IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8, Section 268 AND
REGULATION 283/95 MADE UNDER THE *INSURANCE ACT*

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

AVIVA CANADA

Applicant

- and -

STATE FARM INSURANCE COMPANY

Respondent

- and –

THE COMMONWELL MUTUAL INSURANCE GROUP

Respondent

- and –

CHUBB INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRIORITY

COUNSEL

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ISSUES

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, *R.S.O. 1990, c. I.8 and Ontario Regulation 283/95*, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, Nicole Garden, with respect to personal injuries sustained in a motor vehicle accident which occurred in the early morning hours of Sunday, May 29, 2016.

[2] This priority determination involves several issues. Was the claimant still an “occupant” of her mother Dawn Garden’s vehicle, insured by Aviva, when struck as a pedestrian by a vehicle insured by State Farm? Was the claimant an “insured” under the Aviva policy on the basis of being principally financially dependent on her mother, Dawn Garden, or her spouse? Were Mark Emerson and the claimant's mother “spouses” of one another? Was the claimant an “insured” under the Commonwell policy on the basis of being principally financially dependent on Mark Emerson or, in this case, his spouse? Did the claimant’s step father Mark Emerson have “regular use” of his employer’s vehicle insured by Chubb at the time of the accident?

PROCEEDINGS

[3] The matter proceeded on the basis of written submissions, Examination Under Oath transcripts, Document briefs and Books of Authority.

FACTS

[4] This dispute arises out of a motor vehicle accident that occurred shortly after midnight on Sunday, May 29, 2016. Nicole Garden, who was 25 years old at the time, was driving her mother’s vehicle, insured by Aviva, when she was pulled over by the police near a Tim Horton’s in Oshawa. She had a valid G1 Ontario license at the time. She was charged by the police for driving with an improper license (failing to have another fully licensed driver in the vehicle and driving between the hours of 12:00 a.m. and 5:00 a.m., which are restrictions on a G1 license).

[5] The claimant’s evidence was after realizing that what she was doing was illegal and being stopped by the police, she had no further intention to drive the car. She exited the vehicle and walked over to and entered a nearby Tim Horton’s with a friend to purchase a tea. After the purchase and while outside of the doors of the Tim Horton’s, Nicole was struck

by a vehicle operated by David Shaw. At all material times, the striking vehicle owned and operated by David Shaw was insured by the Respondent, State Farm Insurance Company (hereinafter "State Farm"). Her phone had died and needed charging. Her plan had been to stay in her mother's car for the night. In the morning she would charge her phone at a local convenience store and arrange for a ride home.

[6] As previously indicated, the vehicle that Nicole had operated was owned by Nicole's mother, Dawn Garden and was insured by the Applicant, Aviva Canada (hereinafter "Aviva").

[7] The two other parties involved in this dispute are Chubb Insurance Company (hereinafter "Chubb") and The Commonwell Mutual Insurance Group (hereinafter "Commonwell"). Chubb insured Dawn Garden's partner and alleged "spouse", Mark Emerson's work vehicle and Commonwell insured Mark Emerson's personal vehicle. The claimant's mother had been residing with Mark Emerson since early May 2012, some four years prior to the subject collision on May 29, 2016.

[8] The claimant, Nicole Garden, presented her accident benefits claim to Aviva, which has continued to pay statutory accident benefits to the claimant. In the application for benefits, it was indicated that the claimant's representative was her mother, Dawn Garden and that she was dependent on her mother. The claimant had never lived independently and had always lived with her mother.

[9] At the time of the May 29, 2016 motor vehicle accident, the claimant was 25 years of age and residing with her mother, Dawn Garden and her mother's partner and alleged "spouse", Mark Emerson in Whitby, Ontario. It was her intention to enroll in a full-time college program in January 2017 with the goal of becoming a Wildlife Rehabilitation Officer.

[10] The claimant had worked in the fast food and retail industry since 2011. The claimant had previously worked full-time at Tim Horton's between November 2013 and May 31, 2015. At times, she was working 40-45 hours a week and earning between $800 and $1,000 a week. While at Tim Horton's, she paid her mother $100 a month for rent. She left that job when she and her mother moved from Oshawa to Whitby in 2015. She then worked a seasonal job for Bath & Body Works from October to December 2015. She earned $3,587.02 during that period according to an OCF-2. Following her seasonal work, she then travelled to Nova Scotia to visit her sister and on her return found work at Wendy's.

[11] The claimant in 2015 had T4 earnings of $12,544.00 and EI benefits of $5,367.00.

[12] On May 1, 2016 (four weeks pre-accident), the claimant commenced employment at Wendy's. It was her expressed intention to complete the training program and work full-time. However, as of the date of the accident, she was working 10-15 hours each week at minimum wage, but anticipated full-time hours. During this period she testified that she paid for her cell phone bill, toiletries, entertainment, health care renewal, licence costs and clothing. She also claimed to have purchased her own groceries, keeping them separate from the groceries of Dawn and Mark. During the four week period that she was employed,

she earned $334.87 or about $84 per week on average. She did have savings in her bank account totalling some $1,300.

[13] The evidence of the claimant was that she planned on starting a one year program at Durham College in January 2017 which would also include the summer months, followed by a multi-year program at Sir Sandford Fleming for a career as a Wildlife Rehabilitation Officer. It was her plan to continue living with her mother and step-father while attending college. The tuition at Durham College was approximately $3,500. The claimant believed that once she got full-time hours at Wendy's, she would have enough for the tuition. She believed that her mother and step-father were nevertheless going to assist her financially. As she stated "it was basically whatever I couldn't afford, they would help me out with". It was her plan to take a year off between the Durham College and the Sir Sanford Fleming program to have money for tuition.

