IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTIONS 268 and 275, and ONTARIO REGULATION 283/95

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTACT INSURANCE COMPANY
(formerly known as ING INSURANCE COMPANY OF CANADA)
Applicant

- and -

INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

FINAL AWARD
(Claimants – Kregar & Begin)

COUNSEL:

Eric Grossman for the Applicant

Sandi Smith for the Respondent

BACKGROUND:

1. Gary Kregar and Bonnie Begin were injured when the transport truck they were driving was involved in a single-vehicle accident near Sudbury, Ontario on August 25, 2005. Mr. Kregar and Ms. Begin were spouses, and regularly drove loads between British Columbia and Ontario in a Peterbilt truck obtained by Mr. Kregar in 2002. Ms. Begin was driving the vehicle at the time of the accident, and Mr. Kregar was a passenger. Mr. Kregar was rendered a quadriplegic as a result of the accident, and passed away in 2008 as a result of complications suffered from his injuries.

2. Both Claimants submitted applications for the payment of accident benefits under the *Statutory Accident Benefits Schedule (*the *"SABS")* to Nordic / ING (now Intact), the insurer of their personal vehicle. The tractor trailer they were operating at the time of the accident was registered in British Columbia, and insured by the Insurance Corporation of British Columbia ("ICBC"). ING provided notice to ICBC pursuant to section 3 of *Ontario Regulation 283/95*, alleging that as the insurer of the truck that the Claimants were occupying at the time of the accident, it was in higher priority to pay the claims.

3. ING also contends that it is entitled to indemnification from ICBC for the benefits it has paid out to both Claimants pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act.*

4. This arbitration was commenced by ING in 2006, and the first pre-hearing call was convened in January 2007. Several pre-hearing calls followed, and various preliminary and procedural issues were raised. ICBC denied receiving a Notice of Commencement of Arbitration with respect to Ms. Begin's claim, and took issue with my jurisdiction to determine that question. ING brought an application to the Superior Court, seeking a ruling on the issue. Justice Trotter determined that I did have jurisdiction to determine whether ING had complied with the limitation period in the regulation, and ordered that I do so. A hearing was subsequently held and my decision that ING had commenced the arbitration with respect to Ms. Begin's claims in accordance with section 7(2) of the Regulation was issued in May 2010.

5. The parties could not agree on the costs payable to ING as a result of the above determination, requiring me to consider submissions and issue a further award in December 2010. Subsequently, a dispute arose regarding a request by ICBC for the production of certain documents in ING's possession. I reviewed the parties' submissions on that point and issued a written ruling on the applicability of solicitor-client privilege to the documents in question in June 2012.

6. While these steps were proceeding, the Workers' Safety Insurance Appeals Tribunal (WSIAT) heard the parties' applications for a determination that Mr. Kregar and Ms. Begin were workers in the course of their employment at the time of the accident, and were employed by Schedule 1 employers. Both applications were successful. The Tribunal determined that Ms. Begin was entitled to claim benefits under the *WSIA,* and that Mr. Kregar did not have the right to sue in tort to recover for damages he suffered as a result of the accident.

7. The consequence of the Tribunal's findings is that neither of the Claimants are entitled to payments for accident benefits under the *Schedule.* Counsel for ING has advised that his client has paid approximately $128,000 in benefits to or on behalf of Ms. Begin, and has received repayment from the WSIB for approximately $58,000, leaving a shortfall of approximately $70,000. More dramatically, ING has paid approximately $1,075,000 in benefits to or on behalf of Mr. Kregar, and received only $62,000 from the WSIB, leaving a very significant shortfall of $1,013,000.

8. ING looks to ICBC for repayment of all benefits paid out, either by virtue of ICBC being in higher priority pursuant to section 268(5.2) of the *Insurance Act*, or pursuant to the Loss Transfer provisions. ICBC contends that if it is found to be liable on either count, it should not be required to reimburse ING for the shortfall between the WSIB payments it has received by was of assignment, and what was paid out under the *Schedule*, as ING did not bring its application to WSIAT in a timely manner.

9. As can be seen from the above summary, this proceeding has been lengthy and hard-fought. More than five years after the commencement of the arbitration, the merits of the priority dispute and Loss Transfer requests were finally presented and were strenuously argued by counsel at a hearing. Their submissions focused on these remaining issues:

ISSUES:

1. Are Gary Kregar and Bonnie Begin deemed to be "named insureds" (or spouse of a named insured) under the ICBC policy covering the tractor trailer that they were occupying at the time of the accident, pursuant to section 66 of the *SABS*?

2. If not, can ING seek indemnification from ICBC pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act* in these circumstances?

3. Does the timing of the WSIAT proceedings impact on the potential recovery under issue (1) or (2) ?

4. Were payments made by ING made in error, or as a result of misrepresentation, pursuant to section 47 of the *SABS*, and if so, what are the consequences?

RESULTS:

1. Yes, both Mr. Kregar and Ms. Begin are deemed to be named insureds under the ICBC policy, by operation of section 66 of the *SABS.*

2. Given the finding above, I make no determination on this issue.

3. No, ING is entitled to full payment for any shortfall between the benefits it has paid out to both Claimants, and what WSIB has reimbursed, from ICBC.

