IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, as amended 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 :

ECHELON GENERAL INSURANCE COMPANY

Applicant

- and -

UNIFUND ASSURANCE

Respondent

DECISION

COUNSEL

Jamie Pollack and Erica Lewin – Laxton, Glass LLP
Counsel for the Applicant, Echelon General Insurance Company
(hereinafter referred to as "Echelon")

Katherine Kolnhofer and Sarah Deol – Bell, Temple LLP
Counsel for the Respondent, Unifund Assurance
(hereinafter referred to as "Unifund")

ISSUE – FINANCIAL DEPENDENCY

[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 Tabban Soleimani-Deilamani, with respect to personal injuries sustained in a motor vehicle accident which occurred on July 26, 2012. The issue before me is whether the claimant was principally financially dependent on her father, who was insured by Unifund. At the time of the accident, the claimant was 23 years of age and had been living independently for a couple of months while completing her fourth year at OCAD University. For the most part, she had lived with her father and had worked part-time throughout high school and university.

PROCEEDINGS

[2] The Arbitration hearing proceeded on May 10, 2018 in Toronto, on the basis of the oral evidence of the accountants retained by each of the parties and Document Briefs which included Examination Under Oath transcripts of both the claimant and her father, together with all available financial documents such as bank records, credit card records and tax returns. Written submissions followed in June and July 2018.

FACTS

[3] On July 26, 2012, Tabban Soleimani-Deilamani ("the claimant") was a passenger in a vehicle owned and operated by Brandon Martin. The vehicle was reportedly t-boned on its passenger side by a third party vehicle, while travelling on Centre Street near its intersection with Highway 7, in Vaughan, Ontario. The claimant sustained a traumatic brain injury, chest trauma, fractured ribs, a C2 fracture, a pelvic fracture, and a right clavicle fracture. The claimant has been accepted as having sustained a catastrophic impairment as a result of the subject accident.

[4] The owner and operator of the vehicle, Mr. Martin, was insured by Echelon General Insurance Company ("the Applicant") at the time of the accident, pursuant to Policy No. 20317225.

[5] At the time of the accident, the claimant was not a named insured or a listed driver on any policy of insurance. She did not have a driver's license. The claimant submitted an Application for Accident Benefits (OCF-1 form) to the Applicant Echelon on August 7, 2012. Echelon has paid statutory accident benefits to the claimant and now seeks reimbursement on the basis that Unifund stands in priority. The claimant's father was insured by Unifund Assurance ("the Respondent") at the time of the accident, pursuant to Policy No. 5089AG0765. Echelon claims that the claimant was principally financially dependent on her father Sassan Soleimani at the time of the accident and therefore an "insured" under the Unifund policy, making Unifund the priority insurer as per the priority hierarchy scheme set out in s. 268(2) of the *Insurance Act*.

[6] Mr. Soleimani met with a representative of Crawford & Company, independent adjusters, and provided a signed statement shortly after the accident, on August 16, 2012. Mr. Soleimani stated that he considered his daughter to be dependent on him for financial support and care at the time of the accident.

THE CLAIMANT: PARENTAL RELATIONSHIP

[7] Mr. Soleimani divorced the claimant's mother in 2003. While the claimant's mother had previously been ordered to pay child support, Mr. Soleimani testified that he received

only a small amount of what had been ordered and that he forgave a large portion of the money she had owed.

[8] This is corroborated by a Child Support Order dated on December 6, 2010, which terminated child support and fixed the amount owed at $0. This Order was issued more than one year prior to the accident.

[9] Mr. Soleimani testified that he provided for the bulk of the claimant's expenses, food, room, and board. The claimant testified that her mother remarried, but is currently divorced for a second time. She testified that her mother was not employed.

[10] There is no evidence that the claimant's mother provided any significant financial support to the claimant in the years leading up to the accident.