[14] As for expenses, the claimant testified that she would spend $60-$70 each week on groceries. If she used her mother's car, she would pay for the gas. She paid her own cell phone bill. She paid for her own toiletries, entertainment and cigarettes. She would only shop for clothes every two or three years and would spend $500-$600. She had $1,300 in savings at the time of the accident. In her evidence, the claimant indicated that she may have been able to live independently when she ultimately would have gotten full-time hours at Wendy's, but it was her plan to continue living with her mother and step-father so she could save her money to go to school. The claimant was not paying rent at the time of the accident.

[15] The claimant's step-father Mark Emerson had use of an employer's vehicle, being a 2008 Chev Impala insured by Chubb. He had been using this vehicle since 2013. He carried the keys with him at all times. Most days he would drive the car to and from work. On weekends, the car would either be at his home or at the office. There is no evidence before me as to whether the claimant was permitted to use the vehicle for personal errands or whether there were specific prohibitions for personal use on non-work days. There is no evidence as to whether the vehicle was at the step-father's home or at the workplace at the time of the accident in the early morning hours of Sunday, May 29, 2016.

WAS THE CLAIMANT AN "OCCUPANT" OF HER MOTHER'S VEHICLE?

[16] Section 224 of the *Insurance Act, R.S.O. 1991, c.I.8* defines "Occupant", in respect of an automobile, as:

> (a) the driver;
> (b) a passenger, whether being carried in or on the automobile; or,
> (c) a person getting into or on or getting out of or off the automobile.

[17] Jurisprudence has evolved as to who may be considered a “driver” of an automobile. The leading case is the Ontario Court of Appeal decision in *Axa Insurance Company v. Markel Insurance Company of Canada* (2001) CanLii 24143.

[18] The issue before the Court of Appeal in *Axa* was whether a Mr. Ferguson was an occupant of the tractor-trailer insured by Markel. Mr. Ferguson drove the tractor-trailer to the Stelco South Billet Yard to make a delivery of steel. He parked the tractor-trailer outside of the loading bay, exited the vehicle and entered the loading bay to wait his turn to unload the tractor-trailer. He was standing about 30 feet away from the tractor-trailer when he was struck by a piece of wood that had been propelled off another truck exiting the loading bay. As a result of that accident, Mr. Ferguson sustained serious injuries causing his death. In his reasons, Justice Goudge on behalf of the Court of Appeal found Mr. Ferguson to be the “driver” of the tractor-trailer that he had parked and therefore an “occupant” making Markel, as insurer of the tractor-trailer, liable to pay statutory accident benefits. Section 224(1) of the *Insurance Act* as set out above at page 6 indicates that the “driver” of a vehicle is considered an ”occupant”.

[19] The Ontario Court of Appeal considered the Oxford Dictionary definition of driver as “one who drives”, but concluded that the criterion ought be focused on the description of the person claiming benefits and did not turn on the activity being engaged in, nor the person’s precise location. The Court stated that there was nothing in the statutory definition in s.224 of the *Insurance Act* that required the person at the time of the accident to be engaged in the act of driving or to be in the vehicle. The requirement was simply that he or she be the driver of the vehicle.

[20] Three considerations found relevant by the Court of Appeal to the determination of whether someone is the driver of a vehicle are these:

1) There must have been some degree of physical connection with the vehicle for the person to be the driver;

2) The individual must have the status of driver at the time. The status of driver does not attach permanently to the person, but it is something that depends on the circumstances of the case at the time of the accident;

3) The person can only have been the driver of one vehicle at the time of the accident.

[21] In reaching its conclusion, the Court in *Axa* made the following factual findings:

a) the claimant was in close physical proximity to the vehicle;

b) the claimant had driven the vehicle to the location of the accident and undoubtedly would have driven the vehicle away;

c) the absence of evidence that someone else had taken over control of the vehicle or assumed the role of driver.

[22] Justice Gouge noted that keeping in mind the above considerations, the question to ask to determine if a person was the driver of a vehicle is whether an objective observer of this incident, who had in mind these considerations, would answer affirmatively if asked whether Mr. Ferguson was the driver of the tractor-trailer. The Court of Appeal determined that the answer to the question was clearly yes.

[23] The "objective observer" test emerging from the *Axa* decision was also applied in the Ontario Court of Appeal decision in *McIntyre Estate v. Scott* (2003) CanLii 31493, (2003) 68 O.R. (3d) 45. In *McIntyre Estate,* the Plaintiff had been a passenger on a motorcycle operated by her husband when a rainstorm started. They stopped and took shelter under an overpass. She and her husband got off the motorcycle. As the Plaintiff later approached the motorcycle to retrieve some dry clothing, she was struck by an uninsured motorist. The Plaintiff at the time of the accident was not mounted on or operating the motorcycle. Applying the "objective observer" test as set out in *Axa* (supra), the Court held that the Plaintiff was a "passenger" and therefore an "occupant" of the motorcycle at the time of the collision. Her presence at the scene was entirely explained by the fact that she was a passenger on the motorcycle. She intended to resume her journey when the rain stopped. She remained in close proximity to the motorcycle and did not leave it for any other purpose. She did not engage in any other activity other than to wait for the rain to abate. The Court did not require her be "in or on the vehicle" but looked at her status as "passenger" at the time, even though s.224 of the *Insurance Act* included those words.

[24] In the M*cIntyre Estate* decision Justice Sharpe, on behalf of the Court, noted that the finding was consistent with the general principle that insurance legislation defining coverage should ordinarily be construed in favour of the insured.