4. No, payments made by ING were not made in error.

RELEVANT PROVISIONS:

I will refer to various statutory and regulatory provisions in the course of my reasons, and set them out here for ease of reference:

(I) Priority Issue:

Insurance Act - Section 268

> *(2) The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> > *1. In respect of an occupant of an automobile,*
> >
> > > *i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,*
> > >
> > > *ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,*
>
> *(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.*

Statutory Accident Benefits Schedule – Section 66

> ***66.*** *(1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,*
>
> > *(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or*
> >
> > *(b) the insured automobile is being rented by the individual for a period of more than 30 days.*

(II) Loss Transfer Issue:

Insurance Act – Section 275

> *(1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.*

(III) Quantum /WSIB Issue:

Statutory Accident Benefits Schedule – Section 59

> ***59.*** *(1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan.*
>
> *(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the Workplace Safety and Insurance Act, 1997 so long as the election is not made primarily for the purpose of claiming benefits under this Regulation.*
>
> *(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,*
>
> > *(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and*
> >
> > *(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment.*

Workplace Safety and Insurance Act – Sections 30 & 31

> ***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

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).

(IV) Payments Made in Error:

Statutory Accident Benefits Schedule – Section 47

47. *(1) A person shall repay to the insurer,*

(a) any benefit under this Regulation that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud;

PRIORITY ISSUE - ***Were the Claimants deemed 'named insureds' under the ICBC policy pursuant to section 66 ?***

10. The parties filed several documents relating to this issue at the hearing. Counsel also referred to the transcripts of Ms. Begin's and Mr. Kregar's evidence provided at the examinations for discovery in the tort action brought by Mr. Kregar, as well as the testimony provided by Ms. Begin at the hearing of the WSIAT applications. This evidence set out the following facts:

11. Gary Kregar incorporated a company named Gary's Driving Services Inc. ("GDSI") in July 1998, when he bought his first truck. He was the sole shareholder and director of the company. Mr. Kregar, through GDSI, obtained the Peterbilt truck that was involved in the accident in issue in July 2002. GDSI paid approximately $20,000 as a down payment on the vehicle, and entered into a lease agreement with PACCAR Financial Services Ltd. ("PACCAR"), the finance company for Peterbilt trucks, to finance the balance of the purchase price through monthly payments over a period of 48 months.

12. The same parties also entered into a Residual Buy-Back Agreement at this time. It provides that upon the expiry of the lease agreement, GDSI would purchase the truck from PACCAR for $20,000 plus applicable taxes.

13. It is not disputed that both Mr. Kregar and Ms. Begin provided driving services for GDSI. While the evidence surrounding the parties' financial arrangements is not clear, it appears that Ms. Begin was an employee of the company and received a salary. Any profits earned by GDSI were allocated at the end of the year to Mr. Kregar, and were reported as self-employment business income on his personal tax return. The evidence indicates that the Peterbilt truck was used to transport loads for various hauling companies from July 2002 until 2005.

14. Mr. Kregar and Ms. Begin began working with Red Hawk Express Transport Limited ("Red Hawk"), a hauling company based in British Columbia, in March 2005. Ms. Begin estimated that Red Hawk employed between 20 and 25 company drivers, and contracted with 8 to 10 independent owner/operators. While there was no written contract between the parties, it is agreed that GDSI hauled loads exclusively for Red Hawk up until the time of the accident, and that Red Hawk paid GDSI $1.25 per mile travelled.

15. GDSI paid for the fuel consumed, as well as any repairs or maintenance required by the truck. GDSI also paid for the plates or "running rights" provided by Red Hawk. Red Hawk held the Commercial Vehicle Operator's Registration ("CVOR") license, and

owned various trailers that were used to haul goods. Red Hawk made the arrangements for the loads to be hauled, and provided dispatching services.

16. The lease agreement between GDSI and PACCAR requires GDSI to procure and maintain insurance for the vehicle over the life of the agreement. It is not disputed that the truck was covered by a fleet policy issued by ICBC once the parties began working with Red Hawk in 2005. The Certificate of Insurance for the vehicle filed at the hearing notes PACCAR as the "lessor" of the Peterbilt truck, and Red Hawk as the "lessee". There is no mention of GDSI on the ICBC certificate. Part way down the document the heading "Declaration of Entitlement" appears, next to which states - "Principal Operator will be Gary Kregar who is not licensed in BC".

17. Ms. Begin and Mr. Kregar both testified at their examinations for discovery that Ms. Begin had made all of the inquiries related to the level of insurance coverage obtained for the truck, and ultimately decided that coverage of $10 million should be procured. Red Hawk paid the insurance premiums to ICBC, but deducted them from the $1.25 per mile rate that they paid to GDSI. Ms. Begin testified at the WSIAT hearing that "it was cheaper to go through the company for fleet prices". She also stated that Red Hawk had not provided any direction or instruction regarding the amount of coverage required on the truck.

ARGUMENTS ON SECTION 66 ISSUE:

Applicant's submissions:

18. Counsel for ING contended that section 66 of the *Schedule* applies in the circumstances outlined above, and results in both Mr. Kregar and Ms. Begin being "deemed named insureds" under the ICBC policy. He noted that subsection 268(5.2) of the *Act* dictates that if the Claimants are named insureds under both the ING policy insuring their personal vehicle and the ICBC policy insuring the truck, ICBC would be in higher priority to pay their claims, given that they were occupants of the truck at the time of the accident.

