IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8 AND REGULATION 283/95 AS AMENDED BY REGULATION 38/10

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 :

ROYAL AND SUN ALLIANCE INSURANCE COMPANY

Applicant

- and -

ECHELON GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Eric Grossman – Zarek, Taylor, Grossman, Hanrahan LLP
Lawyer for the Applicant, Royal and Sun Alliance Insurance Company
(hereinafter referred to as "Royal")

Chris Blom – Miller Thomson LLP
Lawyer for the Respondent, Echelon General Insurance Company
(hereinafter referred to as "Echelon")

ISSUE

The sole issue before me in this Insurance Act priority dispute is that of "dependency". I must determine whether the 14 year old claimant Elizabeth Tisseur was at the time of the motor vehicle accident "dependant", as defined in the applicable legislation, upon her father Christopher Maxwell. If I were to so find, the insurer of Christopher Maxwell, Echelon, would be the priority insurer and responsible for paying statutory accident benefits to the claimant Elizabeth Tisseur.

PROCEEDINGS

This matter proceeded on the basis of an Agreed Statement of Facts, a Document Brief including transcripts, Written Submissions and oral argument presented on April 29, 2013.

AGREED FACTS

This claim arises from a motor vehicle accident that took place on November 1, 2010.

Ms. Elizabeth Tisseur ("Elizabeth") was struck as a pedestrian by a truck driven by Mr. Steve McCombie (insured by Royal and Sun Alliance Insurance Company at the time of loss under policy number WAH03441699).

Royal and Sun Alliance Insurance Company has continued to responded to Elizabeth's claim for Accident Benefits during the course of this dispute between insurers, having paid a total of approximately $348,196.49 in benefits.

Elizabeth was born on October 11, 1996 and was fourteen years old at the time of the accident, attending Eastwood High School, Kitchener, Ontario.

There is no dispute as between the insurers for the purposes of this proceeding that Elizabeth has required and will continue to require significant rehabilitation as a result of the injuries she sustained in the motor vehicle accident.

Mr. Christopher Neil Maxwell (born July 15, 1978, "Mr. Maxwell") is Elizabeth's natural father. Ms. Mellinda Tisseur (born January 7, 1980, "Ms. Tisseur") is Elizabeth's natural mother.

Mr. Maxwell and Ms. Tisseur were common law partners from June 1999 until their separation in March 2001. There has been no period of reconciliation since 2001.

There is no formal custody, separation or child support agreement as between Mr. Maxwell and Ms. Tisseur stemming from their separation in 2001. Ms. Tisseur never pursued any claim for support either formally or informally.

At the time of Elizabeth's accident, Mr. Maxwell was a full time employee of GMF Transport, earning approximately $64,000 per year as a transport truck driver.

At the time of Elizabeth's accident, Mr. Maxwell carried a valid policy of motor vehicle insurance through Echelon General Insurance Company under policy number A20049222.

At the time of the accident, Ms. Tisseur was employed at Preston Medical Centre as a Medical Lab Technician located at 506 King St. E., Kitchener. Ms. Tisseur worked six and a half hours per day (thirty two and a half hours per week), making $17 per hour ($28,730 per annum).

Ms. Tisseur and Elizabeth lived at 124 Beverley Street in Cambridge.

At the time of the accident, Ms. Tisseur did not have any policy of motor vehicle insurance.

At the time of the accident, Elizabeth stayed with Mr. Maxwell at his home located at 221 Huron Street, in the Town of Huron, from after school Friday to Sunday evening every other weekend. Elizabeth would also spend the entire month of July, additional days during the holidays and two to three additional weekends with Mr. Maxwell during the year.

Also residing with Mr. Maxwell at the time of Elizabeth's accident were his girlfriend, Ms. Shannon Embling and their biological daughter, Anastasia Maxwell (born July 30, 2008).

During the remainder of the year, Elizabeth resided with Ms. Tisseur.

Ms. Tissuer and Mr. Maxwell each provided for Elizabeth's food, care and entertainment expenses while she was residing with the respective parent.

At the time of the accident, Ms. Tisseur provided for the expenses relating to Elizabeth's schooling, inclusive of required books or lessons.

At the time of the accident, Ms. Tisseur provided any required homework assistance required by Elizabeth.