THE CLAIMANT: PRE-ACCIDENT SOCIAL AND EMPLOYMENT HISTORY

(a) The Claimant's Testimony

[11] The claimant is currently 29 years old (date of birth: May 2, 1989). At the date of the accident, she was 23 years old. She was born in Iran and immigrated to Canada in February of 1999. She is now a Canadian citizen. She is single, has never been married, and has no children or dependants.

[12] The claimant graduated from high school in 2008. She commenced a four year Bachelor of Design program at OCAD University in the Fall of 2008. She majored in Illustration and she testified that it was her intention to become a freelance illustrator. At the time of the accident she was in her final year, attending school during the summer and scheduled to graduate in October 2012, some two to three months post-accident. Her education was fully funded by OSAP. Her father did not contribute to such costs.

[13] The claimant was unable to provide an exact timeline of her pre-accident employment history. However, it appears that she was employed throughout her first three years of studies at OCAD on a part-time basis. The claimant testified that she worked part-time as a cashier at Ikea until her second or third year of University. She then began employment at Aveda, a retail cosmetic store, for approximately two months. After leaving Aveda, the claimant testified that she was unemployed for approximately two weeks before starting a retail position at Aritzia. She testified that she worked in this capacity for eight to nine months, prior to starting as a clerk at the Humber River Hospital in the summer of 2011. At the Humber River Hospital, the claimant worked part-time. The claimant was eventually terminated in or around January of 2012. This was approximately six months prior to the subject accident. The claimant testified that after being terminated from Humber River Hospital, her only other pre-accident employment was two weeks in a retail position, which she quit. The claimant testified that she was not working in the months leading up to the

accident because of the demands from her schooling. She indicated that she had a lot to do to complete her grad exhibit and focus on her thesis. Overall though, the evidence indicates that for the most part, the claimant worked part-time through high school and university.

[14] The claimant's T4 earnings in 2011 totalled $11,875.

[15] The claimant also testified that had the accident not occurred, it was her intention after she graduated to continue to reside independently in a downtown apartment. She testified "well, the sublet was going to be done in August so I was planning to just move out, stay downtown." The sublet was going to expire August 31, 2012. When her father was asked how long she was planning to stay downtown, he also replied "to my understanding, forever. I mean she planned to – I mean move by her – I mean live by herself and move out."

[16] When asked how she intended to finance her lifestyle, she testified that she would be looking for jobs. As noted above, when speaking about her employment at Humber River Hospital, the claimant testified that she wanted to get more experience because she knew coming out of school that she needed to make money to support her freelance career.

(b) Mr. Soleimani's Testimony

[17] Mr. Soleimani testified that the claimant had worked part-time up until being let go from the Humber River Hospital. He further testified that he started paying her an allowance after she left Humber River Hospital. As noted above, this would have been approximately six months pre-accident.

(c) Documentation

[18] The claimant's bank records indicate that she was receiving payments from Aritiza from January to July of 2011, a period of approximately seven months. She began receiving payments from the Humber River Hospital in July of 2011, with the last payment being received in February of 2012, after her termination. The claimant's banking records indicate that she had no substantial savings pre-accident.

[19] The employment file from the Humber River Hospital indicates that the claimant was terminated due to unsatisfactory performance. Her last day worked was January 18, 2012 and she was terminated effective January 23, 2012.

[20] According to her income tax returns, the claimant earned $11,875 in total T4 earnings in 2011, but only $2,929 in T4 earnings in 2012, the year of the accident. As the accident occurred on July 26, 2012, there were nearly seven months for the claimant to earn T4 earnings prior to the accident.

[21] The claimant appears to have received approximately $30,000 in student loans from OSAP, although some of this funding would have been provided after she returned to school post-accident. The claimant completed her studies in 2014.

THE CLAIMANT: PRE-ACCIDENT HOUSING

(a) The Claimant's Testimony

[22] The claimant testified that she resided at her father's home throughout most of her schooling, up until moving downtown in or around May of 2012, just a couple of months before the subject accident. This was approximately four months after leaving her employment at Humber River Hospital and approximately two months pre-accident.

