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

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 :

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

AXA INSURANCE (CANADA)

Respondent

DECISION

COUNSEL

Bruce Keay – Malach, Fidler, Sugar & Luxenberg LLP
Counsel for the Applicant, Co-operators General Insurance Company
(hereinafter referred to as "Co-op")

Linda Matthews – Matthews, Abogado LLP
Counsel for the Respondent, AXA Insurance (Canada)
(hereinafter referred to as "Axa")

ISSUE

In the context of a priority dispute pursuant to the provisions of the *Insurance Act*, R.S.O. 1990, c. I.8, the issue before me is whether the 19 year-old claimant CH was at the time of the subject motor vehicle collision principally dependent for financial support upon his parents so as to make him an "insured person" under his parent's policy with Co-op, thereby leaving Co-op responsible for payment of statutory accident benefits rather than the insurer of the vehicle in which he was an occupant, Axa, which would stand in priority otherwise.

PROCEEDINGS

This three and a half day arbitration hearing took place on May 11, May 12 and June 12, 2015, followed by oral submissions on July 29, 2015. It proceeded on the basis of filed expert reports, Examination under Oath transcripts, Document Briefs and the oral evidence of four expert witnesses. Their reports were treated as their examination-in-chief with the hearing consisting of their cross-examination and re-examination.

APPLICABLE LEGISLATION

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefit 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.

Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

> *(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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> *(iii) If recovery is unavailable under (1) or (2), 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

Regulation 34/10, *Statutory Accident Benefits Schedule* - effective September 1, 2010, provides at s.3(1) a definition of an "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 dependent of the named insured, or of his or her spouse;
>
> (i) If the named insured specified driver, spouse or dependent is involved in an accident in or outside Ontario that involves the insured automobile or another automobile …

For an individual to be a "dependent" for the purposes of the *Statutory Accident Benefits Schedule,* this terms is defined at s.3(7)(b), as follows:

> "A person is a dependent of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse".

On the basis of this legislation Co-op would be the priority insurer if the claimant CH was found to be principally financially dependent upon his parents at the time of the accident.

FACTS

On July 16, 2011, at about 7:10 p.m., the claimant CH was an occupant of a motor vehicle that was involved in a single vehicle motor vehicle accident on Side Road 3 near Grey Road in the County of Grey. At the time of the accident this vehicle was insured by Axa.

Subsequent to the subject accident, the claimant's lawyer filed an Application for Accident Benefits, OCF-1, with the Applicant, Co-operators General Insurance Company. The claimant's Application for Accident Benefits revealed that his date of birth was November 10, 1991, which means that he was 19 years of age at the time of the subject accident.

Education

With respect to education, is clear that CH was a poor student and had issues with authority while in school some three years prior to the subject accident. There is evidence that he had reading and writing disabilities. It appears that he stopped attending high school in the fall of 2008 after numerous suspensions which are documented in the Banting Memorial School records. CH would have been 16 years old at the time.

By February 26, 2009, Banting Memorial High School ("Banting") was sending letters to CH advising him that provincial legislation requires him to attend school until he is 18. At the time these letters from Banting were dated February 26, 2009, April 6, 2009, April 26, 2009 and June 9, 2009. The claimant was 17 years old at the time.

At the time of the subject accident in 2011, the claimant had but a Grade 10 education, despite having attended an adult learning centre after high school. The evidence would suggest that he has had difficulty in school from a very young age, associated with a communication learning disability, behavioural issues, truancy, and ADHD.

CH attended from Grade 9 (2005-2006) to Grade 11 (2008-2009) at Banting Memorial High School. His IEP's indicate issues with self-management, social skills, conflict resolution, self-control, task completion, and reading comprehension. In the three years, he was suspended no fewer than eleven times for the following reasons:

- Throwing sawdust at a fellow student (November 29, 2005)
- Being in the company of students smoking marijuana on school property during class (May 9, 2006)
- Smoking on school property (October 24, 2006)
- Persistent opposition to authority – being directed to the principal's office by a teacher and never arriving (February 23, 2007)
- Use of profane or improper language – asked to give an Education Assistant his iPod that he was listening to and refused, and then being in her face and arguing with her (March 28, 2007)

- Swearing at his educational assistant (June 13, 2007)
- Caught smoking on school property (February 21, 2008)
- Habitual neglect of duty – directed to class by the Vice Principal and did not follow the instruction (April 16, 2008)
- Being intoxicated at the end of the previous school year while walking through the school halls with no shirt on and threatening a teacher and Vice Principal saying "I'm going to punch you in the face" (September 2, 2008, 9 day suspension)
- Habitual neglect of duty – was continuing to take the bus to school, but was not attending classes (October 2, 2008)
- Being suspected by a teacher of being involved in a fight, and then giving the teacher a false name (October 9, 2008)

By the end of his Grade 11 year (summer 2008), CH had earned a total of 15 high school credits, out of 30 credits required for graduation. In October 2008, he left Banting Memorial High School.

In 2009, there is evidence of CH having taken one credit in October 2009. He was enrolled at the Alliston Adult Learning Centre, but as of November 16, 2009, he was removed from the rolls because he had not attended school for three weeks. His final number of credits earned was 16. The last credit he received was for a 55% pass in "Managing Personal Resources", which was a Grade 11 course. This was the only Grade 11 credit that he managed to obtain. The only other Grade 11 course on his transcript is "Transportation Technology", in which he obtained a 33%.

Since dropping out from the Alliston Adult Learning Centre in 2009, CH has not attended further adult education. He has not done any apprenticeships, and does not have a special class of driver's license. He does not speak any languages other than English. He essentially has a grade 10 education.

Work History

By way of work history there is no evidence that the claimant held any employment in 2008 or 2009, even when he was not attending school. In 2008, CH was 16 turning 17 in November. In 2009, when CH barely attended school at all, he was 17 years old and turned 18 in November. To the extent there is evidence of "side jobs", it was CH's evidence that whenever he described these side jobs, they were not significant and lasted a day or two and not very often.

The claimant's "first" documented job was at Seaton Corp Canada Inc., where he worked at a factory manufacturing windows. The Record of Employment from Seaton Group indicates CH started this job on February 8, 2010 and his last day for which he was paid was May 23,

2010. His total insurable earnings totaled $3,139.36. The reason for issuing the ROE is noted to be Code “M” which stands for dismissal. The Employer’s comments indicate: “Violation of Attendance Policy.”

The claimant’s evidence was that in the summer of 2010, after the job with Seaton ended, he worked for CNS Masonry for a person named Chris, in the general area of Lisle. CNS paid $12 per hour. He never worked a full two weeks, it was always a day here and there. In response to how long did the job last, CH answered: “It really didn’t do much. Maybe – not much money”. When CH was asked if he ever worked every day for CNS for two solid weeks, he answered, “No, not that crazy. No.”

From CH’s evidence, it might be concluded that he hardly worked at all during the summer of 2010 and earned “not much money” despite the fact that this would be a busy time in the construction industry. However, the banking records for his account with the Bank of Nova Scotia show regular deposits into the account in 2010. The account records showed a deposit of $559.00 June 11, 2010, $238.77 June 17, 2010, $131.75 June 28, 2010 and starting on July 9, 2010 there are regular deposits of $700.00 every two weeks, including July 23, 2010 ($702.00), July 28, 2010 ($340.00), August 6, 2010 ($770.00), August 20, 2010 ($777.00). The issue which arises is whether these deposits represent employment income of some sort that the claimant simply cannot remember.

The claimant’s next job, started on September 2, 2010 and ended on October 16, 2010, when he was employed at a company called Miller Construction (also known as Brennan Paving), working on building a bridge. The job lasted only six weeks, and then CH was laid-off due to shortage of work. His ROE indicates that he earned a total of $5,331.15. The Record of Employment reveals that he was let go due to a shortage of work and end of contract or season.

The claimant’s Notice of Assessment from the Canada Revenue Agency for tax year 2010 shows a total income of $11,985.00.

After being laid-off from Miller Construction on October 16, 2010 and until June 2011, CH was unemployed, although he would do “odd” jobs. These jobs lasted a few days each, and did not total even a month’s worth of employment according to his evidence. CH recalled working on a chimney for a stone mason in Glencairn for a day and a half. He also recalled doing some roofing for a person named Jack for three days. He thought that he may have had two other similar side jobs helping people for money, earning $15-$20 per hour. He doesn’t think he earned much money between the time the job at Miller ended in 2010 and when he started working at JC Masonry in June 2011. CH stated: “not much, maybe a couple hundred dollars, $200 or something. When asked if believed he worked even one month between October 2010 and June 2011, CH answered, “No not that much.”

This absence from work may be attributable to substance abuse issues which will be dealt with in a later section of this decision.

The claimant began working at JC Masonry in June 2011, about five weeks before the accident. The position appears to have been temporary. An undated letter from Dave Parker of JC Masonry states:

> "CH was hired over the telephone and was a fair to good employee. He was hired as a sub. temporarily for one project. This project completed Sept. 1/11 at which time we would not need CH as an employee."

