WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 842/16

BEFORE: M. Crystal: Vice-Chair

HEARING: April 5, 2016, October 18, 2016 and April 19, 2017 at Toronto
Oral

DATE OF DECISION: August 15, 2017

NEUTRAL CITATION: 2017 ONWSIAT 2438

APPLICATION FOR ORDER UNDER SECTION 31 OF THE *WORKPLACE SAFETY AND INSURANCE ACT, 1997*

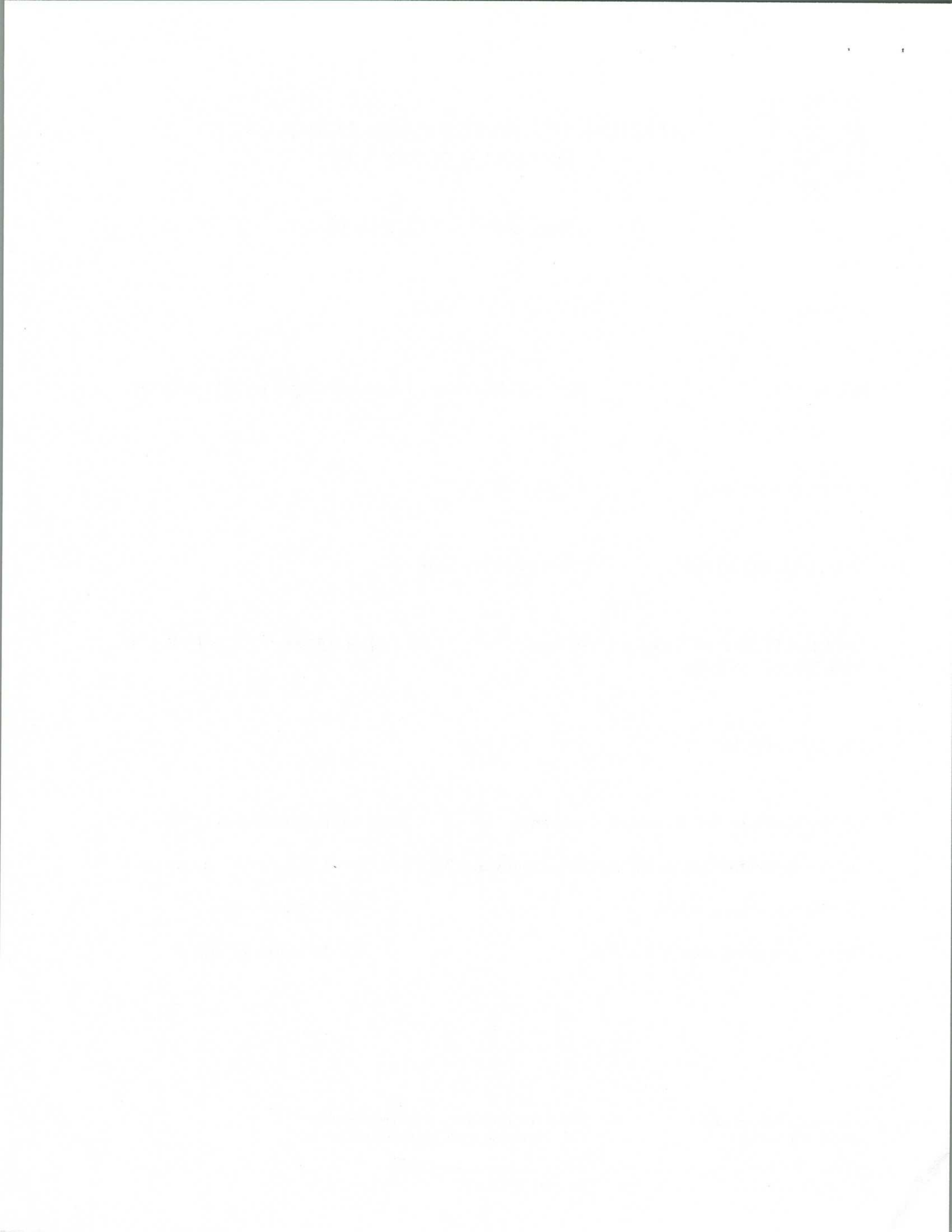
APPEARANCES:

For the applicant N.C. Insurance Company: Mr. D. Himelfarb, Lawyer

For the applicants Quebec numbered company and Mr. S. M.: Mr. J. Villeneuve, Lawyer

For the respondent, Mr. S. F.: Mr. J. Dick, Lawyer

For the interested party V.E.C. Ltd Ms. K. McBride, Lawyer



REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the Act) by the applicants N.C. Insurance Company, the co-applicant, a Quebec numbered company, and a further co-applicant, Mr. S. M. The respondent to the application is Mr. S. F. The applicant N.C. Insurance Company was represented by Mr. Daniel Himelfarb, lawyer, the co-applicants, the Quebec numbered company and Mr. S. M., were represented by Mr. Joe Villeneuve, lawyer, and the respondent, Mr. S. F. was represented by Mr. Joel Dick. An interested party, V.E.C. Ltd. was represented by Ms. Karen McBride.

[2] This application was heard in Toronto, on April 5, 2016, October 18, 2016 and April 19, 2017. The hearing was adjourned, on April 5, 2016, with the consent of all parties, to allow Ms. McBride, who indicated that she had been retained by her client on the day before the scheduled date for the hearing, an opportunity to get further instructions from her client. The respondent, S. F., testified on October 18, 2017, however, there was not sufficient time to complete the parties' submissions on that date, and the hearing was adjourned again. The hearing reconvened on April 19, 2017, and submissions were provided by Mr. Villeneuve and by Mr. Dick.

(ii) Issues

[3] The issue in this application is whether the respondent's right of action is taken away pursuant to section 31 of the WSIA and whether the respondent is entitled to claim benefits under the WSIA. In order to determine these issues, the following questions must be answered:

i) At the time of the accident, was the respondent a worker within the meaning of the Act, employed by a Schedule 1 employer, and in the course of his employment, or alternatively, at the time of the accident was he an independent operator?

ii) At the time of the accident, was V.E.C. Ltd., a Schedule 1 employer?

iii) At the time of the accident, was the Quebec numbered company a Schedule 1 employer?

iv) At the time of the accident, did the Quebec numbered company and/or the applicant Mr. S. M. have a substantial or sufficient connection to Ontario.