[23] The claimant testified that when she was residing with her father pre-accident, she probably could not have supported herself if she had wanted to move out of her father's home. The claimant did not contribute to any utilities while residing with her father, or make regular contributions to household groceries.

[24] At the time of the accident, she was residing with roommates in an apartment in downtown Toronto. They were subletting the apartment. She testified that her father paid for her rent, which she believed to be approximately $460 per month. The claimant testified that her sublet agreement ended in August 2012, making it a four month agreement. She was approximately three months into the sublet at the time of the accident. While she wanted to stay permanently downtown, at the time of the accident she had yet to secure any post-graduation employment to support this endeavor. Her sublet agreement ended one month after the subject accident.

[25] The claimant testified that she was not working in the months leading up to the accident while she was residing downtown and attending school.

[26] Although the claimant resided with her mother for a period of time post-accident while she received personal care, she testified that her room was at her father's home and that she eventually moved back to his condominium.

(b) Mr. Soleimani's Testimony

[27] Mr. Soleimani testified that he has owned the condominium located at 135 Antibes Drive since 2007. He testified that the claimant had resided with him her entire life prior to her move downtown, which occurred shortly prior to the subject accident and that she moved downtown to be closer to school for her final semester.

[28] Prior to moving downtown, the claimant resided at Mr. Soleimani's home rent free. He never charged the claimant for food or rent.

[29] Mr. Soleimani testified that the claimant had advised him she was moving for "just four months" and that if he could pay the rent, she could live close to school and save a lot of time during her final semester.

[30] Mr. Soleimani testified that he believed the claimant's share of the rent was $500 per month. He testified that he paid for the claimant's rent. He further testified that the claimant was not working before she moved downtown and that she had no further employment between her move and the subject accident.

[31] Mr. Soleimani testified that the claimant continued to have an intact room in his home while she resided downtown and that she would go back and forth between her sublet and his condominium. He estimated that she spent one night per week at the condominium.

(C) Documentation

[32] There is a Rental Application (sublease) form in respect of a unit at 159 Beverly Street, signed by the claimant dated April 16, 2012. The terms are indicated to be from May 1, 2012 to August 31, 2012 at the rate of $468 per month.

THE CLAIMANT: PRE-ACCIDENT LIVING COSTS

(a) The Claimant's Testimony

[33] While the claimant testified that she had always paid for her own cell phone and expenses, it is clear from Mr. Soleimani's testimony discussed below that he was paying those expenses for the claimant while she was not working in the six months leading up to the accident. There is no evidence that the claimant had access to any other funding outside of Mr. Soleimani and her OSAP loan, while unemployed. The claimant testified that her OSAP loan paid for her OCAD tuition and other schooling expenses, including textbooks.

[34] The claimant testified that she also rented an art studio which she was subletting under a casual agreement; she believed it cost around $100 per month. While she testified that she covered the rent for same, based on Mr. Soleimani's testimony described below, it appears that she must have done so through funds he provided to her.

[35] The claimant testified that her father provided her with cash in $150 increments. She was not sure how often he provided her cash.

(b) Mr. Soleimani's Testimony

[36] In addition to the claimant's monthly rent, Mr. Soleimani testified that he was providing her with cash to pay for all of her expenses in the time period leading up to the accident. He testified that he paid for "all the expenses she had", including attending clubs, buying clothing and "everything".

[37] While she received OSAP funding for her schooling, Mr. Soleimani testified that it did not cover her living expenses. Mr. Soleimani testified that he provided the claimant with $150 per week in cash for her expenses. He testified that while she was working, she paid the difference, but when she stopped working, she required the allowance. As noted above, the claimant was essentially unemployed for the six months leading up to the accident, outside of a short two week period in April.

[38] The claimant was also a supplementary cardholder on Mr. Soleimani's American Express credit card. Mr. Soleimani paid for the credit card and estimated the claimant used $500-600 on a yearly basis. However, he did not keep track of the claimant's spending. While the claimant had her own credit card, Mr. Soleimani testified that she used the cash allowance he provided her to pay the associated bill.