The Co-op took a statement from Dave Parker, owner of JC Masonry, on August 21, 2012. In that statement he indicates he hired CH around June 1, 2011. He was hired as a labourer for a specific job in Brampton. In that statement he advised that he paid CH as a sub-contractor and he did not deduct taxes from CH's pay. He paid CH $15.00 or $16.00 per hour for a 40 hour work week. In his statement, Dave Parker indicates that once the project they were working on was over, he was prepared to hire CH again "sometime down the road". In his statement, Mr. Parker indicates that Dale Lawson, who was in the vehicle with CH at the time of the accident, was also his employee. He indicates that Mr. Lawson completed the job they were on at the time of the accident and then worked another job for him in Collingwood. Mr. Parker indicates that after CH's accident, JC did not replace CH nor did CH return to work for JC. JC Masonry did not have a job lined up after this one. In describing CH at Q. 108-113 of the statement Mr. Parker states: "We're sorry he had an accident, he probably wouldn't be with us today because we know he had a few problems. He's lucky he had a job for a while….I know he's been charged…with impaired a couple of times since this….yeah he did everything else. He's lucky he had a job, and then he screwed it up." Later on in this transcript of the statement, Mr. Parker describes the duties of CH where he states at Q.179: "CH was a monkey, a gofer, that's bricks." Mr. Parker states that CH never drove the vehicles.

At JC Masonry, CH was paid $16 per hour. His hours were variable, as they would not work in the rain. It appears that he earned between $552 and $840 per week. The letter from JC Masonry shows total income of $3,563.00.

The evidence indicates that prior to the accident, CH had plans to become a truck driver. His father owns a trucking business and would have employed him, but only once he turned 25, for insurance reasons. CH had not discussed any other future employment plans with his father, prior to the accident, other than waiting to drive a truck when he turned 25 years old. He was only 19 years old at the time of the subject motor vehicle accident.

Living Situation

At the time of the accident, CH was living with his parents. He is the youngest of seven children. One of his sisters also lived at home at the time of the accident.

While CH was employed by Miller Construction from September 2, 2010 to October 15, 2010, he went to live in Alliston with a friend from work. He and his friend both paid rent. He recalled it being for about a month. However, once CH was laid off from Miller Construction, he moved back in with his parents because he had no money left. He did not save any money from working in 2010.

The claimant testified that even while he moved out for that month or two in October 2010, he would stop off at his parents' house on his way home from work to eat dinner. When he lived in the apartment, he went to his parents' place for dinner, "pretty often."

From October 15, 2010 up until the time of the accident on July 16, 2011, CH lived with his parents continuously. Once he started working at JC Masonry in June 2011, Cody would give his mother money to buy him lunch meats and Gatorade to take to work for lunch. He

estimated giving her a total of $200. They did not ask him for money for rent, food or utilities, and CH recalled that other than the contribution referred to above he never paid any money to his parents in that time period. He did not contribute to the expenses of the house or provide assistance with any major household repairs. He did not contribute to groceries. He essentially relied on his parents to provide food and a place to live. CH stated, “I was not capable in the money situation on my own”.

In the same time period, CH’s father would give him money to buy a pack of cigarettes per day, and would also give him money for going out. CH’s evidence was that his dad gave him money whenever he needed it. CH testified that his father would give him $20 to go out with his friends and his mother would also give him money. He believes his parents gave him $50-$100 per week to buy cigarettes and food. The claimant’s father testified that he would pay $78 for a carton of cigarettes for CH every week. He would also give his son about $20 a week to go out. When CH was working he would pay his father back for cigarettes “once in a blue moon”. When CH was not working, his father would always pay for the cigarettes. He was not required to pay this money back to his parents.

At Christmas time in 2010, CH’s father gave him money so that CH could purchase gifts for his nephews. After January 1, 2011, CH continued to ask his parents for money. He was not required to pay rent.

The claimant was not responsible for any personal bills other than his cell phone bill for $20 - $30 per month. This was a “pay as you go” plan that basically gave him texting.

The claimant owned a vehicle for a month or two in 2010. It was a pick-up truck, a green Ford. He no longer owned it at the time of the accident. It went to the scrap yard in November 2010. Up to the time the vehicle went to the scrapyard, CH paid for the gas and insurance.

The claimant’s father gave evidence regarding the household expenses at the time of the accident. The house mortgage was $1,200 including property taxes. Heating costs were approximately $1,200 to $1,300 per year. Telephone and television cost $120 per month. The hydro bill was about $110 per month. The grocery bill was approximately $800 per month.

At his Examination Under Oath, CH testified that he had certain chores around his parents’ home that he was responsible for including cutting the grass, cleaning his room and taking out the garbage, but in addition to that he performed some household renovations. He testified that he was paid by his parents for doing the renovations and helping around the house.

When describing the household renovations he performed for his parents, CH provided a statement to the insurer where he indicated that he built a deck on his parent’s home.

At his Examination for Discovery held October 24, 2013, CH testified that he did have a credit card, a CIBC Visa Card, prior to the subject accident.

<u>Alcohol and Drug Issues</u>

The available evidence suggests that CH had issues with alcohol and drug abuse, prior to the accident such that he was charged with possession of Ecstasy and was on probation

starting in March 2011, four months prior to the accident. The medical records have numerous references to heavy consumption of alcohol and drugs prior to the accident.

A Referral Request for Psychiatric Assessment dated February 28 2012, addressed to Dr. D'Addorio from Dr. Jean-Guy Ranger (counsellor), sets out CH's "Addiction and Treatment History." This handwritten record indicates that "CH describes a history of alcohol abuse starting as early as 12 years old. His drinking escalated most following the death of his friend who died in a house fire on his 18th birthday (prior to the accident). Typical drinking = 20 drinks daily."

The clinical notes and records of Dr. Jean-Guy Ranger reflect that CH was referred to him on December 5, 2011. The primary problem is noted to be Alcohol and MDMA (street name is Ecstasy). CH was to see Dr. Ranger for "mandatory treatment" as a condition of his probation. He started his probation on March 17, 2011 and it was to end on March 17, 2012.

The records of Dr. Dale Williams include a consultation report dated August 12, 2011 wherein it is noted that CH "smokes one pack per day for the past five years. Because of the presence of his mother, he did not want to get into his drinking and potential illegal drug use". This may suggest that CH's parents were not likely aware of the degree of his addiction issues prior to the accident.

CH's family physician at the time of the accident was Dr. Daddario. On October 24, 2010, Dr. Daddario's records refer to "Rehab for ETOH" and "Pt states he will go to AA".

The clinical notes and records of Dr. Crampton dated May 12, 2011, two months prior to the motor vehicle accident, reflect that CH's history was "withdrawal" and "in ETOH + narcotic detox – last drink 4 d ago (24 beer/day), plus Percocet addiction – used to snort it, last used 4 days ago." CH was apparently experiencing withdrawal symptoms, sweats and anxiety. The diagnosis was ETOH/narcotic withdrawal. Prescriptions were given for Clonidine and Diazepam.

Dr. Daddario's last pre-accident records in May 2011 make reference to ETOH and a prescription for Ativan was sent to the Detox Centre in Barrie.

The Hamilton Health Sciences Records dated July 16, 2011 (day of accident) indicate that at the time of the accident CH was under the influence of alcohol.

A Mental Health Consultation Report dated March 20, 2012 completed by Dr. Mansour indicates that CH was interviewed along with his addiction counselor, Jean-Guy. CH stated that "he has always been having a problem with depression and anxiety, and he was diagnosed with ADHD at a young age, and he was on Ritalin at one point. He also started drinking when he was 13, and he felt drinking was becoming a problem for him. He is also involved with other drugs, including Ecstasy and *other hard core drugs*."

Dr. Mansour's report continues that CH was "able to identify other psychosocial factors including 2-3 years ago, as he describes a year of death. A lot of friends and family members died in a car accident. Patient reports feeling sad and down on a most every day basis…"

Dr. Mansour's report also notes the following on p.2: "Other features that he described included him having ADHD, mainly of hyperactivity and attention deficits, troublemaker as a child. Conduct disorder type of features including of guilty feelings. Some criminal records,

but could be minor, that he went to jail when he was 16 or 17, and that happened twice and he was on probation. Again, now, he has a court date for the physical fight he had before the car accident."

Dr. Mansour's report also indicates that CH revealed he suffers from a learning disability having difficulty writing and difficulty reading.

Despite that outlined above, at his Examination for Discovery, the father of CH testified that in the three years prior to CH's accident, he was able-bodied and had no physical incapacity or injury, nor did he have any psychiatric or psychological injury or issue that would have kept him from working in any way. The claimant's father testified that his son had no legal issues which would have affected his ability to work prior to the car accident. He testified that his son had a good work ethic and that he was a go-getter before the car accident. He essentially described his son as able-bodied, fit, physically and psychologically healthy and always looking for work.