19. Counsel argued that the wording of section 66 captures Ms. Begin's circumstances perfectly, as she was clearly an employee of GDSI, and the company made the truck available for her "regular use". He contended that section 66 would apply to Mr. Kregar as well, as GDSI leased the truck, executed a "Buy-back Agreement" and paid for the fuel and any maintenance required, all of which resulted in GDSI making the truck available for his "regular use ".

20. Counsel submitted that a finding that both Claimants are named insureds under the ICBC policy insuring the truck would be in keeping with the legislative intent behind section 66. He contended that the legislators intended to ensure that if a claimant is injured while driving a truck in the course of normal business operations, the company insuring the truck should be in higher priority to the insurer of the claimant's private vehicle, given that the private insurer would generally be unaware of the increased risk associated with long-haul truck driving, and would not have factored that risk into the premiums charged.

21. Mr. Grossman referred to Mr. Justice Perell's finding in the appeal decisions in *Kingsway v. Gore* (Arbitrator Bialkowski, October 15, 2009) and *Security National v. Markel* (Arbitrator Samis, November 20, 2009) that there is no reason to exclude a sole proprietorship from the list of entities that can make a vehicle available to a driver under section 66. He contended that the argument is even stronger in circumstances involving an incorporated company such as GDSI, as there is no doubt that the "provider" of the truck is a separate entity from the driver or occupant. He stated that this case fit perfectly within the language and purview of what section 66 of the *Schedule* is designed to capture, and urged me to find that ICBC is in higher priority to pay the claim.

Respondent's submissions:

22. Counsel for ICBC agreed that GDSI was the entity that made the truck available to Mr. Kregar and Ms. Begin. She noted, however, that the ICBC insurance certificate lists PACCAR as the "lessor" of the truck and Red Hawk Transport as the "lessee", and

that GDSI did not appear on the document. She submitted that the only way that ICBC can be determined to be in priority is if either of the entities that appear on the certificate made the vehicle available for the Claimants' regular use. She contended that PACCAR (as the leasing company) did not do so, and that while Red Hawk (as the company with the license permitting the loads to be hauled) may have made the vehicle available to GDSI - the entity with whom it contracted - it cannot be said that Red Hawk made the truck available for either Mr. Kregar or Ms. Begin's regular use. She therefore contended that as GDSI was not the named insured under the ICBC policy, it would not respond in these circumstances and ICBC could therefore not be the 'priority insurer'.

23. Ms. Smith suggested that the interrelationships between the entities involved in this case are typical of way that things are structured in the trucking industry. She noted that it is beneficial from a tax perspective for an individual such as Mr. Kregar to incorporate a company such as GDSI, through which a truck is purchased. She submitted that many arbitrators have determined in these circumstances that it is the individual (or his/her solely-owned company) who makes the vehicle available to the hauling company, rather than the other way around, leading to a finding that section 66 does not apply. She cited the decisions in *Axa v. Markel*, (Fidler #1, upheld by Justice Day, May 29, 1997), *Axa v. Markel* (Fidler #2, December 18, 1998), *Markel v. State Farm (*Hudson, May 31, 2000*), Axa v. ING* (Samis, May 27, 2006), and *Certas v. ICBC* (Novick, June 30, 2009) in support of this statement. She contended that GDSI made the Peterbilt truck available to Red Hawk for its regular use, and that section 66 of the *Schedule* would therefore not apply.

24. Ms. Smith acknowledged Justice Perell's appeal decision in *Kingsway v. Gore* and *Security National v. Markel* (2010 ONSC 5308 & 5309) but argued that the facts in those cases are distinguishable from those in the instant case. She contended that the focus of those decisions is on whether a sole proprietorship can make a vehicle available for an individual's regular use, and that it therefore does not change Justice Day's finding in the appeal of Arbitrator Fidler's decision in *Axa v. Markel*, *supra,* which remains good law.

25. Finally, Ms. Smith took issue with ING's contention that policy reasons support the application of section 66 in these circumstances. She stated that truck drivers whose vehicles are insured under fleet policies do not have the option of choosing which insurer to contract with, or whether to opt for enhanced, optional benefits, whereas drivers may do so with respect to their own personal policies. She submitted that it therefore makes sense for an owner/operator driver's personal policy to respond to an accident benefits claim, and that the application of section 66 should be restricted to the classic "company car" scenario.

ANALYSIS & FINDINGS:

26. The question of whether section 66 of the *Schedule* applies to owner/operator truck drivers whose vehicles are insured under fleet policies has received much attention from arbitrators and the courts over the last fifteen years. The discussion begins with Arbitrator Fidler's decision in *Axa v. Markel, supra,* in which he determined that the driver who effectively owned the truck was the entity who made the vehicle available for the hauling company's regular use, and not vice-versa. The result of that finding was that the claimant was not considered to be a named insured under the Markel policy insuring the truck, and that the insurer of his personal vehicle (Axa) was responsible for payment of his accident benefits.

27. As has often been cited, Arbitrator Fidler commented that he was troubled by the conclusion that he felt compelled to reach, and that it did not result in a "common sense solution". He suspected that the intention of the drafters of the provision was to require the insurer of the truck that was involved in the accident to be responsible for payment of accident benefits, but found that the wording of the (predecessor to section 66) provision did not allow him to reach this conclusion.