[39] Mr. Soleimani also testified that he would sometimes buy the claimant groceries and bring her prepared food, but that the claimant mostly ate out for which she used the cash he provided. He estimated that he purchased her groceries twice per month. This would be in addition to her monthly allowance.

[40] Mr. Soleimani testified that the claimant used the cash he provided her to pay her expenses, which included her cellphone bill. He further testified that the claimant's cellphone was in his name. If the claimant wanted any other additional items, Mr. Soleimani testified that he would provide her more cash above the $150 per week. Again, he did not track the amounts of money he provided the claimant. If the claimant were to take a trip or vacation, Mr. Soleimani testified that he would pay for those expenses as well. He noted that she went to New York, Cuba, and San Francisco prior to the accident. He estimated that she went to New York three times in the year pre-accident. He testified that she would "put it on [his] credit card" and he would "pay for her ticket". Mr. Soleimani testified that he would provide her with a lump sum of cash in the range of $500 before a trip and sometimes would pay for her bus ticket to New York. He also testified that he paid for her plane ticket to Cuba, which he estimated to be $800 to $850. He also provided her with cash for her trip to Cuba, which included her room costs. Mr. Soleimani believed the trip to Cuba was some time in the spring or summer prior to the accident. He also testified that he paid for the claimant's full airline tickets to San Francisco in 2010 or 2011.

[41] In addition to the above, Mr. Soleimani testified that the claimant had a separate monthly rent for an arts studio. He believed the rent was $125 per month and she had the studio for two or three months pre-accident. This would have been the time period she was

living downtown. It appears that Mr. Soleimani paid for this rent as well, as this was during a time period where the claimant was unemployed.

[42] Mr. Soleimani's previous employment at Wells Fargo also provided the claimant with extended health insurance coverage through Great West Life.

(c) Documentation

[43] During the claimant's period of unemployment, she continued to receive direct deposits to her bank account from her student loans, as well as various deposits and transfers of an unknown origin. Given the claimant's testimony and her father's testimony, her only other known source of income was from her father. Therefore, these were likely cash deposits made with monies provided by Mr. Soleimani.

ANALYSIS AND FINDINGS

[44] 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 to be applied to determine which insurer is liable to pay statutory accident benefits.

[45] 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.*
>
> [emphasis mine]

[46] 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.
>
> [emphasis mine]

[47] 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".

[48] As for the "dependency" issue, the facts indicate that at the time of the accident, the claimant was a passenger in a vehicle insured by Echelon. He presented his accident benefits claim to Echelon. However, if principally financially dependent on his father, then on the basis of the aforesaid legislation, she would be an "insured" under the Unifund policy and Unifund would stand in priority by reason of s. 268(2)(i), as opposed to simply being an "occupant" under s. 268(2)(ii). If not principally financially dependent, then Echelon would stand in priority.

[49] 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* (1986), 48 O.R. (2d) 451 (H.C.J.) aff'd 50 O.R. (2d) 797 (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.

[50] In *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company* (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.

[51] 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 v. ING,* (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 the 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.

[52] 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.

[53] Arbitrator Cooper referred to decisions of Arbitrator Samis in *Coseco v. ING Insurance of Canada* (July 21, 2010) and *St. Paul Travelers v. York Fire & Casualty Insurance Company* (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 a household – the exercise we were directed not to follow by the *Miller and Safeco* 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.

[54] 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.

[55] Arbitrator Cooper's decision in *Allstate Insurance v. ING* 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, Justice Mayers 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 Mayers 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 statistics to determine the*

cost of housing in a locale". Justice Mayers accepted the “LICO” approach as a means of determining dependency.

[56] As jurisprudence currently stands, both the “mathematical” and “LICO” approaches are being applied by judges and arbitrators.

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

[58] 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.

[59] 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.

[60] 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 circumstances and the “big picture” of the claimants’ lives.

[61] 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.

[62] In the present case, Echelon takes the position that either the time since leaving her job at Humber River Hospital (seven months) or since moving from her father’s residence (two months), is most representative of the relationship existing at the time of the accident. This is a relatively short period of time. There are 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.

