IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, C.1.8, SECTION 268 AND REGULATION 283/95 MADE UNDER THE *INSURANCE ACT*

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

INTACT INSURANCE COMPANY

Applicant

- and -

WESTERN INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Peter A. B. Durant for the Applicant.

Arthur Camporese for the Respondent.

ISSUES:

The parties have submitted this matter for Arbitration pursuant to Section 268 of the *Insurance Act,* Regulation 283/95 thereunder, and the *Arbitration Act* S.O. 1991.

The Arbitration Agreement provides:

1. The Arbitrator shall determine all matters in dispute amongst the parties arising out of a priority dispute regarding indemnification for Statutory Accident Benefits paid by Intact Insurance Company on

behalf of Marc-Anthony Tollis arising out of a motor vehicle accident on or about June 8, 2012.

2. The Arbitrator shall deal with all disputes between Intact Insurance Company and Western Insurance Company which will include:

(a) Which of the two insurers is responsible for adjusting and funding the claim for Statutory Accident Benefits advanced by Marc-Anthony Tollis?

(b) The determination of costs of the Arbitration and the burden of payment of same.

The fundamental issue in this dispute is whether or not the claimant, Marc-Anthony Tollis, is a dependent of his father, Marco Tollis and/or his mother, Anna Tollis such that Marco Tollis' policy with Western Insurance Company is in priority on the facts and circumstances of this case.

HEARING:

The Arbitration was held in the City of Hamilton, in the Province of Ontario, on June 26, 2015.

Examinations Under Oath were conducted of Marc-Anthony Tollis on November 26, 2012 and of Marco Tollis on February 25, 2013. Transcripts from these Examinations were submitted in evidence in this hearing along with the expert report of Gregory C. Hocking. Mr. Hocking was the only witness called at the hearing and was cross-examined by Mr. Durant. Documents submitted by each insurer in their respective Document Briefs have also been considered.

THE FACTS

On June 8, 2012, Marc-Anthony Tollis ("Marc-Anthony") was operating a 2009 Mitsubishi Lancer owned by his father, Marco A. Tollis, when he was involved in a motor vehicle accident on Lake Street in the Town of Grimsby. The vehicle was rear ended from behind.

The 2009 Mitsubishi Lancer was insured by Western Insurance. The listed drivers on the Western Insurance policy were Marc-Anthony's father, Marco and his brothers, Joseph and Lucas. Marc-Anthony was not a listed driver on the policy.

Intact Insurance provided coverage on a second vehicle, a 2010 BMW 528, where the insured drivers were listed as Anna Tollis, Marc-Anthony's mother, and Marc-Anthony himself. His father, Marco Tollis, is shown as the insured on the Certificate of Automobile Insurance.

Marc-Anthony applied to and has received benefits from Intact Insurance.

Marc-Anthony prepared and submitted an Application for Accident Benefits (OCF-1) to Intact dated July 1, 2012. He described himself as "employed and working" and as a "student or a recent graduate", under Part V: "Applicant's status". He indicated that he had completed a course at Niagara College in business administration and marketing on April 28, 2012. This was a three year course.

Under Part VIII of the OCF-1, in dealing with income replacement benefits, he indicated the following employment:

1. "From 2011/05/16 to 2011/12/01 – communications co-ordinator at Joseph Brant Memorial Hospital working 40 hours a week earning approximately $12,500.00 during that time period.

2. From May 25, 2012 to the present – office manager, Golfi Team Re/Max, again 40 hours a week with a gross income of $1,200.00".

Under Part IV: "Details of Automobile Insurance", Marc-Anthony responded affirmatively to the question inquiring of other coverage with respect to "the policy of any person on whom he was dependent". He referred to the policy of his father, Marco Tollis, with Western Insurance, in this regard.

Pay stubs from Re/Max show that Marc-Anthony was being paid $15.00 an hour and that he had earned $1,170.00 as of June 6, 2012.

Intact Insurance filed a Notice of Dispute Between Insurers on August 15, 2012 and a Notice of Commencement of Arbitration on February 6, 2013.

On the date of the accident, Marc-Anthony Tollis did not have a vehicle of his own.

He was taking a real estate course on the date of loss.

On his Examination Under Oath, Marc-Anthony stated his employment as an office manager (administrative assistant) at Rob Golfi's Re/Max Escarpment Realty office had commenced on May 25, 2012. May 25, 2012 was a Friday. A fax from Re/Max dated August 29, 2014 found at Tab O of the Respondent's Document Brief describes employment from May 29, 2012 forward at a rate of $15.00 per hour. It would appear from this document that he started on Monday May 29, 2012 and would have been completing his second full week of work with Re/Max Escarpment in the employment of Rob Golfi on the date of the accident, Friday June 8, 2012.

