

2019 CarswellOnt 7271  
Ontario Arbitration (Insurance Act)

Intact Insurance Co. and Security National Insurance Co. (Knez), Re

2019 CarswellOnt 7271

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

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

INTACT INSURANCE COMPANY (Applicant) and SECURITY  
NATIONAL INSURANCE COMPANY (Respondent)

Kenneth J. Bialkowski Member

Judgment: May 6, 2019

Docket: None given.

Counsel: A. Sandy Williams, Suzan Park, for Applicant, Intact Insurance Company  
Yasna Beheshti, for Respondent, Security National Insurance Company

**Headnote**

Insurance --- Claims — Payment of insurance proceeds — General principles  
Insurance --- Automobile insurance — Extent of risk — Persons covered under policy  
— Dependent relative

**Table of Authorities**

**Cases considered by *Kenneth J. Bialkowski Member*:**

*Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada* (May 1, 2014),  
Vance H. Cooper J. (Ont. Arb.) — considered

*Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada* (2011), 2011  
CarswellOnt 19150 (Ont. Arb. (Ins. Act)) — referred to

*Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada* (2015), 2015  
ONSC 4020, 2015 CarswellOnt 9447 (Ont. S.C.J.) — referred to

*Co-operators General Insurance Co. v. TD Home & Auto Insurance Co.* (2014),  
2014 ONSC 1604, 2014 CarswellOnt 4919, 32 C.C.L.I. (5th) 312 (Ont. S.C.J.) —  
considered

*Coseco Insurance Co. and ING Insurance Co. of Canada, Re* (2010), 2010  
CarswellOnt 18808 (Ont. Arb. (Ins. Act)) — considered

*Echelon General Insurance Co. v. State Farm Mutual Automobile Insurance Co.* (2011), 2011 CarswellOnt 13197 (Ont. Arb.) — distinguished

*Federation Insurance Co. of Canada and Liberty Mutual Insurance Co., Re* (1999), 1999 CarswellOnt 7813 (Ont. Arb. (Ins. Act)) — considered

*Intact Insurance Co. v. Allstate Insurance Co. of Canada* (2016), 2016 ONCA 609, 2016 CarswellOnt 12335, 131 O.R. (3d) 625, 60 C.C.L.I. (5th) 1, 351 O.A.C. 1, 403 D.L.R. (4th) 438 (Ont. C.A.) — considered

*Lewandowska v. GAN Canada* (1996), 42 C.C.L.I. (2d) 8, 1996 CarswellOnt 5107 (Ont. Gen. Div.) — referred to

*Lloyd's of London Insurance Co. and Wawanesa Mutual Insurance Co., Re* (2004), 2004 CarswellOnt 11268 (Ont. Arb. (Ins. Act)) — considered

*Miller v. Safeco Insurance Co. of America* (1984), 48 O.R. (2d) 451, 9 C.C.L.I. 1, [1984] I.L.R. 1-1848, 1984 CarswellOnt 679 (Ont. H.C.) — considered

*Miller v. Safeco Insurance Co. of America* (1985), 50 O.R. (2d) 797, 13 C.C.L.I. 31, [1985] I.L.R. 1-1949, 1985 CarswellOnt 787, 50 O.R. (2d) 797 (note) (Ont. C.A.) — referred to

*Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.* (2006), 2006 CarswellOnt 6991, 43 C.C.L.I. (4th) 199, [2007] I.L.R. I-4564, 40 M.V.R. (5th) 1, 83 O.R. (3d) 591, 40 M.V.R. (5th) 2 (Ont. C.A.) — considered

*Progressive Casualty Insurance Co. of Canada v. Zurich Insurance Co.* (1996), 1996 CarswellOnt 6344 (Ont. Arb.) — referred to

*Saskatchewan Government Insurance and Lombard Canada Inc., Re* (2004), 2004 CarswellOnt 11275 (Ont. Arb. (Ins. Act)) — considered

*St. Paul Travelers and York Fire & Casualty Insurance Co., Re* (2011), 2011 CarswellOnt 19008 (Ont. Arb. (Ins. Act)) — considered

*State Farm Mutual Insurance Company v. Her Majesty the Queen* (2018), 2018 ONSC 4258, 2018 CarswellOnt 11309, 82 C.C.L.I. (5th) 286 (Ont. S.C.J.) — considered

