

**IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT*, R.S.O. 1990,  
AND *ONTARIO REGULATION 283/95***

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

**AND IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**CERTAS HOME AND AUTO INSURANCE COMPANY**

**Applicant**

- and -

**AVIVA INSURANCE COMPANY OF CANADA**

**Respondent**

**ARBITRATION AWARD**

**COUNSEL:**

Adam Fox for the Applicant

Catherine H. Zingg for the Respondent

**ISSUE:**

1. Was the Claimant principally dependent on her parents for financial support at the time of the accident and therefore an “insured” under their policy with Aviva?

**RESULT:**

1. Yes, Ms. Saadi was principally dependent on her parents for financial support at the time of the accident, and was an “insured” under their Aviva policy.

**BACKGROUND:**

1. Shadi Fahandezh Saadi was struck as a pedestrian by a vehicle insured by Certas Home and Auto Insurance Company (“Certas”) on October 6, 2017. She submitted an Application for Accident Benefits (OCF-1) to Certas, and they have paid benefits pursuant to the *SABS* to her and on her behalf.

2. Ms. Saadi was twenty-one years old at the time of the accident. She lived with her parents and two of her older siblings in an apartment in the north end of Toronto. Her parents owned a car that was insured by Aviva Insurance Company of Canada (“Aviva”) at the time. Certas contends that the Claimant was principally dependent for financial support upon her parents at the time of the accident and would therefore be an “insured person” under the Aviva policy, resulting in Aviva being in higher priority to pay the claim in accordance with section 268(2)2i of the *Insurance Act*.

3. The Claimant graduated from high school in June 2014. She enrolled at York University in September of that year, but dropped out after one year of study. She later enrolled in a program at the International Beauty Institute, and received a diploma in Makeup Art techniques in September 2016, approximately one year before the accident. Ms. Saadi also worked at two part-time jobs between August 2016 and October 2017, the time of the accident.

## **THE EVIDENCE:**

4. The parties filed a lengthy Statement of Agreed Facts setting out many details relating to the Claimant's financial circumstances at the time of the accident. Various other documents were filed, including a Financial Dependency Worksheet completed by the Claimant, income tax documentation and a transcript from the Examination Under Oath ("EUO") conducted on Ms. Saadi in October 2018. The parties exchanged written submissions and case law to support their arguments.

5. The evidence establishes the following facts: After graduating from high school, the Claimant began her studies at York University in September 2014, in the Law and Society program. She obtained a loan through the Ontario Students' Assistance Program ("OSAP"), which covered her tuition payments. She dropped out of York after one year of study, and advised at her EUO that the OSAP loan remained outstanding. She stated that her parents had also paid for some of her miscellaneous expenses while she was at university, such as the cost of the yearbook, and her participation in sports and social activities.

6. As noted above, Ms. Saadi subsequently enrolled in a four-month course through the International Beauty Institute, and received her diploma in Makeup Art Techniques in September 2016. The cost for attending this program was approximately \$5,000. Her parents paid for the full amount of the course and the parties agreed that there was no expectation that Ms. Saadi would repay them.

7. The T4 income tax slips filed indicate that Ms. Saadi received employment income of \$5,077 in 2016, and \$1,887 in 2017. She testified at the EUO that she worked approximately fifteen hours each week from August 2016 to August 2017 earning between \$11 and \$12 per hour, at a restaurant called Me Va Me. She then left that job and worked fifteen to twenty hours per week earning \$14.25 per hour at Main Drug Mart, from August 2017 to the time of the accident in October 2017.

8. The Claimant began working at MAC Cosmetics in the Bayview Village shopping mall in January 2018, a few months after the accident. She worked on an “on call” basis, and was paid \$16.50 per hour.

9. The evidence also indicated that Ms. Saadi’s parents paid rent of \$1,597.51 per month for the family’s apartment. They also covered other monthly household expenses in the amount of \$1,027.89. The family’s total household expenses amounted to \$2,625.40 per month. The Claimant did not contribute financially to the rent or household expenses, but performed some household chores such as cooking and cleaning. She estimated that she cooked one or two dinners for the family each week, and that she did the family’s laundry about 50% of the time. She also cleaned the main bathroom and vacuumed the apartment weekly.