At an Examination Under Oath of CH held September 24, 2012, the claimant testified that prior to this accident he was healthy and had never suffered injuries to his head, neck, shoulders, chest or knees, he had never suffered a head injury and though he had a learning disability, he was otherwise healthy. CH admitted that he had a problem with alcoholism. He had been referred to a detox facility prior to the accident. He indicated that his problems with alcoholism did not affect his memory and did not lead to depression before the accident. CH was seen by Dr. Suzie Crampton regarding his pre-accident substance abuse, but at his Examination Under Oath he denied drinking as much as reported in Dr. Crampton's notes. He also denied taking Percocet, as described in Dr. Crampton's notes. At his Examination Under Oath he testified that he had taken Percocet just the odd time and the real reason he was seeing Dr. Crampton was for alcohol. He confirmed that he had completely quit and stopped taking any Percocet in the month before the accident.

There is obvious discrepancy between that contained in the medical records and the claimant's evidence given on his Examination Under Oath more than a year post accident.

Post-injury Employment

Subsequent to his car accident, CH was assessed at the request of the insurer by Centric Health Medical Assessments. They prepared a Multidisciplinary Assessment Report dated April 18, 2013, in which they noted that their review of the available medical information reveals that following the subject car accident, CH was ejected from the vehicle, he was unresponsive to painful or verbal stimuli and a decreased level of consciousness was noted. His Glasgow Coma Scale was noted to be seven. His Glasgow Coma Scale then decreased to three and a CT Scan of his head revealed multiple small superficial hemorrhagic contusions in the frontal and temporal lobe, consistent with diffuse axonal injury. The assessors at Centric Health Medical Assessments concluded that he experienced a traumatic brain injury, soft-tissue injuries to his cervical and lumbar spine and a separated shoulder.

The claimant was assessed by Dr. Mark Watson, a neuropsychologist, at the request of the insurer and when he assessed CH in April 2013, Dr. Watson was told by CH that he experienced constant pain in his neck and back, throbbing headaches, poor sleep and he was troubled by memory issues. After putting CH through a series of tests, Dr. Watson concluded that CH was suffering from neuropsychological deficits, as a result of the accident

and though he had a history of attention deficit disorder before the accident, it was in all likelihood exacerbated by this accident.

Dr. Watson also performed a psychological assessment of CH in April 2013 and after testing and assessing him, he concluded that CH was presenting with an adjustment disorder, attention deficit disorder and a pain disorder associated with a general medical condition and psychological factors which were chronic.

Despite these physical and psychological challenges, CH returned to work after the motor vehicle accident at SL Oil Field Construction in Whitecourt, Alberta. He worked for SL Oil Field Construction as a rock truck driver from August 1, 2013 until he was laid off at the end of December 2013, a period of five months, during which he earned over $26,796.00.

At his Examination Under Oath, CH's father testified that his son was laid off in January 2014 by SL Oil Field Construction.

The claimant applied for employment insurance benefits after he was laid off by SL Oil Field Construction and in his Application for EI Benefits, he confirmed that he was no longer working due to a shortage of work as a result of layoff. In his EI application he confirmed he worked from August 5, 2013 to December 31, 2013 for SL Oil Field Construction in Alberta. At Page 12 of his Application for EI Benefits he confirmed that "during the last two years he was not unable to work for medical reasons".

ACCOUNTING EXPERTS

Ms. Janet Olsen, a chartered accountant with H & A Forensic Accounting Inc., testified on behalf of the Applicant Co-op. Mr. Gary Phelps, a chartered accountant with Davis Martindale, testified on behalf of the Respondent Axa.

Janet Olsen (for Co-op)

Janet Olsen prepared two reports dated December 19, 2014 and March 4, 2015 regarding her analysis of the dependency issue. In both reports, Ms. Olsen concluded that CH was not principally dependent for financial support on his parents, as the cost of meeting his financial needs was not more than twice his financial resources in the year prior to the accident.

In her first report, Ms. Olsen calculated CH's financial resources in the year prior to the accident as $10,211.00 based solely on his employment income from JC Masonry and Brennan Paving, together with $160.00 for odd jobs for cash and a tax refund of $2,355.00.

Upon being provided with Mr. Horan's bank statements, Ms. Olsen revised her calculation of his pre-accident financial resources. In her second report of March 4, 2015, Ms. Olsen reviews CH's bank statements and concludes that she understated his pre-accident financial resources by $2,279.00 and she accepts that the bank statements reflect income earned at other employment totaling that amount in the year prior to the accident. Ms. Olsen testified that she believes that deposits to CH's bank account found in his banking records between July and September 2010 represent income from employment, due to their regularity every two weeks and due to the consistency of the amounts being deposited. Her new calculation as to his financial resources in the year prior to the accident was $12,940.00.

In assessing CH's financial needs, Ms. Olsen researched through Kijiji the cost of shared and bachelor accommodation near Lisle and adjusted those figures for the consumer price index between 2014 and 2011, then used other statistical sources such as the weekly cost of the Nutritious Food Basket in Toronto and Statistics Canada data for items such as transportation, personal care, tobacco products and alcoholic beverages and medical and dental.

Ms. Olsen calculated CH's financial needs in the year prior to the subject accident at $20,134.00 and based on that figure and her calculation as to his financial resources, concluded that he was not financially dependent upon his parents at the time of the accident. CH's financial resources of $12,940 were more than 50% of his needs of $20,134.

In the following paragraphs I will deal with the cross-examination of Ms. Olsen.

In cross-examination Ms. Olsen indicated that she assumed the claimant was able-bodied in her analysis. She had not been provided with the medical records but did have a copy of the Examination Under Oath transcript of CH where he was questioned extensively about his difficulties in school, his alcohol and drug use, his time in jail, his probation and the treatment he received for his problems.

Ms. Olsen admitted that in calculating CH's financial resources she did not subtract any income tax which may have been payable on the amounts that he received from JC Masonry.

Ms. Olsen admitted that her conclusion that the unidentified 2010 bank deposits were employment income despite CH's evidence that he did not recall working much that summer.

In cross-examination she admitted that rather than using Statistics Canada figures for the average cost of operating a one person household she only used some of the elements and chose to use other statistical sources for some of the elements.

She admitted that income she attributed to JC Masonry ought to have been reduced by 3% given CH's evidence that he was cashing his cheques at the Hock Shop and they kept 3%.

She admitted that she only attributed $1,248 for tobacco and alcohol despite the father's evidence that he was spending $78 per week or $4,506 annually on tobacco for his son.

With respect to accommodation, Ms. Olsen's Kijiji research resulted in a finding of $629 per month but cross-examination revealed a small sample size without confirmation that they were furnished. Some of them would not accept smokers or non-professionals. Some were as far away as Orillia.

Ms. Olsen's calculation of food costs using a website called Weekly Cost of the Nutritious Food Basket was $810 shy of the Statistics Canada figure on an annual basis.

Ms. Olsen allowed $2,517 for transportation costs whereas Statistics Canada has them at $4,364 annually a difference of $1,847.

Ms. Olsen's calculation of needs at $20,134 was less than Statistics Canada average needs of a one person household at $28,636.

Gary Phelps (for Axa)

Two reports were prepared by prepared by Gary Phelps of Davis Martindale Advisory Service Inc., Professional Accountants, dated February 13, 2015 and April 10, 2015 regarding whether CH was principally financially dependent on his parents at the time of the accident.

Mr. Phelps concluded that CH was principally dependent for financial support on his parents at the time of the accident. Mr. Phelps concluded that in the 12 months prior to the accident, CH paid for $10,211 of his needs (because he spent all of his money and there is no evidence that he had an extravagant lifestyle or that he spent his money on anything other than basic needs, tobacco, alcohol and drug addictions) while his parents provided for $17,282 of his needs. Accordingly, CH contributed only 37.1% of his financial needs, while his parents contributed 62.9% of his financial needs.

Mr. Phelps also addressed some of the alternative calculations provided by Ms. Olsen and H&A Accounting ("H&A"). Mr. Phelps noted that the approach of annualizing CH's earnings at JC Masonry did not accurately reflect the temporary nature of Cody's employment. The approach of using CH's hourly rate at JC Masonry for half a year of full-time work was also flawed as highly speculative, and not reflective of his actual situation in the 12 months prior to the accident.

Mr. Phelps noted that the H&A approach of taking CH's financial resources post-accident from August 2013 to August 2014 while working in Alberta was also not accurately reflective of his situation at the time of the accident living in Ontario.

Mr. Phelps also noted that H&A's estimate of CH's financial needs as $20,134 for the year prior to the accident was an underestimate, in particular with respect to CH's tobacco habit, which actually cost approximately $4,067 per year, and not $1,248 for tobacco and alcohol combined, as suggested by H&A.

Mr. Phelps provided a second report dated April 10, 2015 to address the H&A report dated March 4, 2015. Mr. Phelps disagreed with H&A's conclusion as H&A's analysis failed to consider all of CH's personal needs/expenses. The approach taken by Mr. Phelps concluded that CH's parents provided financially for greater than 50% of his personal needs/expenses in the 12 month period pre-dating the subject accident.

Mr. Phelps addressed H&A's assertion that CH's financial resources might be understated to the extent that he might have had access to extra funds by virtue of a Visa card. Mr. Phelps noted that this assertion neglects the fact that either Cody or his parents would have to pay the monthly credit card bill unless he was accumulating debt. It was the opinion of Mr. Phelps that these expenses paid for with the credit card would be considered additional resources only if CH's parents assisted him by paying the credit card bill, or he was accumulating debt. There was no evidence provided of CH's use of a Visa account during the 12 months prior to the accident.