At the time of the accident, he was 21 years of age, single and living with his parents and two younger brothers. He had always lived with his parents. He did not pay rent, car insurance, groceries or for his cell phone. He spent his earned income on meals out of the home, clothing and putting gas in the car.

He regularly used both of his parents' vehicles.

During the course of his Examination Under Oath, Marc-Anthony Tollis indicated that two weeks into his new job, he would not have been able to move out of the house and support himself. His answer was "no way" and "not a chance" when asked if he would have been able sustain himself.

His income with the Golfi team was $600.00 per week gross.

Marc-Anthony Tollis did some work around the family home both inside and outside. His estimate was that he performed about 1/3 of the inside household chores and 1/3 of the outside household chores.

His parents had paid his tuition at Niagara College, although he had received a $2,000.00 scholarship in his first year.

In addition to the co-op job previously described, Marc-Anthony Tollis had work experience in various part time and seasonal positions in the retail setting. He had also taken a one month course in bartending.

The simple math is that he was earning $600.00 a week, on the day of the accident, and an annualized income of approximately $31,200.00 per year.

On his Examination Under Oath, Marco Tollis, Marc-Anthony's father, indicated that his income in the year prior to the accident was $65,000.00. His wife worked part time 2 to 3 days per week at Joseph Brant Memorial Hospital.

He confirmed that his son had completed his degree at Niagara College in April 2012 and that while at Niagara College, he had held down some part time jobs. Marco Tollis confirmed that he had provided assistance with his son's tuition and school costs. He also confirmed his son's evidence that there was no contribution towards rent, car insurance or cell phone costs. He estimated that he and his wife had covered about 50% of clothing and entertainment costs.

According to his father, Marc-Anthony would not have been able to move out of the house at the time of the accident.

After the accident, Marc-Anthony completed the course to become a licensed real estate agent and he was now working as an agent at Re/Max Escarpment on a team with Conrad Zarini (not Mr. Golfi).

There were no particulars provided with respect to his income since obtaining his license. It is commission based.

EXPERT EVIDENCE:

Western Insurance submitted the report of BDO Dunwoody dated September 10, 2014, with respect to the issue of dependency. The author, Mr. Hocking was cross-examined by Mr. Durant at the hearing.

At page 4 of his report, Mr. Hocking stated:

> "There is considerable case law concerning the interpretation of the phrase 'principally dependent for financial support'. The interpretation of legislation in case law is outside of our expertise as accountants. For the purpose of this report, we have assumed that for Mr. Tollis to have been principally dependant for financial support by his parents, the value of his financial needs as an independent individual would have to exceed twice his personal income plus $1.00."

Referring to a decision of Arbitrator Vance Cooper dated May 2014, in the case of *Allstate Insurance Company of Canada, ING Insurance Company of Canada* and *Aviva Canada Inc.*, Mr. Hocking stated:

> "In order to be deemed financially independent, Mr. Tollis would need to have the means (that is earn sufficient income) to cover at least 50% plus $1.00 of his financial needs as an independent individual".

Mr. Hocking was aware of and referred to the issue that the SABS does not describe a period over which the dependency should be assessed, and he made reference to case law, and in particular, the case of *St. Paul Travellers* and *York Fire* (a decision of Arbitrator Samis, August 11, 2011). This case is discussed below.

For the purposes of Mr. Hocking's report, the assumption was that the appropriate period to measure Mr. Tollis' dependency was the two week period prior to the accident in which he had been working. The assumption was that this period may be the most appropriate given that Mr. Tollis' circumstances had changed to that of a full time employee at Re/Max.

Mr. Hocking calculated the annualized income working for Mr. Golfi's team at $31,200.00. Using the assumptions he did, he stated that Mr. Tollis would be considered dependent only if his financial needs as an independent individual exceeded $62,399.00. Up to that amount, he would be able to cover at least 50% plus $1.00 of his financial needs with his expected income.

The assessment of his independent individual needs was based on Statistics Canada 2012 average household expenses, by household type (one person household) along with average 2013 monthly rent for a one bedroom apartment in the Hamilton area adjusted for inflation, and a cell phone allowance of $45.00 per month. On this basis, the estimated financial needs were $28,963.00. At Schedule 2 of Mr. Hocking's report, there is a complete listing of expenses totalling $28,963.00.

Using the 50% plus $1.00 calculation, he was not principally dependant. Using the assumptions that were made, he would only need to earn $14,483.00 to be independent.

On his Examination Under Oath, Marc-Anthony Tollis indicated that he had planned on working for Rob Golfi at least until the end of year when he expected to complete his Ontario Real Estate license program. Afterwards, he intended to move forward independently with his career and hoped one day to build a team similar to that with which Mr. Golfi conducted his business. Mr. Hocking, in his report at page 7, noted that his report depended on the assumption that Mr. Tollis would have continued in his office work at Re/Max for the Golfi team, at least until he transitioned into his career as a real estate agent after completing the Ontario Real Estate Association program.

