

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

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

INTACT INSURANCE

Applicant

- and -

ALLSTATE INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL

Douglas A. Wallace – Wallace, Smith LLP
Lawyer for the Applicant, Intact Insurance

Frank A. Benedetto, Todd McCarthy, J.C. Rioux – Flaherty, Dow, Elliot & McCarthy LLP
Lawyers for the Respondent, Allstate Insurance Company of Canada

ISSUE

The issue in this priority dispute initiated pursuant to the provisions of the *Insurance Act* R.S.O. 1990 c.I.8 is that of dependency.

On August 21, 2010, Paula Chartrand (“Paula”), Destiny Chartrand (“Destiny”) and Athena Restoule (“Athena”) sustained injuries in a motor vehicle accident (“accident”). Destiny and Athena were both rendered quadriplegic as a result. Paula’s injuries were relatively minor.

Paula, Destiny and Athena were the occupants of a 2004 Chevrolet Impala owned and operated by Rhonda Lucuk and insured under a standard Ontario Automobile Policy (“O.A.P. 1”) issued by Intact Insurance Company (“Intact”). They applied for and received accident benefits from Intact.

At the time of the accident, Paula, Destiny and Athena resided at the home of Kyle Houghton (“Kyle”) located at 314 Collingwood Street in Sarnia, Ontario. Kyle owned a 1978 Chevrolet CR2500 and a 2000 Chrysler Intrepid, both insured under an O.A.P. 1 issued by Allstate Insurance Company of Canada (“Allstate”).

The central question in this priority dispute is which insurer is liable to pay accident benefits to Paula, Destiny and Athena as a result of injuries sustained in the accident. This requires a determination of whether Paula, Destiny and Athena were principally dependant for financial support upon Kyle at the time of the accident. If they were, Allstate is liable to pay benefits. If they were not, Intact is liable. Subsumed within this larger issue is the appropriate time period to consider financial dependency.

PROCEEDINGS

This arbitration proceeded in Toronto on August 15 and August 20, 2014. Document Briefs and Examination under Oath transcripts were filed as evidence. A total of five witnesses gave oral evidence. This was followed by both oral and written submissions.

APPLICABLE LEGISLATION

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

Since the claimants were occupants 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.*

Section 2 (1) of the Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, Ontario Regulation 403/96, as amended, defines an “insured person” as follows:

- (a) *“The named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant*
 - (i) *is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile.”*

Section 2 (6) of the Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, Ontario Regulation 403/96, as amended, reads as follows:

“For the purposes of this regulation, a person is a dependant of another person if the person is principally dependant for financial support or care on the other person or the other person’s spouse.”

AGREED STATEMENT OF FACTS

Insurance and the Dispute

1. On August 21, 2010, Paula Chartrand (“Paula”), Destiny Chartrand (“Destiny”) and Athena Restoule (“Athena”) sustained injuries in a motor vehicle accident (“accident”).
2. At the time of the accident, Paula, Destiny and Athena were the occupants of a 2004 Chevrolet Impala owned and operated by Rhonda Lucuk and insured under a standard Ontario Automobile Policy (“O.A.P. 1”) issued by Intact Insurance Company (“Intact”).
3. At the time of the accident, Paula, Destiny and Athena had been residing at the home of Kyle Houghton (“Kyle”) located at 314 Collingwood Street in Sarnia, Ontario, since the July 1, 2010 long weekend. Kyle owned a 1978 Chevrolet CR2500 and a 2000 Chrysler Intrepid, both insured under an O.A.P. 1 issued by Allstate Insurance Company of Canada (“Allstate”).
4. Ida Lavigne is Paula’s mother. At the time of the accident, Ida owned a 2000 Chrysler 300 which was insured under an O.A.P. 1 issued by Allstate.
5. After the accident, Paula, Destiny and Athena each submitted an Application for Accident Benefits (OCF-1) dated September 16, 2010 to Intact. Intact subsequently paid statutory accident benefits to or on behalf of Paula, Destiny and Athena.
6. Intact sent to Allstate a Notice to Applicant of Dispute Between Insurers dated November 19, 2010 pertaining to Paula, Destiny, and Athena related to the Kyle Houghton insurance policy Allstate.
7. Intact sent to Allstate a Notice to Applicant of Dispute Between Insurers dated December 8, 2010 pertaining to Destiny and Athena related to the Ida Lavigne insurance policy with Allstate.