(iii) A synopsis of the case under application

[4] This application relates to an action commenced in the Ontario Superior Court of Justice in Brampton as Court file No. CV-14-4650-00. The action is related to a motor vehicle accident (MVA) that occurred in eastern Ontario on September 27, 2013, involving two transport tractor-trailer trucks. One of the trucks was driven by Mr. S. F., the plaintiff in the action and the respondent in this application. The other truck was driven by Mr. S. M., one of the defendants in the action and one of the applicants in this application. At the time of the accident, Mr. S. M. was an employee of the Quebec numbered company, another of the defendants in the action and one of the applicants to this application. The remaining applicant is N.C. Insurance Company,

who was the insurer of the truck driven by the respondent, Mr. S. F. The respondent has claimed statutory accident benefits from the applicant N.C. Insurance Company.

[5] The truck driven by the respondent, Mr. S. F. was owned by D. Transline Inc., a company established and owned by Mr. S. F. Mr. S. F. testified that D. Transline Inc. owned three trucks, and that, in or about the time of the accident, all three trucks owned by D. Transline Inc. hauled loads for another company, V.E.C. Ltd., and its subsidiary, R-W Express Lines Ltd. Mr. S. F. testified at the hearing that, although he was free to contract with other clients to haul their loads, at the time of the accident, the trucks owned by D. Transline Inc. (and indirectly, by Mr. S. F. who is the owner of D. Transline Inc.) hauled loads exclusively for V.E.C. Ltd. At the time of the accident, the truck driven by Mr. S. F., although owned by his company, carried plates registered to R-W Express Lines Ltd. (the subsidiary of V.E.C. Ltd. – the parties agreed that, for the purposes of this application, V.E.C. Ltd. and R-W Express Lines Ltd., are the same party).

[6] At the hearing, Mr. S. F. testified that, as of the hearing date, his company, D. Transline Inc. was continuing to operate, and that at the time of the accident, he was the sole owner of the company, which he established in 2003. He stated that the business activity with which the company has been involved since its establishment has always been trucking. He stated that he is the CEO of the company and that he also performs truck driving for the company. He indicated that he had performed truck driving for about 10 years prior to his accident.

[7] Mr. S. F. testified that he had not operated a business in Canada before establishing his company. He testified that he established the company because he was told by contacts that if one wants to be an owner/operator in the trucking business, it is necessary to establish a company. As noted above, he testified that D. Transline Inc. owned three trucks, and that he had two other drivers operating the other trucks for his company. Mr. S. F. testified that the drivers of his other two trucks were not employees of D. Transline Inc., that he did not have a formal agreement with the other drivers and that he did not make source deductions from the payments that he made to the drivers. He stated, however, that while they were performing work for D. Transline Inc., the drivers worked exclusively for the company and did not work for other companies.

[8] Mr. S. F. also testified that all three of his trucks performed work exclusively for V.E.C. Ltd. He stated that from about 2006 until the date of accident, 100% of the work performed by D. Transline Inc. was related to hauling loads for V.E.C. Ltd., and that this was also true for the period subsequent to the accident. Mr. S. F. noted that, although he and his drivers drove exclusively for V.E.C. Ltd., this was because V.E.C. Ltd. kept them busy with work, and there was no need to seek out other work. He testified that he and his other drivers were free to drive for other companies, although they did not drive for other companies because V.E.C. Ltd provided all the work that they could handle. As noted above, the plates on the truck Mr. S. F. was driving at the time of the accident were owned by R-W Express Lines Ltd., a subsidiary of V.E.C. Ltd.

[9] Mr. S. F. testified that D. Transline Inc. paid the cost of the fuel for the trucks. He stated that V.E.C. would pay for the cost of fuel upon presentation of receipts for fuel, but that the cost of fuel was charged back to D. Transline Inc.

[10] Mr. S. F. also testified that his company, D. Transline Inc., paid for the insurance on his trucks. He stated that V.E.C. Ltd. had a fleet policy with N.C. Insurance Company, and that the fleet policy provided a preferred premium rate. He stated that he took advantage of the preferred

premium rate offered through V.E.C. Ltd.'s fleet policy, although D. Transline Inc. paid the cost of insurance on its own trucks. He stated that V.E.C. Ltd. deducted the cost of the insurance from the payments that it made to D. Transline Inc., at a rate of six cents per mile. Mr. S. F. stated that he paid the insurance in keeping with advice from V.E.C. Ltd., and that D. Transline Inc. did not have other insurance on its trucks other than the insurance provided by N.C. Insurance Company, through the fleet policy of V.E.C. Ltd.

[11] At the hearing, Mr. S. F. indicated that his trucks bore the logo of R-W Express Lines Ltd., although he stated that this was an optional requirement from V.E.C. Ltd., and that he chose voluntarily to have the logos on his trucks. The case materials included a document entitled "R-W Express Lines Ltd. Independent Contractor Agreement," dated June 30, 2011, which is an agreement signed by Mr. S. F. on behalf of D. Transline Inc., and by an authorized official with R-W Express Lines Ltd. In the agreement, D. Transline Inc. is referred to as an independent operator. The agreement included a term which stated that D. Transline would display "inscriptions and insignia" as directed by R-W Express Lines Ltd.

[12] Mr. S. F. testified that V.E.C. Ltd. had its own terminals in cities in Ontario and Quebec. He stated that, with perhaps a single exception when he delivered goods directly to the premises of one of V.E.C. Ltd.'s customers, D. Transline Inc. hauled goods from one V.E.C. Ltd. terminal to another. He stated that neither he nor D. Transline Inc. has direct contact with V.E.C. Ltd.'s customers, and that if customers had complaints about the trucking service provided to them, V.E.C. Ltd. handled the complaints.

[13] Mr. S. F. testified that he began his relationship with V.E.C. Ltd. after a friend told him that V.E.C. Ltd. was looking for drivers. He stated that he contacted V.E.C. Ltd and they gave him a road test and observed him driving. He stated that he told V.E.C. Ltd. that had two years of truck driving experience. Mr. S. F. testified that apart from some training relating to the handling of hazardous goods, V.E.C. Ltd. did not provide him with other training. Mr. S. F. stated that he carried out driving tests with the drivers that he retained to work for D. Transline Inc., and that V.E.C. Ltd. also tested them.