On cross-examination, Mr. Hocking calculated a net income of approximately $24,769.68 assuming an annual income of $31,200.00.

The Re/Max stubs for the two week period ending May 30, 2012 (43 hours worked) and June 6, 2012 (35 hours worked), net of taxes, EI and CPP show a net income of $952.80. Over 52 weeks this would amount to $24,772.80.

It would be the net income that would be available to deal with the ability to pay 50% plus $1.00 of the needs.

Using this number, his needs would need to be greater than $49,539.36 (i.e. 2 x $24,769.68).

Mr. Durant suggested on cross-examination that his ability to fund his own needs would also be subject to a number of negative contingencies, including holidays, being sick, and the loss of the job.

The assumption of continued employment with Golfi was questioned given the Examination Under Oath by Mr. Tollis and that he would only be working through to the end of the year, and planned to go out on his own as a realtor once he got his license. There would be the possibilities of erratic and potentially no income in the early going.

Mr. Hocking was also cross-examined on the listing of expenses with the gist of the cross-examination being that the expenses could reasonably have been calculated at a somewhat higher level if different assumptions were made. Mr. Hocking was unable to answer a question as to whether or not Marc-Anthony would have had the financial ability to move out on his own the day of the accident.

LEGAL FRAME WORK:

The relevant *Insurance Act* and *Statutory Accident Benefits Schedule* provisions in issue are as follows:

(i) *Insurance Act*, S268:

> (2) **Liability to pay**. The following rules apply for determining who is liable to pay Statutory Accident Benefits:
>
> 1. In respect of an occupant of an automobile,
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement for Statutory Accident Benefits arose,

iv. if recovery is unavailable under subparagraph I, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants:

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of the automobile involved in the incident from which the entitlement to Statutory Accident Benefits arose,

iv. if recovery is unavailable under subparagraph I, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

(3) **Liability.** An insurer against whom a person has recourse for the payment of Statutory Accident Benefits is liable to pay the benefits.

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

(5) **Same.** Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim Statutory Accident Benefits against the insurer under that policy.

(5.1) **Same.** Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits.

(5.2) **Same.** If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim Statutory Accident Benefits against the insurer of the automobile in which the person was an occupant.

(ii) Statutory Accident Benefits Schedule - Effective September 1, 2010 (O. Reg. 34/10):

Definitions and Interpretations:

s. 3(1):

"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 dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario; ("personne assurée")

s. 3(7):

> For the purposes of this Regulation,
>
> ...
>
> (b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;

Marc-Anthony Tollis is a listed driver on the Intact insured vehicle apparently owned by his father and which is referred to in the materials as his mother's vehicle.

He is an insured person as defined and is entitled to claim as a listed driver under the Intact policy.

Intact's position is that he is a dependant of his father and an insured person under the Western policy and given that he was an occupant of the Western vehicle at the time of the loss, it stands in priority in accordance with Section 268(5.2). Given that it appears that Marco Tollis owned both vehicles, insured separately with different companies, to the extent that Marc-Anthony Tollis is a dependant both the Intact and Western policies would potentially provide coverage, and given the occupancy at the time of the accident, the Western policy would be primary.

If there is no dependency, Marc-Anthony Tollis would only have the Intact policy to look to as a listed driver.

In summary, in accordance with the legislation and the Statutory and Regulatory frame work, if Intact could prove on a balance of probability that Marc-Anthony Tollis was a dependant, as defined, it would be successful in establishing that Western is in priority.

CASE LAW

In cases requiring determination of dependency for the purpose of SABS, Arbitrators and Judges routinely refer to the criteria for determining dependency established by the Court of Appeal in *Miller* v. *Safeco,(1986), 48 O.R.(2d) 451 (H.C.J.), Aff'd* 50 O.R.(2d) 797 (C.A.). The relevant criteria are:

(1) The amount of dependency

(2) The duration of dependency;

(3) The financial and other needs of the alleged dependant; and

(4) The ability of the alleged dependant to be self-supporting.

At the trial level, the trial Judge had a listed fifth criteria referred to as: "the general standard of living within the family unit". This factor was not endorsed by the Court of Appeal. (See also: *Security National Insurance Co.* v. *The Wawanesa Mutual Insurance Company*, 2014, O.N.C.A. 850).

Intact submitted the Arbitration decision in *MacDonald* and *State Farm Insurance Company*, Ontario Insurance Commission, File No. A-001347, March 11, 1993, a decision of Arbitrator David Draper, wherein he considered the meaning of what is the equivalent of the current definition of dependant. The SABS regulation at the time contained the following definition of dependency:

> "3(2). For the purpose of this Schedule, a person is a dependant of another person if the person is principally dependent for financial support on the other person or the other person's spouse."

Arbitrator Draper stated that:

> "The plain meaning of Section 3(2), in my view, is that if the children were principally dependent on either of their parents for financial support, or perhaps both of them jointly, then they are dependants of both parents".