The Relationships

8. Ida Lavigne was born on December 16, 1953. At the time of the accident, Ida lived in an apartment in Sudbury, Ontario with her daughter, Arlene Lavigne.
9. Paula Chartrand-Restoule was born on August 27, 1983. Paula is the mother of Destiny Lee Chartrand, born April 30, 2000. William Hulan is Destiny's natural father. William has never been involved in Destiny's life and paid no child support.
10. Yvan Hendrik Edward Restoule Junior was born on July 15, 1979. He and Paula met in Sudbury when Paula was pregnant with Destiny. They started a relationship. Yvan treated Destiny like his own child from the day she was born.
11. Paula and Yvan started a relationship in 2000 and started living together in 2000.
12. Athena Restoule was born on July 13, 2003. Paula and Yvan are her biological parents.
13. Paula and Yvan were married on July 14, 2008.
14. Paula, Yvan, Destiny and Athena lived together in a rent-controlled 3-bedroom apartment located at 180 King Street in Sudbury, Ontario until about January of 2010 when Paula started staying with Kyle in Sarnia, returning from time to time to live with Yvan and the girls in Sudbury.
15. Destiny and Athena went to the same school in Sudbury until the end of June 2010.
16. For years leading up to the accident, Paula, Yvan and Kyle had substance addictions.

Chronology and Income Leading Up To The Accident

Paula

17. In July of 2009, Paula starting working at Colson Night Club in Sudbury as an exotic dancer.

18. In around January 2010, Paula continued her exotic dancing career at the Triple Play Sports Bar in Sarnia where she met Kyle. Thereafter they started dating.
19. While Paula was away, Destiny and Athena remained in Sudbury, living with Yvan. When Paula returned from time to time to Sudbury, she stayed with Yvan, Destiny and Athena.
20. At all material times, Paula received a Child Tax Benefit in the amount of approximately \$743.72 per month.

Yvan

21. From July 1, 2009 through August 21, 2010 Yvan worked for Archambault Roofing in Sudbury. Aside from his work for Archambault Roofing, Yvan also did odd jobs after hours for Fiella Roofing and Over The Top Roofing.
22. In 2010, Yvan reported T4 earnings of \$7,270 and Employment Insurance Benefits of \$7,171.
23. Shortly before the accident, Yvan paid Paula approximately \$800 for child support.

Kyle

24. At all material times, Kyle worked at One Stop Automotive in Sarnia.
25. For part of the summer of 2010, beginning on or about July 1, 2010, Destiny and Athena stayed with Paula as guests at Kyle's house in Sarnia.
26. Kyle has a daughter, Julia, born in 1998. In the year prior to the accident, Julia split her time living with Kyle and with her mother. There is apparently court Order granting 50/50 custody. In the summer of 2010, Julia spent more time living with Kyle because he lives close to the beach.

Destiny and Athena

27. On or about July 1, 2010, Paula drove Paula, Destiny and Athena to a location just south of Parry Sound, Ontario to meet Kyle. Kyle met Paula, Destiny and Athena on

the highway. Some of the girls' personal belongings were transferred to Kyle's vehicle. Kyle then drove Paula, Destiny and Athena to his home in Sarnia.

The Accident

28. On August 21, 2010, Rhonda Lucuk's 2004 Chevrolet Impala was involved in an accident on Highway 402 while returning to Sarnia.
29. Destiny and Athena are catastrophically impaired as a result of the accident.

AGREED STATEMENT OF POST ACCIDENT FACTS

(RULED ADMISSIBLE SUBJECT TO THE WEIGHT, IF ANY, TO BE GIVEN TO THEM BY THE ARBITRATOR)

Post Accident Events

1. The accident on August 21, 2010 occurred on Highway 402 between London and Sarnia. Kyle went to the scene immediately afterwards.
2. Destiny and Athena were treated at London Health Sciences Centre immediately following the accident.
3. Yvan stayed with girls at the Hospital. Kyle apparently visited them at the Hospital daily after work.
4. On August 27, 2010, Yvan posted a Happy Birthday message for Paula on Facebook. At that time, Paula was staying in London where the children were in hospital.
5. In November 2010 Destiny and Athena were admitted to Bloorview Rehabilitation Hospital. Paula and Yvan stayed in a hotel funded by insurance while they were there. According to Kyle, he and his daughter, Julia, apparently travelled to Toronto every weekend visit the girls and to learn how to look after them for an unknown period of time.
6. In November 2010, Kyle said Paula proposed marriage to Kyle while they were both drunk. Kyle gave her a ring for Christmas. Paula sold the ring some time before March 27, 2011.
7. On December 23, 2010 the children were released into

Yvan's custody. Yvan took them to a suite at the Sheraton Centre for Christmas. The hospital would not release the girls into Paula's care as she had not completed the training to take care of them. Paula went to Sarnia in late December 2010.