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43

Generally — referred to

*Insurance Act*, R.S.O. 1990, c. I.8

s. 268 — considered

s. 268(2) — considered

s. 268(2) ¶ 1 ¶ i — considered

s. 268(2) ¶ 1 ¶ ii — considered

**Regulations considered:**

*Insurance Act*, R.S.O. 1990, c. I.8

Generally — referred to

s. 3 — considered

s. 3(1) "insured person" (a) — considered

s. 3(7)(b) — considered

***Kenneth J. Bialkowski Member:***

## **ISSUES - FINANCIAL DEPENDENCY DEPENDENCY FOR CARE APPROPRIATE TIME FRAME FOR ANALYSIS**

1 In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, Laya Smith Knez, with respect to personal injuries sustained in a motor vehicle accident which occurred on March 15, 2017. The issue is determined by a finding as to whether the claimant, an occupant of a vehicle insured by Intact, was principally financially dependent or dependent for care on Lisa Mesic, who was insured by Security National. On the facts herein, such finding involves the selection of the appropriate time frame for the analysis of such dependency.

## **PROCEEDINGS**

2 The matter proceeded on the basis of an Agreed Statement of Facts, Examination Under Oath transcripts, Document Brief, Book of Authorities and written submissions.

## **FACTS**

3 The parties have agreed to the following statement of facts:

1) The following timeline is an accurate representation of events:

November 17, 1999	Laya Smith Knez's Date of Birth
October 31, 2016	Ms. Knez moved from her parent's home to no fixed address
February 7, 2017	Ms. Knez moved in with Lisa Mesic at 145 Baseline Road East, Unit 3, London ON
February 13, 2017	Ms. Knez started back to school
March 1, 2017	Ms. Knez started work at London Youth Advisory Council
March 5, 2017	Ms. Knez's father passed away

March 14, 2017	Ms. Knez and Ms. Mesic had a meeting with Ontario Works
March 15, 2017	<i>Date of Loss</i>
April 5, 2017	Ms. Knez attended therapy at CBI Health
April 17, 2017	Ms. Knez provided a statement to Intact Insurance. Ms. Knez's OCF-1 dated April 7, 2017 was received by Intact.
April 27, 2017	Ms. Knez had a CBI Occupational Therapy Screen Report completed by Katherine Loew
May 8, 2017	Ms. Knez moved to Cornerstone Residence, youth housing facility
April 10, 2018	Ms. Mesic provided a statement to TD Insurance.

## **Background**

- 2) Ms. Knez is single and had never been married prior to the subject accident.
- 3) Ms. Knez was not in a common-law relationship and had never been in one prior to the subject accident.
- 4) At the time of the accident, Ms. Knez did not have a driver's license.
- 5) At the time of the accident, Ms. Knez was not named or listed as a driver on any insurance policy in Ontario.
- 6) Neither of Ms. Knez's parents owned a vehicle or had car insurance at the time of the subject accident.
- 7) Ms. Knez was attending high school at the time of the subject accident.

## **The Motor Vehicle Accident**

- 8) The car accident occurred on March 15, 2017, at approximately 6:00pm, in Woodstock, Ontario.
- 9) The driver of the vehicle was Zack Cruickshank.
- 10) Zack Cruickshank is the son of Tracy Cruickshank, the bearer of the Intact Insurance Policy.
- 11) Ms. Knez was the backseat passenger of a Dodge Durango.
- 12) Mr. Cruickshank lost control of his vehicle while driving. The vehicle spun around, left the road and struck a pole.
- 13) It was a single vehicle accident.

## **Living Situation**

14) On October 31, 2016, Ms. Knez moved out of her parents' home and was "couch surfing" between friends' homes.

a. Transcript of Ms. Laya Smith Knez, Page 11, Questions 72-73

15) Ms. Knez contacted Ms. Mesic on February 7, 2017. Ms. Knez and Ms. Mesic agreed to cohabitation commencing on February 7, 2017 because Ms. Knez wanted to attend high school and needed a fixed address to enroll.

16) Ms. Knez moved in with Ms. Mesic and her partner on February 7, 2017. They were the only residents of the home.

17) For the time period between October 31, 2016 and February 7, 2017, Ms. Knez was homeless with no fixed address.