[25] The reasoning in the Court of Appeal decision of *Axa* has also been applied in the private arbitration decision of *Axa Insurance v. Belair Insurance Company* (Arbitrator Kenneth J. Bialkowski, September 6, 2005). In this matter, the claimant had driven her vehicle to a parking lot of a library, exited the vehicle, walked to the library and on her way back to the vehicle, she was struck as a pedestrian by another motorist. The Arbitrator considered that the Court of Appeal decision in *Axa* was binding upon him. The fact that the claimant was within 30 feet from the vehicle met the physical proximity test. The fact that the claimant was the sole driver at the relevant time led to an assumption that the claimant would assume the role of driver and hence met the definition of a "driver "and therefore "occupant" of the vehicle for the purposes of section 224 *SABS* and the application of section 268 of *The Insurance Act*.

[26] On the basis of the evidence before me and the submissions of the parties, I find that the claimant, Nicole Garden, was an "occupant" of the vehicle insured with Aviva at the time of this accident, either as a "driver" or "passenger". There was a physical connection as the subject vehicle had been driven to the general location of the accident by the claimant, with

the vehicle being parked just across the street from where the accident took place. To an objective observer she would have, in my view, been perceived as the "driver". She would have been observed driving the vehicle to the area of the accident and at no time relinquishing the keys to the vehicle. After making a purchase at the Tim Horton's, she had exited. She was standing outside the Tim Horton's when the collision occurred. In my view, an "objective observer" would have assumed that the claimant would simply have made her way to the vehicle to continue on to her ultimate destination. However, the evidence before me indicates that it was not her intention to drive the vehicle but to spend the night in the vehicle until the following morning when she would call for a ride home. In my view, she either remained the "driver" by either application of the objective observer test or by reason of the fact that she remained the driver of the vehicle until such time as some other person had become the "driver". Alternatively, she had transitioned to status of a "passenger" given her intention to spend the night in the vehicle. Either way, she would have met the definition of "occupant" as set out in s. 224 *Insurance Act* definition. The Ontario Court of Appeal made it clear in *McIntyre* (supra) that an individual need not be "in or on the automobile" to be considered a "passenger". Furthermore, such interpretation is consistent with the general principle that insurance legislation defining coverage should ordinarily be liberally construed in favour of the insured. In *McIntyre* (supra), reference was made at paragraph 18 to the Supreme Court of Canada decision in *Amos v. Insurance Corp. of British Columbia [1995] 3 S.C.R., 127 D.L.R. (4th) 618* and the words of Major J.:

> *"traditionally, the provisions providing coverage in private policies of insurance have been interpreted broadly in favour of the insured, and exclusions interpreted strictly and narrowly against the insurer."*

[27] In *Killam v. State Farm Mutual Automobile Insurance Co. 2004 CarswellOnt 2444* FSCO, Arbitrator Skinner confirmed that "control over the vehicle is the critical factor in determining whether a person is a driver". Clearly, with the keys in her pocket, the claimant maintained control over the subject vehicle insured by Aviva.

[28] On the evidence before me, I find that the claimant was an "occupant" of her mother's vehicle insured by Aviva at the time to the accident..

WAS MARK EMERSON THE "SPOUSE" OF DAWN GARDEN?

[29] S. 224 of the *Insurance Act*, R.S.O. 1991, c I.8, provides:

> "Spouse" means either of two persons who,
>
> (a) are married to each other,
>
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this *Act*, or,
>
> **(c)** have lived together in a **conjugal relationship outside marriage,**

> **(i) continuously for a period not less than three years, or,**
> (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.
>
> [emphasis mine]

[30] The evidence before me would indicate that the claimant's mother and step-father, Dawn Garden and Mark Emerson, had been living together since early May 2012, some four years prior to the subject collision on May 29, 2016. There is no evidence before me to suggest that the relationship was anything but conjugal. In fact, the submissions of Aviva indicates that Mark Emerson was the husband of their insured Dawn Garden. I find that they were "spouses" of one another for the purposes of the priority analysis.

WAS THE CLAIMANT PRINCIPALLY FINANCIALLY DEPENDENT ON HER MOTHER AT THE TIME OF THE ACCIDENT ?

[31] In terms of traditional legal principles, criteria for determining dependency for the purposes of the SABS were established by the Court of Appeal in *Miller v. Safeco* (1986), 48 O.R. (2d) 451 (H.C.J.) aff'd 50 O.R. (2d) 797 (C.A.). Consideration should be given to criteria as follows in determining dependency for the purposes of the *Schedule*:

i. The amount of dependency;

ii. The duration of the dependency;

iii. The financial needs of the claimant;

iv. The ability of the claimant to be self-supporting.

[32] In *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company* (Arbitrator Lee Samis, May 7, 1999), it was determined that a person's capacity to earn must be taken into account in measuring dependency. A person can only be principally dependent for financial support if the cost of meeting their needs is more than twice their resources. This has come to be known as the 51% rule.

[33] Arbitrator Lee Samis confirmed that it was necessary to examine a claimant's "ability to be self-supporting" at the time of the accident when considering the issue of financial and care dependency in *Co-Operators v. Halifax Insurance Company, 2001 CarswellOnt 10724.* He indicated that the question to be answered is whether or not the claimant had the ability to be self-supporting by providing for their own needs, more than such provision was required from any other source. It was found that it was appropriate to measure dependency by examining the individual's capacity to provide for their own needs.

[34] Early jurisprudence applied this 51% rule using a detailed analysis of the claimant's income sources in comparison to the value of that provided by the person or persons upon whom the claimant was said to be dependent. This has been referred to as the "mathematical approach". The exercise of determining the value of that provided in many cases proved to be a difficult and expensive task. In the last few years, a new approach to the analysis of dependency has emerged known as the "LICO approach". In *Allstate Insurance v. ING,* (Award of Arbitrator Vance H. Cooper, dated May 1, 2014), the arbitrator preferred to resort to an alternative approach to determine dependency, namely, to use Low Income Cut-Off measure as a qualifying number in relation to which 51% rule is to be applied (as opposed to using actual expenses of the claimant). The LICO approach focuses on statistical average needs of an individual in the geographical area where the claimant lived rather than an analysis of the claimant's specific individual needs.