28. This decision was followed in several subsequent cases. I addressed the issue when presented with similar facts in *Certas v. ICBC, supra.* I determined that absent an

unusual degree of control exercised over the owner/ operator driver, the truck involved in the accident was being "made available" to the trucking company by the claimant, which led to the conclusion that the claimant was not a deemed named insured under the ICBC policy insuring the truck.

29. The *Kingsway v. Gore, supra*, decision, initially decided by Arbitrator Bialkowski and *Security v. Markel, supra,* initially decided by Arbitrator Samis, then followed. Arbitrator Bialkowski noted Arbitrator Fidler's stated frustration in the *Axa v. Markel* case, and opined that section 66 indicates a legislative intent that insurers of commercial vehicles be in priority to insurers of individual's private vehiclea when the accident occurs while a truck is being driven in the course of the parties' commercial arrangement. He then determined that the sole proprietorship in that case, or the joint venture comprised of the sole proprietorship and the trucking company that owned the CVOR, made the truck available to the claimant, as opposed to the claimant making it available to the trucking company.

30. Arbitrator Bialkowski concluded that the claimant was therefore deemed to be a named insured under the fleet policy insuring the truck that was issued by Kingsway. He suggested that this result was in keeping with the drafters' intention of transferring the commercial risk to the insurer of the commercial operation. Faced with similar circumstances in *Security National v. Markel, supra,* Arbitrator Samis reached a different conclusion. He determined that to find that a vehicle is being "made available" to an individual by a sole proprietorship that he established in order to conduct his business "put a strain on the wording of the regulation that it cannot reasonably bear".

31. An appeal of these two decisions was heard by Justice Perell in September 2010. Kingsway and Markel argued that an individual who carries on business as a sole proprietorship cannot make his or her vehicle available to him or herself. Justice Perell did not accept this argument and determined that there was nothing in the wording of section 66 that justifies the exclusion of a sole proprietor from being able to make a vehicle available to him or herself. He noted that while a corporation is a 'legal fiction',

section 66 permits that it can make an insured vehicle available, and that there is "no reason to conclude that a sole proprietor, who actually exists as an individual and can make a vehicle available, cannot as a rule of law make it available to himself". Justice Perell also explicitly stated that the *Axa v. Markel*, *supra*, decision is wrong and should not be followed.

32. Interestingly, Justice Perell noted the arbitrator's analysis of the policy reasons underlying section 66, and stated that it is not necessary to speculate about the Legislature's intentions, given the clear wording of the provision. He stated (at para. 43) that the regulation directs us to accept that relationships exist between a variety of entities even though some of them are not "in and of themselves legal entities separate and apart from the individuals". Justice Perell also made the following comment with respect to the identity of the named insured – (at para. 30)

> It is worth noting here ...that the deeming provision applies if the vehicle that is the subject of the contract of insurance is made available to an individual for regular use by the sole proprietorship or other entity *regardless of whether that sole proprietor or other entity is a named insured under the policy of insurance on the vehicle.*
>
> (emphasis added)

33. Markel and Kingsway appealed Justice Perell's decision to the Ontario Court of Appeal (2012 ONCA 683, October 11, 2012). The court upheld his finding that section 66 permits an insured vehicle to be made available for an individual's regular use by the individual's sole proprietorship, based on both the language of the provision and its legislative purpose. Despite Justice Perell's statement that the arbitrator need not have relied on the legislative intent behind the section, the Court of Appeal states - (at para. 64)

> ...if a vehicle is made available for regular use by any of the listed entities, the risk is to be borne by the insurer of that vehicle. This, in my view, makes sense and should be so in spite of any past practice in the insurance industry.

34. The instant case does not involve a sole proprietorship, but rather a solely-owned corporation. I set out these recent decisions and the comments above to illustrate the

evolution in the interpretation and general approach taken by the courts with respect to how section 66 is to be read, and the legislative intent behind it. The Court of Appeal has now explicitly stated that insurers of commercial vehicles should bear the risk in these circumstances. Justice Perell has also asserted that section 66 would apply regardless of whether the entity making the truck available is a named insured under the policy covering the vehicle.

35. Arbitrator Densem also considered the question of whether the entity making the vehicle available must be the named insured under the policy in his decision in *The Economical Insurance Group v. Kingsway General Insurance Company* (August 9, 2010). Kingsway argued in that case, as ICBC does here, that in order for section 66 to apply, the corporation making the vehicle available to the individual must be the named insured under the policy insuring the truck. In that case, as here, it was not. Arbitrator Densem dismissed that argument, finding that to interpret the requirement that the corporation making the vehicle available be the named insured on the policy requires either "adding words into the section that are not there or changing the plain meaning of the words".

36. I agree with Arbitrator Densem's finding, In any event, I am bound by Justice Perell's determination on the matter. As this case indicates, adding the requirement that the entity making the vehicle available to a claimant be the named insured under the policy can result in unfairness, given the arrangements in the trucking business. The evidence is clear that Ms. Begin made all of the inquiries and procured the insurance coverage on the truck on behalf of GDSI, as the lease agreement requires. Only Ms. Begin and Mr. Kregar drove the truck in question. The fact that Red Hawk appears on the certificate of insurance in place of GDSI is likely, as found by the WSIAT Vice Chair, so that the benefit of reduced premiums available on a fleet policy could be obtained.

