

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,  
c.l.8, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act, 1991*,  
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ECHELON GENERAL INSURANCE COMPANY

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

## **A W A R D**

### **Counsel:**

Jason Frost and Yasna Beheshti

Counsel for the Applicant, Echelon General Insurance Company (hereinafter referred to as "Echelon")

Michael Hochberg

Counsel for the Respondent, Intact Insurance Company (hereinafter referred to as "Intact")

### **Issues:**

1. This Arbitration involves a priority dispute between insurers with the primary issuing being that of "dependency". More specifically, was the claimant, Stephanie Pereira ("Stephanie"), principally dependent for financial support on her father, Artur Pereira ("Artur"), at the time of the motor vehicle accident of June 29, 2010? If it is found

that Stephanie was dependent for financial support on Artur, then Intact would be the priority insurer. If it is found that Stephanie was not principally dependent for financial support on Artur, then Echelon would be the priority insurer (subject to a subsidiary issue, discussed below).

2. The subsidiary issue relates to whether Stephanie was a deemed named insured under the Intact policy as an individual with regular use of the vehicle(s) insured by Intact.

**Proceedings:**

3. This matter proceeded by way of a joint document brief (marked as Exhibit 1), examination under oath transcripts of Stephanie and Artur, the oral evidence of Stephanie and Artur, Artur's income tax return for 2010 (marked as Exhibit 2), written submissions and books of authorities.

**Preliminary Procedural Issue:**

4. Stephanie submitted to an examination under oath as part of the Arbitration process. In the course of such examination, she apparently gave an undertaking to produce documentation regarding her rental of a condominium. As this undertaking remained outstanding, counsel for Echelon was able to interview the landlord's daughter and, ultimately, obtain an Affidavit from her (appearing at tab 15 of the Joint Document Brief). Counsel for Intact objected to the filing of the Affidavit without being afforded the opportunity to cross-examine the deponent.

5. While counsel for Echelon advanced a persuasive argument whereby I could admit the evidence (relying on Section 21 of the *Arbitration Act*, 1991, and Section 15 of the *Statutory Powers Procedure Act*, I need not accede to such argument by reason of

the fact that Stephanie, when giving evidence at the Arbitration hearing, identified Exhibit A to the Affidavit as the lease which governed her occupancy of the condominium, Exhibits C and D (whereby Stephanie signed receipts for certain cash payments in relation to rent), Exhibit E (whereby Stephanie acknowledged arrears of rent as at August 23, 2010) and Exhibit F (Notice to Terminate the Tenancy dated August 19, 2010 wherein Stephanie acknowledged partial rent arrears due as at July 15, 2010 and full rent arrears for rent due August 15, 2010).

6. Consequently, the Affidavit appearing at tab 15 of the Joint Document Brief and Exhibit B thereto are struck from the evidentiary record. Exhibits A, C, D, E and F, having been identified by Stephanie, form part of the evidentiary record.

**Evidence re: Financial Dependency:**

7. On June 29, 2010 at approximately 8:30 p.m., Stephanie (then 26 years of age) was riding as a passenger in a motor vehicle insured by Echelon. Intact insured one or perhaps two automobiles owned by Artur. Stephanie was an excluded driver under the Intact policy.

8. At the time of the accident, Stephanie had a daughter, Katrina, who was then almost 5 years of age. Stephanie had *de facto* custody of Katrina and financial responsibility for Katrina. Stephanie was some 7 months pregnant and delivered her son, Kaydin, after the subject accident on September 1, 2010.

9. Travis Gibson was the father of Stephanie's daughter and son to be. Travis' relationship with Stephanie appears to be an on-and-off relationship. At the material times, Travis appears to have made sporadic, voluntary child support payments in the approximate amount of \$200.00 - \$300.00 every 4 to 6 weeks. This creates a monthly

range from \$144.33, at the low, to \$300.00, at the high. I find this payment to be \$225.00 per month.

10. Stephanie was receiving \$100.00 per month by way of universal child care benefit. In addition, she received \$363.00 per month by way of a Canada Child Tax Benefit (CCTB).

11. Stephanie had some experience performing hair dying services for others. She testified that she performed such services one to two times per week and charged approximately \$40.00 on each occasion. She incurred expenses of some \$7.00 such that she earned \$33.00 - \$66.00 per week (\$142.89 - \$285.78 per month). It would appear that she stopped performing this service, by reason of her pregnancy, in the month or two months before the accident.