8. On December 25, 2010, Paula left the girls in Toronto and returned to Sarnia with Kyle.
9. In January 2011, Paula stole from Kyle. He believed that she was stealing, hooking and dancing. On February 3, 2011, Paula posted on Facebook that she is "on the road again".
10. Yvan remained with Destiny and Athena throughout January 2011 in London, Ontario.
11. According to Kyle, he and Paula reunited on February 14, 2011 in Sarnia. Paula disappeared again on February 25, 2011.
12. On February 23, 2011, Yvan posted on his Facebook that he "is off again back to Toronto for a few days then with Athena back to London for good...Happiest dad ever!".
13. On March 3, 2011, Destiny and Athena were discharged from Bloorview Rehabilitation Hospital to the care of Yvan in London, Ontario. The three of them moved into an apartment together.
14. On March 27, 2011, Kyle picked up Paula at a bus depot in London. There was an altercation between Kyle and Paula and Kyle subsequently plead guilty to assault causing bodily harm and was sentenced to jail for 8 months. Kyle has not seen Paula since the incident of March 27, 2011.
15. At the end of March 2011, Paula moved in with Yvan and the girls. On April 14, 2011, Paula posted on Facebook that she was married to Yvan Restoule and updated her current city to London, Ontario. At that time, Yvan also posted on Facebook that he was married to Paula Restoule.
16. Paula's stripping stage name is Sexy Lexi, Sexy Lexis, and/or Sexy Lexis/Lexi from the North and she is listed on stripclublist.com. At some point after the accident she worked at Triple Play in Sudbury.
17. In April 2011 Paula, through her stripping name "Sexy

Lexi", was listed on a Niagara Falls listing for stripclublist.com.

18. On May 16, 2011, Athena and Destiny were removed from their parents' care by the Children's Aid Society ("CAS") due to Yvan and Paula's alcohol abuse. The girls became Society Wards of the CAS and were moved to the Sunbeam Lodge in Kitchener where they lived in the care of the CAS until July 2, 2013.
19. On October 1, 2011 Paula and Yvan moved into an apartment together in London, Ontario.
20. At some point, Paula left and moved to Western Canada. Paula's whereabouts are unknown.
21. Yvan was required to participate in a rehabilitation program and obtain employment before he was permitted reapply for custody of the girls. Yvan became Destiny and Athena's legal guardian in early July 2013.
22. Kyle is currently in jail due to weapons and drug offences.

EVIDENCE

Paula Chartrand and Yvan Restoule met in 2000 while Paula was a pregnant prostitute. The evidence indicates that he has treated Destiny, born April 30, 2000 as his own child from the day she was born. They started living together in 2000 and had their own child Athena on July 13, 2003.

The family unit endured despite Paula's prostitution, severe depression, addictions, periods of separation, periods of moving throughout Sudbury, placement by the Children's Aid Society of Destiny from 2001 to 2003 and both girls' placement again when Athena was about a year and a half old. There was no CAS involvement from March 2007 to the accident in August 2010.

Paula and Yvan married on July 14, 2008 and continued to live in Sudbury with the girls. Their last residence since July 2009 was at 180 King Street, Sudbury in a rent controlled apartment. Paula received welfare and Yvan worked seasonally as a roofer and collected EI.

In July of 2009, Paula starting working at Coulson Night Club in Sudbury as an exotic dancer on Fridays, Saturdays, and sometimes Thursdays. Yvan did not like this and their relationship seems to have deteriorated as a result. Now being a married woman, he did not like her working as an exotic dancer "shaking her tata's" as she had done prior to the marriage. Yvan started sleeping on the couch. In his evidence, Yvan provided some insight as to what was going on at that time. He believed that she was not satisfied living the "quiet housewife life". When she started stripping again at Coulson it started her "downhill spiral". She was arrested for prostitution in the spring of 2010. She was told she could make more money in Sarnia so she went.