10. The Claimant completed a Financial Dependency Worksheet provided to her by Certas, in March 2018, outlining her earnings and personal expenses. It provides that her net monthly earnings amount to \$423. It also indicates that her monthly expenses consist of her cell phone bill, the cost of clothing, and entertainment and social outings, totalling \$270. Ms. Saadi stated at the EUO that she paid for these expenses on her own, but that her parents gave her money when she needed it while she was in school to pay for restaurant meals, going out with friends and to buy clothes. She estimated that her father drove her to work and to other appointments approximately once each week.

11. The OCF 1 form filed either by Ms. Saadi or on her behalf indicates that she earned \$300 every two weeks. This figure also appears in a Statutory Declaration dated December 2017. Interestingly, Ms. Saadi stated at her Examination Under Oath that she earned between \$400 and \$500 every two weeks at her job at Main Drug Mart. I note that this amount is approximately double the net monthly amount of \$423 that she reported on the Dependency Worksheet.

**RELEVANT PROVISIONS:**

***Insurance Act:***

*268(2) The following rules apply for determining who is liable to pay statutory accident benefits:*

*2. 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,*

***Statutory Accident Benefits Schedule (“SABS”)***

*3. (1) In this Regulation,*

*“insured person” means, in respect of a particular motor vehicle liability policy,*

*(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 dependant of the named insured or of his or her spouse,*

*(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile*

*3(7) For the purposes of this Regulation,*

*(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual’s spouse;*

**PARTIES’ ARGUMENTS:**

*Certas’ submissions*

12. Counsel for Certas contended that Ms. Saadi was principally dependent upon her parents both financially and for care at the time of the accident, and that she was therefore an insured person under their Aviva policy. He submitted that whether a

mathematical approach to dependency is used, or whether the more holistic “big picture” approach is followed, the same result is reached.

13. Mr. Fox noted that the Claimant’s earnings as reported on the worksheet she completed were \$423 monthly, amounting to \$5,076 per year. He noted that this sum corresponds with the figure on her 2016 T4 slip, but is much higher than the \$1,887 appearing on her 2017 T4 slip.

14. Counsel submitted that when the family’s total monthly household expenses of \$2,625 are divided by five to reflect the number of people living in the home, the Claimant’s share of the expenses would be \$525.08. When her personal monthly expenses of \$270 and anticipated monthly OSAP repayment obligations (which arise after a six-month “grace period”) of \$145 are added to that, her total monthly expenses amount to \$940.08 per month.

15. Counsel noted that when Ms. Saadi’s reported monthly earnings of \$423 is compared to her expenses of \$940 per month, her earnings represent only 45% of her monthly needs. As this is below the “51% threshold” required for a finding of financial independence, Mr. Fox contended that I should conclude that she was principally dependent on her parents for financial support.

16. Counsel for Certas cited various authorities in support of his contention that the Claimant was financially dependent on her parents. He referenced the factors cited in *Miller v Safeco* (1984) 48 O.R. (2d) 451, aff’d on appeal at 50 O.R. (2d) 797 of the duration and amount of dependency, the financial needs of the person and their ability to be self-supporting. He noted Arbitrator Bialkowki’s comments in *Co-operators v AXA Insurance* (August 13, 2015), in which he cites the Court of Appeal’s statement in *Oxford Mutual Insurance Company v Co-operators General Insurance Company* (2006) O.J. No. 4518 that a claimant will not be considered to be dependent upon anyone else if they have sufficient resources to fund 51% of their financial needs. Counsel also noted that Justice Myers instructed Arbitrators to look beyond a strict application of the “51% rule” in the

appeal decision in *Allstate Insurance Co. of Canada v ING Insurance* (2015) O.J. No. 4020, and suggested that the “big picture” of a claimant’s circumstances should be considered.

17. Mr. Fox suggested that the appropriate time frame to consider for the dependency analysis should be the three-month period (July to September 2017) preceding the accident. He submitted that if that period is too short, the period from September 2014 to June 2016 should be considered, as it represents Ms. Saadi’s period of “transition” from her first post-secondary academic endeavour at York University to the beginning of her studies at the International Beauty Institute.

18. Counsel submitted that Arbitrators have increasingly turned to statistics to estimate a person’s needs in a financial dependency analysis. He noted that the Market Basket Measure, consisting of a basket of goods and services representing a modest, basic standard of living, has been developed by Statistics Canada as a measure of low income or “poverty line”. He noted that that figure for a single person living in Toronto at the relevant time was \$18,431, and that the Claimant’s earnings of approximately \$5,000 (at the highest, given T4 filed for 2017) were far below that.