In *Federation Insurance Company of Canada* and *Liberty Mutual Insurance Company*, (Arbitrator Lee Samis, dated May 7, 1999, upheld on Appeal by Mr. Justice O'Leary, dated September 15, 1999, and by the Ontario Court of Appeal, unreported Decision dated April 10, 2000), Liberty Mutual would be required to pay benefits if Jonathan Sebastian was not dependent on his parents. If dependent on his parents, Federation would be obliged to pay benefits. With respect to the time frame to be looked at, vis-à-vis the issue of dependency, Arbitrator Samis stated:

> "When examining the financial and other arrangements of the family of a household, it is necessary to set some time frame during which to examine income, expenses and other matters which necessarily occur over a period of time. Relationships change from time to time, perhaps suddenly. Transient changes may alter matters for a short period, but not change the general nature of a relationship. A momentary snapshot would not yield any useful information about these time dependent relationships".

The accident in issue in this case occurred on February 13, 1998. Jonathan Sebastian had not worked in the few days before the accident. He had been employed on a full time basis since July 1997. Arbitrator Samis found that it would not be appropriate to examine his income for the few days that he had not worked. Arbitrator Samis found that his situation had been stable since September 1997 and that it was the time frame from then up until the time of the accident that should be considered. He had been employed with earnings but there had been significant periods of lay offs. He had earned $5,700 in the 19 weeks prior to the accident. He performed household chores. His parents provided him with free room and board and $40 to $100 per week in spending money.

At page 3 of the decision, he stated:

> "Earnings are evidence of capacity. But many individuals may not be earning up to their capacity. If this is because earnings are foreclosed by the unavailability of work, then the person may become a dependent, even with a very high rating capacity. On the other hand, a person who could earn significant income, but simply chooses not to, can't be regarded as dependent in the sense that the need for financial support is imposed on the person".

Citing the *Miller* v. *Safeco*, Arbitrator Samis found it to be "compelling authority" for the proposition that the "ability" to be self-supporting must be taken into account in measuring dependency. He concluded that Mr. Sebastian had reasonable capacity to earn, was able bodied, had been gainfully employed on a regular basis and could reasonably be expected to earn $450 per week which negated any possibility of him being found principally dependent on his parents. Importantly, Arbitrator Samis stated:

> "Dependency implies something more than receiving a financial benefit. It requires some kind of need on the part of the person alleged to be dependent".

Continuing on, Arbitrator Samis stated:

> "To interpret the Regulation as requiring an evaluation that is confined to reviewing the actual financial contributions, without regard to need, is to ignore the wording of the Regulation which calls for dependency. In this case, Jonathan Sebastian has received significant benefits from his parents. They provided him with food and shelter. They gave him some spending money on occasion. He earned a significant income, but he was allowed to spend this freely and was not required to provide for any of his own basic needs. His lifestyle was enhanced by the assistance of his parents. It is noted earlier that the Ontario Court of Appeal disapproved a consideration of the "general standard of living within the family unit" in dependency cases.
>
> In short, he was not providing for any of his own basic needs. Nonetheless, he had the reasonable ability to do so. He may well have had the need for support or care to supplement what he could provide for himself. Against these facts, the Regulation challenges us to discern whether his parents are persons upon whom he is "principally" dependent".

Arbitrator Samis concluded:

> "The problem posed is more difficult than simply measuring the cost of Jonathan's needs and comparing that to his own resources. Even if Jonathan was unable to meet the basic cost, this would not render him principally dependent on someone else. He only becomes 'principally' dependent on another, when that person provides for most of his needs.
>
> In other words, Jonathan can only be considered principally dependent for financial support on someone else if the cost of meeting Jonathan's needs is more than twice Jonathan's resources. I cannot conclude that Jonathan is principally dependent for financial support on others".

In *Co-Operators Insurance Company* and *ING Insurance Company of Canada/Halifax,* (Arbitrator Lee Samis dated May 2, 2006) the injured party, Maria Araugo, had been struck by an automobile insured by ING/Halifax. Ms. Araugo was living with her

daughter and her daughter's husband who had a policy of automobile insurance with Co-operators. Co-operators would be obliged to pay benefits if she was found to be a dependent relative on the named insured (son-in-law) or his spouse (the daughter).

Maria Araugo had moved into her daughter's home following her husband having been admitted to a nursing home. Mrs. Araugo's daughter expected that her mother would live with her indefinitely. The daughter was employed full time. Her husband typically worked every day with the exception of adverse weather in the construction business.

Her mother remained in the household and provided some care to her daughter's children. The mother also performed work around the house. Evidence was given with respect to the value of services that was provided between the family members.