In January or February 2010, Paula began stripping at the Triple Play Sports Bar in Sarnia. She met Kyle Houghton in Sarnia and the two began to date. Perhaps not surprisingly, Yvan and Paula's relationship deteriorated further. Nevertheless, expressions of love between Yvan and Paula continued to be made on Facebook in April, May, June and July 2010. Yvan knew what Paula was doing in Sarnia, and yet Yvan posted on Facebook that he is going to miss his wife, and hoped she has fun while in Sarnia. Less than one month before the accident, Yvan expressed on Facebook on July 25, 2010 that he loved Paula and wanted her to bring his children back. He testified at the hearing that he did not like her line of work, her addictions and her depression he was prepared to stick with her. He testified that he had no intention of divorcing her.

While working in Sarnia Paula met Kyle Houghton. Kyle was employed full time at One Stop Automotive in Sarnia. He had worked as a bouncer and as a manager of strip clubs for about 14 years previously. Shortly after their first meeting, Paula started staying at Kyle's house in Sarnia. Yvan testified that between February and June of 2010, Paula was spending three weeks in Sarnia each month, and only one week in Sudbury. In June 2010, Paula decided to leave Yvan and to move to Sarnia with the girls. She told Yvan that she had an apartment for she and the girls. She did not tell him about Kyle Houghton.

At the same time Paula was telling Kyle that she wanted to leave her ex-husband and move the girls to Sarnia. The plan, according to Kyle, was that the three of them would move in with him, the girls would be enrolled in school in September at which time Paula would look for a legitimate job.

In early July, Paula asked her mother Ida to drive her and the girls from Sudbury to Parry Sound to meet Kyle. Ida agreed, and drove Paula, Destiny and Athena to a gas station in Parry Sound. Kyle met them at the gas station, transferred their belongings to his vehicle, which included their clothes, toys, blankets and sheets, and he brought them back to Sarnia.

Kyle's recollection of when this occurred changed at the arbitration from his prior testimony. He thought the move took place later during the month of July 2010. The vast majority of the witness evidence, including the Agreed Statement of Facts, confirms that the move took place on or shortly after the July 1, 2010 long weekend. I will use the move date as being July 1, 2010 for my analysis.

On July 25, 2010, about a month before the motor vehicle accident, Yvan expressed on Facebook that he loved Paula and wanted her to bring his children back.

Yvan testified that he thought her move to Sudbury was going to be permanent. He was told he would have to relocate or would not get to see his kids. Kyle's evidence was that he hoped the move was permanent but really had no idea. As he stated in his evidence at the arbitration hearing "you hope for the best and expect the worst". Ida testified that she believed the move to be permanent in her testimony on the arbitration but on her Examination Under Oath testified that she had no idea as to how long they (Paula and the children) would be gone from Sudbury. We have no evidence from Paula as to what her intentions really were. Paula did not testify as a witness.

In Sarnia, Kyle's daughter Julia, then age 11, lived with him part-time, but more often during the summer months. Athena slept in her own room while Destiny and Julia shared bunk beds that Kyle had acquired for them.

The evidence would indicate that there was some discussion which took place in the summer of 2010 between Kyle and Paula about getting married. At the hearing he stated that it was general discussion and not serious.

Up until the time of the accident, Paula had still not told Yvan about Kyle, only that she had an apartment in Sarnia. Kyle made it clear in his evidence that he would not have tolerated his relationship with Paula if he knew she was doing extra sexual acts at the strip club where she was working or prostituted, He would not have tolerated his relationship with Paula if he knew that she continued to have a relationship with Yvan. During the early stages and before the July 2010 move Paula had told Kyle that she was getting a divorce and that when she returned to Sudbury from time to time she was staying with her mother when she was really staying with Yvan and the children.

On August 18, 2010, Paula's friend, Rhonda Lucuk, drove, Paula, Destiny and Athena to Canada's Wonderland. She then drove them to Sudbury to visit Ida and to retrieve the rest of their belongings. On August 21, 2010, Rhonda Lucuk's 2004 Chevrolet Impala was involved in an accident on Highway 402 while returning to Sarnia. Destiny and Athena sustained catastrophic injuries.