### **Terms of Cohabitation**

18) Ms. Mesic stated the following were the conditions of cohabitation:

- i. Ms. Knez did not have a key to the house.
- ii. Ms. Knez was never to be alone in the house.
- iii. Ms. Knez was never to be alone with Ms. Mesic's partner in the house or the car.
- iv. Ms. Knez resided in a partially furnished suite in the basement that consisted of a bedroom and bathroom, but no kitchen.
- v. Ms. Knez had access to the basement and main floor only.
- vi. Ms. Knez did not pay rent or household expenses.
- vii. Ms. Knez would keep her area clean.
- viii. Ms. Knez did her own laundry.

19) Ms. Knez stated the following were the conditions of cohabitation:

- a. She did not have a key to the house.
- b. She was never to be alone in the house.
- c. She had to keep her room and bathroom clean.
- d. She had access to the whole house.

20) Ms. Mesic consulted about the cohabitation with the London Police Services. She took steps to ensure that Ms. Knez had "house guest" status, rather than "tenant" status. This meant that Ms. Mesic did not provide a kitchen to Ms. Knez since providing a kitchen would imply she was a tenant. Ms. Mesic wanted to ensure that she had the right to ask Ms. Knez to leave.

Transcript of Ms. Lisa Mesic, Page 20-21, Question 105.

### **Financial Information**

21) The below table is an accurate representation of the financial information provided by Ms. Mesic and Ms. Knez for the time period that they were cohabitating.

<b>Item</b>	<b>Ms. Mesic's EUO Evidence</b>	<b>Reference</b>	<b>Ms. Knez's EUO Evidence</b>	<b>Reference</b>
Student Fees	\$15/term	P14 Q78	No Student Fees	P32 Q217
YMCA	\$50-100	P15 Q 80	-	-
School Uniform	\$500	P26-27 Q140-141	No recollection of cost	P32 Q216
Clothing	\$400	P27 Q143	None	P33 Q221
Spending Money	-	-	\$20	P34 Q225
Condo Fees	\$2,000/year (\$166.67/month)	P37 Q 188	-	-
Property Tax including utilities	\$9,600/year (\$800/month)	P22 Q 115	-	-
Heating	\$100/month	P23 Q116	-	-
Electricity and Water	\$250/month	P23 Q118	-	-
Cable/Internet	\$160/month	P23 Q123	-	-
Home Insurance	\$700/month	P23 Q120	-	-
Car Insurance	\$3,500/year	P25 Q130	-	-
Additional groceries for Laya	Less than \$50/month	P26 Q134	-	-
Lunches	\$10/day	P26 Q137	\$10/day	P33 Q223

### **Ontario Works**

22) Ms. Mesic and Ms. Knez met with Ontario Works together on March 14, 2017, the day prior to the subject accident. The meeting was to determine Ms. Knez's eligibility for Ontario Works. Ms. Mesic advised Ontario Works that her home was "just temporary" for Ms. Knez. Additionally, Ms. Mesic believed that Ontario

Works understood that she "was paying for things that most people would not pay for anybody other than a family member" [sic].

Transcript of Ms. Lisa Mesic, Page 31, Question 167.

23) Ms. Mesic advised Ontario Works that she did not want to charge Ms. Knez rent.

Transcript of Ms. Lisa Mesic, Page 33, Question 169

24) Ms. Mesic left the meeting with Ontario Works confident that Ms. Knez would receive the Ontario Works benefit as Ontario Works understood that Ms. Knez's case was urgent.

Transcript of Ms. Lisa Mesic, Page 32, Question 168.

25) Ontario Works telephoned Ms. Mesic on March 15, 2017, to advise that Ms. Knez would be entitled to benefits. This is the same day as the subject car accident.

26) Ontario Works advised that Ms. Knez would be able to pick up a cheque the day after the subject accident.

### **Relationship**

27) Neither Ms. Mesic nor her partner were ever listed or considered as legal guardians for Ms. Knez.

28) Both Ms. Mesic and Ms. Knez considered their relationship to be friendship rather than parental.

29) Ms. Knez signed a document at her school that advised she made her own decisions in school and that she wouldn't skip school because she could sign herself out.

Transcript of Ms. Laya Smith Knez, Page 16 Questions 103-104.

30) Ms. Mesic was listed as Ms. Knez's emergency contact for school along with Ms. Knez's sister.