[35] After hearing all evidence including evidence at cross-examinations and re-examinations of the three accountants involved in that case, Arbitrator Cooper noted that all of the accountants who gave evidence and offered expert opinions, acknowledged the inherent difficulty and weaknesses when trying to gather reliable information, documentation and evidence regarding a family's expenditures and individual expenditures in relation to needs.

[36] Arbitrator Cooper referred to decisions of Arbitrator Samis in *Coseco v. ING Insurance of Canada* (Award July 21, 2010) and *St. Paul Travelers v. York Fire & Casualty Insurance Company* (Award, dated August 11, 2011). In these decisions, Arbitrator Samis explained the intrinsic difficulties of trying to ascertain the needs of the claimant by attributing to the claimant a share of household expenditures. The allocated portion of the household expenditures may be greater than the claimant's needs or lesser than the claimant's actual needs. Arbitrator Samis compared this exercise to looking at the general standard of living in a household – the exercise we were directed not to follow by the *Miller and Safeco* appeal. Instead, Arbitrator Samis suggested we should follow a "*more objective valuation of the costs of meeting someone's needs*". The history of family setting may assist in calculating the costs of meeting a person's needs, but is not determinative.

[37] To that end, Arbitrator Samis used Canada LICO threshold statistic numbers as determined by Statistics Canada, which he characterized as the "*best and most reliable approach to the evidence respecting one's needs*". The LICO approach was used by Arbitrator Cooper and formed the basis for his decision.

[38] Arbitrator Cooper's decision in *Allstate Insurance v. ING* was appealed to the Superior Court on the ground that Arbitrator Cooper did not use the correct methodology. On appeal as reported at 2015 ONSC4020, Justice Myers found that mathematical calculation or application of 51% rule in relation to needs/means is an important factor, but it is not the only factor. Justice Myers dismissed the appeal after concluding that dividing or allocating estimated gross household spending to determine one's needs is not a "*particularly meaningful proxy*" and "*is no better than looking at government statistic to determine the cost of housing in a locale*".

[39] More recently and in a move toward a more statistical analysis of dependency, jurisprudence has emerged wherein information from Statistics Canada's Market Basket Measure has been employed. That data provides "the cost of meeting basic modest needs for different family sizes, for different parts of the country, segmented by size of community". In *The Wawanesa Mutual Insurance Company v. State Farm Insurance Companies* (Arbitrator Samis, September 13, 2018), the arbitrator preferred use of the statistical data of the "Market Basket Measure" or "MBM" approach to the other approaches aforesaid. Arbitrator Samis writes at p. 10 of his decision:

> *"In order to compare resources to the cost of meeting needs I prefer to look at statistical information from Statistics Canada as I find the statistical approach is likely to be more reliable than the evidence of the witnesses here. I also thing that the components of the Market Basket Measure are more focused on the costs of meeting needs than the alternative of simply compiling an inventory of any and every expenditure.*
>
> *Statistics Canada publishes the "Market Basket Measure" data which gives us the cost of meeting basic modest needs for different family sizes, for different parts of the country, segmented by size of community. Additionally, the measure is adjustable to all sizes of families.*
>
> *According to information from Statistics Canada, the "basket" of goods and services measures a "specified basket of goods and services representing a modest, basic standard of living. Taken into consideration are the costs of specified quantities and qualities of food, clothing, footwear, transportation…". This is compiled by work done by Human Resources and Skills Development Canada during the 1990's.*
>
> *According to Statistics Canada the Market Basket Measure is a measure more sensitive to geographical variations and other scales.*
>
> *By reference to the Market Basket Measure we can credibly get a number that represents the denominator making the when making the 50% calculation that the regulation requires.*
>
> *I find the "Market Basket Measure" an appropriate source for this purpose."*

[40] As jurisprudence currently stands, the "mathematical", "LICO" and "MBM" approaches are being regularly considered by Arbitrators of priority disputes involving financial dependency issues.

[41] A critical component of the analysis is the determination of the appropriate time frame for analysis. There is considerable jurisprudence on the issue of the appropriate time frame for consideration of dependency. A common thread in all of such jurisprudence is that the determination of the appropriate time frame must be based on the facts of each particular case.

[42] General guidance is found in *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co*. [2006] O.J. No. 4518, where the Ontario Court of Appeal held that a "snapshot" approach on the day of the accident is inappropriate. Rather, the time frame chosen must be one that provides a fair picture of the relationship at the time of the accident. Only by looking at the relationship as a whole, over a reasonable period of time, is the arbitrator able to determine the nature of the relationship at the time of the accident.

[43] Further guidance is found in the decision of Arbitrator Robinson in *Saskatchewan Government Insurance v. Lombard Canada Inc*. (January 23, 2004), where it was held that while transient changes over short periods may not reflect a general change in the nature of a relationship between a dependent and his or her parent, shorter time frames may be appropriate to use provided they yield a more accurate reflection of the circumstances of the person(s) at the time of the accident. Arbitrators must be attuned to the totality of the circumstances and the "big picture" of the claimants' lives.

[44] On the basis of the jurisprudence provided by both parties, it is clear that arbitrators, myself included, have considered periods as short as several weeks and as long as several years when considering the appropriate time frame for the determination of financial dependency.