At the time of the accident, the Lucuk vehicle contained the rest of the girls' clothes including winter clothes, toys, personal belongings and small household decorating items.

Finances

In the present case, Kyle testified that he was employed full-time as an automotive technician, working 40 hours per week and earning between \$18 and \$20 per hour during the relevant period. If he earned \$18 per hour, this calculates to \$37,440 per year or \$3,120 per month. If he earned \$20 per hour, it calculates to \$41,600 per year or \$3,467 per month.

Despite this evidence as to income it is clear from the evidence that Kyle was under some financial strain. He testified that he purchased his house and had planned his finances based on the two incomes that were available during his relationship with his prior girlfriend. That relationship ended in 2008. When he started living on his own he started having problems meeting his financial obligations. The documentary evidence shows that he was not paying his utility accounts in full as they came in. When Paula and the children arrived the household expenses increased with little contribution by Paula. This only increased the financial strain. Kyle admitted in cross-examination that unless Paula got a job in September he was not making enough money to support them

Paula received a Child Tax Benefit in the amount of \$743.72 per month. Until it was terminated on June 1, 2010, she also received welfare in the amount of \$961.00 per month. Paula also worked from time to time as an exotic dancer and possibly as a prostitute. We have no idea what she earned from these endeavours. The evidence is consistent from both Yvan and Kyle, however, that Paula did not contribute in any significant way to their household expenses, at least after Paula effectively moved to Sarnia in January or February 2010. There is no contrary evidence.

For his part, Yvan testified that he worked seasonally as a roofer. His 2010 income tax return discloses income of \$7,270 as well as EI Benefits of \$7,171. He testified that he worked 50 to 60 hours per week and earned \$22.00 per hour when he was working. It was clear that he did not make a lot of money. After the girls moved out he could no longer stay in the rent-

controlled apartment so he was couch surfing at friends' houses within a few weeks of them moving out.

The evidence overall would indicate that each of Yvan, Paula and Kyle suffered from addictions. In Yvan and Paula's case, it was alcohol and drugs. For Kyle, it was alcohol. According to Yvan, Paula's addictions consumed much of her income. At the arbitration, Kyle acknowledged that Paula used any kind of drug she could get her hands on, that she had addiction issues, and was often high on drugs.

Paula was not contributing to Kyle's household expenses, other than occasionally purchasing groceries, alcohol or a dinner out. At the arbitration, Kyle explained that Paula was not paying any of his bills.

At the arbitration, Kyle estimated that in July and August, he and Paula were consuming \$400 per week in alcohol alone. While in the first few weekends of July, Paula had money to spend at the bar and on alcohol, thereafter Kyle estimated he paid for 75% of the alcohol.

Once Paula, Destiny and Athena moved to Sarnia, Kyle paid for nearly all of the household expenses. The only evidence available from Paula is contained in two statements. In the first handwritten statement dated December 1, 2010, Paula stated that Kyle "was financially supporting" herself and the girls. She also stated that she "was financially dependent on Kyle Houghton since February 2010." In the second statement dated October 7, 2011, which Paula refused to sign but agreed was accurate, Paula acknowledged that Kyle paid for the mortgage, utilities, groceries and all of the family expenses. She stated she used part of her child tax credit to take the girls out from time to time.

Kyle provided a statement on April 10, 2011. He stated that he and Paula had agreed that she would spend July and August looking after the children and that he would financially support them. While Paula used some of her child tax benefit for occasional entertainment for the girls, Kyle stated that he paid for all the groceries, home expenses, utilities, insurance and vehicle expenses. This is consistent with his oral evidence. Kyle testified at his Examination Under Oath that Paula spent some of her money to buy groceries occasionally, but she did not pay for any of the mortgage, utilities or vehicle expenses. At the arbitration Kyle recalled spending \$100 per week on groceries after Paula and the girls moved in.

Accounting Evidence

Chris Gray and Bruce Webster of PriceWaterhouseCoopers LLP ("PWC") prepared an accounting report to assist counsel determine who, if anyone, Paula, Destiny and Athena were principally dependent upon for financial support in July and August of 2010. Based on the statements provided, the examination under oath evidence and the household expenses estimated by Kyle, PWC concluded that Kyle provided for 66% of Destiny and Athena's needs and 84.8% of Paula's needs for the period between July 1, 2010 and August 21, 2010.