Prior to the accident, Mr. Maxwell had specifically listed Elizabeth as a dependant with respect to his medical benefits plan through his employer, from GMF Transport.

APPLICABLE LEGISLATION

A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the Insurance Act, R.S.O. 1990, c.I.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

As Elizabeth Tisseur was a pedestrian at the time of this motor vehicle accident, the priority rules with respect to "non-occupants" are applicable. They are set out in Section 268(2) of the Insurance Act, which is set out as follows:

In respect of non-occupants,

> **i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured;**
>
> **ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant;**
>
> iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose;
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

The bolded sections above would make the insurer of the striking vehicle responsible for the payment of statutory accident benefits, provided the claimant was not an insured under some other policy. The Applicant Royal takes the position that the claimant was dependent on her father and therefore an insured under his policy with Echelon.

Subsection 268(5) of the Insurance Act, R.S.O. 1990, c.I.8 provides that:

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

Subsection 2(6) of the Statutory Accident Benefits Schedule - Accidents On or After November 1, 1996 provides that:

> (6) For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse.

ANALYSIS AND FINDINGS

Royal submits that the 14 year-old claimant herein was dependent on her father, Mr. Maxwell, for financial support or care. Accordingly, if such a finding were made, then the claimant would be an "insured person" under Mr. Maxwell's policy of insurance with Echelon and Echelon would become the priority insurer.

Royal conceded in oral argument that the onus of proof rests with the Applicant Royal to prove such dependency.

These priority disputes often involve the issue of "dependency". The caselaw which has evolved has established that in order to be principally dependent for financial support or care, one must receive more than 50% of one's financial needs or care from such person. This has often been referred to as the "50 + 1% " rule. This principle has been detailed in several decisions, including the following:

1. J.B. v. Liberty Mutual Insurance Company, O.I.C. A96-000008;
2. Hau v. State Farm Mutual Automobile Insurance Company, F.S.C.O. A97-001159;
3. Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada, [2000] O.J. No. 1234 (C.A.);
4. State Farm v. American Home Assurance and York Fire (Arbitrator Guy Jones, November 2002);
5. Allstate v. ING (Arbitrator Lee Samis, August 18, 2011);
6. Security National v. AXA (Arbitrator William McCorriston, February 15, 2011);
7. Singh v. State Farm Mutual Automobile Insurance Company (Arbitrator Naylor, June 4, 1993).

The first position taken by Royal is that Mr. Maxwell had legal support obligations, which if met, would make the claimant principally dependent upon her father for financial support. Royal points out that Mr. Maxwell and Ms. Tisseur were in a common-law relationship prior to separating in March 2001. The Family Law Act, R.S.O. 1990, c.F.3, places an obligation on Mr. Maxwell to provide child support payments to Ms. Tisseur, as outlined in the Child Support Guidelines Ontario Regulation 391/97. I have no difficulty accepting this legal obligation.

Royal relies on the decision of McInytre (Litigation Guardian of) v. West Wawanosh Mutual Insurance Co. [1994] O.J. No.652 to support the proposition that this legal obligation, although payments were not being made or sought, would nevertheless make the claimant dependent on her father in law.

In response to Royal's position, Echelon claims that there exists three cases, as outlined below, where the Court reached the opposite conclusion finding that the Court must look at the actual payments that were being made to determine dependency.

In Catherwood v. Young Estate (1995) 27 O.R. (3d) 63, Wade Catherwood died in a car accident in 1990. He was insured by Pilot Insurance Company ("Pilot"). Wade and Jacqueline Catherwood were married but separated in 1981. Thereafter, Wade paid financial support in accordance with two court orders to his spouse and his two children. At the time of the accident Jacqueline earned approximately $25,000 per annum. The total of the support payments paid by Wade to her on account of the spousal and child support obligations amounted to no more than 12.5% of her income.