37. Despite the fact that Red Hawk appears as the "lessee" on the ICBC certificate, it was clear that the lease agreement between GDSI and PACCAR was not changed in any way once GDSI began hauling loads for Red Hawk, and that Red Hawk did not replace

GDSI as lessee of the vehicle. The ICBC certificate indicates on its face that Mr. Kregar is not licensed to drive in British Columbia, which may have also contributed to the decision not to list GDSI as the named insured on the ICBC policy.

38. In light of the above, I do not accept ICBC's argument that section 66 would only apply to Mr. Kregar and Ms. Begin if GDSI was the named insured on the policy. I find, for the reasons expressed above, that GDSI was the entity that made the truck available to both Mr. Kregar and Ms. Begin for their regular use, and that section 66 of the *Schedule* applies. The result of this finding is that both Claimants are deemed to be named insureds under the ICBC policy, and that in accordance with section 268(5.2) of the *Act*, ICBC is in priority to ING to pay their accident benefits claims.

LOSS TRANSFER ISSUE:

39. Given my findings above, and my determination that ICBC is in higher priority to ING to pay the Claimants' accident benefits claims, I need not determine this issue.

WSIAT PROCEEDINGS – DOES THE TIMING OF THE APPLICATIONS BROUGHT IMPACT ON THE QUANTUM PAYABLE BY ICBC ?

40. Having found that ICBC is the priority insurer for both Claimants, I must determine the appropriate amounts to be repaid to ING. As noted above, Mr. Grossman advised that the shortfall (at the time of this hearing) between the benefits paid out by ING and the amounts recovered from WSIB was approximately $70,000 for Ms. Begin, and over $1 million with respect to Mr. Kregar's claim. While Mr. Grossman stated that the Board may forward further payments, a significant shortfall will remain due to the fact that the amounts paid for income replacement benefits and medical and rehabilitation benefits are higher under the *SABS* than are provided for in the *WSIA*. The *WSIA* scheme also does not provide for payment of attendant care or housekeeping expenses, or for the cost of medical assessments, as does the *SABS*.

41. ING contends that if ICBC is found to be the "priority insurer", it should be responsible to fully repay ING for any shortfall suffered, with interest, and that it can then pursue WSIB for further benefits, if it chooses.

42. Ms. Smith argued that ICBC should not be required to repay ING for any shortfall resulting from the different payment schemes, as the amounts paid out by ING to Mr. Kregar and Ms. Begin were unreasonable, in the face of a clear "WSIB defence". In other words, ICBC asserts that if ING had acted in a more expedient manner and had initiated the section 31 applications to WSIAT at an earlier stage, the shortfall outlined above could have been avoided.

Factual Background:

43. I will outline the relevant facts surrounding the initiations of the WSIAT applications, so that the parties' arguments can be understood in their proper context.

44. Both Claimants applied to ING for the payment of accident benefits shortly after the accident of August 25, 2005. The claims were initially assigned to an adjuster named Tanya Cullen-Michaud. ING also retained an Independent Adjuster who provided support and regular reports to Ms. Michaud. Mr. Kregar retained counsel, who commenced a tort action on his behalf against PACCAR (as owner of the truck) and Ms. Begin, who was driving the truck at the time of the accident.

45. The log notes filed indicate that the Independent Adjuster reported to ING in late September 2005 that Ms. Begin had advised him that the accident had occurred while she and Mr. Kregar were in the course of their employment. There are other references in the log notes that indicate that the "WSIB issue" was flagged early on by Ms. Michaud. She obtained assignments from both Claimants, as stipulated by section 59 of the *Schedule*. Mr. Kregar's assignment was signed on October 6, 2005 and approved by WSIB on October 17, 2005. Ms. Begin's assignment was signed on November 22, 2005, but was

not forwarded to the Board and approved until June 9, 2008, over two and one-half years later.

46. The documents filed by the parties also indicate that Red Hawk Express submitted a form entitled Employer's Report of Injury to WorkSafe BC (the equivalent of the WSIB in Ontario) in early September 2005, on behalf of both Claimants. While the initial letter received in response confirmed that the claims were being "established" with WorkSafe, both claims were rejected on October 19, 2005, on the basis that the Claimants were Ontario residents who were injured in Ontario, and therefore not covered by the *Workers' Compensation Act* of British Columbia.

47. Mr. Kregar's claim was subsequently forwarded to the WSIB in Ontario. The Board responded on November 18, 2005 that they were unable to establish a claim on behalf of Mr. Kregar, as neither Red Hawk Express nor GDSI were registered employers with the WSIB.

48. The Independent Adjuster's notes reveals that he wrote to ING at some point in 2006 and recommended that they "contemplate a section 31 WSIAT application for Ms. Begin. If determined she is eligible, a section 59 denial should be entertained". There is no further reference to the WSIB issue having been considered in 2006, and no action was taken by ING in this regard.