[14] Mr. S. F. testified that he and the other drivers driving for D. Transline Inc. drove under the C.V.O.R. (Commercial Vehicle Operator Registration, i.e., the "plates") registered to V.E.C. Ltd.'s subsidiary, R-W Express Lines Ltd. The case materials included a signed statement made by Mr. S. F. on October 30, 2013. The statement indicated that the statement was taken and witnessed by an official with the applicant, N.C. Insurance Company. At the hearing, Mr. S. F. initially testified that, although he did not actually use the trucks, which were registered to V.E.C. Ltd., for his personal use, he was free to use them for his personal use. When it was pointed out to him at the hearing that his signed statement stated, "I am not allowed to use the truck for personal reasons," Mr. S. F. agreed with that statement.

[15] Mr. S. F. also testified that when his trucks were not in use, they were kept at a yard maintained by V.E.C. Ltd., and that he was not charged a parking or storage fee for the trucks while they were at V.E.C. Ltd.'s yard. He stated that typically, when he was heading out on a trip, he drove his personal vehicle to V.E.C. Ltd.'s yard, left his personal vehicle in the yard while he took a truck out on a trip, and that when he returned to the yard at the end of a trip, he drove his personal vehicle home from the yard. He stated that this was the arrangement in place in or about the time of his accident in September 2013.

[16] Mr. S. F. stated that in or about the time of the accident he drove five days per week, which always included Monday to Thursday, as well as one more day on Friday, Saturday or Sunday. He stated that drivers who drove for V.E.C. Ltd. were also expected to work five days per week. Mr. S. F. testified that if he is unable to drive due to illness, he would contact one of his drivers with D. Transline Inc., to see if one of those drivers could take his load. He stated that if his drivers are not available, V.E.C. Ltd. will find another driver to take the load. Mr. S. F. noted that V.E.C. Ltd. has approved his drivers, so that his drivers would be suitable for V.E.C. Ltd., but that he is not able to choose a replacement driver without the driver being approved by V.E.C. Ltd.

[17] Mr. S.F. indicated that, in order to drive for V.E.C. Ltd., his drivers must sign an "Independent Contractor Agreement" with V.E.C. Ltd., and follow the rules set by V.E.C. Ltd, including the rules for completing a log book. He noted that, although the drivers that he retains for D. Transline Inc. must sign an agreement with V.E.C. Ltd., the drivers do not sign any formal agreement with D. Transline Inc.

[18] Mr. S. F. testified that if he is not available to drive for V.E.C. Ltd. he advises V.E.C. Ltd. by contacting V.E.C. Ltd.'s dispatcher. He stated that D. Transline Inc. does not have a dispatcher, and that his two drivers who drive for D. Transline Inc. work with V.E.C. Ltd.'s dispatcher to receive information about loads and to advise on the status of a load, noting that there was usually an expected timeframe in which the delivery of a load was expected to be completed. He stated that he is free to drive any route that he chooses when delivering a load, but that he would be paid for the load on the basis of the number of miles associated with the shortest route for the trip. He also stated that, at times, he has refused a load, because he was required to help a friend, or to attend a church meeting, but that when this occurs he gets one of his drivers to take the load. Mr. S. F. also indicated that if he wants to be paid for his return trip home, he is required by V.E.C. Ltd. to take a load back to the beginning point of the trip.

[19] Mr. S. F. testified that he is paid $1.25 per mile for hauling loads for V.E.C. Ltd., but that the amount that he was paid at about the time of the accident in September 2013 may have been $1.20 per mile. He noted that, before he owned his trucks, he typically drove for other carriers at a rate of 40 cents per mile. He stated that the difference between the two rates reflects the cost of operating the truck. He stated that he pays the drivers who drive for his company, D. Transline Inc., 40 cents per mile, which is similar to the rate he was paid when he was driving trucks that he did not own.

[20] He also testified that he is paid a salary by his company, D. Transline Inc., and that his accountant subsequently reconciles the amounts received and paid out by D. Transline Inc. He also stated that every two weeks he receives money from V.E.C. Ltd. through a direct deposit into D. Transline Inc.'s bank account, and that there are no source deductions taken from his payments. He stated that he requires more money, at times, he "dips into" his company's bank account. Mr. S. F. testified that he is paid for his driving by V.E.C. Ltd. whether or not V.E.C. Ltd. is paid by its clients for the trips taken by Mr. S. F. He stated that this is also the arrangement for his drivers who drive for V.E.C. Ltd.

[21] Mr. S. F. testified that, while driving, he maintains safety standards, and that he wears safety equipment including safety shoes and vests. He noted that V.E.C. Ltd. does not pay for his safety equipment and that it is paid for by his own company.

[22] Mr. S. F. stated that he is able to drive for a maximum of 70 hours per week, and that he drives all of these hours for V.E.C. Ltd. He stated that if he had more time available for driving he could haul loads for another company, but that he does not do this because he does not have available time. He noted that the dispatcher for V.E.C. Ltd. refers to him as an independent operator.

(iv) Law and policy

[23] Section 31 of the WSIA provides that a party to an action or an insurer from whom Statutory Accident Benefits (SABs) are claimed under section 268 of the *Insurance Act* may apply to the Tribunal to determine whether: a right of action is taken away by the Act; whether a plaintiff is entitled to claim benefits under the insurance plan; or whether the amount a party to an action is liable to pay is limited by the Act.

[24] Sections 26 through 29 of the WSIA provide the following:

> **26(1)** No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.
>
> **(2)** Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.
>
> **27(1)** Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.
>
> **(2)** If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the Family Law Act.
>
> **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.
>
> **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.

[25] In *Decision No. 1460/02,* the Panel noted that the Tribunal is not required to apply Board policy in right to sue applications, as section 126 of the Act refers to appeals, not applications. The Panel, however, also noted that it is important to maintain consistency with findings that might have been made had the case come to the Tribunal by way of appeal from a decision regarding entitlement. Therefore, Board policy continues to be relevant in right to sue applications. See *Decision No. 755/02.*

[26] In determining this application the I have considered the following Board document from the WSIB's *Operational Policy Manual* (OPM):

- OPM Document No. 12-02-01 on the subject of "Workers and Independent Operators."
- OPM Document No. 12-04-12 on the subject of "Non-Resident Workers"

(v) Analysis

[27] At the hearing, counsel were in agreement the following points, which are not in dispute:

- Mr. S. F. was in the course of his employment at the time of the accident;
- Mr. S. M. was employed by the Quebec numbered company at the time of the accident;
- At the time of the accident, the Quebec numbered company had a substantial connection to Ontario;
- V.E.C. Ltd./R-W Express Lines Ltd. is a Schedule 1 employer;
- For the purposes of this application, the Quebec numbered company is a Schedule 1 employer.

