

# BRIEFING NOTE

## *Lessor's exposure for motor vehicle claims against lessees/drivers*

*Stroszyn v. Mitsui Sumitomo Insurance Company Limited, 2014 BCCA 431*

In reasons for judgment released November 6, 2014, the BC Court of Appeal has determined that:

- 1) Absent express statutory language prescribed by s.61(2) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, ch. 231, a lessee or driver operating the vehicle with consent is an additional insured under an excess automobile insurance policy obtained by a lessor; and
- 2) A lessor's liability of \$1 million prescribed by s.82.1 of the *Insurance (Vehicle) Act* is reduced by payments under third party liability policies obtained by a lessee/driver, where such payment is also on behalf of the lessor as an additional insured.

### **Background:**

The petitioner, Mr. Stroszyn, suffered injuries as a result of a motor vehicle accident on May 15, 2008, when he was struck by a vehicle driven by Jason Chen, leased by Mary Chen from Honda Canada Finance Inc. ("Honda").

Mary Chen obtained a third party liability policy from ICBC, with limits of \$1 million which named Honda as an additional insured. Honda obtained an excess auto policy from Mitsui Sumitomo Insurance Company Ltd. ("Mitsui") which specifically excluded coverage for anyone other than Honda.

The parties settled the action for \$1.6 million. \$1 million was paid by ICBC, in satisfaction of the limits of its policy. ICBC asserted that the payment was on behalf of all insureds, including Honda. The parties agreed to resolve the payment of the outstanding \$600,000 by way of a Reference Petition.

The two questions raised by the Reference Petition were:

- 1) Whether Honda's vicarious liability as lessor, prescribed under section 82.1(2) of the *Insurance (Vehicle) Act* as being \$1 million, applied in excess of the limits of the ICBC policy (the "Lessor Cap issue"); and
- 2) Whether Jason Chen was an additional insured under an excess auto policy obtained by Honda from Mitsui (the "Excess Coverage issue")

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**The Lessor Cap Issue:**

At issue was the proper interpretation and application of s.82 of the *Insurance (Vehicle) Act*, which provides for a cap on the liability of lessors.

By way of background, section 86 of the *Motor Vehicle Act*, R.S.B.C. 1996, ch. 318, provides for the vicarious liability of an owner/lessor and lessee for a person operating a motor vehicle with consent.

Section 82.1 of the *Insurance (Vehicle) Act* has the effect of capping that liability with respect to lessors. It states:

- 1) In an action to recover for loss or damage to persons or property arising out of the use or operation of a leased motor vehicle on a highway in British Columbia, the maximum amount for which the lessor of the motor vehicle is liable, in that lessor's capacity as lessor of the motor vehicle is the amount determined under subsection (2).
- 2) The maximum amount for the purposes of subsection (1) is the greatest of the following amounts:
  - a) \$1 000 000;
  - b) the amount established, or determined in the manner prescribed, by regulation;
  - c) the amount of third party liability insurance coverage required by law to be carried in respect of the motor vehicle.

At the Supreme Court level, the Chambers judge had found that payment by or on behalf of the lessee/driver under the ICBC policy did not have the effect of reducing the liability of the lessor provided by s.82.1.

The Court of Appeal held that the payment of \$1 million by ICBC was made on behalf of all insureds and had the effect of reducing each insured's liability to the extent of the payment. The Court stated, at para. 24: "In my view, each of the insureds in this case can regard the whole of the payment made by ICBC to have been made on his, her or its behalf and to have reduced its liability to the petitioner to the full extent of the payment."

As such, Honda's liability of \$1 million had been discharged by payment by ICBC of \$1 million on behalf of all insureds.

**Excess Coverage Issue:**

The excess coverage issue asked whether or not the driver (Jason Chen) was an unnamed additional insured under a policy of excess insurance obtained by Honda from Mitsui, which policy specifically excluded coverage for anyone other than Honda.

The policy had, however, failed to include the mandatory statutory language for excluding coverage prescribed by s.61(2) of the *Insurance (Vehicle) Act*.

Mitsui argued that the failure to include the language was immaterial given the clear wording of the policy as well as the fact the policy would never be seen by the driver or lessee of the vehicle.

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The Court of Appeal disagreed, and found that the failure to include the statutory language precluded Honda's insurer from excluding the driver from coverage.

As a result, Mr. Stroszyn is able to collect the remaining \$600,000 owing from the settlement from the policy of insurance issued by Mitsui, which was found to extend coverage to the defendant driver.



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