[45] It was found that a three month time frame was the appropriate time to evaluate financial dependency in *Unifund Assurance Company and TD Meloche Monnex* (Arbitrator Novick, July 14, 2015*).* In this case, a 60 year-old claimant had been living in India with her husband until his death in 2008. Prior to that time, the two of them had visited their daughters in Toronto regularly, having spent 2½ months in 2002 and 5½ months in 2006 in Canada with them. The year following her husband's death, she spent four months with her daughters. The accident happened on July 23, 2010 in Canada while the claimant was here on a six month visitor's visa. Prior to the accident, arrangements had been made to rent an apartment in Mississauga where the claimant would live with her daughter, Niti, while in Canada. First and last months' rent had been paid and $10,000 in furniture purchased. The claimant's plan was to spend more time in Canada. Arbitrator Novick found that the claimant's life had changed significantly when her husband died before the motor vehicle accident and the claimant was shifting her routine to spend more time in Canada helping her daughter with laundering, cooking and cleaning while her daughter worked full-time. It was clear she was not financially independent while in Canada. Arbitrator Novick found that the three month period the claimant was in Canada best reflected the relationship she had at the time of the accident. Arbitrator Novick stated:

> *"While I understand the temptation to adopt a standard and therefore predictable time frame, peoples lives and the shifts and transitions they experience often do not follow a predictable pattern. In my view, parties, accountants and arbitrators considering financial dependency cases must remain open to considering different time periods,depending on the evidence provided."*

[46] In *Waterloo Insurance Company and The Personal Insurance Company* (Arbitrator Novick, May 13, 2014), the arbitrator found a one month time period prior to the accident was

the appropriate time period to evaluate dependency and concluded that the evidence of each case, in addition to the reality of the claimant's life circumstances leading up to the accident, must be evaluated. The 16 year-old claimant had lived with his mother in Scarborough until high school. He then moved in with his father in Mississauga in September 2007 until August 2009, which was one month before the subject accident. While living with his father, he spent most weekends and holidays with his mother. The evidence indicated that he had no intention of returning to live with his mother. The claimant was found to be dependent on his mother at the time of the accident, even though he had only been living with her for one month.

[47] The most recent appellate decision on the issue is that of *Intact Insurance Co. v. Allstate Insurance Co. of Canada,* 2016 ONCA 609, which provides considerable guidance in the method for determining the appropriate time frame for analysis. The Ontario Court of Appeal made it clear that there did not need to be an element of permanency with respect to the time frame selected and that there cannot be speculation as to the future of the relationship. The Arbitrator at first instance accepted a 12 month period for analysis rather than a seven week period pre-accident where the claimant had entered into a new relationship. The Arbitrator found on the facts that the relationship was transient and given the conduct of the claimant on previous occasions, the relationship was unlikely to succeed, therefore favouring the longer time frame for analysis. As indicated, in overturning the Arbitrator's finding, the Ontario Court of Appeal concluded that there need not be any element of permanency and that one could not speculate as to the future of a relationship.

[48] In a subsequent appeal decision, Justice Sanfillipo in *State Farm Mutual Insurance Company v. Her Majesty the Queen,* 2018 ONSC 4258, overturned an Arbitrator's decision to use a six month time frame rather than a three month time frame, emphasizing that there need not be an element of permanency and emphasizing that the relationship must fairly reflect the status of the parties "at the time of the accident". Justice Sanfillipo accepted a three month time frame as being the most appropriate, being the time frame between the claimant Devi's separation form her husband and her move to live with her brother Prakash. According to Justice Sanfillipo, the separation from her husband represented a "groundshift in the support provided".

[49] Aviva has submitted that the claimant was <u>not</u> principally dependent for financial support on her mother at the time of the accident. Aviva claims that the appropriate time frame for analysis is the four week period from the date the claimant started her job at Wendy's on May 1, 2016, to the date of the accident on May 29, 2016. During this period, Nicole lived with Dawn and Mark.

[50] According to Aviva, a dependency analysis covering the four week period of May 1, 2016 to the date of the accident best reflects the state of Nicole's life at the time of the accident. It is not an artificial period. After several months of not having a job, she finally began working at Wendy's with an intent to work full-time after the accident.

[51] Aviva has claimed that the decision to accept a job at Wendy's and begin training to work full-time represents a significant milestone in Nicole's life and living situation. She started a new job where she would be making a living; a living that she states would have allowed her to live independently. This was not merely a transient or summer job for Nicole. The intent was to continue to work in this job while in school and save money, so that she could fund her education which would kick start a new career for her.

[52] Aviva has pointed out that Nicole was also planning to use the money made from her new job to purchase her own car. Nicole had full intention to continue with this job and work full-time, but for the accident. Aviva submitted that, as a result, this ought to be the material period that is applied to determine dependency.

[53] The Applicant Aviva has claimed that during this four week period, the claimant was able to provide more than 50% of her needs.

[54] Aviva has submitted that while living at home, Nicole was paying for her own necessities of life, including her cell phone bill, toiletries, entertainment expenses, health care renewal, license costs and clothing. Nicole even purchased her own groceries and had her own storage area in the house where she would place her personal groceries, keeping her food separate from that of Dawn and Mark. Aviva submitted that the evidence showed that Nicole, during the material period, was not financially dependant on Dawn or Mark. She had $1,300 saved up in her bank account and was working at Wendy's. She had earned $334.87 during those four weeks. Her intentions were to save up the money she made from Wendy's to purchase a car, pay for her own gas and insurance and fund her education.

[55] Furthermore, Aviva has submitted that there is no evidence to suggest that Nicole had any pre-existing physical or psychological difficulties, other concerns, or desired lifestyle changes that would have impacted her ability to continue working as she was at the time of the accident.