Mr. Phelps also addressed the H&A assertion that a review of CH's Scotia Bank statements revealed deposits made in 2010 and as such, H&A's initial calculations of CH's financial resources were understated. H&A identified deposits totaling $2,729 made on July 23, 28, August 6, 20 and September 30, 2012 that could have understated the calculations of his financial resources even though they state "the sources of these deposits are not known".

Mr. Phelps notes that there was no evidence of the source of the unknown deposits. Mr. Phelps indicated that it was unreasonable that H&A considered these unidentified deposits to be unidentified financial resources generated by CH to increase his financial resources, however did not increase his personal needs/expenses incurred to consider that CH clearly spent all of his financial resources on his personal needs/expenses.

In addition, Mr. Phelps noted that he reviewed CH's transcript from his Examination Under Oath wherein CH reported that he did not have any additional sources of income other than the odd side jobs he performed. Mr. Phelps noted that CH also stated that he did not receive EI or welfare or any sort of income benefits, at which point CH said "no because my parents take care of me".

Mr. Phelps noted that the bank statements show that the amounts were deposited in the summer of 2010. Mr. Phelps noted that on his EUO, CH indicated that he was working for Staff Management (Seaton Corp) in the spring of 2010 but did not continue to work there during the summer of 2010. There was no documentation provided to indicate that CH had a job during the summer of 2010 where he generated income of $2,729.

As an alternative argument, Mr. Phelps noted that if we were to assume that the deposits were additional financial resources generated by CH during the 12 months prior to the accident, they would increase the amounts which he spent on his own personal needs. In such a scenario, it was concluded that CH was principally dependent for financial support on his parents at the time of the accident as his parents provided 57.2% of his personal needs.

Mr. Phelps also noted that with respect to H&A's Schedule 2d, it is inaccurate from a financial dependency point of view to compare CH's financial resources in Alberta in 2013 to his living expenses in Ontario 2011. H&A did not address Mr. Phelps' argument that it was inappropriate to compare income and expenses in different provinces which have different income tax rates, historical inflation rates, standard wage rates and costs of living.

It remained the opinion of Mr. Phelps that the three hypothetical scenarios presented by H&A should be disregarded as they did not accurately consider CH's financial dependency at the time of the accident.

Mr. Phelps also noted that based on his review of CH's bank statements, it appeared CH owned the vehicle for several months in 2010. Therefore, all of the expenses relating to the vehicle including insurance, gas and maintenance would have been paid by CH and was therefore considered in the calculation of CH's needs when allocating the difference between his financial resources and his identified personal expenses to his unidentified personal expenses. Mr. Phelps noted that H&A understated CH's financial needs by not considering his unidentified personal expenses.

Mr. Phelps noted that the banking information provided supported that any funds deposited by CH were later spent by him on identifiable personal needs notwithstanding the personal needs paid by his parents.

Mr. Phelps concluded that there was no reason to amend his calculations as he continued to conclude that CH was principally dependent for financial support on his parents at the time of the accident even if the 2010 bank deposits represented employment income.

VOCATIONAL EXPERTS

Both parties introduced expert evidence with respect the vocational issues.

Jeff Cohen (for Co-op)

The Co-operators retained the services of Jeff Cohen of Vocational Alternatives to prepare a Vocational File Review and Labour Market Research Report. Mr. Cohen assessed Mr. Horan's education, training and work experience in order to consider his pre-accident work capacity and occupations he might have been suited to prior to the accident. Mr. Cohen also researched the local Labour Market and wage information related to those occupations.

Mr. Cohen acknowledged that CH had behavioral concerns while he was a student and some of these concerns continued after leaving school due to alcohol and recreational drug use. Mr. Cohen noted that Mr. Horan was characterized by his father as somebody who is able-bodied with no physical, psychiatric or psychological injuries that would have prevented him from working with, no legal concerns that would have impaired his ability to work, albeit, Mr. Cohen acknowledged that CH may not have been bondable. Mr. Cohen noted that CH was not characterized by his father as somebody who sought to depend principally on his parents.

Mr. Cohen reported that a potential drawback for CH was his relatively rural residential location, however, he demonstrated resourcefulness with respect to getting to and from work as required.

After assessing CH's employability, Mr. Cohen concluded that he was fit for various elemental employment opportunities including general labourer, factory labourer, factory worker, parts inspector, production worker, production labourer, dock worker or warehouse worker and material handler. Mr. Cohen performed some labour market research in the geographic area immediately surrounding Mr. Horan's home for 2010 and 2011 and was able to find 381 job postings which were suitable for CH at the relevant period of time prior to the accident.

Mr. Cohen noted that CH pursued work with a construction company, Miller Construction, aka Brennan Paving, in September and October 2010 earning $20.00 per hour and pursuant to his testimony, he worked subsequently on and off thereafter in the fall of 2010 completing various side jobs involving other construction projects from roofing, chimney repair and shingling earning up to $20.00 per hour depending on the job. Mr. Cohen reported that CH was largely unemployed over the winter months of 2010 and 2011, but then began employment around June 1, 2011 with JC Masonry.

Mr. Cohen noted that based on CH's transcript, while working at JC Masonry he worked long hours rising between 4:00 a.m. and 4:30 a.m. to get to work early, demonstrated the resourcefulness to carpool with another worker and he appeared to be a reliable employee.

Mr. Cohen reported that it is worthy of note that CH returned to the labour market post-accident in Alberta where he earned $25.00 per hour as a heavy equipment operator driving a rock truck. While not formally trained to do so beyond a valid G License, his ability to operate large vehicles in construction settings is further indicative of CH's capacity to acquire new skills with an applied environment and the resourcefulness to procure employment independently through his network. Mr. Cohen reported "one can only assume that if he had

the capacity to do this post-accident following fairly significant injuries, he would have had the capacity to do so pre-accident as a healthy and able-bodied individual with at least functional reasoning abilities".

Mr. Cohen concluded that based on his research into employment opportunities available in CH's geographic area in the timeframe prior to this accident, CH had the capacity by way of education, training and experience in the 12 months leading up to his accident to have been employed on a full-time basis in various occupations such as labourer, landscape and ground maintenance labourer, construction labourer, material handler, delivery driver, light-duty cleaner, dishwasher or kitchen helper.

In assessing the earnings associated with these occupations, Mr. Cohen noted that CH could have earned between $20,540.00 and $29,180.00 on a statistical basis per annum, adjusted retroactively for inflation.

Mr. Cohen then assessed the earning capacity or average earnings of similarly educated and experienced people in the same geographic area in 2011 and using the statistics for males between the ages of 15 and 24 working the full year and full-time, earned on average $22,100.00 per annum.

Mr. Cohen made several concessions in cross-examination. Mr. Cohen admitted on cross-examination that CH's high school records contained several letters from the school to CH's parents advising that CH was being suspended for various behavioural issues, including on one occasion, threatening to punch his teacher in the face and by early 2009, the school was writing to CH advising that he was required by provincial law to attend school until he is 18 years old.

Mr. Cohen also admitted that CH's transcript indicates that the last time he obtained a credit at Banting Memorial High School was in February 2008 and the one and only credit he obtained at the Adult Learning Centre was in in October 2009. Mr. Cohen agreed that by October 2008, CH had essentially been kicked out of school. Mr. Cohen admitted that despite the fact that CH had not attended school for much of 2008 and 2009, there is very little evidence of any employment in 2008 or 2009. Mr. Cohen admitted that there is not a single job identified in 2008 or 2009. Mr. Cohen further admitted that none of these facts are mentioned in his report. Mr. Cohen further admitted that other than being able to decipher that CH did not work or attend school for much of 2008 and 2009, there was no other information as to what CH was doing at this time when he was not in school or at work.

Despite page 16 of his report where Mr. Cohen states, "After acquiring his final grade 10 credit, further file review indicates that CH began to focus his efforts on finding work and integrating into the labour market...". Mr. Cohen admitted on cross-examination that that there was no evidence that in 2008 or 2009 CH was focused on finding work or integrating into the work force. He admitted that there was no evidence of employment in 2008 or 2009. Mr. Cohen agreed that the only evidence of CH's intentions in 2008 or 2009 were that of a "troubled kid" and perhaps references to a "kid who threatened to punch his teacher in the face." Mr. Cohen admitted he did not mention any of these negative prognosticators in his report.

At page 17 of his report, Mr. Cohen reviewed CH's Record of Employment from Seaton Corp. Canada Inc. and finds that Cody was likely working part-time hours, but had "full-time hours become available, this Evaluator sees no reason as to why based on his education,

training and experience, he could not have worked in a full-time capacity with this employer (or other similar).” On cross-examination, Mr. Cohen admitted that the ROE in fact notes that the reason for issuing the form was “M” and this is the code for “dismissal.” Mr. Cohen was also shown the Comments section where Seaton Corp indicates “Violation of Attendance Policy.” Mr. Cohen admitted that these two facts were not mentioned in his report. Mr. Cohen admitted that his report would have been more balanced had he referred to the dismissal and the violation of the attendance policy.