[63] 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."*

[64] Arbitrator Samis essentially concluded that the four week time frame was the appropriate one to use (representing a person in British Columbia, perhaps with the intention of shortly returning home and taking 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.

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

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

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

> *financially independent since leaving his mother's home in 1989 or 1990. A return to his mother's home, on a temporary basis, in these circumstances did not place him in a financially dependent position."*

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

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

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

[69] 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".

[70] In *MVACF v Gore Mutual and Aviva Canada* (Arbitrator Bialkowski - March 3, 2017), a four month period was determined to be the appropriate time frame to consider. The claimant had separated from his wife and for four months had lived with his parents. He had no intention of returning to his wife. During the four months, he suffered from psychological issues for which he saw a psychiatrist, psychologist and counsellors. There was no medical evidence as to when he would likely overcome his psychological problems. It was found that his condition and situation was going to exist for the foreseeable future and was not transitional. The claimant was found to be dependent on his parents.

[71] 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 some permanence and likely to continue into the future, or was it transitional. However, in the recent decision in *State Farm Mutual Insurance Company v. Her Majesty the Queen 2018* ONSC 4258, the court accepted a short three month time frame where reliance was placed on Ontario Court of Appeal decision in *Intact v. Allstate* (2016) 131 O.R. (3d) 625, wherein it was noted that "importing a permanency test on the process of determining the appropriate time frame to analyze dependency is inconsistent with the legal principles". However, a careful analysis of the decision clearly shows that "transient" or "recent" relationships ought to be considered but with no actual requirement to show that they were permanent. It should also be noted that these two cases are factually distinguishable from the present facts. In each of the two cases, the claimants had no employment income and were financially dependent on someone. It was simply a matter of determining which person the claimant was dependent upon "at the time of the accident". In the case before me, the issue is really whether the claimant herself was capable of providing more than 50% of her own needs from the income she was earning as a part-time worker and full-time student, or whether her father was providing more than 50% of those needs.

[72] Although Echelon has submitted that the appropriate time frame ought to be from the date she left work at Humber River to the date of the accident (seven months), or from when she moved out of her father's condo to the date of the accident (two months), I am satisfied that the circumstances in both time frames were transitional. I find that it was just as probable that she would have graduated and found work as graduating and still not earning enough to provide for more than 50% of her needs. Both of the two short time frames were periods where the claimant essentially had no income to speak of and would clearly be dependent on her father for financial support, but not reflective of her overall status as a full-time student working part-time now and again and earning considerable income over the course of a year. I am of the view that a traditional one year period pre-accident is the appropriate time frame for analysis. It is a time frame where the claimant was a full-time student, yet earning income from part-time jobs just as she had for many years since starting high school. The issue which remains is whether she earned enough from those part-time jobs to provide for more than 50% of her needs.

[73] Having established the appropriate time frame for analysis, it is then necessary to consider the "mathematical" and "LICO" approaches to the evidence before me with respect to income, earning capacity and expenses.

[74] The Respondent Unifund relied on the oral evidence and the report dated April 17, 2018 of Ms. Sheri Gallant, partner in the London office of Matson, Driscoll & Damico ("MDD"), to support its position to show that the claimant was providing for more than 50% of her own needs. Ms. Gallant reviewed the financial dependency issue for the 52 week period pre-accident on three scenarios:

1. Utilizing the average household expenditures in Ontario adjusted for the rent paid by the claimant at the time of the loss;

2. Utilizing the expenses per the claimant's bank statements on the assumption that they represented her basis needs;

3. Utilizing **after tax** LICO data for 2012 based on a 1 person household.

[75] MDD came to the conclusion under scenario two that the claimant was principally financially dependent on her father, only having contributed 47.28% toward her own needs with the father providing the balance, or 52.72%, of her needs. This provides some credence to the accounting evidence adduced by the Applicant Echelon for that time frame who opined that the claimant was financially dependent on her father earning insufficient income in the 52 week period pre-accident to provide more than 50% of her own needs.