[56] Aviva has submitted that the Ontario general minimum wage rate at the time of the accident was $11.25 per hour. This rate increased effective October 1, 2016 to $11.40 per hour. At these rates, working full-time, 40 hours per week, Nicole would have earned in the 52 weeks following the accident, a combined gross total of $23,604.00 (plus her savings in the amount of $1,300). The LICO statistic for a household of one person in Whitby was $17,485 in 2016. Statistics Canada has not published an MBM table for the year 2016 or 2017. As a result, Aviva respectfully submits that the appropriate MBM table to use is the year prior, 2015. At this time, Whitby had a population over 100,000. The MBM threshold for a single individual living in Whitby in 2015 was $18,436.00. This amounts to $354.54 per week. The MBM for the material period of four weeks would therefore have been $1,418.16. Aviva has submitted that Nicole had more than this amount during the material period, as her total financial resources and earnings were $1,679.87, being her earnings over the four week period, plus her savings of $1,300. As a result, the numbers according to Aviva show that Nicole had sufficient income to pay for over 50% of her expenses, based on the MBM statistics as well as the LICO statistics.

[57] Alternatively, Aviva claimed that even if another appropriate time period is considered, that being from the time of the move to Whitby to the date of the accident, the claimant was able to provide more than 50% of her needs/expenses. This alternative period of May 2015 to May 29, 2019 amounts to 56 weeks. Aviva's analysis is that in 2015, Nicole earned a total of $17,911 according to her 2015 tax return. This amounts to $1,492.58 per month. May 1, 2015 to December 31, 2015 is seven months. Aviva submits that this entails that one can reasonably attribute Nicole's income during those months as $10,448.06. Nicole took some time off in January 2016 to travel. She then started to work at Wendy's, where she made $334.87 before the accident. Therefore, the total amount of money which is to be used for this alternative analysis is $10,782.93, the total Nicole made from May 2015 to December 31, 2015, and her income from Wendy's.

[58] As mentioned above, the MBM for an individual living in Whitby in 2015 amounts to $354.54 per week. During the alternative period of 56 weeks, this amounts to a total of $19,854.24. Nicole earned $10,782.93 during that time, which is 54.31% of $19,854.24 according to Aviva. This surpasses the 50 + 1% threshold outlined in the case law.

[59] Further, as submitted by Aviva, the LICO statistic for an individual in Whitby in 2016 was $336.25 per week. In 2015, the total amount was $17,240, or $331.54 per week. There is 22 weeks from January 1, 2016 to the date of the accident. Therefore the LICO statistic to attribute to this timeframe is $7,397.50. Of the remaining 34 weeks in the alternative period proposed by Aviva, the LICO statistic to attribute is $11,272.36. Thus, for the alternative period, the total amount under the LICO analysis would be $18,669.86. Nicole earned $10,782.93 during this time, which is 57.76% of this amount.

[60] Therefore, according to Aviva, the claimant was able to provide more than 50% of her statistical needs, whether MBM or LICO statistics are used.

[61] Furthermore, Aviva claims that the claimant had the ability to be self-supporting. Factors relevant to Nicole's ability to be self-supporting include her educational background, the availability of jobs in the area she was living, her work-related training, and her prior employment history. Clearly, when working full-time at Tim Horton's before the move to Whitby, she had earnings sufficient to provide more than 50% of her needs.

[62] In response to the Applicant Aviva's submissions, the Respondent State Farm has claimed that the claimant, Nicole Garden, had yet to make the transition from completing her education to a career providing financial independence and until such time as this transition was complete, she remained principally financially dependant on her mother and Mark Emerson. In 2016 up until the accident of May 29, 2016, she had only earned $334.87 and had but $1,300 in savings, yet her plan was to enter a full-time community college program in January 2017 with tuition of $3,500. Although she planned to move to full-time hours, there is no hard evidence before me that such a full-time position would be available. Furthermore, her evidence suggests that she felt that she would still need some help from her mother and Mark Emerson for school expenses, even if she continued living with them rent-free.

[63] I am of the view that a purely statistical analysis using LICO and MBM data may not be appropriate when dealing with a young individual who planned on completing her education and had not yet established a career. In such circumstances, a "big picture" or common sense approach must be taken when assessing the claimant's life circumstances at the time of the accident. In *The Dominion of Canada General Insurance Co. v. Intact Insurance Co. & Unifund Assurance Co.* (Arbitrator Shari Novick, July 28, 2014) upheld on appeal by the Honourable Justice Perell, 2015 ONSC 3689, it was held that a young individual who had completed high school, commenced approximately eight weeks of part-time employment, but was otherwise uncertain as to their next steps in terms of employment or education, would still be considered a dependent of their parents, despite not actually residing in the family home at the time of loss. The fact that such an individual had never supported themselves financially and had never been financially independent were considered as significant factors when assessing dependency. Arbitrator Novick applied a "big picture" analysis and this was supported on appeal.

[64] Arbitrator Novick again, in *The Co-operators General Insurance Company v. Security National Insurance Company* (March 2, 2021), chose to use a "big picture" analysis when dealing with a young claimant in transition from a student to full-time work or a career. The claimant in *Co-operators* was 23 years of age at the time of the accident. In the 12 months prior to the accident, he had earned $10,500 from part time jobs. The applicable Market Basket Measure was $18,436 for a city the size of Kingston. Statistically, the claimant's earnings of $10,500 would provide more than 50% of his statistical needs, but applying a "big picture" analysis was used to support a finding that the claimant continued to be principally financially dependent on his mother at the time of the accident. In her decision, the Arbitrator noted that this was yet another in a long line of cases involving a young adult at the early stages of his working life who was not fully employed at the time of the accident. Arbitrator Novick concluded that the claimant had not yet made the shift to independence.

[65] I share the views of Arbitrator Novick and believe that consideration ought be given to the "big picture" when involved with a young claimant in transition from a part-time work or student, to full-time work or a career. In such cases, I believe that a statistical analysis ought be used cautiously.

[66] I am of the view that the true nature of the relationship "at the time of the accident" is best reflected by the short period of time since moving from Oshawa to Whitby and having made the decision to return to school, complete a college program and start off in a career as a Wildlife Rehabilitation Officer.

