in my view, it is more probable that Mr. V. N. was working as a co-driver at the time of the accident, than that he was present for some other reason not associated with a work relationship.

[172] The other possibility that I have considered is that, at the time of the accident, Mr. V.N. was driving along with Mr. Toor in the capacity of an independent operator, rather than as a worker employed by a Schedule 1 employer. In my view, this is also less probable than the likelihood that Mr. V.N. was a worker being paid a wage either by H. Inc. or directly by Mr. Toor. One of the characteristics of independent operators is that, commonly, they use their own equipment to perform the work assignment. As I have noted above, I am satisfied that the truck driven by Mr. Toor was beneficially owned by H. Inc., and there was no evidence to suggest that the truck was owned by Mr. V.N. Further, if Mr. V.N. was acting in the capacity of an independent operator, independently performing his work as a truck driver, the question arises as to why Mr. Toor was present. In my view, the role of a co-driver or "relief driver" is probably, in most cases, inconsistent with the role of an independent operator, particularly when the other driver is one of the principals of the company which is the owner/operator of the truck. In my view, it is more probable that Mr. V.N. was a worker employed either by H. Inc. or by Mr. Toor, than that he was acting in the capacity of an independent operator at the time of the accident.

[173] For these reasons, I conclude that, at the time of the accident, Mr. Toor was either a director of a Schedule 1 employer that employed Mr. V.N., or that Mr. Toor was himself a Schedule 1 employer, employing Mr. V.N. directly. In either case, Mr. Toor is entitled to protection from the action by the respondent, pursuant to section 28 of the Act.

**C) Declarations requested pursuant to section 31(1)(b) and (c)**

[174] In the circumstances of this application, as a result of my findings, Mr. Jhagra's right to sue in the subject action is taken away against certain of the applicant/defendants. Other of the applicant/defendants, however, are not entitled to s. 28 protection in relation to the action. As a result of section 29(3), however, in such circumstances, in the action, the court shall determine what portion of the loss or damage was caused by the fault or negligence of parties who are entitled to protection from the action pursuant to section 28, and, pursuant to section 29(4), no damages, contribution or indemnity for the amount determined to be caused by a party entitled to protection, is recoverable in an action. In this manner, the liability of parties entitled to section 28 protection, as well as the liability of parties not entitled to such protection, but against whom the portion of damages attributed to the parties entitled to protection may not be recovered, may both be limited by the Act. Section 31(1)(b) provides that a party to an action may apply to the Appeals Tribunal for a determination whether the amount that a person may be liable to pay in an action is limited by the Act. In the circumstances of this application, all of the applicant/defendants who participated in this application applied for such a determination. I conclude that since the liability of all of the applicants who applied is limited by the Act, they are entitled to such a determination.

[175] The defendant/applicants Judith A. Peister-Robertson, and Boyce Parrill did not participate in the application, did not provide section 31 statements and did not apply for a declaration pursuant to section 31(1)(b). Accordingly, I have not provided a declaration pursuant to section 31(1)(b) in relation to the liability of those parties.

[176] In addition, Ms. Smith, counsel on behalf of the insurer with carriage of the application by Mr. Singh and Dana applied for a determination, pursuant to section 31(1)(c) of the Act, that Mr. Jhagra, the respondent/plaintiff, is entitled to claim benefits under the insurance plan. That determination was sought for the purposes of a different proceeding in which the insurer's liability in relation to Statutory Accident Benefits is to be determined. Having found, for reasons that are set out above, that Mr. Jhagra was, at the time of the accident, a worker in the course of his employment, employed by a Schedule 1 employer, I conclude that the insurer is entitled to the determination requested.

**DISPOSITION**

[177] The application is allowed in part.

1. Gurjit Jhagra's action is taken away by the Act in relation to the following parties: Tarvinder Singh Toor, R. S. Carrier Inc., Ramanjot Singh, Dana Trucking Inc., Marion Sherwood, Stephen Condran, ABCO Kingswood, Eldorado Logistics Systems, Forbes Motors Inc., Kayle Moore, Sterling D. Macdonald, ERB Transport Ltd., Marty C. Fick and SM Freight Inc.
2. Gurjit Jhagra's action is not taken away by the Act, and he has the right to elect, pursuant to section 30 of the Act, to maintain his action in relation to the following parties: David J. White, Judith A. Peister-Robertson, Jasvir Singh Gill, Boyce Parrill, William McFarlane, and GE Capital Leasing Ltd.
3. Upon application for a declaration accordingly, it is determined that the amounts that the following parties may be liable to pay in action is limited by the Act: Tarvinder Singh Toor, R. S. Carrier Inc., David J. White, Ramanjot Singh, Dana Trucking Inc., Marion Sherwood, Stephen Condran, ABCO Kingswood, Eldorado Logistics Systems, Forbes Motors Inc., Kayle Moore, Sterling D. Macdonald, ERB Transport Ltd., Marty C. Fick, SM Freight Inc., Jasvir Singh Gill, William McFarlane, and GE Capital Leasing Ltd.
4. Upon application by the insurer with carriage of the application by Ramanjot Singh and/or Dana Trucking Inc., for a declaration accordingly, it is determined that Gurjit Jhagra is entitled to claim benefits under the insurance plan.

DATED: December 16, 2008

SIGNED: M. Crystal