Arbitrator Samis was provided with alternate ways of calculating the principle dependency issue. Ultimately, at page 13, he stated:

> "Numerous decisions have concluded that principle dependency means looking at whether or not a person could provide for 51% of their own needs. If so, they are not principally dependent for financial support on some other person. This is the effect of the decision in many cases and has been specifically referred to on Appeal in the case of *Liberty v. Federation*".

Arbitrator Samis concluded at page 14:

> "When measuring her financial resources against the imputed proportion of her household expenses for the existence that she had at the time of the accident, it was overwhelmingly clear that she had adequate resources to provide for more than 51% of her needs, and therefore, if that is the appropriate comparison, she was not principally dependent for financial support on anyone at the time of the accident".

In looking at an alternative theory of having 51% of the resources, after tax, to live at the standard of a person living alone in an urban area in relation to the "poverty line", she would have adequate resources to meet 51% of the cost. After doing all of the math on the economic value of living with her family members, Arbitrator Samis concluded that

the cost of meeting the necessities of Mrs. Araugo in that context were far less than twice her financial resources.

In *Co-operators General Insurance* and *Gore Mutual Insurance Company* (Arbitrator Guy Jones, February 2008), the Arbitrator dealt with the case of Joseph Morgan, who at the age of 19 was struck and catastrophically injured in a motor vehicle accident on July 11, 2004. The vehicle which struck him was insured by Co-operators. Co-operators paid benefits and commenced a priority dispute against Gore Mutual on a theory that Joseph was a dependent of his mother, Kathleen Morgan, who was married to his stepfather, Ron Wheeler. Mr. Wheeler owned a motor vehicle insured by Gore.

Joseph Morgan had completed grade 10 in June of 2003. In July 2003, he went to Quebec and worked for a construction company for one month. He returned home to his mother and stepfather's home in McTeer, Ontario and did not work until returning to high school in September 2003. He dropped out of school in October 2003. Between October and late December 2003, he earned only $20. In early 2004, he began working for $9.00 an hour cash and between January and June 2004, he earned approximately $250 to $300. He was given an allowance between $20 and $50 every two weeks from his mother. He did not receive this money while working.

Approximately one month prior to the accident, on June 14, 2004, he began working. He worked 39.5 hours the first week and 44 hours the second week. He did not work the third week and then worked 46.5 hours in the week before the accident. He had earned a total of $1,430 in the month before the accident.

The household expenses of the mother and stepfather amounted to $1,458 per month or $17,496 per year. The Arbitrator concluded that the appropriate time frame was between October 2003 and July 11, 2004. This represented the period from when the young man left school and began a limited work career to the time of the accident. His average income was $194 per month and his share of expenses was calculated at $486. The income earned by Joseph Morgan was such that he was not financially independent but rather was principally dependant on his mother and stepfather.

This was not the end of the analysis and Arbitrator Jones, after referencing *Federation Insurance Company of Canada* and *Liberty Mutual Insurance Company*, (supra); *Co-operators* v. *Halifax Insurance Company* (unreported decision of Arbitrator Samis dated December 14, 2001, upheld on an Appeal by the Honourable Madam Justice MacDonald dated June 21, 2012); and *Co-operators* v. *Zurich* (unreported decision of Arbitrator Samis dated May 11, 2005). Arbitrator Jones wrote:

> "In *Co-operators* and *Zurich*, Arbitrator Samis was dealing with a 19 year old youth, Trevor Harrison, who had been living with his mother at the time of the accident. Trevor had dropped out of grade 11 approximately 3 years prior to the accident. In those 3 years, he had held numerous temporary physical jobs such as stocking shelves, etc These jobs were obtained through placement agencies and generally paid approximately $10 per hour. Between January and April of 2001 or approximately 5 months prior to the accident, Trevor took a heating and air conditioning technician's course to upgrade himself, although he ultimately failed the course. Shortly before the accident, Trevor received a job placement with Canadian Tire. By the time of the accident, he had completed two weeks of paid orientation and one week of full work. Arbitrator Samis found that Trevor had worked about as much as he could work. He concluded that the appropriate time frame for considering the question of dependency was from the completion of the technician's course until the accident. This resulted in his income averaging approximately $1,000 per month.
>
> Arbitrator Samis stated:
>
> 'This indicates earnings of nearly $1,000 per month. I am mindful of the fact that I should consider not only the actually earnings of Trevor Harrison, but his capacity to earn. This is in accordance with the case law of Ontario and in particular the decision of *Miller* v. *Safeco* and the subsequent decision of the Ontario Court of Appeal in *Federation* v. *Liberty*. The capacity to earn income is a highly relevant consideration when we are dealing with such a person as Trevor Harrison who is able to be in the workforce. Income he actually earned is certainly evidence of his capacity but it is probable that his capacity was greater than his earnings. Certainly if he had been called out for further employment, he would have earned more and there was certainly no evidence that he refused available employment at any time. To the contrary, he indicated that he took the employment opportunities that came his way.'"