12. Finally, Stephanie and Artur both testified that Stephanie performed services for Artur in connection with his employment and self-employment as a drywall taper. She would attend at Artur's home and answer or return telephone calls and perform other administrative services. Stephanie testified that she estimated she might work up to 15 hours per week. Artur was not in a position to confirm, deny or add to this evidence. While Echelon submitted that amounts paid to Stephanie in this regard should be viewed as income splitting, rather than income earned, I find that Stephanie did indeed perform services for which she was paid by Artur. I make this finding despite the fact that her application for Statutory Accident Benefits indicated that she was "unemployed". This apparent contradiction can be explained by the fact that the application was completed in large measure by someone on behalf of Stephanie [though she did sign the application] or by the fact that Stephanie did not view herself as "employed", in any

traditional sense, as her father did not issue her a T4 slip, make traditional deductions from wages, etc.

13. However, the quantum of Stephanie's wages is far from clear. All or most payments were made in cash. Stephanie kept no records. Artur's bookkeeper prepared income tax returns both for Artur and for Stephanie. There was no agreement in place regarding Stephanie's hours of work, days of work or wages. There can be no doubt, for reasons to follow, that Artur was supplementing Stephanie's wages with additional financial support. Indeed, Artur testified that he would make payments to Stephanie, whether by way of wages or financial support, if she was not able to work (by reason of the advancement of her pregnancy or otherwise), would assist her with her bills and do anything within his power to provide her with the assistance she required.

14. Artur also testified that his wife made cash withdrawals on credit cards to assist Stephanie to make her expenses as they came due.

15. According to Stephanie's income tax returns, she was paid some \$7,800.00 by Artur in 2009 and some \$4,800.00 by Artur in 2010. The evidence is unclear whether the payment made in 2010 was made over 12 months or some lesser period. Stephanie's advancing pregnancy and injuries sustained in the motor vehicle accident of June 29, 2010 appear to have impaired her ability to work. Counsel for Echelon submits that I should find her income to be \$400.00 per month. Counsel for Intact submits that this income was more probably earned over 4 months such that I should find her wages to be \$1,200.00 per month. Given all of the evidence, including the non arms-length nature of the relationship, I find that Stephanie earned \$800.00 per month in the first 6 months of 2010. If I extrapolate earned income for 12 months, this produces an annual total of \$9,600 which is not dissimilar to the amount Stephanie earned in 2009 [\$7800] and

significantly less than the amount she earned in 2008 [\$15,000] [Artur being the source of all such payments].

16. At the time of the accident, Stephanie was residing in a rented condominium in Scarborough. The monthly rent was \$1,525.00. While Stephanie clearly had difficulty making her rent payments from time to time and/or in a timely fashion, by August 2010, she had made all rent payments for the period January – June 2010 and just over 50% of the payment due on July 15, 2010. I find that Stephanie had the means, through one fashion or another, to make those payments over the relevant time period.

17. Stephanie had leased a vehicle or entered into some form of financing agreement in relation to a vehicle in or about May 2008 for a period of 6 years (covering the period in issue in this matter). The evidence discloses that she was obliged to make a monthly payment in this regard in the order of \$500.00 per month. While it would appear that she had gone into default in relation to this obligation some number of months before the subject accident, it remained her legal obligation nonetheless and I find that this must be considered as part of her expenses. Apparently, the vehicle was not being used at the material time, possibly because of mechanical issues or Stephanie's inability to pay for insurance, such that I find there to be no need to consider additional vehicle expenses such as insurance, gasoline, maintenance, etc.

18. Stephanie has given varying evidence in relation to clothing expenses for herself and for Katrina (ranging from \$150.00 to \$200.00 per month). I find her expense in this regard to be \$175.00 per month.

19. Stephanie testified that she spent at least \$25.00 per month for her phone/cable/internet service at the condominium.

20. The evidence discloses that Stephanie expended at least \$30.00 per month for a cell phone. Her food costs had been \$400.00 per month but increased to \$600.00 per month when she was pregnant. As I find the relevant time period under consideration to be January – June 2010 inclusive, during which time Stephanie was pregnant, I find the monthly food costs to be \$600.00 per month.

21. In addition, Stephanie expended \$12.50 per month on contact lenses, \$100.00 per month on toiletries, approximately \$85.00 per month on entertainment for herself and for Katrina, approximately \$25.00 per month on toys for Katrina and \$5.00 per month on supplements while pregnant. All of this totals \$227.50 per month.

22. Stephanie lived in Scarborough. Her parents lived in Ajax. Katrina frequently slept over at Stephanie's parents' home as she attended junior kindergarten at a school near their home. While Stephanie's mother or father may have picked her up and driven her to their home, whether for purposes of work or to spend time with Katrina, Stephanie testified that she frequently used a GO bus at a cost of \$5.00 for a one-way trip. Stephanie testified that she probably did so 3 – 4 times per week at the material time. This gives rise to a monthly expense ranging from \$64.95 to \$86.60. I find Stephanie's monthly expense in this regard to be \$75.00.