[28] It should be understood that, in agreeing that, at the time of the accident, Mr. S. F. was in the course of employment, the parties were not agreeing that, at the time of the accident, Mr. S. F. was in an employment relationship with V.E.C. Ltd. (i.e., that Mr. S. F. was a "worker" within the meaning of the Act), but rather, that at the time of the accident, he was performing the

work of a truck driver for remuneration. There was no agreement on the question of whether, at the time of the accident, the respondent, Mr. S. F., should be characterized as a "worker", or alternatively, as an independent operator , and this is one of the central issues in this application.

[29] The other issue upon which the parties did not agree was whether, at the time of the accident, Mr. S. M., the other driver involved in the MVA, had a substantial connection to Ontario. The parties agreed that Mr. S. M. was an employee of the Quebec numbered company, that the Quebec numbered company had a substantial connection to Ontario, and that the Quebec numbered company should be characterized as a Schedule 1 employer for the purpose of the application. As noted, however, there was not agreement on the issue of whether Mr. S. M. had a substantial connection to Ontario, and the parties made submissions on this point.

[30] Given the points of agreement noted above, should I determine that, at the time of the accident, Mr. S.F. is properly characterized as a "worker" within the meaning of the Act, rather than an as independent operator, and should I determine that, at the time of the accident, Mr. S.M. had a substantial connection to Ontario, it would follow that the Mr. S.F.'s right to sue the defendants is taken away by the Act, and that he is entitled to claim benefits under the Act.

[31] Another question that was discussed at the hearing was whether, apart from his relationship with V.E.C. Ltd., Mr. S. F. should be considered to be an independent operator in the context of his relationship with his own company, D. Transline Inc. At the hearing, however, the parties agreed that the relationship which is central to this application is the relationship between Mr. S. F. and V.E.C. Ltd., given that the MVA on September 27, 2013 occurred while Mr. S. F. was hauling a load for V.E.C. Ltd. The parties agreed that the question of whether, for the purposes of this application, the relationship between Mr. S. F. and D. Transline Inc., is one in which Mr. S. F. is a worker, or alternatively an independent operator, is not pertinent to the disposition of the application.

(a) Was the relationship between Mr. S. F. and V.E.C. Ltd. an employment relationship, or was Mr. S. F. an independent operator?

[32] A factor that must be considered in addressing the nature of the relationship between Mr. S. F. and V.E.C. Ltd. is the fact that they entered into an agreement dated June 30, 2011 (the agreement was between D. Transline Inc., Mr. S. F.'s company, and R-W Express Lines Ltd., a subsidiary of V.E.C. Ltd.). The title of the agreement document is "Independent Contractor Agreement." The document named D. Transline Inc. as the "independent contractor" and R-W Express Lines Ltd. as "the Carrier." Paragraph 13 of the agreement states, in part:

> It is expressly understood by and it is the intent of the parties hereto that independent contractor is an independent contractor only and neither independent contractor nor his employee(s) are employees of the Carrier, and nothing herein contained shall be construed otherwise…

[33] It follows that the stated intention of the Mr. S. F. and V.E.C. Ltd., as indicated in the agreement, was that Mr. S. F. would be an independent operator in its relationship with V.E.C. Ltd. A question that has been considered in previous Tribunal decisions on section 31 applications, where the issue has been whether one of the parties to the application was an independent operator or a "worker," within the meaning of the Act, is whether the parties intended that their relationship be an employment relationship or alternatively one where the party in question is an independent operator. I note that the Panel in *Decision No. 105/93* addressed this point and stated, near the bottom of page 10 of the decision:

> There is no question that in this case both the parties intended to structure a business relationship which was that of independent contract. Both parties testified to this intention and there is no reason to disbelieve them on this. Mr. Petriglia testified that he did not want all the responsibilities attendant upon an employment relationship, including the obligation to pay for various benefits including sickness, and he wished to preserve work force flexibility to deal with seasonal business fluctuations. He needed to have a fairly flexible work force because of the seasonal nature of his work.
>
> When we consider the evidence however, we are satisfied that, regardless of their intentions, the parties to this agreement created an employment relationship....

[34] The Board's OPM Document No. 12-02-01 on the subject of "Workers and Independent Operators" refers to the "Organizational test" as a basis for determining a person's status as a "worker" or alternatively, as an "independent operator". In this regard, the policy document states:

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

[35] Although the intention of the parties is a factor to take into consideration in determining whether or not one of the parties is an independent operator, Tribunal jurisprudence indicates that an inquiry into the substantive relationship between the parties, taking into account the features of the relationship associated with the "organizational test" is necessary to determine the issue. I accept that the parties entered into an "Independent Contractor Agreement" and arranged their affairs in a manner which might in some respects be viewed as consistent with an independent operator relationship. These arrangements include the fact that Mr. S. F. incorporated a company which entered into the agreement with V.E.C. Ltd., and also the fact that V.E.C. Ltd. did not make source deductions from its payments to Mr. S. F's company. These factors tend to weigh in favour of the presence or an independent operator relationship. I note however, that these factors were within the control of the parties, and these arrangements could be made regardless of the factors considered in the "organizational test." Accordingly, I attribute greater weight to the factors associated with that test, than to the stated intentions of the parties, to the extent that the stated intentions of the parties are inconsistent with those factors.

[36] Moving to the factors associated with the "organizational test," I have considered factors included in the policy document, as indicated below.

(i) Control and direction

[37] In this application, Mr. S. F. testified that the he receives his trucking assignments from the V.E.C. Ltd. dispatcher. He stated that D. Transline Inc. does not have a dispatcher, and that drivers of the two other trucks he owns through D. Transline Inc. also receive their assignments from the V.E.C. Ltd. dispatcher. He testified that all of the work he performs is done for V.E.C. Ltd. and it follows that all of the trucking work performed by Mr. S. F. is assigned by the V.E.C. Ltd. dispatcher.