Mr. Cohen was referred to CH’s evidence with respect to his employment at CNS Masonry wherein CH stated that he never worked for CNS a full two weeks, it was always a day here and there. In response to how long did the job last, CH answered: “It really didn’t do much. Maybe – not much money”. When CH was asked if he ever worked every day for CNS for two solid weeks, he answered, “No. not that crazy. No.” In response to this, Mr. Cohen agreed that before starting employment with Brennan Paving in September 2010, there is very little evidence of CH’s summer employment in 2010.

On cross-examination, Mr. Cohen was also referred to CH’s evidence wherein he stated that once the job at Brennan Paving ended in October 2010, he had to move out of his apartment and went back to his parents because he had no money. Mr. Cohen admitted that there was no evidence that CH was able to find and maintain employment.

Mr. Cohen admitted that as a vocational assessor, in considering whether someone is able-bodied, he would have to consider both physical and psychological factors. He agreed that someone who has alcohol and drug addiction issues could very well have trouble finding and maintaining employment.

Mr. Cohen was not provided with any of the post-accident treatment records. He was not aware of the contents of the various reports reviewed above from Dr. Mansour and Dr. Jean-Guy Ranger that I have referred to earlier.

On cross-examination, Mr. Cohen was referred to the last paragraph on page 16 of his report wherein he refers to “intermittent behavioural concerns” including “alcohol and recreational drug use” which in his report, Mr. Cohen states are activities which are “not necessarily out of the ordinary for a rural teenager with a history of behavioural issues.” Mr. Cohen’s report refers to CH as someone who “is able-bodied (with no physical, psychiatric, psychological injuries that would have prevented him from working), no legal concerns that would have impaired his ability to work, and in fact as a young man with a good work ethic…”.

When referred to Jean-Guy Ranger’s record, Mr. Cohen was surprised that CH had been on probation since March 17, 2011. Mr. Cohen was referred to Dr. Ranger’s record which indicates that CH was treated for alcohol and MDMA. He knew that MDMA is an illicit street drug. He admits that none of this information with respect to probation, alcohol and drug addiction treatment was contained in his report.

When Mr. Cohen was referred to Dr. Susan Crampton’s record dated May 12, 2011 which has references to ETOH, detox, 24/beer a day, Percocet addiction, used to snort it, withdrawal, sweats, anxiety, mildly dysphoric, appears anxious, he agreed that it would not be surprising that in May 2011, someone with that treatment record was unable to seek and find employment. He answered, “That would not be surprising, I agree.”

Mr. Cohen agreed that CH's drug and alcohol issues were far more significant and serious than Mr. Cohen had set out in his report. He agreed that these issues must be considered when determining if someone is able bodied for the purposes of financial dependency.

Mr. Cohen admitted that Dr. Daddario's records dated May 9, 2011 and May 12, 2011 with references to prescription for Ativan, CH's admission to a detox centre in Barrie is certainly "out of the ordinary behavior." Mr. Cohen agreed that this is relevant in determining CH's ability for finding and maintaining employment in 2011.

Mr. Cohen admitted that the Consultation Report from Dr. Dale Scott Williams dated August 12, 2011 suggests that CH's parents were not fully aware of CH's alcohol and drug use. Mr. Cohen admitted that to the extent that he relied on the father's testimony that CH did not have any psychological issues that would affect CH's employability, it is likely that the father did not know of the extent of CH's drug and alcohol use.

Mr. Cohen admitted that he did not have a copy of the Mental Health Consultation Report dated March 20, 2012 completed by Dr. Mansour which sets out CH's history with depression and anxiety, that he was diagnosed with ADHD at a young age, being on Ritalin, that CH started drinking when he was 13, and that he was also involved with other drugs, including Ecstasy and other hard core drugs." Mr. Cohen agreed that this was not normal behaviour even for a rural teenager as described in his report.

Mr. Cohen was referred to the Referral Request for Psychiatric Assessment dated February 28, 2012 addressed to Dr. D'Addorio from Dr. Jean-Guy Ranger (counsellor) sets out CH's "Addiction and Treatment History." This handwritten record indicates that "CH describes a history of alcohol abuse starting as early as 12 years old. His drinking escalated most following the death of his friend who died in a house fire on his 18th birthday (prior to the accident). Typical drinking = 20 drinks daily." Mr. Cohen agreed that this certainly provides an explanation as to why CH did not work much at all between October 2010 and June 2011.

Mr. Cohen also agreed with the statement put to him that even though CH had employment on July 16, 2011, he was drinking the day of the accident, therefore he had not overcome his alcohol issues.

Mr. Cohen admitted on cross-examination that prior to the accident, CH had very serious drug and alcohol issues. He admitted that these addiction issues could be the reason why CH could not find and maintain employment prior to the accident. He admitted that someone who has drug and alcohol problems would find it more difficult to find and maintain employment. Mr. Cohen admitted that CH's drug and alcohol issues would have impaired him from working the winter and spring from 2010 to 2011. Mr. Cohen admitted that CH likely had psychological problems and may not have been able-bodied.

At page 18 of his report, Mr. Cohen states, "Notwithstanding, it appears that Mr. Horan was willing, ready and able to engage in labouring positions within the construction trades commencing the summer of 2010…able to extend his experiences to work in increasingly defined (albeit intermittent) employment opportunities in the construction sector over the course of the next few months and into the spring and early summer months of 2011." Mr. Cohen agreed that this statement was not entirely accurate and that CH's problems seemed to come to a head in the winter and spring (2010/11).

Mr. Cohen admitted that he did not see any records which described CH as a reliable employee as he suggests at page 19 of his report.

Mr. Cohen admitted that of the jobs he has listed which were available to CH at page 20 of the report, CH would not qualify for the delivery jobs requiring a driver's license while his driver's license was suspended.

In response to a question on cross-examination as to whether CH's issues further marginalized his ability to engage in the jobs outlined in Mr. Cohen's report, Mr. Cohen admitted that with the driver's license suspension, not being bondable, drug and alcohol issues, CH "has shown weaknesses that would undermine his capacity to work in that way. I think he has strengths, too, in fairness."

Mr. Cohen agreed that his cross-examination revealed other weaknesses in CH's ability to find employment in addition to his rural residential home.

Mr. Cohen admitted that "many years had to happen" before CH was ready to be a truck driver as suggested by his father.

In the final analysis, Mr. Cohen conceded in cross-examination that there were many barriers, often referred to as "negative prognosticators", to CH being able to work full-time including:

- he had but a grade 10 education
- he did not have computer skills
- he had a sporadic work history
- he did not have a car
- he did not have a driver's license
- he had no money to pay for first and last month's rent needed to move from Lisle
- the fact that he was or had been on probation
- the fact that he had spent time in jail
- the fact that he was not bondable
- the fact that he had no employment in 2008 and 2009
- the fact that he was fired at Seaton for attendance issues
- his problems with alcohol and drugs

With respect to the latter, Mr. Cohen admitted that alcohol and drug issues were negative prognosticators for employability and that for someone with CH's treatment record for these problems, it would not be surprising that he would be unable to seek and find employment at that time. Mr. Cohen admitted that with CH's sporadic work history he had yet demonstrated an ability to find and maintain full time employment.

Chladny (for Axa)

Ms. Chladny was retained by AXA to provide an expert vocational evaluation opinion. She is a Registered Rehabilitation Professional, Vocational Rehabilitation Specialist and a Psychometrist/Vocational Assessor.

Ms. Chladny notes in her report that CH had a pre-accident history of impulse-control issues and substance abuse issues.

Ms. Chladny reviewed Mr. Cohen's report dated January 31, 2015. She found that although CH may have been potentially capable of some of the occupations identified by Mr. Cohen, CH would not likely have secured and maintained gainful employment given these impulse control and substance abuse issues. Looking at CH's sporadic work history, it is evident that CH did not maintain long-term employment. She believed that CH chose to be underemployed likely due to various reasons including impulse control and substance abuse issues.

Ms. Chladny also noted that CH is not bondable and had limited computer skills. He did not have his own vehicle. As such, he would have been at a significant disadvantage for many occupations including that of delivery driver, light duty cleaner, and even some restaurant based work (dishwasher and food preparer) as these would require him to be bondable. Her research revealed that current job postings from Boston Pizza required drivers to be bondable and have a vehicle. Boston Pizza also required that their kitchen staff to be bondable. Furthermore, she noted even elemental jobs often require basic computer skills to apply for a job. Of note, Walmart only accepts applications online.

Ms. Chladny testified that the fact that CH was dismissed from his employment with Seaton Corp due to violation of their attendance policy was a negative prognostic indicator.

Ms. Chladny also testified that if CH had a suspended driver's license that was also a negative prognostic indicator as he would not have been able to obtain a driving/delivery job without a valid license.

Ms. Chladny testified that based on CH's history with truancy, substance abuse and a learning disability, a person with those characteristics may have difficulty maintaining employment, abiding by rules and attending work regularly. A person with alcohol issues would have difficulty waking up and getting to work on time and would have relapses. Ms. Chladny opined that all of these factors could explain CH's long periods of unemployment and attendance problems.