31) Following the death of her father on March 5, 2017, Ms. Knez was able to access Ms. Mesic's Employee Assistance Program for counselling, despite not being a family member.

32) Ms. Mesic would drive Ms. Knez to her appointments two to three times each week.

### **Duration**

33) Both Ms. Knez and Ms. Mesic considered their cohabitation to be temporary.

34) Ms. Mesic wanted Ms. Knez to stay at her place to finish the first and second semester of school and find another place thereafter.

Transcript of Lisa Mesic, Page 18, Question 99.

4 In addition to the agreed upon facts above, I was also provided with a joint Document brief, statements from Ms. Mesic and Ms. Knez, as well as Examination Under Oath transcripts of both.

5 By way of summary and at risk of oversimplification, the evidence before me reveals a 17 year-old who left her parents' home on October 31, 2016 with no evidence of a planned return. She also stopped attending school at that time. For approximately three months the claimant 'couch surfed' at the homes of friends, until moving in with Ms. Mesic (the mother of a friend of the claimant and an insured of Security National) on February 7, 2017 so the claimant could have a fixed address needed for a return to school. Both the claimant and Ms. Knez agreed that the situation was temporary. Ms. Mesic wanted the claimant to stay at her place to finish the first and second semester of school in order to graduate and find another place thereafter. Approximately five weeks after moving into Ms. Mesic's home and having returned to school, she was involved in the subject motor vehicle accident on March 15, 2017. On the same day, the claimant was approved for Ontario Works benefits to supplement the \$80 weekly income she was making while working part-time at the London Youth Advisory Counsel. On April 8, 2017, the claimant found housing through a youth housing facility, moving in on May 8, 2017. The rent for the youth housing facility was covered by Ontario Works.

## **ANALYSIS AND FINDINGS**

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

7 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.*

8 Section 3(1) of the Statutory Accident Benefits Schedule — Accidents On or After September 1, 2010, Ontario Regulation 34/10 defines an "insured person" as follows:

(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.

9 Section 3 (7)(b) of the Statutory Accident Benefits Schedule — Accidents On or After September 1, 2010, Ontario Regulation 34/10, as amended, reads as follows:

a person is dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse

10 Therefore, if it is determined that the claimant was principally dependent for financial support or care on Lisa Mesic, then her insurer, Security National, would stand in priority to the insurer of the vehicle in which the claimant was merely an occupant, on the basis of the priority hierarchy set out in s. 268 above.

### ***Time frame for analysis***

11 The Applicant Intact has maintained that the appropriate timeframe to examine the Claimant's dependency on Ms. Mesic is February 7, 2017, the date she was invited and moved into Ms. Mesic's home, to March 15, 2017, the date of the accident. The Respondent Security National maintained that a more appropriate time frame for consideration would be the 12 month period pre-accident or the period since leaving her parents, namely October 31, 2016 to the date of the accident, March 15, 2017.

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

13 General guidance is found In *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.*, [2006] O.J. No. 4518 (Ont. C.A.), 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.

14 Further guidance is found in the decision of Arbitrator Robinson in *Saskatchewan Government Insurance and Lombard Canada Inc., Re* [2004 CarswellOnt 11275 (Ont. Arb. (Ins. Act))] (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.

15 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.

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

17 In a subsequent appeal decision, Justice Sanfillipo in *State Farm Mutual Insurance Company v. Her Majesty the Queen*, 2018 ONSC 4258 (Ont. S.C.J.), overturned an Arbitrator's decision to use a six month time frame rather than a three month time frame,

emphasizing that there need not be an element of permanency and emphasizing that the relationship must fairly reflect the status of the parties "at the time of the accident".

18 I am bound by the guidance provided by these appellate decisions and must therefore find that true nature of the relationship "at the time of the accident " is best reflected by the short period of time that the claimant was residing with Lisa Mesic, even though both the claimant and Lisa Mesic made it clear that the relationship was temporary. At the time of the accident, the claimant's support relationship had shifted from homelessness to then living with Lisa Mesic. This new arrangement was "the new normal" at the time of the accident. It is therefore the time frame from February 7, 2017 to the date of the accident, March 15, 2017 that ought be considered in light of the guidance provided in the appellate decisions aforesaid.