[38] Mr. S. F. also testified that for each load that he hauls, there is an expectation from V.E.C. Ltd. in relation to the amount of time over which the delivery is to be completed, and it follows that the speed at which a delivery is to be completed is determined by V.E.C. Ltd. Mr. S. F. also stated that although he is free to drive any route he wishes to make a delivery, he is paid on a mileage basis, according to the shortest route available. It follows that, in most cases, if Mr. S. F. drove a different longer route than the route for which V.E.C. Ltd. had determined he

would be paid, he would drive a greater distance than that for which he was being paid, which would be contrary to his financial interest. Accordingly, I find that this is not something that Mr. S. F. would be likely to do. I therefore find that, in substance, the route to be travelled by Mr. S. F. in making a delivery was determined by V.E.C. Ltd.

[39] Mr. S. F. testified that if he is unavailable for a delivery to which he has been assigned, for example, due to illness, he would try to get one of the other drivers for D. Transline Inc. to take the assignment. He said that all of the drivers who drive for D. Transline Inc. have passed the driving test provided by D. Transline Inc., and that they would therefore be acceptable to V.E.C. Ltd. He noted that it would not be acceptable to V.E.C. Ltd. if he chose a replacement driver whom V.E.C. Ltd. had not approved. It follows that, in his relationship with V.E.C. Ltd. he is not permitted to determine who performs the driving work on his own, without approval from V.E.C. Ltd.

[40] Mr. S. F. also testified that he is free to refuse a load from V.E.C. Ltd., and that he has done this, on occasion, to assist a friend or to attend a church meeting. Mr. S. F. was asked about this issue at an Examination under Oath, carried out on May 12, 2014, and he stated that although "he could "refuse the load anytime," when asked whether there would be consequences for such a refusal, he acknowledged that the V.E.C. Ltd. dispatcher "wouldn't give me good work next trip." On this basis, I find that Mr. S. F. was not free to refuse a load without negative consequences.

[41] Mr. S. F. testified that he did not receive training from V.E.C. Ltd., however, he acknowledged that he and the other drivers with D. Transline Inc. received training from V.E.C. Ltd. in relation to the transport of hazardous goods. As noted above, however, Mr. S. F. testified that before being permitted to drive for V.E.C. Ltd., he and the other drivers for D. Transline Inc. had to pass a driving test given by V.E.C. Ltd. It follows that, in relation to his level of driving skill, although not directly trained by V.E.C. Ltd., he was required to meet the standards set by V.E.C. Ltd.

(ii) Opportunity for profit and loss

[42] A factor which, when considered alone, tends to support the position that Mr. S. F. is an independent operator in his relationship with V.E.C. Ltd. is the fact that he (or his company) is the owner of the truck that he drives in the work performed for V.E.C. Ltd. He testified that owns his trucks and that he also pays to have them maintained and he pays the cost of his safety equipment, fuel and insurance. These factors tend to support the conclusion that Mr. S. F's actions may contribute to whether he earns a profit or loss, in the sense that, if he pays too much for the carrying charges for trucks or maintenance, or alternatively, if he obtains a good rate for these things, this will affect his overall revenue.

[43] This ability to effect a profit or loss, however, is limited given that he pays for insurance through V.E.C. Ltd.'s fleet insurance policy, and although he pays the cost of insurance, he has no control over it. At the hearing, Mr. S. F. testified that he believed that he was free to obtain insurance on his own, but that the rate offered through V.E.C. Ltd.'s fleet policy was optimal, however, the "Independent Contractor Agreement" , referred to above, states, in part:

> The parties agree that the independent contractor will participate in purchasing insurance from the Carrier at the rate outlined in Schedule B (Insurance).

[44] It appears, from this provision, that Mr. S. F. would not be free to obtain insurance according to his own wishes or judgement. At the hearing, Mr. S. F. testified that he pays the rate for insurance that he is told to pay by V.E.C. Ltd.

[45] On the question of remuneration, Mr. S. F. testified that he is paid for his driving by V.E.C. Ltd. at a rate of $1.25 per mile, although he believed that, at about the time of the accident, he may have been paid $1.20 per mile. He stated that when he drove a truck before owning his trucks, he was paid 40 cents per mile, and that this was also the rate that he paid to the drivers that he retained to drive his trucks for D. Transline Inc.

[46] On the issue of compensation, the Independent Contractor Agreement states:

> As compensation for the use of said equipment and the driving service to be rendered hereunder, Carrier agrees to pay to the independent contractor, the amounts agree upon and set forth in Schedule "B" hereto attached and by this reference made a part hereof, or as may from time to time be supplemented by the carrier hereto via supplement to Schedule "B".

[47] The copy of the agreement that is included in the case materials did not include a copy of Schedule "B." At the hearing, Mr. S. F. testified that there was no negotiation of the agreement, and that he and his own drivers with D. Transline Inc. were required to sign the agreement if they wanted to drive for V.E.C. Ltd. The question of how the rate was determined was not canvassed at length, however, and it was not entirely clear whether the rate of $1.25 per mile was determined unilaterally by V.E.C. Ltd., however, it appears that the rate of compensation was not an ongoing source of negotiation, subsequent to the agreement. I note that workers who are in an employment relationship may initially negotiate their remuneration, but that after it has been determined, the remuneration is not changed, going forward, on an assignment by assignment basis.

(iii) Other factors considered

[48] The Board's policy document, referred to above, lists a few additional factors to consider when determining whether a person's status is more appropriately determined to be that of a "worker" within the meaning of the Act, or alternatively, an independent operator. In this regard, I have considered the following additional factors.

- At the hearing, Mr. S. F. testified that, with a few possible exceptions, he does not deal with the customers whose goods are being hauled. He testified that V.E.C. Ltd. deals with the customers and their complaints. He stated that he does not advertise for customers, because he receives all of his work through V.E.C. Ltd. He also stated that if a customer does not pay their account with V.E.C. Ltd., he and his drivers with D. Transline Inc. get paid by V.E.C. Ltd., in any event.
- Mr. S. F. testified, and the Independent Contractor Agreement confirms that, the license registration for the truck he drives, which he owns, is provided and paid for by V.E.C. Ltd. or its subsidiary.
- Mr. S. F. testified that the truck he drives, which he owns, bears the logo of V.E.C. Ltd. or subsidiary. He stated at the hearing that this was optional, although I note that the Independent Contractor Agreement provides for the

display of the logo as a term of the agreement, and I find that the display of V.E.C. Ltd.'s (or R-W Express Lines Ltd.'s) logo is mandatory.