On cross-examination, Ms. Chladny was referred to a post-accident medical report of Dr. Oshidari where mention is made of the claimant exaggerating his pre-accident addiction problems. She admitted that despite the many challenges and negative prognosticators, he did work at Seaton, Miller and JC Masonry. She admitted that despite his accident-related injuries, he was able to find work out west after the accident. Ms. Chladny conceded in cross-examination that CH had shown the capacity pre-accident to find work. However, she modified that answer by stating that she did not believe he had the ability to maintain work.

ANALYSIS AND FINDINGS

The Applicant Co-op takes the position that the claimant was not "principally dependant for financial support" on his parents insured with Co-op. If so found, Axa, the insurer of the vehicle in which CH was an occupant would stand in priority and responsible for reimbursing Co-op for the statutory accident benefits it paid to or on behalf of CH.

Dependency

For an individual to be a "dependent" for the purposes of the *Statutory Accident Benefits Schedule,* this terms is defined at s.3(7)(b), as follows:

> "A person is a dependent of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse".

The Ontario Court of Appeal affirmed the "correct legal principles" to be applied to questions of dependency in *Oxford Mutual Insurance Company v. Co-operators General Insurance Company (2006) O.J. No.4518*. This decision incorporated some of the principles from earlier decisions involving dependency namely *Miller v. Safeco* 1986, 13 C.C.L.I. 31, 50 O.R. (2d) 797 (C.A.) and *Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada* [1997] O.J. No.1234 (C.A.).

The "correct legal principles" set out in *Oxford Mutual v. Co-operators* (supra) can be summarized as follows:

> (a) The 51% principle from *Liberty Mutual Insurance v. Federation Insurance* should be applied. It is not sufficient that the claimant simply be dependent, but rather must be principally dependent. If the claimant had sufficient resources to fund 51% of their financial needs, then the person could not be dependent upon others.
>
> (b) The time frame to be looked at may encompass days, weeks or even years. One does not simply look at a "snap shot" of the actual day of the Accident to determine the issue of dependency.
>
> (c) The factors from *Miller v. Safeco* should be considered:
>
> (i) the duration of the dependency
> (ii) the amount of dependency
> (iii) the financial or other needs of the alleged dependent
> (iv) the ability of the alleged dependent to be self-supporting.
>
> (d) Each case must be factually driven.
>
> (e) The ability to be self-supporting must be taken into account when measuring dependency.

Most recently, the issue of principal dependency was reviewed by Justice Myers in *Allstate Insurance Co. of Canada v. ING Insurance* (2015) *OJ No. 3282,* an appeal from a decision of Arbitrator Vance Cooper. Justice Myers noted that the case law recognizes that if a person has the means to provide for more than 50% of her own needs, then individual cannot be dependent. Conversely, where one person provides more than 50% of the needs of another, then the other is financially dependent upon the provider. Of importance though is the fact that Justice Myers also noted that the math is just a part of the test and in the context of any specific case consideration should also be given to the "big picture" approach. Specifically Justice Myers writes at page 2 of his decision:

> "… In my view, the math is just part of the test that has arisen out of the seminal decision of *Miller v. Safeco*, 50 O.R. (2d) 797 (C.A.). I agree with the insightful

> comments of Corbett J. in St*ate Farm v. Bunyan*, 2013 ONSC 6670, at paras.19 to 22 to the effect that while math is an important factor it is not the only factor. The legal issue is whether R was principally dependent on her mother and her mother's spouse. In *Miller*, the Court of Appeal approved four factors to consider dependency. Even those four are not necessarily the exclusive considerations. A change in the math from 50.001% dependency to 49.999% dependency may or may not overcome other aspects of the factual dependency between the relevant parties. All of the accountants before the Arbitrator agreed that the math they were performing was artificial. I would say highly artificial and necessarily inaccurate is a better description. A change of $8, while perhaps crossing a magical mathematical line, does not alter the "big picture" on the facts in the context of this specific case as found by the Arbitrator. See *Security National v. The Personal*, April 1, 2011, Arbitrator Bialkowski, at page 9, 4th para."

Appropriate time frame for analysis

The first step in determining the dependency issue is selecting the appropriate time frame for the analysis. There is considerable jurisprudence on the issue.

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.

General guidance is found In *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co*. (supra), 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.

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 circumstance and the "big picture" of the claimants' lives.

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.

In the present case, Intact takes the position that the seven weeks pre-dating the accident is most representative of the relationship existing at the time of the accident. This is a relatively short period of time. Both parties have referred me to several decisions where a relatively short period of time was suggested as the appropriate time frame which cases will be discussed in the paragraphs which follow.

In *ICBC v. Federated* (Arbitrator Samis - July 3, 2009), the 27 year-old claimant was involved in a motor vehicle accident on June 17, 2004. At the time of the accident he had been living in British Columbia for about four weeks. It was being argued that he was principally dependent for financial support on his father at the time of the accident. His father was living

in Timmins. The claimant had graduated from high school in Timmins in June 2000. He worked various jobs before moving to Alberta then onto British Columbia in 2002. He worked in British Columbia. He returned to Timmins in December 2003. He worked from February to April 2004 before injuring his ankle and having to take time from work. In the spring of 2004 he returned to British Columbia to live with his girlfriend and her mother. He was there about four weeks when the accident occurred. He worked three of those weeks for All Seasons Industries earning $1,345. In determining the appropriate time frame to use Arbitrator Samis writes at page 9:

> *"However based on the evidence that is before me I would choose the four weeks prior to the accident as an appropriate timeframe to look at Craig T's status. It represents his date of loss status as a person in British Columbia, perhaps with an intention to shortly return home and take on other employment, but that was entirely prospective as of the date of the accident. Looking backwards more than four weeks takes into account periods of time during which Craig T. was in Timmins or relocating, a period of time during which he had a disabling injury for six weeks and other transitions in his personal and employment relationships. As I look for the timeframe that most closely reflects his status on the date of the accident, I would choose a timeframe indicating the four weeks prior to the accident which reflects his status and the problems in British Columbia as it was on the day of the accident."*

Arbitrator Samis essentially concluded that the four week time frame was the appropriate one to use (representing a person in British Columbia, perhaps with the intention of shortly returning home and take on other employment) and that periods prior to that were transitional. In the final analysis, he concluded that the claimant was capable of providing more than 50% of his own needs and not dependent on his father.

In *TD Home & Auto Insurance Company v. Co-operators General Insurance Company* (Arbitrator Samis - February 26, 2013) the arbitrator found a period of just over three months to be the appropriate time frame. The case involved a 17 year-old grade 12 student whose situation at home became untenable. All involved were supportive of a change in residency. With the assistance of Children's Aid he was placed in the home of a couple to whom the claimant paid some rent out of the Ontario Student Welfare Benefit that he was receiving. It was accepted as a given that the situation with his parents was one that simply could not continue. He essentially concluded the significant change in his life was more than transitional and reflected a situation of permanence.

In *AXA Insurance Company v. Royal Insurance Company* (Arbitrator Robinson - May 28, 1997) the arbitrator was urged to accept a two month timeframe as appropriate. During this period the 21 year-old claimant was unemployed, his EI had run out and he was living with his mother. However, for the previous five or six years following high school the claimant had been living independently, working various jobs and collecting EI. The arbitrator came to the conclusion that the living situation with his mother was only temporary. Arbitrator Robinson writes at page 7:

> *"The 'snapshot approach' has been found to be inappropriate in these situations. Arbitrators have considered a few months to several years when considering the matter of dependency (3). This is a realistic approach and one that I adopt in this case. I find that Mr. Chettle had been on his own and financially independent since leaving his mother's home in 1989 or 1990. A*

> *return to his mother's home, on a temporary basis, in these circumstances did not place him in a financially dependent position."*

In *Economical Insurance Group v. State Farm Insurance Company* (Arbitrator Kenneth J. Bialkowski - January 13, 2014), I had to determine whether a 12 month period pre-accident or a 2.8 month period pre-accident was most appropriate. The case involved a 25 year-old claimant who was involved in a motor vehicle accident on Sept. 3, 2010. At the time he was living with his parents. He had just graduated from college with a diploma in Broadcasting. Following graduation he immediately found work at Tiffany Party Rentals while looking for work in the field of his college education. By way of background, the claimant had made over $28,000 in his transitional year between high school and college. He worked part-time while in college. He worked each summer between school terms and during Christmas breaks. I was satisfied that the 2.8 month period before the accident was the appropriate time frame. I wrote at page 8 of the decision:

> *"The "dependency" jurisprudence clearly establishes that each case must be decided on its own facts and this is no exception. On the evidence before me, I am satisfied that the 2.8 month period pre-dated the accident, however short that might be, is the appropriate time frame for the dependency analysis. I accept the expert evidence of Mr. Phelps that during this time period the claimant was only 38.6% dependent on his parents. I am satisfied that he was finished school and was either going to find a job in the field of his education (which would have paid far more than the $1,474 per month that he was making at Tiffany) or continued with labouring work making at least as much or more than he was making at Tiffany. Keep in mind that he made over $28,000 in his transition year between high school and college. I find that he had capacity to earn a similar amount at a labouring job when his seasonal work with Tiffany came to an end. He may well have gone on EI for a month before returning to Snow Valley for the winter where he had worked previous winters while still waiting to find a job in the field of his education. This to me is obviously a young man with a strong work ethic. He worked during high school. He worked part-time while at college. He worked during the summers between school sessions and during Christmas breaks. In my view, if work was no longer available at Tiffany he would have found work elsewhere and probably have earned more money than he was making at Tiffany. A return to school was only a possibility. Given this work history, I conclude that he had transitioned from being a "student" to being a "full-time" worker. As long as he was working at wages similar to those at Tiffany, he may have required some support from his parents but nowhere near at a level that he would have been "principally financially dependent" upon them."*

I concluded that the change from "student and part-time worker" to that of "full-time worker" had been established and likely to continue in the long term. As a full-time worker he was no longer principally dependent on his parents for financial support.