49. Both claims were transferred from Ms. Cullen-Michaud to Maddalena Panetta, another ING claims handler, in December 2006. The log notes reveal that part of a "To Do list" recorded in March 2007 includes "workers' compensation issue". An entry from October 2007 reads - "WSIB – section 59 – terminating AB claim" as part of her "to discuss list" with respect to Ms. Begin's claim. Ms. Panetta wrote to both the BC and Ontario Boards in December 2007 to inquire into whether Ms. Begin had applied for benefits. The WSIB responded that it had no record of her having done so under the *WSIA*.

50. Ms. Panetta was examined under oath as part of this proceeding. She could not explain why Ms. Begin's assignment was not submitted to the Board until June 2008. When asked why no action was taken to pursue the "WSIB defence" in 2007, Ms. Panetta responded that the WSIB issue was always listed in her "disposition plan", but acknowledged that she had not determined how to address the issue. She acknowledged under cross-examination that "the main focus was priority".

51. The evidence confirms that on the basis of legal advice she received, Ms. Panetta instructed counsel for ING to pursue a section 31 application to WSIAT on April 15, 2008, seeking a declaration that Ms. Begin was a worker employed by a Schedule 1 employer in the course of her employment at the time of the accident. When asked why a similar step was not pursued on behalf of Mr. Kregar, Ms. Panetta stated that she could not recall.

52. Correspondence exchanged between counsel for ING and ICBC was also filed at the hearing. Most notably, Tom Wright, counsel defending ICBC in the tort claim (and Ms. Smith's colleague at that time) wrote to Ms. Cullen-Michaud, the ING adjuster, on February 7, 2006. He stated –

> *I anticipate that we will be bringing an application before WSIB for a determination as to whether or not Kregar was an employee of the company at the relevant time*
>
> *Please let me know if you have any interest in this matter and whether or not you feel you want legal representation with respect to it.*

53. In fact, ICBC did not bring such an application in 2006 or in 2007. The examinations for discovery of Mr. Kregar and Ms. Begin in the tort proceeding were completed in September 2006.

54. The first pre-hearing teleconference in this arbitration proceeding took place on January 2007, and the question of whether ING had commenced the arbitration on behalf

of Ms. Begin within the allowable timeframe was raised later that year. As outlined above, ICBC objected to my jurisdiction to determine the matter, requiring ING to bring an application to the Superior Court for a determination of that issue. On April 18, 2008, a few months before that application was to be heard, Ms. Smith wrote to Mr. Grossman and proposed that the parties hold off on litigating the "limitation issue" in favour of pursuing applications to WSIAT with respect to both Mr. Kregar`s and Ms. Begin`s claims. She states –

> *ICBC does not have status to commence this (Ms. Begin`s) WSIB Section 31 application. ING does have the status. ICBC would support the Section 31 application, and only if unsuccessful, would we then need to deal with any limitation argument.*
>
> *Quite a bit by way of costs and delay would be avoided if we could agree to this manner of proceeding. ICBC does have status to bring a Section 31 claim in regards to Gary Kregar, and my office would undertake that step to coincide with the Section 31 application being brought by your office to deal with Ms. Begin, which would cut down on delay and costs as well.*

55. It is evident from this letter that despite Mr. Wright's earlier correspondence, ICBC had not brought a WSIAT application by the spring of 2008.

56. Interestingly, Mr. Wright wrote to Mr. Grossman on June 20, 2008, two months after the above letter was sent by Ms. Smith. That letter indicates that his firm will bring a WSIAT application 'seeking a declaration that ***both Mr. Kregar and Ms. Begin*** were employees and in the course and scope of their employment at the time and thus the action is barred by section 28 of the Act'.

57. ICBC ultimately initiated an application to the Tribunal under section 31(1)(a) of the *WSIA* seeking a declaration that Mr. Kregar was a worker under the *Act* in the course of his employment and therefore precluded from bringing a tort action seeking damages for his injuries in July 2008. Counsel could not agree on whether ICBC also brought an application under section 31(1)(c) regarding Ms. Begin`s right to claim benefits under the *WSIA*, or whether that was done solely by ING. The Tribunal's decision suggests that

ICBC's application related solely to whether Mr. Kregar's right to sue was taken away by section 31(1)(a), and that ING's application sought a determination of whether Ms. Begin was entitled to *WSIA* benefits by virtue of section 31(1)(c).

58. In any event, the WSIAT heard the two applications together over the course of two days in the spring of 2009. The Tribunal rendered its decision in December 2009, granting both applications. Ms. Begin represented herself at the hearing, and testified about the arrangements between herself, Mr. Kregar, GDSI and Red Hawk Express. It appears that neither she nor counsel appearing on behalf of Mr. Kregar`s estate (who had passed away by that point) contended that she was an independent operator, and it was easily determined that she was a worker employed by a Schedule 1 employer and therefore entitled to claim benefits under the *WSIA*.

59. Counsel for Mr. Kregar's estate requested a reconsideration of the Tribunal's decision, which was denied in March 2010.

60. Jennifer Griffiths, a partner in the law firm Zarek Taylor Grossman Hanrahan, was examined under oath in this proceeding in September 2009. She also testified at the arbitration hearing in December 2009, held to address the preliminary issue of whether timely notice of arbitration with respect to Ms. Begin's claim was provided to ICBC. Ms. Griffiths was initially retained to represent ING in this proceeding, and had reviewed the claims and provided advice to ING, as requested. She was asked on both occasions about the reasons why ING had not brought a WSIAT application prior to April 2008.