(iv) Conclusions

[49] I note that an issue which frequently arises in an application made pursuant to section 31 of the Act, is whether the plaintiff (or potential plaintiff) in the action (or potential action) which is the subject of the application is a worker within the meaning of the Act, or alternatively, an independent operator. In many such applications, the various factors which must be addressed by the decision maker, in order to determine whether the party in question (in this case, the respondent) is a worker or an independent operator, are often mixed, in that it is not unusual for some of the factors to favour a determination that the party is a worker, within the meaning of the Act, while other factors in the same case will favour a determination that the party is an independent operator.

[50] That is the case in the circumstances of this proceeding. Some aspects of the respondent's relationship with V.E.C. Ltd. are consistent with the typical relationship between an independent operator and a principal, such as the stated intentions of the parties in executing the "Independent Contractor Agreement," and the fact that the respondent, Mr. S. F., owned the trucks that were used to haul loads for V.E.C. Ltd. Other aspects of the respondent's business relationship with V.E.C. Ltd. are more typical of an employment relationship between a worker and an employer, such as the fact that the respondent worked full time for V.E.C. Ltd. and he took instructions in relation the work from V.E.C. Ltd.'s dispatcher. I find that the characteristics of the respondent's business relationship with V.E.C. Ltd. do not fit neatly into one category or the other. Accordingly, in this proceeding it is necessary to determine, on a balance of probabilities, which type of relationship most closely fits the respondent's circumstances.

[51] On this basis, although there were some aspects of the respondent's business relationship with V.E.C. Ltd. which were consistent with the typical relationship between an independent operator and a principal, I find that overall, the worker's business relationship with V.E.C. Ltd. at the time of the accident on September 27, 2013, was more consistent with the relationship between a "worker", as defined by the Act, and an employer, in an employment relationship.

[52] I have reached this conclusion noting that, at the time for the accident, Mr. S. F. was working full time for V.E.C. Ltd. He testified that 70 hours per week was the maximum number of hours that he was permitted to drive, and that he drove all of his hours delivering loads for V.E.C. Ltd. He stated that he believed that he was at liberty to drive for other carriers, but that he had no time to drive for others, and he chose not to do so. I am not able to attribute significant weight to the respondent's testimony in this regard, given that he did not actually drive for other carriers. I also note that, although the respondent initially testified that he believed that he was permitted to use his trucks for his personal use, he ultimately agreed with the statement he provided to an official with the insurer on October 30, 2013, that he was not permitted to use his trucks for personal use. I interpret this to mean that Mr. S. F. understood that he was not to use his trucks for purposes other than hauling loads for V.E.C. Ltd., who owned the plates on the truck.

[53] As I have noted, I also attribute weight to the fact that Mr. S. F. took his instructions from the V.E.C. Ltd. dispatcher. He was told by the dispatcher where to pick up his loads (although he had some freedom to choose among V.E.C. Ltd.'s terminals as a starting point for a trip) and

there was an expectation that the trip would be completed within an accepted timeframe. His route was determined by V.E.C. Ltd. in that they paid him only for the number of miles associated with the shortest distance between pick-up and delivery points. He had to pass a driving test given by V.E.C. Ltd. He could only substitute another driver for himself if the other driver was approved by V.E.C. Ltd. He drove under the vehicle registration of V.E.C. Ltd. He did not advertise for his own customers, he got paid whether or not the customer paid V.E.C. Ltd., and complaints by customers were addressed V.E.C. Ltd. His trucks carried the logo of V.E.C. Ltd. or its subsidiary.

[54] I note that Mr. S. F. indicated that he preferred to drive at night, when traffic was lighter, and this appears to have been a factor (i.e., choosing his hours of work) which was under his own control, although only to limited degree, given that he was required by V.E.C. Ltd. to drive five days per week, and he had no control over the length of the trips. On the basis of the issues relating to control over the manner in which the work was to be performed, and the extent to which V.E.C. Ltd. provided instructions to the respondent in relation to the business activity, I find that the preponderance of evidence is consistent with the conclusion that Mr. S. F. was performing a "contract of service" for V.E.C. Ltd., in keeping with an employment relationship.

[55] On the question of whether Mr. S. F. had an opportunity for profit or loss, in keeping with an independent operator relationship, I conclude that Mr. S. F. had some opportunity for profit or loss, but that it was limited. In keeping with the policy document, a critical factor which affects the opportunity for profit or loss is ownership of tools and equipment. In this case, the main piece of equipment used by Mr. S. F. in the service of V.E.C. Ltd., was the truck used to haul the loads, and this was owned by Mr. S. F.

[56] *Decision No. 1362/06* addressed the question of the significance which should be attached to the issue of ownership of the truck in determining whether the individual in question should characterized as a worker or alternatively as an independent operator. The decision stated at paragraph 48:

> Finally, I note that in many Tribunal cases dealing with the question of whether a truck driver is an independent operator or a worker, the truck driver in question actually owned, or leased the truck. That fact complicates the issue and is a factor which counts in favour, but is not determinative of independent operator status. In the instant case, the respondent did not own or lease the truck that he drove. He was not what is commonly referred to as an "owner-operator," but was simply an "operator." Lack of ownership of a truck by the respondent is an important factor and supports the conclusion that the respondent is a worker rather than an independent operator. There are numerous decisions of this Tribunal in which a driver who does not own a truck been has been determined to be a worker. I find that the respondent was not an owner operator.

[57] I agree that the fact that Mr. S. F. owned the truck that he was driving for V.E.C. Ltd. at the time of the accident, and that this is "counts in favour…of independent operator status," but also that it is only one factor to consider, and it is ultimately "not determinative of independent operator status," on its own. I find that, in this case, the fact that Mr. S. F. owned the truck must be considered together with the fact that the truck was registered under the plates of V.E.C. Ltd., was insured under the fleet policy of V.E.C. Ltd., and Mr. S. F. ultimately agreed that he was not permitted to use the trucks for personal use. Because the owner of a truck in this case relinquished his ability to use the truck according to his own wishes and judgement, in favour of exclusive use in keeping with the objectives of the principal, ownership of the truck becomes a less prominent feature in support of a finding of an independent operator relationship.

[58] Although it is true that Mr. S. F. was responsible for the costs of fuel, maintenance, safety equipment and carrying charges associated with the truck, and that by achieving savings in these areas he could affect his profit or loss, I find that the significance of this, in relation to profit and loss, is outweighed by the relatively fixed nature of his revenue from V.E.C. Ltd.