Mr. Gray prepared an addendum dependency analysis chart (Exhibit "E"), revising Kyle's expenses based on his evidence at the arbitration. The revised dependency analysis chart indicates that Kyle funded 64% of claimant's financial needs during the 7 week period pre-accident.

For his part, Daniel Edwards of Crowe Soberman, retained on behalf of Allstate, confirmed that from his own analysis PWC's revised chart accurately set out the expense figures during

the 7 week period before the accident and that he had no reason to disagree with the figures used. He challenged the income component as calculated by Mr. Gray.

At risk of oversimplification, Mr. Edwards testified that if Kyle's take home income were only \$30,000 annually, which he believed it to be, then Kyle would have been contributing less than half of the claimants needs if one considered the 7 week period pre-accident as being appropriate. This opinion was premised on the child tax credit being treated as income and spent on the children.. He did testify that before Paula moved to Sarnia in July of 2010 it was most likely the Government was the primary source of income for the claimants with the balance coming from a combination of Yvan and Paula with a modest amount from the grandmother Ida

ANALYSIS AND FINDINGS

The Applicant Intact takes the position that the claimants were "principally dependant for financial support" on Allstate's insured Kyle Houghton. If so found, the claimants would be "insured persons" under Allstate's policy of insurance and Allstate would stand in priority to Intact and therefore responsible for the payment of statutory accident benefits to the claimants. Allstate maintains that the claimants were not "principally dependant for financial support" on Allstate's insured Kyle Houghton so that the insurer of the vehicle in which the claimants were passengers, namely Intact, would be the priority insurer.

Dependency is defined in the s. 2(6) of the *Statutory Accident Benefits Schedule O. Reg 403/96* as:

"For the purpose of this Regulation, a person is a dependent of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse."

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

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

- (a) The 51% principle from *Liberty Mutual Insurance v. Federation Insurance* should be applied. It is not sufficient that the claimant simply be dependent, but rather must be principally dependent. If the claimant had sufficient resources to fund 51% of their financial needs then the person could not be dependent upon others.
- (b) The time frame to be looked at may encompass days, weeks or even years. One does not simply look at a "snap shot" of the actual day of the Accident to determine the issue of dependency.
- (c) The factors from *Miller v. Safeco* should be considered:
 - (i) the duration of the dependency

- (ii) the amount of dependency
 - (iii) the financial or other needs of the alleged dependent
 - (iv) the ability of the alleged dependent to be self-supporting.
- (d) Each case must be factually driven.
- (e) The ability to be self-supporting must be taken into account when measuring dependency.

I am satisfied on the evidence overall that for the 7 week period pre-accident Paula and her children were principally financially dependent on Kyle Houghton. I prefer the evidence of the accountant Chris Gray to that of Dan Edwards on the mathematical calculation of financial dependency as I am not persuaded that the money being received by Paula from the government by way of Child Tax Benefit was being spent on the children. Paula was not contributing in any meaningful way to the household expenses and there is no evidence of any significant purchases for the children. Mr Edwards in his calculations had credited the full amount of the government benefit as income in her hands for the benefit of the children. I am of the view that Paula was going through a difficult time and that the vast majority of monies coming into her hands, including the government benefit, was being used to fuel her addictions. In light of this, it was Kyle upon whom the three claimants were principally financially dependent upon during the 7 weeks pre-accident.

I am also satisfied on the evidence that if one were to analyze the one year period pre-accident Paula and her children were not principally dependent on Kyle Houghton. Both accountants agree on that.

In the circumstances, the result in this case is totally dependent on the appropriate time frame to use for the calculation of financial dependency. There is considerable jurisprudence on the issue.

A common thread in all of such jurisprudence is that the determination of the appropriate time frame must be based on the facts of each particular case.

General guidance is found In *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.* (supra), where the Ontario Court of Appeal held that a “snapshot” approach on the day of the accident is inappropriate. Rather, the time frame chosen must be one that provides a fair picture of the relationship at the time of the accident. Only by looking at the relationship as a whole, over a reasonable period of time, is the arbitrator able to determine the nature of the relationship at the time of the accident.