Arbitrator Jones ultimately stated potential income versus actual earnings may be appropriate consideration in one case and not in another.

The work that had been done in the month before the accident was part time, and was temporary with no guarantees for the future. Arbitrator Jones concluded that Joseph Morgan would have continued to do "very little in terms of work but for the accident". He made a finding that "one cannot simply say that he earned $1,430 in the month before the accident, and therefore, he had a capacity to earn that in the future and should therefore be deemed to earn that". In the end, he put further emphasis on the 9 months prior to the accident and found that Joseph Morgan was financially dependant on his mother and stepfather at the time of the accident.

Gore Mutual appealed the decision of Arbitrator Jones. Mr. Justice Perell in *Gore Mutual Insurance Company* v. *Co-operators General Insurance Company* [2008] O.J. No.3603, dismissed the Appeal. There was no reversible error.

Mr. Justice Perell stated:

> "Just as having one score a hole in one is not necessarily a demonstration of a person's golfing capacity, the person's earning capacity is not simply demonstrated by a past occasion or series of occasions where the person earned money. Standing alone, while a prior history of a person's earnings may or may not provide an adequate basis for determining a person's earning capacity, in a given case, employment history may reveal a person's earning capacity sufficient to determine the person's financial dependency or independency; however, in another given case, the employment history may provide a poor sample for an assessment of what a person is capable of earning and of his or her dependency or independency. In this regard, it is useful to note that the determination of dependency is essentially a factual issue and each case must be analyzed based on its own particular facts and the applicable law: *Co-operators General Insurance Company* v. *Halifax Insurance Company* [2002] O.J. No. 2459 (S.C.J.); *Oxford Mutual Insurance Company* v. *Co-operators General Insurance Company* [2006] O.J. No. 4518 (C.A.).

> In the case at bar, had the accident occurred one month sooner, there would have virtually been no employment history upon which to base a determination of earning capacity. Arbitrator Jones would have been left with little more than the fact that Joseph Morgan completed grade 10 and was able bodied. Arbitrator Jones, however, did have the evidence of one more month employment history and he considered it, and concluded that it was appropriate to put greater emphasis upon the 9 months prior to the accident. In my opinion, there was no reversible error in this approach and Arbitrator Jones' conclusion was sound".

In *Pafco Insurance Company* and *AXA Insurance and the Dominion of Canada General Insurance Company*, (Arbitrator Guy Jones dated December 2008), the issue was whether or not Justin Decker was principally financially dependant on his father, Neil Decker, or his grandmother, Wilhelimina Decker, at the time of the accident.

Justin Decker had been struck riding a bicycle by a motor vehicle insured by Pafco. The accident occurred on July 11, 2006. He claimed SABS from Pafco. Pafco took the position that he was a dependant of his father or his grandmother. His father was insured with AXA and his grandmother with Dominion of Canada. At the time of the accident, he was 23. He had left school at 17 and he had been involved in a number of low paying jobs. He was out of his father's home from 2000 to 2003. He returned and lived with his father until 2006. In July 2006, just before the accident, he moved in with his grandmother. Justin Decker paid nothing for food or shelter. Arbitrator Jones stated:

> "Determining financial dependency is particularly difficult in cases where a young adult is involved. They are often in a period of transition with their financial needs and revenues changing. They receive money or other financial support such as food and shelter from various sources".

The primary disagreement in the case revolved around the appropriate time frame to determine financial dependency. Arbitrator Jones referred to a number of decisions, that have held that the appropriate time frame does not simply involve taking a "snapshot" on the date of the accident, but rather looks at the time frame before the accident. After selecting the appropriate time frame from March of 2006 when he returned to school with part time employment, the Arbitrator concluded that Justin Decker had earned

more than either his father or grandmother had provided to him by way of food and shelter and was not dependant on either.

In *Insurance Corporation of British Columbia* v. *Federation Insurance Company of Canada* (Arbitrator Samis, July 3, 2009), Arbitrator Samis determined that a 27 year old male was not principally dependent on his parents despite extensive support. The claimant, Craig T., had prior difficulties maintaining steady employment and his parents provided him with food, shelter, transportation and other care. He was living with his parents. Arbitrator Samis examined the cost of his needs and then whether or not he was required to derive more than 50% of those needs from someone else. Arbitrator Samis repeated the fact that this general standard of living within the family was not one of the criteria to consider, instead the cost of meeting only the individual's basic needs. Arbitrator Samis stated:

> "If, and only if, his resources are less than 50% of the cost of meeting the needs do we look further for possible dependency on others".

In this case, Arbitrator Samis looked at only a four week period prior to the accident as Craig T. had made various transitions in the months prior. This case stands for the proposition that even though a family may provide important support, it does not necessarily follow that a child will be principally dependent on his parents.