[67] Even if a four week period from when the claimant started work at Wendy's, or a 12 month period since leaving her job at Tim Horton's, necessitated by her move to Whitby, is used, the claimant had insufficient employment income to provide for anything near 50% of her needs. An analysis of the four week time frame shows that the claimant only earned $334.87, or about $84 a week on average. Extrapolated, this would be an annual income of $4,368 in the face of a LICO of $17,485 and an MBM of $18,436, respectively.

[68] In the 12 months after leaving Tim Horton's in late May 2015 and her accident in late May 2016, the claimant had employment income only totalling $3,921. Again, this does not come close to 50% of the LICO or MBM statistical needs. The small amount of savings were earmarked for anticipated school expenses.

[69] Furthermore, Nicole Garden had special needs not reflected in the statistical LICO and MBM needs calculation, namely tuition and books totalling almost $4,000, bringing Nicole Garden's specific needs when added to the LICO or MBM statistical numbers, to between approximately $21,500 and $22,500 annually.

[70] Although the claimant may have been able to provide more than 50% of her needs when working full-time at Tim Horton's, the nature of the relationship changed when she moved to Whitby and decided to return to a multi-year college program. In my view, the claimant was at that point in the middle of a transition period to completing her education and seeking a career. Such circumstances mandate consideration of a "big picture" analysis, which results in a finding that she remained principally financially dependent on her mother and Mark Emerson at the time of the accident. Such conclusion is further supported by analysis of either the four week or 12 month time frames during which she was only working part-time and planning to return to a multi-year college program. Although the claimant was hoping for full time employment at Wendy's, if not for the accident, the Court of Appeal in *Intact* (supra) made it clear that the trier of fact ought not speculate as to the future when determining the nature of the relationship at the time of the accident. The fact is that at the time of the accident, the claimant was only working part-time and averaging $84 per week in employment income.

[71] Whether dependency is viewed on a "big picture" approach, or using LICO or MBM statistics for an appropriate four week or 12 month period, the claimant was principally financially dependent on her mother Dawn Garden and Mark Emerson at the time of the accident. They were providing the largest portion of the claimant's needs.

DID MARK EMERSON HAVE "REGULAR USE" OF HIS EMPLOYER'S VEHICLE INSURED BY CHUBB AT THE TIME OF THE ACCIDENT?

[72] The materials provided to me indicate that Mark Emerson's personal vehicle was insured by Commonwell. There is also reference in the materials that he had "regular use" of his employer's vehicle at the time of the accident.

[73] Section 3(7)(f) of the *Statutory Accident Benefits Schedule* (the "*Schedule*") states that an individual who is living and ordinarily present in Ontario shall be deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident:

> i. The insured automobile is made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or

ii. The insured automobile is rented by the individual for a period of more than 30 days.

[74] There is no doubt on the evidence before me that Mark Emerson's use of his employer's vehicle was "regular". The issue which remains is whether it was being made available to him at the time of the accident.

[75] The meaning of "being made available at the time of the accident" was addressed by Justice Belobaba in *ACE INA Insurance v. Co-operators General Insurance Co* [2009] CanLii 13625, at paragraph 15, 16 and 17 as follows:

> *[15] As already noted, one can paraphrase the relevant portion of s. 66(1) as follows: if, at the time of the accident, an insured company automobile is being made available for the individual's regular use, then that individual shall be a deemed named insured under the company's policy insuring the automobile at the time of the accident.*
>
> *[16] In other words, the focus in s. 66(1) is whether at the time of the accident a company-insured car was being made available to the individual.*
>
> *[17] The question is not whether the car would be available to the claimant when he went back to work the next day but was it being made available to him at the time of the accident…*
>
> *[19] The point of s. 66 is that accident benefits are to be paid by one's employer's auto insurer if at the time of the accident, a company car is being made available to the injured employee, i.e. is accessible to him…*

[76] In *Cheiftain Insurance v. Federated Insurance Company of Canada* (Arbitrator Densem, October 31, 2012), the Arbitrator reviewed the decision of Justice Belobaba in *ACE INA*, supra, and concluded:

> *"In my opinion, the ratio of ACE-INA v. The Cooperators, is that determining whether vehicles are being made available "at the time of the accident" requires that the focus be on the nature of the individual's control over the vehicle(s) being made available, or his authority to use the vehicle(s) at the time of the accident. The nature of the individual's activities, or the actual use to which the vehicle is being put are relevant only in so far as they may be within the scope of, or outside the scope of the individual's control or authority over the vehicles.*
>
> *…*
>
> *As I have explained, Justice Belobaba's "floating charge" comments were made in the context of describing when the deemed named insured status would attach to an individual and when it would cease. The key to the status attaching, according to Justice Belobaba's reasoning, depends on whether the individual has control over or permission to use a vehicle at the time an accident occurs. If an individual has control over and permission to use a vehicle, then deemed named insured status exists.*
>
> [emphasis mine]

[77] Arbitrator Novick recently had an opportunity to consider the *ACE INA* decision in *Travelers Insurance v. Scottish and York* (Arbitrator Novick, December 9, 2019) and considered Justice Belobaba's statement :

> *"decision makers should not focus on whether a specific vehicle was being made available to the employee at the time of the accident, but rather on whether <u>any</u> vehicle was being made available to him at that time. This statement, along with the examples he provides earlier in the decision, essentially creates a theoretical test – <u>did the accident happen at a point in time that the individual in question had access to the company's vehicles? If so, the test for "regular use" is met."</u>*
>
> [emphasis mine]