19. Counsel for Certas also proposed that when a claimant is a young adult or teenager, the fact that parents provide emotional care and guidance should also be considered in the dependency analysis in a priority dispute, citing Arbitrator Densem’s decision in *Economical Insurance v Aviva Canada, AXA Insurance, RSA Insurance et. al* (January 29, 2013). He suggested that the evidence in this case indicates that Ms. Saadi’s parents provided discipline and academic guidance, and that this should factor into the analysis, along with the fact that her father regularly drove her to work, school and other appointments.

20. Mr. Fox also contended that when the “big picture” of her circumstances is considered, we see a teenager who lived with her parents from the time that she graduated from high school to the time of the accident, while moving through different stages of her

academic and working life. Her parents supported her in all of these attempts, and paid \$5,000 to cover her tuition costs for the program that she had completed a few months before the accident. Counsel suggested that while Ms. Saadi's part-time employment provided her with some spending money, it was clear that she was not financially independent at the time of the accident.

*Aviva's submissions*

21. Counsel for Aviva noted that Certas' assertion that Ms. Saadi was obliged to repay her OSAP loan was not supported by the evidence, and contended that the \$145 monthly expense attributed by Mr. Fox should not be included in the analysis. She also contended that the evidence gathered does not support an argument that the Claimant met the test for having been dependent for care on her parents.

22. Ms. Zingg noted that the information provided by Ms. Saadi regarding her earnings in the period before the accident was inconsistent. She pointed out that the Claimant testified at the EUO conducted in October 2018 that she worked between fifteen to twenty hours per week at Main Drug Mart and was paid \$14.25 per hour, which amounts to between \$214 to \$285 per week. She also noted that Ms. Saadi reported earnings of \$300 every two weeks on her OCF 1 form submitted to Certas.

23. Ms. Zingg noted that the evidence was clear that the Claimant performed many household chores, and submitted that the monetary value of these services should be factored into the analysis. She contended that an hourly rate of \$11.60 – the minimum wage rate applicable at the time of the accident – should be attributed to the time that Ms. Saadi spent on chores, and suggested that \$150 per month should be added for the time she spent cooking meals for the family, \$250 per month for the estimated five hours per week she spent doing half of the family's of laundry, and \$100 per month added for the time she spent cleaning and vacuuming the apartment, totalling an additional \$500 per month, or \$6,000 on an annual basis.

24. Counsel for Aviva contended that this amount should be added to the \$5,077 figure on Ms. Saadi's 2016 T4 form in order to obtain an accurate figure for her total earnings. She cited Arbitrator Malach's decision in *Coachman v The Personal Insurance* (November 17, 2003) and Arbitrator Jones' decision in *CT Direct v. Liberty Mutual Insurance* (December 3, 2004) in support of this proposition. Ms. Zingg submitted that when the total annual figure of \$11,077 is compared to the cost of Ms. Saadi's annual needs of \$9,540 (calculated at \$795 monthly, by adding her reported personal expenses of \$270 to her one-fifth share of the rent and other family household expenses of \$525), it is clear that she contributed more than 51% toward her needs at the relevant time, and was therefore not financially dependent upon her parents for support.

*Certas' reply*

25. Mr. Fox noted that there was no evidence to suggest that Ms. Saadi had applied for or was granted a deferment for repaying her OSAP loan. He suggested that I should conclude either that she was repaying the loan (which would add to her expenses as noted above) in the period before the accident, or that she was not able to do so, which would reinforce the argument that she was unable to support herself.

26. Finally, Mr. Fox submitted that recent case law demonstrates that the approach taken by Arbitrators to financial dependency issues has shifted from a pure "51% mathematical calculation" to a consideration of the Low Income Cut-Off ("LICO") measure as a way to determine whether a claimant could support herself in the geographic area in which she lives. He argued that this was consistent with the "holistic view" of the concept of dependency urged by the courts, and that regardless of the manner in which Ms. Saadi's income is calculated in this case, it does not add up to the level that would have allowed her to subsist above the poverty line in Toronto, where she lived at the time of the accident.

**ANALYSIS & REASONS:**

27. Having considered all of the evidence and counsels' submissions, I find that the Claimant was principally dependent for financial support upon her parents at the time of

the accident. She was accordingly an “insured” under their Aviva policy. I reach this conclusion based on both a comparison of her reported earnings and expenses, and also a consideration of the “big picture” of her circumstances at the time of the accident.