61. Ms. Griffiths stated that first and foremost, she had expected ICBC to bring a section 31 application with respect to Mr. Kregar's entitlement to claim benefits under the *WSIA,* and felt that the two applications should proceed together. She referred both to the letter sent to ING by Mr. Wright in February 2006 (excerpted above) suggesting that such an application was imminent, and to a telephone discussion she had had with Mr. Wright around that time in which the issue was discussed. She testified that while it was

clear from the outset that the accident had occurred while both Claimants were in the course of their employment, it was not clear whether they were "employees" or "owner/operators", and if determined to be the latter, they would not be entitled to benefits under the *WSIA*. She noted that Ms. Begin's employment status was "being developed" through the tort proceeding, and that ING was not a party to that process.

62. Ms. Griffiths also explained that the WSIAT had issued a few decisions around that time that cast doubt on whether an accident benefits insurer, acting alone, could initiate a section 31 application. She referred to two specific cases in which the Tribunal had determined that unless a claimant had initiated an action in court (and was therefore a "plaintiff"), an accident benefits insurer did not have standing to initiate such an application (Decision No. 465/05, issued September 22, 2005, Decision No. 2035/05, issued January 20, 2006). She acknowledged that earlier decisions had proceeded on the basis that an AB insurer did have such standing, but explained that given the competing case law on this point, it was her practice and preference at the time to advise her clients not to initiate such an application to the Tribunal, but rather to wait and join an application commenced by a tort defendant.

63. Finally, Ms. Griffiths made the point that there had also been a considerable delay in ICBC's initiation of the WSIAT application with respect to Mr. Kregar's claims, which were far more substantial than those of Ms. Begin. Under cross-examination, she acknowledged that her client was not interested in pursuing a WSIAT application in the face of a pending application with regard to the tort defence, when "it wasn't their claim to start with" and the costs incurred by ING in the course of the WSIAT process would not be recovered.

ANALYSIS & DECISION – WSIAT ISSUE:

64. In considering this issue I am guided by the statutory framework provided by section 59 of the *Schedule,* and sections 30 and 31 of the *WSIA,* set out above. Subsection 59(1) provides that an insurer is not required to pay benefits to an insured if they are entitled to claim benefits under the *WSIA*. Subsection 59(5) states, however, that if the

application of subsection (1) is in dispute, the insurer **shall** pay benefits pending resolution of that question, as long as the insured provides an assignment to the insurer of any benefits he or she may become entitled to under the *WSIA*, and the Board approves the assignment.

65. The question of whether an insured is entitled to benefits under the *SABS* or the *WSIA* depends upon whether he or she was injured in an accident in the course of employment, while a worker employed by a Schedule 1 employer. If so, benefits are to be paid pursuant to the *WSIA*. If the insured is more properly characterised as self-employed, he or she would remain eligible to claim accident benefits under the *Schedule*. This issue is brought before WSIAT by way of an application under section 31 of the *WSIA* brought by a defendant in a tort action, or an insurer from whom accident benefits are claimed. Section 31(1) provides that either of those parties "**may** apply to the Appeals Tribunal to determine.." that issue: the language used is permissive rather than mandatory.

66. Recent case law in the area has confirmed that the failure on the part of a first insurer to bring a timely section 31 application to WSIAT is not *de facto* proof that payments made to a claimant were unreasonable. (see *Economical* v. *ACE Insurance*, Arbitrator Cooper, December 23, 2011, and *RBC General v. Zurich Insurance*, Arbitrator Novick, March 15, 2012). I have not been advised that either of these decisions have been appealed.

67. As I stated in the *RBC* case, any assessment of whether payments made by the first insurer are unreasonable must be conducted with the overall structure of the priority scheme in mind. The priority regulation is designed to clarify questions of priority at the earliest possible stage, which operates to the benefit of both parties involved. It is not desirable for a first insurer to continue making claims handling decisions as a complex *SABS* claim matures, and it is similarly awkward for a priority insurer not to be involved in the ultimate resolution of a claim, as can often occur when the priority determination is not made until late in the process. A first insurer has a statutory obligation to adjust the claim and pay benefits (assuming a nexus exists), but it is not properly their file, and the

decision-making should be taken over by the proper insurer who is in priority at the earliest opportunity.

68. It is clear from the log notes filed that the ING adjusters in this case focused primarily on adjusting the claims and on the priority issue. Ms. Smith rightly pointed out while the log notes contain many references to the "WSIB issue" at an early stage, especially in reference to Ms. Begin's status, no action was taken to initiate an application to the Tribunal for well over two years. Ms. Panetta also could not explain why Ms. Begin's assignment was not filed with the Board until June 2008, when it had been obtained in November 2005.

69. Ms. Smith also contended that Ms. Griffiths and ING "got it wrong" when they took the position that an accident benefits insurer acting alone, in a case in which no action had been commenced in court, did not have jurisdiction to bring a section 31 application. A thorough review of the case law emanating from the Tribunal around that time reveals that the two decisions referred to by Ms. Griffiths – released in September 2005 and January 2006 – did in fact determine that in the absence of a court action having been commenced by the claimant, an accident benefits insurer lacked the standing to initiate an application under subsection 31(1)(c). This finding, however, was in direct opposition to many cases that had been decided earlier, most of which proceeded on the assumption that the AB insurer had standing. Shortly after these two decisions were released, other Vice-Chairs considered the question and arrived at the opposite conclusion, rejecting the analysis in the cases highlighted. I specifically note the decision by Vice-Chair Martel, released in October 2006 (Decision No. 1362/061), in this regard.