[59] Mr. S. F. testified that he had negotiated a rate of $1.25 per mile with V.E.C. Ltd. for hauling its loads. Although it was not clear whether this rate had been determined unilaterally by V.E.C. Ltd. or was the subject of a bilateral negotiation process, it appears to have been essentially a fixed rate, or a rate subject to limited change, going forward. I accept that the ability of Mr. S. F. to earn a profit or loss would be affected by his actions and decisions in relation to the acquisition of his truck and the cost of its ongoing fuel and maintenance, however, I find that overall, Mr. S. F.'s ability to earn a profit or loss was limited, and that V.E.C. Ltd. made most of the decisions which affected profit and loss.

[60] I note that the Board's policy document provides that, in addition to "features of control, ownership of tools and equipment, chance of profit/risk of loss," the "organization test" also considers "whether the person is part of the employer's organization, or operating their own separate business." Although Mr. S. F. established a corporation in connection with his "Independent Contractor Agreement" with V.E.C. Ltd., I find that at the time of the accident, in substance, Mr. S. F. was acting primarily as a part of V.E.C. Ltd.'s operations, and not as a separate business. I reach this conclusion noting that Mr. S. F. had no customers of his own, had no business cards or public identity for his company, and his sole business activity was hauling loads for V.E.C. Ltd.

[61] As I have noted, in reviewing all of the factors in this case which must be considered in determining whether the relationship between the respondent and V.E.C. Ltd. is properly characterized as an employment relationship, where the party performing services is a "worker" within the meaning of the Act, or alternatively, an independent operator relationship, I conclude that the factors are mixed. I find, however, for the reasons provided, that the preponderance of evidence supports the conclusion that the relationship was, in substance, predominantly an employment relationship where Mr. S.F. acted in a role as a "worker" within the meaning of the Act.

(b) At the time of the accident, did Mr. S. M. have a substantial connection to Ontario?

[62] The remaining issue to be determined in this application is whether, at the time of the accident, Mr. S. M. had a substantial connection to Ontario. Mr. S. M. was the other driver involved in the MVA on September 27, 2013, and he is one of the applicants in this proceeding. At the hearing, the parties agreed that, at the time of the accident, Mr. S. M. was driving a truck in the course of his employment with the Quebec numbered company.

[63] The case materials included a transcript of an Examination for Discovery conducted on October 5, 2015 of Mr. F. C., who testified at the discovery that:

- Mr. F. C. is the sole owner of the Quebec numbered company;
- The Quebec numbered company owned the tractor trailer involved in the accident of September 27, 2013, that was driven by Mr. S. M.;
- The Quebec numbered company's yard is located in a city in Quebec;

- The Quebec numbered company had multiple customers in Quebec and Ontario and Mr. F. C. estimated that 95% of the routes travelled by the Quebec numbered company's trucks were between a city in Ontario and a city in Quebec, with a few routes between the Quebec city and another city in Ontario.

[64] Mr. F. C. did not testify at the hearing, however the parties agreed that they would rely on the testimony provided by him at his Examination for Discovery. On the basis of his testimony at his Examination for Discovery, the parties agreed that, for the purposes of this application, the Quebec numbered company had a substantial connection to Ontario, and was a Schedule 1 employer for the purpose of this application.

[65] Mr. F. C. also testified at his Examination for Discovery about the status of Mr. S. M. In this regard, Mr. F. C. testified:

- Mr. S.M. was hired as a truck driver by the Quebec numbered company on September 16, 2013, and he was in the course of his employment as a truck driver at the time of the accident. Mr. S. M. stopped working for the Quebec numbered company immediately following the accident on September 27, 2013.
- Mr. S. M. made his first trip for the Quebec numbered company on September 17, 2013. The trip that Mr. S. M. was on at the time of the accident on September 27, 2013, was his fourth trip for the Quebec numbered company. All of his trips were between a major city in Quebec and a major city in Ontario, carrying loads back on the return trips. The accident occurred when Mr. S. M. was on route to the Ontario city.
- On the day of the accident, Mr. S. M. intended to haul a load to the Ontario city, and haul a further load back to the Quebec city.
- As noted above, the accident occurred in Ontario, not far from the Quebec border. On the day of the accident, Mr. S. M. had purchased fuel in Ontario.

[66] At the hearing, the parties agreed that Mr. S. M. was in an employment relationship with the Quebec numbered company at the time of the accident, but that an issue to be determined in the application was whether, at the time of the accident, Mr. S. M. had a substantial connection to Ontario.

[67] OPM Document No. 12-04-12 on the subject of "Non-Resident Workers" states, in part:

> **Policy**
>
> A non-resident employer who employs an Ontario resident to work in Ontario is an "employer" under the *Workplace Safety and Insurance Act* or the Workers' *Compensation Act* (the Act). In all other cases, a non-resident worker or non-resident employer must have a substantial connection with Ontario in order to come within the scope of the Act.
>
> ....
>
> **Guidelines**
>
> A non-resident worker who works in Ontario normally has a substantial connection with Ontario unless the worker's Ontario employment is so minimal that it is merely incidental to the worker's employment in another jurisdiction.
>
> To decide whether a worker has a substantial connection with Ontario, the decision-maker considers all the surrounding circumstances. In most cases, the major

consideration is the amount of time that the worker spends working in Ontario. If an injured non-resident worker claims benefits under the Act, the decision-maker considers the amount of time the worker had spent working in Ontario in the year immediately preceding the date of the accident.

Although each case must be decided on its own facts, it is generally considered that a worker who works in Ontario for

- 5 or fewer days in the course of a year usually does not have a substantial connection with Ontario
- 6 to 10 days in the course of a year may have a substantial connection with Ontario if the surrounding circumstances suggest that such a connection exists
- 11 or more days in the course of a year usually has a substantial connection with Ontario.

When applying these time frames, the decision-maker considers whether the worker worked in Ontario for the entire day or for only several hours.

Other factors include

- whether the worker also makes similar trips to other jurisdictions outside the home jurisdiction
- whether trips to Ontario are regularly scheduled or anticipated
- whether the worker simply passes through Ontario or actually performs employment functions in the province
- whether trips to Ontario are strictly for employment purposes or whether they also have a personal component
- the place where the contract of employment was made
- the place where the worker is paid, and
- whether, if Ontario residency status is doubtful, the worker would have worker status under workers' compensation legislation in another jurisdiction.

....