**Evidence re: Regular Use:**

23. Stephanie testified that the vehicle which she leased or owned, under a financing agreement, was not being used at the time of the accident. Occasionally, she would use Travis' vehicle if granted permission by him. Stephanie was an excluded driver under the Intact policy such that she was not allowed to use, nor did she use, Artur's vehicle(s) as a driver.

24. Stephanie testified that on some occasions, her mother might utilize a vehicle insured by Intact, travel from Ajax to Scarborough to pick up Stephanie, with or without Katrina, and return them to Artur's home. On other occasions, Artur or his wife might drive Stephanie home at the end of the day. There was certainly no set pattern in this regard. On all occasions, Stephanie would have to ask for a ride which may or may not have been available.

25. At the time of the accident, Stephanie was travelling with one or more friends to go shopping for a rocking chair. There was no evidence offered that at the time of the accident, Artur or his wife were ready, willing and able to transport Stephanie either on her shopping mission or to take her home (if Stephanie had been brought to their home after completing her shopping mission).

**Applicable Legislation:**

26. A priority dispute arises when there are multiple motor vehicle liability policies which may respond to pay Statutory Accident Benefits to one 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.

27. As Stephanie was a passenger in the Echelon vehicle, the following rules with respect to priority of payment apply:

- (1) The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;



- (2) If recovery is unavailable under (1) the occupant has recourse against the insurer of the automobile in which he or she was an occupant [*Echelon*];
- (3) 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; ...

28. 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 dependent or named insured or spouse if the named insured, specified driver, spouse or dependent,
  - (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile.”

29. Section 2(6) of the *Statutory Accident Benefits Schedule*, reads as follows:

“For the purposes 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”.

**Analysis and Further Factual Findings:**

30. The parties appear to be in general agreement as to the law applicable to the issues under consideration. The Ontario Court of Appeal, in *Miller v Safeco Insurance*

*Company of America*, identified the following factors as relevant when considering the issue of financial dependency:

- (a) The amount of the dependency;
- (b) The duration of the dependency;
- (c) The financial or other needs of the alleged dependent;
- (d) The ability of the alleged dependent to be self-supporting.

*Miller v Safeco Insurance Company of America* (1985), 50 O.R. (2d) 797

31. The time frame, for consideration of financial dependency, should most fairly reflect the true status of the claimant on the date of the accident. This is not a “snapshot” as at the date of the accident but should involve a time period that reflects the true financial circumstances of the parties, and their needs and resources over a given time period.

*Oxford Mutual v Co-Operators General Insurance Company*, [2006] O.J. 4518 (Ont. C.A.)

32. Given that Stephanie became pregnant in or about December 2009, I find the appropriate time period for consideration to be January – June 2010 inclusive. This was submitted to be the appropriate time period by Echelon and was not seriously contested by Intact.

33. Section 2(6) of the *Statutory Accident Benefits Schedule* defines a person to be dependent on another if the person is principally dependent for financial support on such other person. Thus, in the present matter, the inquiry requires me to find, as a matter of

fact, Stephanie's financial needs, on the one hand, and then make a determination as to how those needs were met, distinguishing between Stephanie's means (earned income, government benefits, informal child support, etc.) considered as against the financial support provided by Artur or his spouse.

34. I am satisfied that for one to be "principally dependent" for financial support on the other person, she must chiefly (or for the most part), derive her support from the other person. The common test used in determining "principal dependence" is the 51% test. This is essentially a factual issue.

35. It must be borne in mind that the focus of the inquiry is whether the claimant can be said to be principally dependent on the other person. Thus, where the evidence discloses that the claimant can meet at least 51% of their financial needs, this can and should end the inquiry. Arbitrators and the courts have consistently come to this conclusion.

*Singh v State Farm Mutual Automobile Insurance Company* (Arbitrator Naylor, June 4, 1993)

*Co-Operators General Insurance Company v. Western Assurance Company* (Arbitrator Bialkowski, September 19, 2012)

*Primum Insurance Company v. State Farm Mutual Automobile Insurance Company* (Arbitrator Samis, August 31, 2009)

*The Dominion of Canada General Insurance Company v. HMQ* (Motor Vehicle Accident Claims Fund), 2013 On. S.C. 4717 (Stinson, J.)

*Allstate Insurance Company of Canada v. ING Insurance Company of Canada*  
(Arbitrator Samis, August 18, 2011)

*Security National Insurance Company v. AXA Insurance Canada* (Arbitrator  
McCorriston, February 15, 2011)

*State Farm Mutual Automobile Insurance Company v. American Home  
Assurance Company and York Fire & Casualty Insurance Company* (Arbitrator Jones,  
November 2002).