28. Ms. Saadi was twenty-one years old at the time of the accident. She had completed high school approximately three years before that. In many cases involving young adults who are in a stage of transition from their post-secondary studies to their working lives, the choice of the appropriate time frame to consider is a key part of the analysis. These individuals will often have moved in and out of their parents’ (or other relatives’) homes, and lived on their own for some period. They may have had stints of steady work mixed with periods of unemployment. Often the time frame chosen to focus on can dictate whether they are determined to be financially dependent on a parent or not.

29. That is not the case here. While Ms. Saadi experienced changes in her life during the three years between graduating high school and the accident in October 2017, she continued to live with her parents and other family members throughout that period. She made no financial contribution to the rent paid on the family apartment, or to any other household expenses incurred by the family. She worked between fifteen and twenty hours per week, and was paid at a rate just above the minimum wage. The evidence suggests that she began the first of these jobs in August 2016. I find that the two-year period preceding the accident is therefore an appropriate time frame to use in this analysis, and that it provides an accurate reflection of the Claimant’s circumstances at the time of the accident.

30. The figures provided by Ms. Saadi regarding her earnings in the two years before the accident varied from a low figure of \$423 per month, as indicated on the Financial Dependency Worksheet provided to her by Certas, to a high estimate of \$400 to \$500 every two weeks provided at her Examination Under Oath. Ms. Saadi also stated that she earned \$300 every two weeks on the OCF 1 form submitted to Certas. She referenced the same figure in a Statutory Declaration completed in December 2017. Ms. Saadi’s T4 slips for both 2016 and 2017 tax years were filed, as well as the CRA Assessments for both of

those years. As noted above, these indicate that Ms. Saadi's income from employment was \$5,077 in 2016 and \$1,887 in 2017.

31. While the T4 figure for 2016 squares with her estimate of \$423 per month (although that is stated as a net figure on the worksheet, while the T4 figure represents gross earnings), the 2017 figure does not. I find it difficult to accept her estimate of having earned \$400 to \$500 biweekly provided at the EUO, given all of the other evidence on this point. I accordingly accept the figures on the CRA documentation as representing the most accurate reflection of Ms. Saadi's earnings during 2016 and 2017. Averaged out over the two- year period, her earnings amount to just over \$290 per month

32. Ms. Zingg submitted that the household chores performed by the Claimant should be given a monetary value of approximately \$500 per month, and that that figure should be added to her earnings for the purpose of the dependency calculation. She cited Arbitrator Malach's decision in *Coachman Insurance v. Personal Insurance Co. of Canada* (November 17, 2003) and Arbitrator Jones' decision in *CT Direct Insurance Co. v. Liberty Mutual Insurance* (December 3, 2004) as support for this proposition.

33. I do not accept this contention. Both of the cases cited above involve grandmothers who lived with their daughters, and provided babysitting services on a daily basis to their grandchildren. In the *CT Direct decision, supra*, the claimant was also found to have contributed an amount of \$700 per month toward the household expenses. I find that Ms. Saadi's situation was different in that the services she provided were household chores such as cooking and cleaning, from which she herself would have also benefitted. The evidence in this case suggests that various family members shared the household chores and in my view, that type of arrangement should not lead to a monetary value being ascribed solely to the chores completed by one person in the household.

34. I turn now to the issue of estimating Ms. Saadi's expenses. The approach taken by arbitrators and judges to quantifying a claimant's living expenses has evolved over time, and has moved away from a straight mathematical approach of calculating all expenses

associated with a given household and dividing by the number of inhabitants. There are (at least) two reasons for this - on a practical level it is near impossible to obtain reliable information, and because the exercise invariably involves a consideration of a family's standard of living, a factor that the Court of Appeal expressly instructed should not be considered in its appeal ruling in the *Miller v Safeco, supra* case.

35. This case illustrates both problems identified above. While counsel have adopted the estimate of \$2,625 in monthly household expenses noted in the Dependency Worksheet as a fact set out in the Agreed Statement of Facts filed, I note that the list of figures comprising that total includes \$150 per month for what is described as "miscellaneous household expenses". That is not only vague, but suggests that the amount may well vary each month. And while the total figure of \$2,625 was divided in five to get the Claimant's share of those common expenses, I note that that figure would increase or decrease significantly depending on whether any of Ms. Saadi's other siblings left the family home, as she mentioned two of her older siblings had done in her EUO. In my view, the drafters of the regulation could not have intended a finding of financial dependency to be based on a variable fact such as how many people lived in the household at a particular time.