### ***Dependency for care***

19 While the word "care" is used in s.3 of the *SABS*, it is not defined. There is but limited jurisprudence on the dependency for care issue. General principles though have emerged.

20 In the July 2011 decision in *Echelon General Insurance Co. v. State Farm Mutual Automobile Insurance Co.* [2011 CarswellOnt 13197 (Ont. Arb.)], Arbitrator Novick found that

*"the assessment of dependency for care is more of a qualitative analysis that should not take financial considerations into account. It requires a consideration of the Claimant's physical, social and emotional needs, and the social and emotional support he or she receives from the person in question".*

[emphasis added]

21 In that case, the 32 year-old claimant was living with his mother and brother. He suffered from schizophrenia and was developmentally delayed. He was receiving ODSP benefits. He was participating in a supported employment program, but the records showed the fact that he was abusing alcohol or drugs and being exploited by others. While the claimant was able to dress and bathe himself, it was his mother who prepared his meals, did most of his laundry and housekeeping chores. She purchased his medication and made sure the claimant took it. She drove the claimant to medical appointments, often making decisions as to his medical care. She had complete control over his finances. She provided a level of supervision critical to him given his poor judgment. Arbitrator Novick concluded on these facts that the claimant was dependent on his mother for care, given the supervision and sense of security she provided.

22 In reaching her decision, Arbitrator Novick found relevant the decision of *Lloyd's of London Insurance Co. and Wawanesa Mutual Insurance Co., Re* [2004 CarswellOnt 11268 (Ont. Arb. (Ins. Act))] (Arbitrator Jones, released March 2004). In *Lloyds*, the arbitrator considered the amount of care provided to the Claimant, who suffered from Parkinson's disease, by a Mr. Hales, a longtime friend and fellow Anglican minister who had moved into the Claimant's condominium six years prior to the accident. The Claimant also received approximately ten hours of care each week from a home care agency. The Claimant in that case was seventy-three years old at the time of the accident and had been suffering from Parkinson's disease for almost 15 years. The degree of care he required varied each day. He was able to dress himself, but often required assistance with bathing. Mr. Hales estimated that he provided care to his friend on average between two and four hours per day. He prepared most of his meals, did the grocery shopping and occasionally helped to feed him if he was having a bad day. He occasionally assisted him with bathing, and regularly went for walks with him. He also helped him review bills and paperwork, and took him to the bank.

23 Arbitrator Jones determined that the Claimant could not have lived on his own, and that he was principally dependent upon Mr. Hales for care. He found that Mr. Hales provided physical care, as well as "emotional support and help" to the Claimant to the extent that he should be considered a "dependent" under the *Schedule*.

24 Wawanesa appealed the decision. Justice Rady upheld the arbitrator's findings, stating:

...Arbitrator Jones correctly concluded that the assessment of dependency for care cannot be determined on the same basis as financial dependency. As he said, "it is not capable of simple mathematical calculation". The issue requires both a quantitative and qualitative analysis. Qualitative factors will include social and emotional support. One of the most significant qualitative factors influencing Arbitrator Jones' decision was the fact that [the Claimant] could not have lived on his own without significant support. Aside from the physical support from Mr. Hales and the other service providers, Mr. Hales provided social and emotional support. Mr. Hales undoubtedly provided ...[the Claimant] with companionship and a sense of security that someone was close by in the event help was needed...there was a sufficient evidentiary basis to conclude that Mr. Hales provided significant physical support in terms of meal preparation, dressing, housekeeping and for personal errands such as banking. In my view, it is the cumulative effect of both the quantitative or qualitative factors that justify Arbitrator Jones' decision.

25 In *Co-operators General Insurance Co. v. TD Home & Auto Insurance Co.*, 2014 ONSC 1604 (Ont. S.C.J.), Justice Brown found that a 17-year old grade 12 claimant who had moved out of his abusive father's home and had been living with TD's insureds (CA and TA) for four months at the time of the accident, was not principally dependent on care.