70. In any event, the question before me is whether ING's actions (or lack thereof) led to payments being made to the Claimants that were unreasonable, given the likelihood of a shortfall between *SABS* payments and those recoverable under the *WSIA*. ICBC's submissions on this point were focused on the information that ING had in its possession regarding Ms. Begin's claim: nothing specific was alleged in relation to ING not having brought a WSIAT application challenging Mr. Kregar's right to collect accident benefits.

On the evidence before me, I am therefore not persuaded that ING acted unreasonably with respect to payments it made to Mr. Kregar prior to the WSIAT application having been determined, and I find that ICBC is responsible to pay the full amount of the shortfall between payments made by ING to Mr. Kregar, and the benefits received by WSIB.

71. ICBC's arguments relating to ING's delay in bringing an application to WSIAT regarding Ms. Begin's status seem persuasive when the lens is focused solely on ING's actions or inaction. They lose much of their forcefulness, however, when reviewed in the broader context of what was transpiring with these claims and between these parties during the relevant periods. ICBC advised at a relatively early stage that it intended to bring a WSIAT application in order to determine whether Mr. Kregar was an employee or self-employed. Mr. Wright's letter of February 6, 2006 states this clearly, and essentially invites ING to participate in the process. The reason that that did not take place was never made clear. No evidence was provided to explain the "gap" between the statement in this letter and the fact that nothing was done in this regard by ICBC until over two years later.

72. Ms. Smith then wrote to Mr. Grossman in April 2008 to suggest that ING bring an application with respect to Ms. Begin and ICBC bring one with regard to Mr. Kregar. It is not clear what exactly transpired between the parties in the aftermath of that letter, but ICBC ultimately initiated its application to WSIAT relating to Mr. Kregar's status in July 2008, some two and one-half years after Mr. Wright's letter, and ING did so with respect to Ms. Begin's status shortly afterwards.

73. While there may be some questions regarding the manner in which ING chose to proceed with respect to Ms. Begin's claim, I am not persuaded that its actions were, in the end, unreasonable. It was clear from early on in this proceeding that ICBC would be mounting an aggressive defence to the allegations of priority (and loss transfer). Once the first procedural issue arose regarding the timeliness of the Notice of Arbitration for Ms.

Begin's claim, the parties proceeded along a protracted path of litigation, featuring a court application, cross-examinations on affidavits, and several examinations under oath.

74. I have already commented in my earlier decision (relating to ING's request for costs) on ICBC's position that I lacked jurisdiction to decide whether ING had provided the Begin notice of arbitration in a timely manner, which was entirely without merit. While each party contributed in its own way to the length of the proceeding, in the end it was ICBC's resistance to accepting priority for the claims that led to an arbitration process that spanned more than five years. Against this backdrop, and given the fact that there is no statutory requirement on a first insurer to initiate a WSIAT application, I find that it was not unreasonable for ING to have focused on adjusting the claims and pursuing ICBC for priority, as opposed to pursuing the WSIAT applications.

75. Consequently, I find that ICBC must repay ING for the full amount of whatever shortfall exists between the benefits it has paid out to Ms. Begin, and what it has received to date from WSIB. I do find, however, that as the reason for the late filing of Ms. Begin's assignment was never explained, ICBC should not be responsible for reimbursing ING for any amounts that WSIB withholds as a result of that delay.

SECTION 47 of SABS: PAYMENTS MADE IN ERROR?

76. Finally, I do not accept ICBC's contention that ING should have claimed repayment of benefits paid to the Claimants pursuant to section 47 of the *Schedule*. As stated above, section 59(5) requires the insurer to continue to pay benefits pending a determination by WSIAT, and therefore, any benefits paid out in this regard are not paid "in error".

ORDER:

77. Accordingly, for the reasons set out above, I order ICBC to repay ING for all accident benefit payments it has made to both Mr. Kregar and Ms. Begin, subject to the proviso outlined above with respect to the late filing of Ms. Begin's assignment, pursuant to the *SABS*, less any amounts received from WSIB as a result of the assignments filed with the Board by both Claimants.

78. I do not find this an appropriate case in which to award interest on the payments owing. As explained above, this proceeding adopted a difficult tone and unique dynamic at an early stage, and ultimately both parties contributed to the delay in having these ultimate issues determined in an expedient manner.

79. Finally, if further payments are forthcoming from the WSIB pursuant to the assignments filed, ING shall do whatever is required to facilitate the transfer of those payments to ICBC.

COSTS:

80. In light of the result achieved, ING is entitled to be paid its costs of this proceeding. I urge the parties to resolve any issues relating to the quantum of costs payable among themselves. In the event that that is not possible, I will entertain submissions from the parties, upon being contacted in writing.

Finally, I thank both counsel for their able and well-prepared submissions, and for their patience in awaiting the final determination of these issues,

DATED at TORONTO, ONTARIO this ____ DAY OF MAY, 2013.

_____

Shari L. Novick
Arbitrator