In *St. Paul Travellers* v. *York Fire and Casualty Insurance Company*, (Arbitrator Lee Samis, dated August 11, 2011), *St. Paul Travellers* was the insurer of a bus involved in an accident. Doris P. was a passenger. Her parents were insured by York Fire and Casualty. The issue was whether or not she was dependent on her parents at the time of the accident on June 25, 2007. At the time of the accident, Doris P. was a 22 year old woman living in her parents' home. Shortly before the accident, she had been a full time student in a nursing program at Fanshaw College. While a student, she had earned income working at various part time and summer jobs. In April 2007, she had ceased her part time employment to give attention to her qualifying exams. She had completed a clinical program in nursing. She had the intention of becoming qualified to work as a registered nurse. She finished the exams on May 16, 2007. In mid-June, she was told

she had successfully passed her exams, and was told that a job application that she had submitted had been accepted giving her probationary employment as a registered nurse. On June 21, 2007, four days before the accident, she commenced her probationary employment pursuant to the contract. She attended for various orientation sessions and earned income which was subsequently paid to her on July 5, 2007, shortly after the accident. She received $428.64 for 22.5 hours of orientation and 3 hours of professional staff development meetings. Prior to the accident, during the probationary employment, she was offered full time work to commence in the first or second week of July.

Doris P. was injured on June 25, 2007, was off work for a brief period of time, and then resumed her employment. Post-accident her hours increased to 75 hours bi-weekly and her pay to $20.81 per hour.

At page 3, Arbitrator Samis stated:

> "Having finished school in mid-May and having been apprised of her successful completion of all of her qualifying exams in mid-June, it is my view that Doris P.'s status of the date of the accident was markedly different than the status of being a student with part time employment. By the date of the accident, she had passed several milestones in her transition from a student to a person in full time employment in the workplace. Not only had she commenced employment, but the brief engagement had already yielded positive signs in the form of a commitment to increase her working hours to full time hours. That proposition was put to her before the accident but did not come to fruition until a couple of weeks after the accident".
>
> He continued:
>
> "The law with respect to dependency cases has evolved over the past two decades to recognize the challenges associated with applying the dependency principle to real life fact situations. Amongst the most challenging situations are those where the recent pre-accident history shows a changing environment. The case law calls for us to identify a time period for the purpose of evaluating dependency. It is often not useful, or even sometimes misleading, to look at circumstances in too narrow a time frame (often referred to as a 'snapshot'). To arrive at an appropriate

> determination of dependency status, we have to look at the status of a person's needs and resources over a time period. Then, within a selected time frame, we can approach the issue of financial needs and resources in order to determine the person's dependency status.
>
> Utilization of a short time frame creates risk of error. We cannot always be confident that a short experience is a fair reflection of a person's status.
>
> The legal test for selection of a time frame is that I should choose a time frame that most fairly reflects the true status of the claimant on the date of the accident".

In this case, the parties had suggested a number of different time frames to undertake the analysis. In the end, Arbitrator Samis chose what was described as the working time frame, from approximately June 21, 2007 to June 25, 2007, a period of only four days, representing the interval which Doris P. was employed up until the time of the accident.

Arbitrator Samis concluded that the contract of employment time frame was a more realistic representation of the status at the time of the accident, rather than the several alternatives suggested.

Arbitrator Samis wrote at page 5:

> "The working time frame, from approximately June 21, 2007 to June 25, 2007 seems to me to be the time frame which most fairly represents Doris P.'s status on the date of the accident. This conclusion is based on the fact that she had started the employment, and had succeeded to the extent that she was offered full time employment. This is entirely a time frame post-graduation and post-commencement of employment. This is the time frame which most accurately represents her status at the time of the accident. Admittedly, there is several reluctance which put too much weight on such a narrow window. The danger of inaccuracy that might flow from selecting such a short time frame is mitigated here by having the benefit of post-accident events: the continuation with the employment, the increase in her hours, and the increase in pay. She clearly was fully into the labour force, although still in early days. In this instance, the date of loss status of the claimant is most

> fairly reflected by choosing the working time frame for the purpose of analysing dependency".

At page 6 of the decision, Arbitrator Samis wrote:

> "The development of case law in dependency is established in 3 principles that are germane to this case.
>
> 1. Capacity to earn actual earnings that are both worthy of evaluation. If a person could reasonably exercise his/her capacity to earn a greater amount, it is that amount that represents the financial resources available to the person.
>
> 2. The cost of meeting a person's needs must be calculated, and is not necessarily equivalent to the cost that he/she habitually incurred before the accident. The history of the family setting may assist in providing some evidence of what the cost is, but that is not determinative.
>
> 3. The person's dependency must be determined by comparing his/her resources (capacity or otherwise) with the cost of meeting his/her needs in determining whether the resources exceed 50% of the costs. Hence, a person may well be in need of other resources to meet the full cost of his/her needs, but this does not create 'dependency' for SABS priority purposes."