In *Co-operators General Insurance Company v. Western Assurance Company* (Arbitrator Bialkowski - September 19, 2012), I was asked to consider a seven week period pre-dating a motor vehicle accident as the appropriate timeframe. The case involved a 17 year-old claimant who for years had lived with his grandparents in Owen Sound. He was involved in a motor vehicle accident on August 8, 2009. In May 2009 he was kicked out of school for truancy. On June 19, 2009 he left his grandparents. He worked part-time at A&W making less than $240 per week and did some occasional grass cutting where he earning a couple

of hundred dollars annually. Once leaving the home of his grandparents, he lived from friend to friend but was homeless at the time of the accident. I did not find the seven week period pre-accident to be the appropriate time frame. I wrote at page 9 of my decision:

> "Applying the "big picture", or general nature of the relationship test to the present fact situation, I conclude that this young man had lived for several years with his grandparents and that his seven week attempt at independence was nothing more than a "summer fling" and was likely doomed to failure. He was already homeless. Living homeless in Owen Sound in the approaching winter months would have been far more difficult than during his "summer fling". It could not be reasonably expected that he could live off the benevolence of friends for accommodation on a long term basis. He would have had to reduce his hours of work if he were to return to school as he planned. I have also considered the issue of the claimants "earning capacity" as opposed to the actual income that he was earning and find that so long as he intended to return to school and reduce his part time hours accordingly he did not have the capacity to live independently. I find that until such time as he had completed school and had found a full-time job or at least a steady job with a regular income of sufficient size to allow him to live independently, he remained principally dependent for financial support on his grandparents. I accept the fact that young people are often able to live independently, but to do so requires the financial wherewithal and a plausible plan for financial independence. I find that Erick Mahar at the time of this motor vehicle accident had neither. On the evidence before me, I am simply not satisfied that he had established an ability to live independently in the long term. He had been financially dependent on his grandparents for several years and what transpired during his seven week summer fling did not change that. In the circumstances, he remained principally financially dependent on his grandparents, in my view, both on a strict "mathematical analysis" and on a "big picture analysis"

The common theme through these cases where a short time frame was considered appears to be that each arbitrator wrestled with the question as to whether the relationship existing during that period was of permanence and likely to continue into the future or was it transitional. The same analysis must be done here.

The accounting expert retained by Axa, Gary Phelps, only used one time frame for analysis namely the 12 month period pre-accident. The accountant retained by Co-op, Janet Olsen, proposed several time frames. She completed her analysis using three scenarios. Firstly, she used the 12 month pre-accident as did Phelps. Secondly, she looked at the income being earned by CH at the time of the accident and extrapolated that income over a 12 month period. Thirdly, she proposed a scenario where the claimant would be working 40 hours week at $16 per hour for six months of the year.

It is clear in my view that using the claimant's income at the time of the accident and extrapolating it over a 12 month period would be inappropriate. CH had never worked continuously for a 12 month period in his life. His employment pre-accident had always been intermittent.

Using a scenario based on an assumption that he would work at $16 per hour 40 hours a week for six months of each year in my view is worthy of consideration, but would be inappropriate given the assumption that he would average $16 per hour while employed and the special circumstances in this case. Firstly as to hourly rate, he was only making $11.85 per hour at Seaton Group. At CNS Masonry he was making $12 per hour. The only documented job he had making $16 per hour was at JC Masonry. In my view there is insufficient evidence to support the assumption that he could have found and maintained six months of employment each year at $16 per hour. Now as for special circumstances, it is clear that if the unidentified bank deposits were found to be employment income, he may well have worked 26 or 27 weeks in calendar year 2010. However, to use that time frame would necessitate ignoring the challenges being faced by the Plaintiff in the immediate 12 months preceding the subject accident. In determining an individual's capacity to work one must consider any physical, psychological or substance abuse limitations which might exist. The evidence is clear in my view that CH had substance abuse issues that he was dealing with over the months leading up to the subject accident. Therefore, a time frame that would consider these challenges would be more appropriate in the circumstances. I am of the view that the 12 month period pre-dating the accident would be the most appropriate time frame to use in the circumstances. Fortunately both accountants did an analysis using such time frame.

Did the 2010 bank deposits represent income earned by CH?

The Scotiabank statements show the following 2010 deposits:

July 23	$ 702
July 28	340
August 6	770
August 20	777
September 30	140
	$2,729

Axa takes the position that these unidentified deposits were not income. According to Mr. Phelps, they could have been late deposits with respect to the work performed by CH in the spring of 2010 or money given to him by his parents. Furthermore CH's evidence was clear that he did not have any steady jobs in the summer of 2010.

Co-op takes the position that the amounts and the fact that the bulk of them are seven to ten days apart suggest they represent paycheques of some sort. They contend that CH's memory was simply mistaken. CH's evidence as to his work in 2010 was given by way of Examination Under Oath long after his brain injury in the subject accident. His recollection may have been affected by the nature of the injury sustained. His recollection could also have been affected by trying to protect an individual who was paying him by cheque under the table. With respect to Axa's contentions above, I find it unlikely that CH would wait until July to deposit cheques he obtained while working in the spring of 2010 at Seaton as the evidence shows he spent everything he made and had no savings. Furthermore, there is no evidence to suggest that the deposits may represent payments made to him by his parents. In fact, at no point in his Examination Under Oath did the father of CH ever suggest that he was making regular payments, particularly significant payments of over $700 every two weeks to his son in the summer of 2010.

Given the amounts involved and the spacing between deposits, I find it more probable than not that these deposits represent paycheques of some sort and ought be included as part of CH's financial resources. I can only assume that the July 23, 2010 cheque represented payment of a two week work period which means one of the week's earnings should not be included in his financial resources for the 12 month period pre-accident. Assuming he made an equal $351 in each of those two weeks, his financial resources for the 12 month period pre-accident ought to include an additional $2,378 over the income initially calculated at $10,211 for a total of $12,589.

Accounting Analysis

Janet Olsen, on behalf of the Applicant, calculated the claimant's needs at $20,134 per year calculated as follows:

accommodation		7,548	
food		3,336	
transportation	work	434	
	other	2,083	
personal care		670	
cell phone		240	
clothing		1,325	
recreation		1,884	
tobacco / alcohol		1,248	
medical / dental		1,246	
safety certificate		120	

TOTAL		$20,134	ANNUAL NEEDS

Janet Olsen then calculated the claimant's financial resources in the 12 month period pre-accident at $10,211 and concluded that his financial resources were more than 50% of his $20,134 annual needs so he was not financially dependent on his parents. Co-op submits that if the unidentified 2010 bank deposits of $2,729 were considered to be reflective of income earned or the evidence of Jeff Cohen were accepted that he had an earning capacity of between $21-22,000 annually, it would be clear that CH was not principally financially dependent on his parents.

Gary Phelps, on behalf of Axa, takes the expenses identified by Janel Olsen and breaks them down on the basis of that provided by his parents and that provided by the claimant himself:

			parents	CH
accommodation		7,548	6,919	629
food		3,336	3,058	278
transportation	work	434		434
	other	2,083	2,083	
personal care		670	614	56
cell phone		240		240
clothing		1,325	1,325	
recreation		1,884	1,413	471
tobacco / alcohol		1,248	1,104	144
medical / dental		1,246	1,246	
safety certificate		120	120	
		---	---	---
TOTAL		$20,134	$17,282	$2,852

It should be noted that many of the amounts provided by CH as outlined above reflect expenditures assumed paid for by CH while living independently for a month in Alliston.

Accountant Gary Phelps takes the contribution made by the parents ($17,282) as calculated by Ms. Olsen above, then assumes that the claimant's full financial resources (whether it be $10,211 or $12,940) during the 12 month period went to his needs as opposed to discretional purchases. If his financial resources were $10,211, as per his identified earnings, Mr. Phelps concludes that his needs were $27,493 and if his financial resources were $12,940 including the unidentified earnings, his needs would total $30,222. On this basis he concludes that the claimant's parents were contributing between 62.9% and 57.2% of his needs.