[68] The parties referred to *Decision No. 2071/12*, dated May 22, 2015. In that case, the defendant transport company was based in another province, however, the Vice-Chair concluded that, based on the company's business activity, it had a substantial connection to Ontario. The subject MVA occurred in Ontario. The driver of the defendant's truck was a trainee who was a resident of the other province and who did not have a history of driving in Ontario for work. The Vice-Chair concluded that the non-resident driver should be found to have had a substantial connection to Ontario primarily because his employer had a substantial connection to Ontario, and that this was determinative of the matter.

[69] I note that in *Decision No. 2071/12R*, dated February 8, 2016, the Tribunal reconsidered *Decision No. 2071/12*, noting that an employer's connection to Ontario is just one factor to consider in determining the extent of the worker's connection. The Tribunal found that the threshold test for reconsideration had been met, and the application was reheard. In *Decision No. 2071/12R2*, dated April 11, 2017, the reconsideration Vice-Chair concluded that the driver did not have a substantial connection to Ontario, noting a number of factors that connected him primarily to his home province, and in particular, that he was not primarily hired to operate in Ontario.

[70] The parties also referred to *Decision No. 382/10*. In that case, the worker was employed by an American company and worked at the American company's U.S. offices, but was a resident of Ontario. In his employment, the worker performed work at locations throughout the United States, United Kingdom and Ontario. The worker sought to claim benefits due to a chemical exposure he experienced while working in Ontario. The Vice-Chair stated, beginning at paragraph 41:

> I am also unable to agree with the employer that the only basis for the Board's decision is the place of residence of the worker. The policy clearly applies to workers who are resident in Ontario *and* who work in Ontario. In all other cases, the Board will look for a "substantial connection" to the province before finding that a worker or employer is subject to the WSIA. In my view, the reference in the policy to residing and working in the province may reasonably be interpreted as having the same significance as having a "substantial connection" to the province without the need for extensive inquiries. In other words, a worker who resides in Ontario and performs work in Ontario on behalf of a foreign employer will by definition have a "substantial connection" to the province.
>
> Even if I am wrong about the latter point, I note that OPM Policy No. 12-04-12, *"Non-Resident Workers"*, describes criteria to determine whether a worker has a substantial connection to the province. Even these criteria do not require a full-time presence in the province, but indicate that a worker who works in the province for eleven days per year "usually has a substantial connection with the province". Had the worker in this case not resided in Ontario, he still would have met the requirement of a substantial connection to the province; one of the employer's witnesses estimated that the worker in question would have worked at the Ontario location roughly 50 days per year. Consequently, on any test the worker in this case is a worker under the WSIA, and his employer is correspondingly an employer under the WSIA.

[71] At the hearing of this application, counsel on behalf of the respondent submitted that on the basis of the Board's policy document, and the ruling in *Decision No. 382/10,* I should determine that Mr. S. M. did not have a substantial connection to Ontario, and therefore is not subject to the Act, or the protection against civil action that is included in section 28.

[72] I find that, in this case, Mr. S. M. had a substantial connection to Ontario at the time of the accident. He had been working for the Quebec numbered company for 11 days at the time of the accident, and although he had probably worked in Ontario for the Quebec numbered company for fewer than the 11 days specified in the policy document to demonstrate that a worker "usually" has a substantial connection to Ontario, I find that the surrounding circumstances support the conclusion that Mr. S. M. had such a substantial connection to Ontario. Most notably, I have taken into account the fact that *all* of the driving assignments that were provided to Mr. S. M. by the Quebec numbered company involved work that required him to travel to Ontario, and this fact distinguishes the case from *Decision No. 2071/12R2,* in which the reconsideration Vice-Chair concluded that the driver in that case had not been primarily hired to operate in Ontario. In this case, given that most of the routes travelled by the Quebec numbered company were between Quebec and Ontario, and all of Mr. S.M.'s assignments, although few, were between Quebec and Ontario, I find that it is reasonable to conclude that unlike the driver in *Decision No. 2071/12R2,* Mr. S.M.'s driving in Ontario was a central feature of his employment with the Quebec numbered company.

[73] Further, although, at the time of the accident, Mr. S.M. had driven fewer days in Ontario for the Quebec numbered company than the number of days specified in OPM Document No. 12-04-12 to demonstrate that a worker "usually" has a substantial connection to Ontario, the

policy document states that "each case must be decided on its own facts" and it is apparent that the number of days specified in the policy document should be regarded as only a rough guideline. The policy document also indicates that the decision-maker shall consider factors such as "whether trips to Ontario are regularly scheduled or anticipated", "whether the worker… actually performs employment functions in the province" rather than simply passes through Ontario and "whether trips to Ontario are strictly for employment purposes…" In this application, all of these questions are answered in the affirmative, and support a finding that Mr. S.M. had a substantial connection to Ontario.

[74] In addition, I do not interpret *Decision No. 382/10,* which found that the worker had a substantial connection to Ontario, necessarily to support a determination that Mr. S.M. did not have a substantial connection to Ontario in the circumstances of this application. The decision concluded that "a worker who resides in Ontario and performs work in Ontario on behalf of a foreign employer will by definition have a 'substantial connection' to the province", however, it does not follow from this proposition that a non-Ontario resident who works both in his home province and Ontario, such as Mr. S.M., should necessarily be found not to have had a substantial connection to Ontario.

[75] For these reasons, I find that, for the purposes of this application, at the time of the accident on September 27, 2013, Mr. S.M. had a substantial connection to Ontario.

(c) Conclusions on the application

[76] For the reasons that are provided above, I have determined that, at the time of the accident on September 27, 2013, the respondent Mr. S. F. was for the purposes of this application, a "worker" within the meaning of the Act, and that he was not an independent operator.

[77] I have also determined, for reasons that are provided above, that for the purposes of this application, at the time of the accident on September 27, 2013, the applicant Mr. S. M. had a substantial connection to Ontario.

[78] Given these determinations, taken together with the points of agreement made by the parties to this application, which are set out above, and which I accept as true, it follows that Mr. S. F.'s right to sue the applicants is taken away by the Act. It also follows that Mr. S. F. is entitled to claim benefits under the Act.

DISPOSITION

[79] The application is granted. The right of action of the respondent against the applicants is taken away by the Act.

[80] The respondent, Mr. S. F., is entitled to claim benefits under the Act in relation to the motor vehicle accident that occurred on September 27, 2013.

[81] Section 31(4) of the Act provides that a claim may be filed six months after a section 31 determination is made.

DATED: August 15, 2017

SIGNED: M. Crystal