[76] However, under scenarios one and three, the claimant was found by MDD to be financially independent having contributed 63.17% and 57.19% to her own needs.

[77] I am not satisfied that scenario one is appropriate for the analysis herein. Although using statistical information, the statistical base chosen by MDD for analysis includes people across all of Ontario cities, big and small. LICO statistical data on the other hand, breaks down the cost of basic needs depending on the size of the city in which the claimant is residing, which I feel is much more appropriate. The approach in scenario one also included the subjective elements of the accountant determining which components of the list of needs applied to the claimant. In addition, there appears to be a glaring error in the assessment of one item of needs in particular. In using scenario one, MDD included the need for rent of the claimant in Toronto at $468 per month, which may have represented the claimant's short term sublet cost, but not indicative of the average apartment rental in Toronto or a city with a population of over 500,000, for a 52 week analysis. The short term sublet was to expire on August 31, 2012, about a month post-accident. The figure arrived at by MDD was far less than the actual spending calculated by either MDD and the accountant retained by Echelon and likely a significant understatement of the claimant's financial needs. I am of the view that LICO statistics provides a much more reliable basis for determining such needs.

[78] The Applicant Echelon relied on the oral evidence and reports dated December 21, 2017 and April 17, 2018 of Ms. Janet Olsen, partner in the Toronto office of BDO Canada LLP ("BDO"). Her analysis for the shorter time frames discussed above came to the obvious conclusion that the claimant was principally financially dependent on her father during those periods, as she essentially earned no income in those time frames. In her one year pre-accident analysis, BDO concluded, using LICO **before tax** data, that the claimant's income in that period provided for less than than 50% of her statistical needs and therefore she was principally financially dependent on her father at the time of the accident.

[79] It is obvious that the main difference in the conclusions reached by the accountants is whether **before tax or after tax LICO data** is the appropriate data to be used in the analysis. Both accountants reached similar findings as to revenue – MDD (Unifund) at $11,207.76 and BDO (Echelon) at $11,155. The difference is essentially immaterial. It is the determination of expenses (basic needs) that becomes the important factor in this dependency determination.

[80] Firstly, I am of the view on the facts before me that a LICO or statistical approach is more favourable than the time-consuming and expensive item by item analysis, where there is discrepancy in the evidence with respect to certain items and incomplete financial records. Here, there were some bank records missing and assumptions had to be made as to income and expenses during the 52 week period. There was a discrepancy as to whether the father was contributing $150 every week as opposed to every other week, for example.

[81] Both accountants agree that if **before tax LICO data** ($23,647 for an individual in a one person household) is used, the claimant was not providing 50% of her needs and was **financially dependent** on her father. The Respondent Unifund has submitted that it is more appropriate to use after tax LICO data and comparing it to the after tax revenue of the claimant. On the basis of MDD's findings, use of **after tax LICO data** leads to a conclusion that the claimant was **financially independent,** with her revenue of $11,207 being more than 50% of LICO expenses **after tax LICO data** for a one person household, namely $19,597.

[82] The "LICO approach" was first adopted over a "mathematical approach" as early as 2010. It was the appeal decision in *Allstate* (supra) in 2015 when it became a generally accepted approach to determining dependency. It was "before tax LICO data" that was used in *Allstate*. Numerous dependency priority decisions since have all used "before tax LICO data". Counsel **could not provide any reported decision where after tax data has been used.** I am of the view that it is before tax LICO data that should be used in cases of this kind and that there is good reason why other arbitrators have chosen to use and approve use of "before tax LICO data". Dependency challenges only occur where the claimant has but minimal income to a point where there are no or extremely minimal taxes paid. If a claimant had earnings taking him or her to a level where income tax payments were required, then they would in all likelihood have sufficient income to provide more than half of their basic needs and there would not be any reason for a priority challenge. In the circumstances, use of before tax LICO data in my view provides more of an "apples to apples" comparison. The difference between before and after tax LICO data in this case amounts to $4,050 ($23,647 less $19,597). If a claimant were paying more than $4,000 in income taxes, their income would have to be at a level where there would be no question that they could provide more than 50% of their basic needs. Here the claimant was not paying any taxes as her income from part-time jobs was less than her basic personal exemption and available tax credits. She did have EI and CPP deductions of some $622.96. In my view, nominal payments of such statutory deductions do not support the usage of after tax LICO data. It would be unfair to look at statistics which would include some $4,000 in taxes in a situation where the claimant was paying little, if any, taxes. Accordingly, I find that in fact situations like the one before me, where the claimant is paying minimal or no income tax, it is the "before tax LICO data" that is the appropriate data to be used.