26 The facts of the case above include a claimant who was not employed outside of school at the time of the accident and who was paying for room and board in the amount of \$340 from Ontario Works that he received. The evidence further suggested the following:

*[The claimant] had his own bedroom and bathroom at the home of CA and TA, use of a television, computer, cable and Internet. He did his own laundry and cleaned his room. He had breakfast and dinner at the home of CA and TA, and lunch at school. He was provided food vouchers and bus passes by the school. CA drove him to school in the morning and he came home by bus in the evening. He participated in some social and family events with CA and TA.*

*CA and TA had no children [and] worked full-time ....*

*They had previously taken in others in need. CA was a drug counselor and sometimes gave [the claimant] advice about what to do in certain situations, peer pressure, insight into avoiding drugs and addiction, although [the claimant] said he had no trouble in this regard. [CA] considered [the claimant] a paying tenant, although the evidence indicates that they included him in some social and familial activities. He returned to the home of CA and TA following the accident ...*

*The evidence was that he intended to stay at the home of CA and TA until he went to college or university.*

27 Justice Brown agreed with the Arbitrator that the claimant was not principally dependent on CA and TA for care. Justice Brown found that "*the claimant did not lack the ability to attend, physically or emotionally, to his own needs*".

28 In the case before me, the Applicant Intact submitted that the claimant was dependent for care on Lisa Mesic. Intact submitted that no one was more in need of care that "creates a sense of security" than the claimant relying on the "sense of security" findings of Arbitrator Novick in *Echelon* (supra). In my view, the facts in *Echelon* are clearly distinguishable from the facts here. In *Echelon*, the claimant had schizophrenia and was developmentally delayed. He required considerable supervision and support. The facts before me are more similar to those in *Co-operators* (supra) with the claimant

being an individual with the "ability to attend, physically and emotionally, to her own needs."

29 There is no evidence that the claimant Ms. Knez was not able to dress or bathe herself. She did her own laundry, prepared her own meals if necessary, she was responsible for keeping her own room and bathroom clean, and signed a document at school which stated she was her own decision maker. Also, Ms. Knez confirmed she considered Ms. Mesic more of a "friend" versus a "parent". Ms. Mesic was not Ms. Knez's legal guardian. Even though Ms. Knez stated that she considered Ms. Mesic a friend, there is no evidence that she asked Ms. Mesic advice regarding school, social or personal issues. There is no evidence that Ms. Knez had difficulty using public transportation to get around. In fact, she used the bus as transportation when she left her parents' home and Ontario Works gave her an allowance for a bus pass when she started receiving the benefit. There is no evidence that Ms. Knez was unable to take care of her own finances or that she exercised poor judgement. Ms. Knez was a good student at school and wanted to re-attend to finish her schooling. There was no evidence that she could not live independently if she had the financial resources to do so. On these facts, I find that the claimant was *not* dependent on Lisa Mesic for care.

### ***Principal financial dependency***

30 In terms of traditional legal principles, criteria for determining dependency for the purposes of the SABS were established by the Court of Appeal in *Miller v. Safeco Insurance Co. of America* (1984), 48 O.R. (2d) 451 (Ont. H.C.) aff'd (1985), 50 O.R. (2d) 797 (Ont. C.A.). Consideration should be given to criteria as follows in determining dependency for the purposes of the *Schedule*:

- i. The amount of dependency;
- ii. The duration of the dependency;
- iii. The financial needs of the claimant;
- iv. The ability of the claimant to be self-supporting.

31 In *Federation Insurance Co. of Canada and Liberty Mutual Insurance Co., Re* [1999 CarswellOnt 7813 (Ont. Arb. (Ins. Act))] (Arbitrator Lee Samis, May 7, 1999), it was determined that a person's capacity to earn must be taken into account in measuring dependency. A person can only be principally dependent for financial support if the cost of meeting their needs is more than twice their resources. This has come to be known as the 51% rule.

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

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

34 Arbitrator Cooper referred to decisions of Arbitrator Samis in *Coseco Insurance Co. and ING Insurance Co. of Canada, Re* [2010 CarswellOnt 18808 (Ont. Arb. (Ins. Act))] (Award July 21, 2010) and *St. Paul Travelers and York Fire & Casualty Insurance Co., Re* [2011 CarswellOnt 19008 (Ont. Arb. (Ins. Act))] (Award, dated August 11, 2011). In these decisions, Arbitrator Samis explained the intrinsic difficulties of trying to ascertain the needs of the claimant by attributing to the claimant a share of household expenditures. The allocated portion of the household expenditures may be greater than the claimant's needs or lesser than the claimant's actual needs. Arbitrator Samis compared this exercise to looking at the general standard of living in household - the exercise we were directed not to follow by *Miller v. Safeco Insurance Co. of America* appeal. Instead, Arbitrator Samis suggested we should follow a "*more objective valuation of the costs of meeting someone's needs*". The history of family setting may assist in calculating the costs of meeting a person's needs, but is not determinative.