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

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

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

In *ICBC v. Federated* (arbitrator Samis - July 3, 2009) the 27 year-old claimant was involved in a motor vehicle accident on June 17, 2004. At the time of the accident he had been living in British Columbia for about four weeks. It was being argued that he was principally dependent for financial support on his father at the time of the accident. His father was living in Timmins. The claimant had graduated from high school in Timmins in June 2000. He worked various jobs before moving to Alberta then onto British Columbia in 2002. He worked in British Columbia. He returned to Timmins in December 2003. He worked from February to April 2004 before injuring his ankle and having to take time from work. In the spring of 2004 he returned to British Columbia to live with his girlfriend and her mother. He was there about four weeks when the accident occurred. He worked three of those weeks for All Seasons Industries earning \$1,345. In determining the appropriate time frame to use arbitrator Samis writes at page 9:

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

Arbitrator Samis essentially concluded that the 4 week time frame was the appropriate one to use (representing a person in British Columbia, perhaps with the intention of shortly returning home and take on other employment) and that periods prior to that were transitional. In the final analysis he concluded that the claimant was capable of providing more than 50% of his own needs and not dependent on his father.

In *TD Home & Auto Insurance Company v. Co-operators General Insurance Company* (arbitrator Samis - February 26, 2013) the arbitrator found a period of just over 3 months to be the appropriate time frame. The case involved a 17 year old grade 12 student whose situation at home became untenable. All involved were supportive of a change in residency. With the assistance of Children’s Aid he was placed in the home of a couple to whom the claimant paid some rent out of the Ontario Student Welfare Benefit that he was receiving. It was accepted as a given that the situation with his parents was one that simply could not continue. He essentially concluded the significant change in his life was more than transitional and reflected a situation of permanence.

In *AXA Insurance Company v. Royal Insurance Company* (arbitrator Robinson - May 28, 1997) the arbitrator was urged to accept a 2 month timeframe as appropriate. During this

period the 21 year old claimant was unemployed, his EI had run out and he was living with his mother. However, for the previous 5 or 6 years following high school the claimant had been living independently and working various jobs and collecting EI. The arbitrator came to the conclusion that the living situation with his mother was only temporary. Arbitrator Robinson writes at page 7:

“The ‘snapshot approach’ has been found to be inappropriate in these situations. Arbitrators have considered a few months to several years when considering the matter of dependency (3). This is a realistic approach and one that I adopt in this case. I find that Mr. Chettle had been on his own and financially independent since leaving his mother’s home in 1989 or 1990. A return to his mother’s home, on a temporary basis, in these circumstances did not place him in a financially dependent position.”

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

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

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

In *Co-operators General Insurance Company v. Western Assurance Company* (Arbitrator Bialkowski - September 19, 2012) I was asked to consider a seven week period pre-dating a motor vehicle accident as the appropriate timeframe. The case involved a 17 year-old claimant who for years had lived with his grandparents in Owen Sound. He was involved in a motor vehicle accident on August 8, 2009. In May 2009 he was kicked out of school for truancy. On June 19, 2009 he left his grandparents. He worked part time at A&W making less than \$240 per week and did some occasional grass cutting where he earning a couple of hundred dollars annually. Once leaving the home of his grandparents, he lived from friend to friend but was homeless at the time of the accident. I did not find the seven week period pre-accident to be the appropriate time frame. I wrote at page 9 of my decision:

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

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

The accounting expert testifying on behalf of Intact chose the seven week timeframe prior to the accident for his analysis of financial dependency as he assumed the situation between Paula and Kyle was permanent and would have continued. He admitted that typically he would use a 12 month time frame for the analysis of financial dependency unless there was a significant change in the meantime. He admitted that if a 12 month timeframe were used he would not have been principally financially dependent on Kyle. If I were satisfied that the situation with Kyle was likely permanent and likely to have continued I would have no trouble finding that the three claimants were principally dependant for financial support on Kyle Houghton at he time of the accident. I am not so satisfied.

Kyle testified that if he knew that Paula was doing extras while working at the strip club or prostituting he would not have maintained the relationship. Kyle testified that if he had determined she was an addict he would not have maintained the relationship. Kyle testified that if he knew Paula was staying with Yvan, which she was, when visiting Sudbury he would not have tolerated it. Paula told him that she was staying with her mother. Kyle testified that his financial situation was such after the three claimants had moved in that it would have been necessary for Paula to find a clean job in September and contribute to the household expenses for the relationship to continue. Paula told Kyle she was getting a divorce from

Yvan. There is no evidence that any steps had been so taken. Kyle, in his examination in chief, when asked whether his relationship with Paula was going to be permanent or a temporary thing, answered:

“You hope it is permanent. You have no idea. You hope for the best and expect the worst.”