Jacqueline and the children were entitled to the death benefits if they were principally financially dependant upon Wade. Justice Ferguson observed that the test of principal financial dependency in Singh v. State Farm Mutual Automobile Insurance Co. (Arbitrator Naylor – OIC A-001525) provides as follows:

> *"...an individual must chiefly or for the most part derive his/her financial support from another person in order to be principally dependant for financial support on that person."*

Counsel for Jacqueline and the children submitted that the obligation on the part of Wade to provide financial support under the *Family Law Act* leads to the conclusion that the children were principally financially dependant for financial support upon him. Justice Ferguson observed as follows:

> *"The fact that the Schedule may have incorporated some definitions in the family law statutes does not mean the policy from those statutes should be applied in the Schedule.I think this is another example of attempting to rewrite the insurance policy in an effort to incorporate social policy found elsewhere. I think the only reasonable construction of the policy is that one is to look at the facts of dependency (in terms of what is actually provided) and not solely to legal obligation."*

The decision of Szpotek v. Co-operators General Insurance Co. (1996) I.L.R. I-3332 is another case where the Court drew a distinction between the obligation of a parent to support a child and principal dependency. The biological father of the Plaintiff was killed in a car accident. He sought the payment of the death benefit. The benefit was only payable if the child was principally dependant upon his father at the time of the accident. The father had never paid any support. The child was supported by his mother. Justice Soubliere concluded that, while the Plaintiff may have been entitled to an order for support from his biological father, he certainly was not principally dependant upon him.

Esquimaux v. Pafco Insurance Co. (1996) CanLII 7983 is a case which involved a claim on behalf of the infant children of Patricia Esquimaux. She was killed in a car accident. As a result of a history of drug and alcohol abuse she was not able to support her sons. At the time of the accident the children were wards of the Family and Children's Services of St.

Thomas and Elgin. The Plaintiffs sought the payment of the death benefit. Justice Valin of the Ontario Supreme Court concluded that the Plaintiffs were not principally financially dependant upon the deceased, notwithstanding that a court could make an order that she pay support pursuant to the provisions of the *Child and Family Services Act.*

I prefer the legal reasoning in Catherwood, Szpotek and Esquimaux to that of McIntyre. I am of the view that dependency ought be determined on the actual support or care being provided to the claimant and not what the individual may have been legally obligated to provide. Furthermore, I find that the McIntyre decision is distinguishable. Unlike the present case, a claim had been made for support and the claimant was in need. In the case before me, support had never been sought by Ms. Tisseur despite the passage of approximately nine years. Furthermore, the claimant does not appear to have been in need. She was well provided for, as outlined in the agreed facts above both during the time she spent with her mother and her father.

In addition, it should be noted that there is no evidence before me as to what Mr. Maxwell's support obligations would have been. There is no evidence before me that such support payments, plus that provided by Mr. Maxwell in the approximately 100 days per year where the claimant was residing with him, would exceed 50% of the claimant's needs overall. Since the onus of proof rests with the Applicant Royal, it's claim in this regard must fail.

Secondly, Royal takes the position that aside from any legal financial obligation the claimant was actually principally dependent for financial support on both Mr. Maxwell and Ms. Tisseur. Royal relies on the decision of McDonald v. State Farm [1993] O.I.C.D., that determined that a person need not be dependant on only one individual. In the Macdonald case, it was held that each child was "dependent " on each parent on the basis of a definition of "dependent" similar to the one before me. State Farm submitted that a person could only be "principally dependant for financial support" on one person at any time. The Commission rejected this argument finding that if the children were principally dependant on either of their parents for financial support, or perhaps both of them jointly, then they are dependants of both parents. This approach was actually endorsed by the Director of Arbitrations on appeal by State Farm.

The McDonald case involved a claim for death benefits for three children arising out of the death of both parents in a motor vehicle accident. Each child would have been entitled to a $10,0000 death benefit if found to be dependent on the parent. It should be noted that the fathers income was significantly larger than the income of the mother. The definition of dependent at that time was similar to the definition that we are dealing with in the present case. The legislation at that time defined "dependent" as follows:

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

The court allowed a $10,000 death benefit for the loss of each parent for a total of $20,000 to each child on the basis that each child met the definition for the loss of each parent.

Royal argues that applying the McDonald principles to the present facts situation would result in a finding that the claimant was dependent on both Mr. Maxwell and Ms. Tisseur. This

would make the claimant an "insured person" under the Echelon policy making it the priority insurer.