Mr. Phelps calculations, with the second column assuming the unidentified 2010 bank deposits represented employment income, were as follows:

Financial Support		
net income	10,211	12,940
expenses paid by parents	17,282	17,282
	27,493	30,222
Expenses		
identified paid by CH	2,852	2,852
unidentified paid by CH	7,359	10,088
paid by parents	17,282	17,282
	27,493	30,222
Analysis		
needs provided by Ch	10,211	12,940
needs provided by parents	17,282	17,282
	27,493	30,222
% provided by CH	37.1%	42.8%
% provided by parents	62.9%	57.2%

On the basis of this analysis, Mr. Phelps concludes that CH was principally financially dependent on his parents.

It is important to note that the analysis completed by Mr Phelps assumes that all income earned by CH went to needs as opposed to spending on any discretionary items. By so doing, he calculates the needs of CH up to 50% higher than those calculated by Ms. Olsen.

On the evidence before me I am not satisfied that all of CH's income went to needs as opposed to discretionary spending but I am satisfied that the bulk of his income did go to needs. In addition, I am satisfied that CH's needs were greater than those calculated by Ms. Olsen. The conflicting accounting evidence with respect to taxes, accommodation, food and transportation alone gives rise to a difference of $5,229. I find that in total, Ms. Olsen has understated these items and that the claimant's needs were much higher and closer to the average consumption of a one-person household as contained in the Statistics Canada Spending Patterns report which was $28,636. Using government statistics was endorsed and encouraged by Justice Myers in *Allstate v. ING* (supra) at page 5 of the decision:

> "Using government statistics also has the benefit of simplicity, low-cost, proportionality, and it was accepted in Miller. While Allstate may be unhappy bearing the substantial accident benefits paid in this catastrophic personal injury case, I dare say that over time, it (and all insurers) will see a substantial savings in the cost of lawyers and accountants for these types of hearings by using an objective statistical approach to the analysis of needs instead of hiring experts to create hypothetical

> models of a claimant's needs on estimated and guesstimated historical spending and meaningless averages."

Keep in mind that Mr. Phelps calculated his needs at $30,222 on his scenario where he found the 2010 bank records supported the additional income of $2,729, all of which money he attributed to needs. The banking records demonstrate that there was not much in discretionary spending. There is no indication of any expenses for extravagances such as trips, jewellery, fine dining, high-end clothing or the like. I cannot help but find that the bulk of CH's financial resources went to necessities with the possible exception of alcohol expenses which may or may not have been be "need". There is evidence before me that CH had an alcohol addiction, as opposed to a young man who enjoyed alcohol, so in the present circumstances it may well have been a "need". Even if I were to discount Mr. Phelps calculated needs of $30,222 or the statistical consumption of a one-person household at $28,636, I cannot help but find that his needs were less than $26,000. On a straight mathematical/accounting analysis it appears that CH, with financial resources of $12,940, was contributing just under 50% towards his needs. With my finding that his financial resources in the 12 month period pre-accident were actually $12,589, the percentage contribution by CH would be even lower - about 48.42%.

In a case like this where the mathematical/accounting analysis is so close to 50/50, it is important to consider the other factors set out in *Miller v. Safeco* (supra) and the "big picture" approach.

One of the factors out in *Miller v. Safeco* (supra) is the "ability of the claimant to be self-supporting". I am satisfied that with financial resources of $12,589 in the 12 month period preceding the accident, the claimant was not in a position to live independently. Minimum wage In 2011 was $10.25 an hour. Assuming a 40 hour work week for 50 weeks of the year would mean an income of $22,500 on minimum wage. The claimant had earnings of just over 50% of annual minimum wage and could hardly be self-supporting in my view.

On the "big picture" approach we have a young man who was faced with several "negative prognosticators" with respect to employment prospects:

- minimal education
- lack of computer skills
- behavioural problems as evidenced by school records
- having previously been fired for attendance issues
- substance abuse problems
- rural geographical location
- probation history
- not bondable
- lack of a car
- lack of a driver's license
- minimal and sporadic work history

I prefer the evidence of Axa's vocational expert Ms. Chladny to that of the Co-op's vocational expert Jeff Cohen. The cross-examination of Mr. Cohen referred to at pages 15 -20 of this decision highlight numerous concessions made. The period of analysis was a period where CH was dealing with substance abuse issues on a medical level. I am satisfied on the medical evidence before me that this played a role in CH's limited employment in the 12 month period pre-accident. As Mr. Cohen, Co-op's vocational expert, admitted in cross-

examination, CH with his sporadic work history, had not yet demonstrated an ability to find and maintain full time employment.

In my view CH was destined for a manual labour job which there were few of in the immediate Lisle area. Without money to pay first and last month's rent would have made moving from his parent's home difficult. I am satisfied that in the year preceding the accident he was doing the best he could. He worked when he could find work. On the spectrum running between dependent and independent, he was still dependent. Until such time as he was able to find and maintain a full-time job or find an employer that would commit to having him back each year to work seasonally, he remained principally financially dependent on his parents.

The facts here are similar to those in several reported cases in which it was found that the claimant remained principally financially dependent on their parents.

In *Miller v. Safeco* (supra) the claimant was an able-bodied 23-year-old man. He was an unskilled labourer with a grade 12 education who had been employed as a factory-worker for the three months preceding the accident, but in the 11 months prior to that he had only been employed for a total of seven weeks. He lived with his parents rent-free. The court concluded that he was a dependent of his parents, which was affirmed on appeal.

In *Gore v Co-Operators* (2008) OJ No. 3603, the claimant was an able-bodied 19-year-old male with a grade 10 education and no particular work skills. He had begun working for a blasting company one month before to the accident. Prior to that, he had been unemployed for nine months, although he did earn some money from snow shoveling and other casual labour during that time. He lived at his parents' home, paying $100 per month for room and board. He would occasionally contribute to the housekeeping. His mother would pay for many of his personal expenses, including cigarettes. The court upheld the decision of Arbitrator Jones that the claimant was principally dependent upon his parents.

In *State Farm v. Bunyan* (supra), the claimant had gone through high school but did not secure a diploma. He lived with his mother until the end of high school. Over the next three years he moved away twice to work, first to North Bay and then to Alberta, but each time returned to live with his mother. He had a girlfriend and a child, and they moved with him both times. At the time of the accident, the claimant was on his way to Alberta again to try to establish himself and become independent. The claimant had problems with alcohol, which Justice Corbett found would likely have interfered with his ability to hold down a job. He found that the claimant would have likely continued to move from job to job and was still a dependent of his mother.

In my analysis, I have considered the arguments advanced by Co-op that that income earning capacity must be taken into account in measuring dependency. I accept the principle that capacity to earn income must be considered in assessing financial dependency. I agree with the proposition that an intelligent able-bodied individual fully capable of employment who chooses to live at home with his parents ought not to be considered dependent upon them as discussed in *Liberty Mutual v. Federation* (1999) OJ No. 5777 as upheld on appeal at (2000) OJ No.1234. Mr. Cohen's evidence was that CH was capable of earning between $21-22,000 annually and that that there were numerous jobs available in his geographical area. This was the average salary of the jobs identified in his report. However, this was premised on the fact that he was an able bodied individual. As I have found, that was not the case here. In the 12 month period pre-dating the subject accident, CH was battling a drug/alcohol

addiction, as set out in the medical records, which I find impacted his ability to find and maintain employment, particularly when viewed along with the numerous "negative prognosticators" listed above. There were "special circumstances" here similar to those in *Echelon General Insurance Company v. Wawanesa Insurance Company* (Arbitrator Kenneth J. Bialkowski - November 4, 2008) where the claimant's situation was affected by drug and alcohol issues. I find that CH's issues with drugs and alcohol did impact his ability to find and maintain employment in the 12 month period pre-dating the subject collision and these "special circumstances" cannot be overlooked. The situation here is not one where there are casual references to alcohol and drug use. This is a case where the medical records disclose an "addiction" for which he was being medically treated through formal rehabilitation and prescriptive medication. In fact, just two months prior to the subject accident, the medical records confirm that he was in detox and experiencing withdrawal symptoms. There was no medical evidence adduced to suggest that his condition was not an "addiction", that his condition did not affect his ability to find and maintain sufficient employment or that it was unlikely that he would relapse from his alcohol/drug issues.

What we have here is a 19 year-old who was living with his parents rent free and only most minimally contributing to household expenses. He had only worked sporadically since leaving high school some three years earlier. He had never held down any long-term employment. He was hampered in finding and maintaining employment by reason of a number of negative prognosticators and most importantly a substance abuse addiction.

On the evidence before me, I cannot help but conclude that CH remained principally financially dependent on his parents on a mathematical/accounting analysis, the ability to live independently approach and the "big picture" approach. As a result CH was an "insured" under the Co-op policy which would stand in priority by reason of s.268(2)1(i) of the *Insurance Act.*

ORDER

On the basis of the findings aforesaid, I hereby order that Co-op is the priority insurer. I order that Co-op pay the costs of Axa of this arbitration on a partial indemnity basis. I order that Co-op pay the costs of the Arbitrator.

DATED at TORONTO this 13th)

day of August, 2015.)

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KENNETH J. BIALKOWSKI
Arbitrator