36. For these reasons, Arbitrators have referred to statistics compiled by Statistics Canada such as the Low Income Cut-Off ("LICO") or Market Basket Measure ("MBM") to estimate a person's expenses. In *Pafco Insurance v. Wawanesa Mutual Insurance Company and Western Assurance* (December 21, 2018, appeal pending), I stated –

*Typically, parties to a priority dispute will make great efforts to obtain specific financial information from the parties, and/or retain accountants to quantify a claimant's financial needs or living expenses. While many decisions have been based on that frustrating exercise, that approach has now largely given way to the use of statistics to estimate a person or household's expenses, based on the size of the community in which they live. That shift occurred as arbitrators and judges reviewing arbitration awards came to realise that the information received by parties or assumed by accountants was unreliable at best, and more likely "highly artificial and necessarily inaccurate" as stated by Justice Myers in*

*Allstate Insurance Company v. ING Insurance and Aviva Canada Inc (2015) ONSC 4020 (CanLii).*

*The use of “LICO data” became popular in the aftermath of the above decision, and Justice Myers’ finding (at para.13) that “there is no accurate way to measure with hindsight an individual’s hypothetical needs some time in the past”. More recently, arbitrators have shifted from considering LICO data, which actually represents the income threshold at which families are expected to spend 20% more than the average family on food, shelter and clothing, to relying on a statistic termed Market Basket Measure, which provides the cost of meeting basic modest needs for different family sizes, in different parts of the country, segmented by community size. (see *Wawanesa Mutual Insurance Company v State Farm Insurance (Samis, September 13, 2018)*, *Pembridge Insurance Company v. Western Assurance Company, (Bialkowski, December 6, 2018)*).*

37. Counsel for Certas noted that the MBM figure for Metropolitan Toronto at the relevant time, representing the cost of a specified basket of goods and services representing a modest standard of living, for a single person, was \$18,431.

38. It is clear that when this figure is compared to Ms. Saadi’s earnings from part-time employment during the relevant period, she was not able to provide for more than 50% of this amount.

39. Ultimately, a comparison of the Claimant’s earnings and expenses, however calculated, only tells part of the story here. In the three years since graduating from high school, Ms. Saadi began her post-secondary studies at York University, but dropped out because she did not enjoy the program in which she was enrolled. It is not clear what she did after that for a year or so, but in the summer of 2016 she completed a diploma in Makeup Art Techniques. The evidence is clear that her parents funded that program, which cost \$5,000, and that she was not expected to pay them back. Even after obtaining that diploma, she either was only able to find, or intentionally chose to only work part-time hours at a restaurant and takeout food franchise, and then in a drugstore, earning slightly more than minimum wage. She continued to live with her parents throughout, and did not make any financial contribution to the household expenses.

40. It is clear from the above facts that while Ms. Saadi may have been on a path toward financial independence in October 2017 at the time of the accident, she still had some way to go before she achieved that status. On a consideration of both approaches outlined above, I find that she remained principally dependent on her parents for financial support at the time of the accident, and was consequently an “insured” under their policy with Aviva. Aviva is therefore in higher priority to pay this claim in accordance with section 268(2)2(i) of the *Act*.

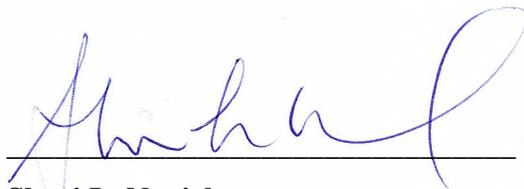
**ORDER:**

Aviva is the priority insurer and is responsible to pay accident benefits to Ms. Saadi under section 268(2) of the *Act*. Aviva shall repay Certas for all benefits properly paid out to date under the *SABS*, along with any applicable interest owing. If Ms. Saadi’s Accident Benefits claim remains open, Aviva shall take over the adjusting of the claim.

**COSTS:**

Given the result, Certas is entitled to its legal costs on a partial indemnity basis. If counsel cannot agree on the quantum of costs payable, I invite them to contact me so that a process can be determined to resolve this issue.

**DATED at TORONTO, ONTARIO this \_\_\_25<sup>th</sup>\_\_ DAY OF JULY, 2019**



**Shari L. Novick**  
**Arbitrator**