36. Counsel for Echelon has referred me to and relies upon the decision of Arbitrator Densem dated January 29, 2013 in *Economical Mutual Insurance Company v. Aviva Canada Inc. et al.* In that case, the parties agreed that the claimant was only able to provide for 20% of her own financial support. She received significant financial support from her mother and father (who were divorced). While her father contributed less than 51% (45%, as per the Agreed Statement of Facts), Arbitrator Densem found the claimant to be principally dependent for financial support on her father.

However, this decision is clearly distinguishable on the facts as it was acknowledged and agreed that the claimant could not and did not provide for 51% or more of her financial needs. Thus, the analysis and decision reached by Arbitrator Densem, in this particular case, has no application to the matter before me as I have made a factual determination, for the reasons that follow, that Stephanie was contributing at least 51% toward her monthly expenses and needs.

37. For the reasons expressed above, I have found Stephanie's monthly expenses to consist of the following:

<b>Description</b>	<b>Monthly Amount</b>
Cadillac lease/finance payment	\$ 500.00
Rent	\$ 1,525.00
Cell phone	\$ 30.00
Food costs	\$ 600.00
Clothing and toys	\$ 200.00
Entertainment	\$ 85.00
Contact lenses, toiletries, personal supplies and manicures	\$ 117.50
Phone/cable/internet service	\$ 25.00
GO bus fares	\$ 75.00
<b>TOTAL:</b>	<b>\$ 3,157.50</b>

38. Similarly, I have found Stephanie's income (for want of a better term) or financial means to consist of the following:

Description	Monthly Amount
T4 income from employment	None
Gross business income (cash payments made to the claimant by her father for work performed)	\$ 800.00
Child support (from Travis Gibson)	\$ 225.00
Child Canada Tax Benefit	\$ 363.00
Universal Child Care Benefits	\$ 100.00
Hair dying services	\$ 200.00
<b>Total monthly income</b>	<b>\$ 1,688.00</b>

39. On the basis of the foregoing, Stephanie was able to provide 53.46% toward her monthly expenses. If I ignore her legal obligation to make the car payments, described above at \$500.00 per month, she was in a position to contribute 63.52% toward her monthly expenses.

40. On the basis of the evidence of Stephanie and Artur and the obvious and logical inference which I can draw from such evidence, Artur, together with his spouse to a

limited extent, were contributing some 36.48% or 46.54% toward Stephanie's monthly expenses.

41. As a result, I conclude that Stephanie had the ability or means to contribute at least 51% toward her financial needs and expenses and, as a result, she was not principally dependent for financial support on Artur and his spouse at the time of the accident and during the material time under consideration. Thus, I find that Echelon has failed to discharge the burden of proof upon it and prove that Stephanie was principally dependent for financial support on Artur. The result is that Echelon remains the higher priority insurer, rather than Intact, for purposes of paying statutory accident benefits to Stephanie Pereira as a result of an accident which occurred on June 29, 2010.

42. I will now address the secondary issue advanced by Echelon regarding "regular use".

43. I cannot find, on the evidence available, that one or the other or both of the Intact vehicles were being made available to Stephanie at the time of the accident. These vehicles were not regularly accessible to her; rather, her use of these vehicles as a passenger depended on a variety of variable factors including, but not limited to, permission being granted by Artur or his wife to take Stephanie home, on an errand or otherwise. There was no predictable or regular pattern of use such that Echelon's arguments in this regard fail on the evidence of this case. I rely on the decision of Arbitrator Bialkowski, in *Dominion of Canada General Insurance Company v. Lombard Insurance Company* (September 11, 2013), Arbitrator Torrie, in *TD General Insurance Co. v. Pilot Insurance Co.* [May 31, 2007], Arbitrator Densem, in *Dominion of Canada General Insurance Company v. Federated Insurance Company of Canada* [October 31, 2012], Arbitrator Bialkowski in *Continental Casualty Co. v. Sovereign General Insurance*

*Company [June 3, 2013]* and the decision of Mr. Justice Belobaba in *ACE INA Insurance v. Co-Operators General Insurance Company* [2009], O.J. No. 1256, in this regard.

**CONCLUSION:**

44. At the time of the accident, Stephanie Pereira was not principally dependent for financial support upon her father, Artur Pereira. Furthermore, Stephanie Pereira was not a deemed named insured under the Intact policy as she did not have regular use of one or the other or both vehicles insured under this policy.

45. Echelon General Insurance is liable to pay statutory accident benefits to Stephanie Pereira as a result of an accident which occurred on June 29, 2010.

46. The costs of the Arbitration, including the Arbitrator's fees and disbursements, are recoverable by Intact as against Echelon. If counsel are unable to resolve the matter of costs, I remain seized of the issue and will be happy to conduct a post-Arbitration teleconference in that regard and, if necessary, make arrangements to have the issue of costs determined by me.

Dated at Toronto this        day of December, 2013.

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Vance H. Cooper, Arbitrator