It strikes me on the basis of this statement that he had his doubts as to whether the relationship was likely to be permanent. Paula did not testify so we have no evidence from her as to whether she expected the relationship to be permanent.

It is clear to me that Paula was a troubled woman. I am satisfied she was an addict and that eventually Kyle would find out. I believe that this addiction would have led her ultimately to doing extras or prostituting, as she had before, to maintain her habits. I am not satisfied that Paula would have severed her ties with Yvan completely. I am not satisfied that she would have found a clean job and contributed to the household expenses as Kyle required to maintain the household given the increased expenses of having three additional people in the house. Simply stated I am not satisfied on the evidence that the situation with Kyle was permanent and likely to continue. The impression I am left with is that this was a convenient “fling” as in *Co-operators General Insurance Company v. Western Assurance Company* (supra) that was unlikely to last. It may well have been a “fling” arising from Paula’s “downward spiral” fuelled by sex, drugs and alcohol. Yvan Restoule provided in his testimony persuasive insight as to Paula’s state of mind and motivation. He indicated that Paula was not “satisfied living the quiet housewife life” in Sudbury. When she started stripping again in Sudbury in June or July 2009 it started her “downward spiral”. She was arrested for prostitution in Sudbury in the spring of 2010. She was told she could make more money in Sarnia and went. This is what led her to Sarnia. Yvan testified that Paula urged him to relocate to Sarnia so he could see the girls and he planned to do so. Kyle had no knowledge of this. Less than a month pre-accident Yvan expressed on Facebook that he loved Paula and wanted her to bring his children back. I am fully satisfied that he was still in love with her and wanted her to return. I am not satisfied that Paula’s relationship had ended permanently.

On the evidence before me Intact has failed to satisfy the onus upon it to establish the relationship between Kyle Houghton and Paula Chartrand was on the balance of probability likely to be permanent. As a result I find that a seven week time frame for the analysis of financial dependency is inappropriate. Accordingly, one must look at the “big picture”. What we have here is a case complicated by relationships involving people on the fringe of society, stripping, prostitution, addiction, depression, criminality and CAS involvement. There is no hallmark of stability. The closest thing to stability is Paula’s on and off relationship (mainly on) with Yvan Restoule. This would encompass a period of several years and certainly the better part of the 12 month period pre-accident. In my view this better represents the “big picture” and true nature of the relationship. Paula and Yvan had separated before but Paula returned. During the 12 month period pre-accident that I have chosen as the appropriate timeframe for analysis the three claimants were not principally dependent for financial support on Kyle.

There is jurisprudence to support the proposition that post-accident information can assist in the selection of the appropriate time frame for the analysis of financial dependency:

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

Gore Mutual Insurance Company v. Co-Operators General Insurance Company, 2008 CanLII 46914 (S.C)

Economical Insurance Group v. State Farm Insurance Company (Arbitrator Bialkowski - January 13, 2014)

Although the post-accident facts may support the finding that the relationship between Kyle and Paula would not have lasted, there is sufficient evidence before me without having to rely on any post-accident events to reach the conclusion that in all likelihood the relationship was not one of permanence. I fully accept the proposition that one cannot consider post-accident events that occur as a result of the injuries sustained by the claimants. I am fully satisfied on the pre-accident facts to conclude that the relationship between Kyle Houghton and the claimants was not likely to continue in the long term.

In the final analysis I find that it would be inappropriate to use the seven week period pre-accident, when the claimants were principally dependent on Kyle Houghton for financial support, as in my view the relationship was not one of permanence. Using the traditional 12 month period pre-accident the claimants clearly were not principally financially dependent on Kyle Houghton for financial support. In the circumstances, Intact as insurer of the vehicle in which the claimants were passengers is the priority insurer by reason of s,268(2)(ii) of the *Insurance Act* R.S.O.1990 c.8.

ORDER

On the findings aforesaid I hereby order that the application herein is dismissed. I order that Intact pay Allstate it's costs of this arbitration proceeding on a partial indemnity basis. I order that Intact pay the arbitrator's costs.

DATED at TORONTO this 16th)
day of October, 2014.)

KENNETH J. BIALKOWSKI
Arbitrator