I find the McDonald decision distinguishable from the fact situation before me on the same basis as Arbitrator Baltman did in her decision in Hau v. State Farm Mutual Automobile Insurance Company, F.S.C.O. A97-001159. The principles in McDonald only apply if the parents were "spouses" at the time of the accident

In the Hau case, a father was making a death benefit claim as a result of the death of his son in a motor vehicle accident. The parents were divorced three years before the motor vehicle accident. The parents shared all costs of their son equally. The son was a university student living with his mother. The death benefit was denied in part because Mr Hau did not meet the definition of "dependent" outlined above as Mr. and Mrs. Hau were not "spouses" at the time of the accident. The decision in McDonald was based on the fact that the parents were "spouses" at the time of the accident This was not the situation in Hau where the parents were divorced or the present case where the parents of the claimant were separated for quite a long time. They had been separated for nine years. In fact, Mr. Maxwell was living with another woman and the child of their relationship at the time of the accident. Because they were separated and not married, Mr. Maxwell and Ms. Tisseur cannot be treated as a single source upon whom the claimant was dependent. The legislation allows a child to consider his or her parents as a single source only if they were "spouses" at the time of the accident. Mr. Maxwell and Ms Tisseur were not spouses at the time of the accident.

In reaching my decision that Mr. Maxwell and Ms. Tisseur were not "spouses" at the time of the accident I have considered the caselaw with respect to the issue of how the Courts have viewed common law situations in an insurance claim context where the couple were no longer living together at the time of the accident In Catherwood (supra) Justice Ferguson completes a thorough analysis of the spousal issue in the context of an insurance claim and concludes that their must be a temporal connection to qualify as a "spouse". In other words, in order to qualify as a spouse in a common law situation, the parties must be in the relationship at the time the family unit is affected by the accident. Justice Ferguson goes so far as to require that they be co-habiting at the time of the accident for them to be considered common law spouses. Justice Ferguson agrees with the reasoning of Arbitrator Mackintosh in McLean v. Wellington Insurance Co. (1995) O.I.C.D. No. 18 who wrote:

> *"Part IV of the Insurance Act (Automobile Insurance) creates a scheme of insurance to protect individuals from the consequences of motor vehicle accidents. The scheme is triggered by an accident and is intended to relate to the situation which exists at the time of the accident. When the definition of "spouse" is placed within the context of the definition of "insured person", it is more likely that the Legislature simply intended to extend the same insurance coverage and benefits enjoyed by married spouses, to the immediate family of not married "spouses" who can establish that they share a relationship of some standing and permanence, at the time that the family unit is affected by an accident."*

The Applicant Royal has not provided me with any caselaw supportive of a different conclusion as to how our Courts have interpreted the definition of "spouse" in a common law situation where the couple was not co-habiting at the time of the accident. This distinction between "spouses" and "non-spouses" outlined above makes sense, given that after a separation, most households divide into two, resulting in separate sources of income and

support. In the present fact situation the legislation and caselaw therefore require me to complete the comparative analysis and apply the "50 + 1%" test outlined above.

On the evidence before me, I find that the claimant was not principally dependent for financial support or principally dependent for care upon Mr. Maxwell. Royal has failed to satisfy the 50 + 1% rule as outlined above. The reality of the situation is that the claimant spent 100 days of the year with Mr. Maxwell during which he provided financial support and care, whereas the claimant spent 265 days of the year with her mother, where she provided the financial support and care. Any contributions aside from these were relatively insignificant. The fact that the claimant was listed on her father's medical benefits plan at work as a dependent was considered by me but the evidence would indicate that any payments on behalf of the claimant were minimal. On a common sense approach the claimant was principally dependent for financial support and care on her mother as she simply spent significantly more time with her mother than her father. There was no need for expert accounting evidence to reach this conclusion.

In reaching the decision that I have, I have considered that the legislative intent of the Statutory Accident Benefits Schedule is to broaden insurance coverage to include family members as persons insured under the policy. However at the same time, I am obligated in law to apply the legislation as it reads and as interpreted in the evolving caselaw. In this case, Royal has been unable to prove that the claimant was 51% dependent upon Mr. Maxwell for either financial support or care.

ORDER

I hereby order that this Application be dismissed. I order that Royal pay Echelon its costs of this proceeding on a partial indemnity basis. I order that Royal pay the Arbitrator's costs.

DATED at TORONTO this 14th)

day of May, 2013.)

KENNETH J. BIALKOWSKI
Arbitrator