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

36 Arbitrator Cooper's decision in *Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada* was appealed to Superior Court on the ground that Arbitrator Cooper did not use the correct methodology. On appeal as reported at 2015 ONSC 4020 (Ont. S.C.J.), Justice Myers found that mathematical calculation or application of the 51% rule in relation to needs/means is an important factor, but it is not the only factor. Justice Myers dismissed the appeal after concluding that dividing or allocating estimated gross household spending to determine one's needs is not a "*particularly meaningful proxy*" and "*is no better than looking at government statistic to determine the cost of housing in a locale*".

37 As jurisprudence currently stands, the "mathematical" and "LICO" approaches are being applied by arbitrators of priority disputes involving dependency issues.

38 The Applicant Intact retained the services of Davis Martindale, Chartered Professional Accountants, to determine the Claimant's financial dependency at the time of the motor vehicle accident. In the report, dated January 8, 2019, Jessy Hawly concluded that the Claimant was principally dependent on Ms. Mesic for financial support at the time of the accident using both the 51% approach and the LICO approach. Applying the 51% approach, the report concluded:

*Given the above and Ms. Smith Knez's minimal income from LYAC (ie. only 5 hours per week), she did not provide for the majority of her financial needs and we find that Lisa and Colin provided for more than 50% of Ms. Smith Knez's financial needs at the time of the accident. Therefore, we conclude that Ms. Smith Knez's would be considered principally dependent on Lisa and Colin for financial support at the time of the accident.*

39 The base figure of \$160.00 bi-weekly earnings was obtained from the Claimant's statement regarding her part-time employment at London Youth Advisory Counsel. Using LICO statistics, the report stated:

*Based on our review of the 2016 Low Income Cut-offs (1992 base) after tax, with a population between 100,000 and 499,999 inhabitants, as published by Statistics Canada, we noted to live independently, Ms. Smith Knez would incur costs based on the average of a 1 person home, or \$17,485.*

40 The report took into account the Claimant's part-time income as well her Ontario Works benefit of \$330.00 per month for basic needs (which she was not yet receiving at the time of the accident) and still concluded she did not have sufficient income to pay for at least 50% of her expenses to live independently. The report considered the



Claimant's highest potential income for the relevant time period, despite that she had not yet received payment from Ontario Works:

*Therefore, Ms. Smith Knez was receiving, at most, \$330 per month from Ontario Works commencing on the date of the accident. Accordingly, we have calculated Ms. Smith Knez's annualized earnings at the date of the accident to be \$8,120 (\$330 per month from Ontario Works ? 12 months) = (\$160 bi-weekly from LYAC ? 26 bi-weekly pay periods). Ms. Smith's annualized income at the date of the accident represents 46% of the LICO statistic.*

41 Security National did not obtain a responding report but essentially has suggested that consideration must be given to the fact that the claimant had available a \$400 monthly shelter allowance if not living with Lisa Mesic.

42 Security National has submitted that even if the short time frame is used, the evidence still supports a finding that the claimant was not principally financially dependent. Security National submitted that Intact's accountant found that Ms. Knez was accepted for Ontario Works on the day of the accident and received \$330.00 per month for her basic needs, which did not include a shelter allowance. What the accountant failed to consider, according to Security National, is the nuance in the case. The only reason Ms. Knez received only \$330.00 from Ontario Works was due to Ms. Mesic's advice to Ontario Works that she would not be charging Ms. Knez rent. Security National maintained that had Ms. Mesic charged rent, Ontario Works would provide a shelter allowance to Ms. Knez. Ms. Mesic did not charge Ms. Knez rent because Ms. Mesic wanted to ensure Ms. Knez had "houseguest" status as opposed to "tenant" and therefore could be asked to leave.