In *Economical Insurance Group* and *State Farm Mutual Automobile Insurance Company*, (decision of Arbitrator Kenneth Bialkowski dated January 13, 2014), Derrick Brayden was injured in a motor vehicle accident on September 3, 2010. He was 25 years of age. He had been struck as a cyclist by a vehicle insured by State Farm. If he was found to have been a dependant of his parents, within the meaning of the SABS, Economical would be in priority to State Farm. At the time of the accident, Derrick had been working since June of 2010 following his graduation from college. The evidence established that he had worked during the summer months and Christmas while in high school. He had taken a year off between high school and community college and earned $28,000. He had started college in September 2008, his program ending in mid-March 2010. He worked part time while at college. He received OSAP funding and had earned $13,717 in 2008 and $8,687 in 2009. He had also funded his education through

a line of credit co-signed by his parents. The line of credit had been maxed out at $12,0000. He graduated in May of 2010. He received financial support from his parents in addition to his income from working and student loans. In 2010, he returned to Barrie and lived with his parents to complete an unpaid work placement. He began full time work as a general labourer and driver assistant on June 11, 2010. Between the time of graduation and the time of the accident, even while working as a general labourer, he had looked for work in his chosen field. Between June 11, 2010 and the date of the accident on September 3, 2010, he had earned $4,082. His income was approximately $340.16 per week. It would have been an annual income of $17,688 and a monthly income of $1,474. The work may have been seasonal. He had $39 in his bank account at the date of loss. He lived rent free in his parents' home. His mother gave evidence that she did not consider him to be financially independent. One year post-accident, he found work at the Flying Monkeys Brewery and earned income similar to that which he had been earning before the accident. He had moved out of the family home and lived with roommates.

In rendering his decision, after citing the criteria from Miller, Arbitrator Bialkowski stated at page 5:

> "As I have in previous decisions involving dependency, I also accept the principles set out in *Federation Insurance Company of Canada* v. *Liberty Mutual Insurance Company* (Arbitrator Samis, May 7, 1999). The decision highlights the importance of selecting an appropriate time frame for the analysis of financial dependency. Relationships change from time to time perhaps suddenly. Transient changes may alter matters for a short period, but not change the general nature of their relationship. A momentary snapshot would not yield any useful information about these time dependent relationships. It is the general nature of the relationship that must be viewed based on the analysis provided by Arbitrator Samis. Arbitrator Samis also deals with the issue of earning capacity as opposed to actual earnings. I accept the proposition that the ability to be self-supporting must be taken into account in measuring dependency. 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.

> When looking at the question of financial dependency, a related case law provides that in order to be principally dependent for financial support, one must receive more than 50% of one's financial needs from someone other than themselves".

In finding that Derrick Brayden was not principally dependent on his parents, Arbitrator Bialkowski stated:

> "On the evidence overall, I am left with the impression that he had left the student stage of his life at the time of his accident, and had entered the full time employment stage of his life. He was either going to find work in the field of his education...or some other form of employment with earning sufficient to meet his frugal lifestyle and minimal needs".

FINDING

As of the date of loss, Marc-Anthony Tollis was employed on a full time basis, while completing his course work to become a licensed real estate agent, and had the capacity to earn $31,200 per year gross. He was a graduate of community college with a degree in business and marketing. He had a plan in place to secure a career in real estate. He has continued and pursued the plan since the accident. He had a demonstrated skill set and an ability to earn at least $15 an hour on a full time basis. He had the ability to work in real estate, in retail and he had completed a course as a bartender.

The case law establishes that the ability to be self-supporting is an essential element of the determination of dependency. Again, Marc-Anthony Tollis was working full time. He was able-bodied. It is my view that despite the evidence that his parents provided extensively for him, he had the ability as of the date of the accident and in the foreseeable future, to provide for most of his needs.

The transition from dependency to being independent is not always easy to determine. Where a young person has completed their education, is working full time, is earning income to meet better than 50% of their needs and has a skill set to continue full time employment, the transition has been made. Despite the able cross-examination by Mr.

Durant of Mr. Hocking, on the balance of probability, I am not able to conclude with an annual income of $31,200 and a net income of $24,769.68 that his needs would exceed $49,539.36.

I appreciate that his independence in this case may have been brief, however, the transition had been made. In my view, the two weeks leading up to the accident is the time frame which most reasonably and accurately represents his status at the time of the accident.

There were no discrepancies or points made on cross-examination in my view that would increase the needs from the $14,483.00 to a figure of $49,539.36 or anywhere near it.

Marc-Anthony Tollis had the ability to meet his own needs and he was not dependent on his parents at the time of the accident.

Intact shall pay the costs of Western and the costs of the Arbitration.

In the event that the parties are unable to agree with respect to the issue of costs, it may be spoken to.

DATED at Hamilton, Ontario this 21st day of December 2015.