[83] It was also pointed out by counsel that in the arbitration decision in *Wawanesa Mutual Insurance Co. v. Travelers Insurance Co.*, 2018 CarswellOnt 6410, dealing with the same issue of dependency, evidence was adduced from an accountant with MDD using before tax

LICO data to support the conclusions reached as to calculation of needs, rather than after tax LICO data.

[84] As I have indicated, both accountants have agreed that if "before tax LICO data" is used, the claimant in this case is found to be principally financially dependent on her father, as her revenue (just over $11,000) in the year pre-accident is less than 50% of her basic needs of $23,647, as set out in the before tax LICO tables for a one person household. I find that in a situation where the claimant was paying no tax, such as the case here, it is appropriate to use "before tax LICO data".

[85] Accordingly, I find that the claimant was principally financially dependent on her father at the time of the accident and therefore was an "insured" under the Unifund policy.

[86] In reaching my decision, I have also considered "earning capacity" and find that the claimant was working to a reasonable earning capacity of a full-time student with approaching exams and grad project to be completed. Looking at the "big picture", I am of the view that Ms. Soleimani-Deilamani was still in a transitional stage of her life and had not achieved financial independence. She would in all likelihood remain dependent on her father until such time as she graduated from university and found employment, providing a regular income sufficient to provide more than half of her basic needs. That time had not yet come.

[87] Support for such findings can be found in two recent cases. In *Dominion of Canada General Insurance Co. v. Intact Insurance Co.,* 2014 CarswellOnt, Arbitrator Novick stated that the issue of determining whether a teenager or young adult whose life is in transition is principally dependent for financial support upon someone else is always challenging, and is often an exercise in "crystal ball gazing". In *Dominion*, the claimant had completed high school, was 19 years old and was unsure of his next move at the time of the accident. He was employed part-time at the time of the accident and was considering whether he would join the military or pursue other options. Arbitrator Novick found that the claimant was in a transitional stage of life and had not achieved financial independence, or developed a plan to do so. He was still trying to "find his way". The appeal of this decision was dismissed.

[88] Even in the situation of a student who had graduated, was working full-time hours and had begun transitioning out of his mother's household, Arbitrator Samis in *Primmum Insurance Co. v. State Farm*, 2009 CarswellOnt 17189, determined that such a transition was not complete, as he had not achieved independence.

[89] In the final analysis, I find that the claimant remained principally financially dependent on her father at the time of the motor vehicle accident of July 26, 2012. She was therefore an "insured" under the Unifund policy. Applying the priority hierarchy set out in s. 268(2) of the *Insurance Act*, Unifund at the first rung of the priority ladder as "insured" would stand in priority to Echelon at the second rung of the priority ladder, where the claimant was merely an "occupant".

ORDER

[90] On the basis of my findings I hereby order:

1. That Unifund is the priority insurer and responsible for payment of statutory accident benefits to the claimant;

2. That Unifund indemnify Echelon for payments made by Unifund that are the subject of indemnity, together with interest calculated in accordance with the *Courts of Justice Act;*

3. That Unifund pay legal costs of Echelon with respect to this arbitration on a partial indemnity basis;

4. That Unifund pay the Arbitrator's account.

[91] I will simply re-activate my file in the event that interest and costs cannot be agreed upon.

DATED at TORONTO this 24th)

day of July, 2018.)

KENNETH J. BIALKOWSKI
Arbitrator