43 The Respondent stated that Ms. Knez's income from Ontario Works in effect would be \$330.00 per month for basic needs, plus a minimum of \$400.00 for shelter, for a yearly income amount of \$8,760.00. The Ontario Works benefit added to her bi-weekly earnings from the youth employment agency (\$160 bi-weekly, a total of \$4,160 per year) would result in a total annualized income of \$12,960. As such, Ms. Knez's earnings would represent 74% of the LICO statistic (\$17,485) referenced in Ms. Hawly's report. As such, she would have more than sufficient income to pay for at least 50% of the expenses that she would incur to live independently.

44 The Respondent therefore maintained that when the nuanced facts of this case are considered, Ms. Knez had ample income to support herself. She was not principally financially dependent on Ms. Mesic because she had the ability to provide more than 51% of her own needs. The flaw in the argument advanced by Security National is that the claimant was not receiving the \$400 shelter allowance and would not be so entitled

as long as she was living with Lisa Mesic under the relationship which existed, the "new normal", at the time of the accident. The Agreed Statement of Facts at paragraph 34 makes it clear that Ms. Mesic wanted Ms. Knez to stay at her place to finish the first and second semester of school and find another place thereafter. The nature of the relationship "at the time of the accident" therefore did not place the claimant in a position that she would be entitled to a shelter allowance. The guidance of the appellate decisions in *Intact* (supra) and *State Farm* (supra) makes it clear that the trier of fact cannot speculate as to what might happen in the future. At the time of the accident the claimant was not receiving a housing allowance and as long as she was staying rent-free with Ms. Mesic she would not be entitled to one.

45 Furthermore, I believe it would be inappropriate in the case of a teenager going to school full-time to say that he or she had capacity to live independently because of the availability of Ontario Works income supplement and shelter allowance. If that were the case, a teenager going to school full-time and living with his parents would be said *not* to be financially dependent on his parents because of the availability of those benefits. Clearly a teenager in full time attendance at school and living with his or her parents would be considered financially dependent on his or her parents in most circumstances.

46 In fairness to Security National, I have also considered what have been often referred to as the "visitor cases" as they involve temporary periods of habitation:

*Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2011 CarswellOnt 19150 (Ont. Arb. (Ins. Act))

*Progressive Casualty Insurance Co. of Canada v. Zurich Insurance Co.*, 1996 CarswellOnt 6344 (Ont. Arb.)

*Lewandowska v. GAN Canada*, 1996 CarswellOnt 5107 (Ont. Gen. Div.)

47 In each of these cases, the claimant was only temporarily in Canada although for periods of up to several months. In each case, the trier of fact found the claimant *not* dependent on the person they were visiting on the basis that the claimant was capable of living independently with their stay in Canada being discretionary. In each case, the claimant either had sufficient personal resources or family support on their return home. There was no 'need' for the support provided. In the case before me I am satisfied that there was a need for the support provided by Ms. Mesic. The claimant did not have a home to which to return. It would be unreasonable to expect her to remain homeless with endless "couch surfing". It was reasonable for the claimant to return to school to finish her grade 12 and graduate from high school. To return to school she required a fixed address. That became a reality when she moved in with Ms. Mesic. This enabled the claimant to return to school. On the particular facts of the case before me, there was

a need for the support provided by Ms. Mesic distinguishing the case before me from the 'visitor cases' to which I have referred. Although the habitation with Ms. Mesic was only about five weeks, it represented the true nature of the relationship 'at the time of the accident' based on the particular needs of this claimant during this relatively short period of time.

48 Accordingly, one must look at the claimant's actual resources and the value of the support provided by Ms. Mesic "at the time of the accident", being the time frame aforesaid. As confirmed by Intact's accountant, Lisa Mesic was providing 54% of the claimant's LICO needs and was therefore the claimant was principally dependent for financial support on Security National's insured given the relationship which existed at the time of the accident. As a result, Security National would stand in priority as the claimant would be considered "an insured" and qualify under s. 268(2)(i), the highest level in the ladder of priority set out in s. 268(2) of the *Insurance Act*, rather than merely "an occupant" in s. 268(2)(ii), a lower level in the ladder of priority set out in s. 268(2).

## **ORDER**

49 I hereby order that:

1. Security National is the priority insurer;
2. Security National reimburse Intact with respect to the payments made to or on behalf of the claimant and subject to reimbursement together with interest calculated pursuant to the *Courts of Justice Act*;
3. Security National pay to Intact the legal costs of the arbitration on a partial indemnity basis;
4. Security National pay the Arbitrator's account.