[78] The claimant's step-father, Mark Emerson, was employed by Dart Canada Inc.. He started with the company in 1981. At the time of the accident, he had been the plant manager for approximately nine years. He had use of an employer's vehicle, being a 2008 Chev Impala insured by Chubb. He had been using this vehicle since 2013. He carried the keys with him at all times. Most days he would drive the company vehicle to and from work. On weekends, the car would either be at his home or at the office but he would make the decision as to where the company vehicle would be. On his Examination Under Oath, he testified that he had access not only to the 2008 Chev Impala, but to the full fleet of vehicles of the company. In fact, he administered the fleet. In the year preceding the subject accident, he would sometimes store his personal vehicle in a rented storage unit along with his boat. On this evidence, I am satisfied that the 2008 Impala owned by his employer was available to him at the time of the accident. There is no evidence before me to indicate that there were restrictions as to use of the vehicle. I therefore find that Mark Emerson was a deemed named insured under the Chubb policy by reason of s. 3(7)(f) of the *Statutory Accident Benefits Schedule*. It follows that the claimant, as principally financially dependent on his spouse, would be considered an "insured person" by reason of Section 3(1) of O. Reg 34/10 Statutory Accident Benefits Schedule defines "insured person" as follows:

> "insured person" means, in respect of a particular motor vehicle liability policy,
>
> (a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a <u>dependant of the named insured or of his or her spouse,</u>
>
> [emphasis mine]

<u>ANALYSIS</u>

[79] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

[80] As a result of the finding that the claimant remained an "occupant" of her mother's vehicle at the time of the accident, the following priority hierarchy as set out in s. 268(2) of the *Insurance Act* would apply:

> . In respect of an occupant of an automobile,
>
> > i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is **an insured,**
> >
> > ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was **an occupant**,
> >
> > iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any **other automobile involved** in the incident from which the entitlement to statutory accident benefits arose,
> >
> > iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.
> >
> > [emphasis mine]

[81] The Applicant Aviva, as insuring the vehicle in which the claimant was an "occupant" would, on this basis, stand at the second rung of the priority ladder. However, given the finding that the claimant was principally financially dependent on her mother at time of the accident, the claimant would be considered an "insured person" under the Aviva policy moving Aviva to the first rung of the priority ladder.

[82] The Respondent State Farm, as insuring the striking vehicle, therefore being an "other automobile involved", would stand at the third rung of the priority ladder.

[83] The Respondent Commonwell insured the personal automobile of the "spouse" of the claimant's mother. Section 3(1) of O. Reg 34/10 *Statutory Accident Benefits Schedule* defines "insured person" as follows:

> *"insured person" means, in respect of a particular motor vehicle liability policy,*
>
> *(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a <u>dependant of the named insured or of his or her spouse,</u>*
>
> [emphasis mine]

[84] Since the claimant was principally financially dependent on the "spouse" of Mark Emerson or on the two of them, the claimant would be considered an "insured person" under the Commonwell policy. This would place Commonwell at the first rung of the priority ladder.

[85] Chubb insured the employer of Mark Emerson. Since it was found that the employer's vehicle was available to him at the time of the accident and that Mark Emerson did have "regular use" of his employer's vehicle, he was therefore a deemed named insured under the

Chubb policy by reason of s. 3(7)(f) of the *Statutory Accident Benefits Schedule*. As a deemed named insured under the Chubb policy, any person principally financially dependent on he or his spouse would be an "insured person" reason of Section 3(1) of O. Reg 34/10 *Statutory Accident Benefits Schedule* as set out above. This would also place Chubb at the first rung of the priority ladder.

[86] The claimant was therefore an "insured person" under the Aviva, Commonwell and Chubb policies. This brings into play the "Choice of Insurer" provision set out in s. 268(4) of the *Insurance Act*.

> *(4) Choice of insurer – If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.*

[87] By reason of the fact that the claimant submitted her accident benefits claim at first instance to Aviva, and in the absence of optional enhanced benefits being available under any of the policies being considered, the choice of insurer might well be considered having been made as found in *Pafco Insurance Co. v. Cumis General Insurance Co., 2014 CarswellOnt 4948* and *Royal and SunAlliance Insurance Co. v. Zurich Insurance Co., 2011 CarswellOnt 18103.* However, the "Choice of Insurer" provisions of the *Insurance Act* provides a tie-breaking mechanism. The claimant was an "insured person" under the Aviva, Commonwell and Chubb policies and by reason of s. 268(5.2), shall claim benefits from the insurer of the automobile in which the claimant was an "occupant". In this case, that would be the vehicle insured by Aviva.

> *(5) Same – Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.*
>
> *(5.1) Same – Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her own discretion, may decide the insurer from which he or she will claim the benefits.*
>
> ***(5.2) Same – 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.***
>
> [emphasis mine]

[88] Therefore, on the basis of this “Choice of Insurer” provisions of the *Insurance Ac*t, the claimant, as “dependant” on the named insured of more than one policy, shall claim against the insurer of the automobile in which the claimant was an “occupant”. In this case, that would be Aviva.

[89] I find that Aviva is the priority insurer.

COSTS

[90] This arbitration was originally commenced against State Farm only. Commonwell and Chubb were only added to the dispute by reason of Aviva’s position that the claimant was no longer an “occupant” of the vehicle it insured and that the claimant was not principally “financially dependent” or “dependent for care” on their insured at the time of the accident. Aviva was unsuccessful on both issues. Were it not for the position taken by Aviva, it would not have been necessary to involve Commonwell or Chubb. In the circumstances, the partial indemnity legal costs of all Respondents are to be borne by Aviva, as well as the Arbitrator’s costs.

ORDER

[91] On the basis of the findings aforesaid, it is hereby ordered that:

1. Aviva is the priority insurer;

2. The Aviva priority application is dismissed;

3 Aviva is to pay the legal costs of State Farm, Commonwell and Chubb on a partial indemnity basis;

4. Aviva is to pay the Arbitrator’s account.

DATED at TORONTO this 11th)

day of May, 2021.)

KENNETH J. BIALKOWSKI
Arbitrator