

**IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration**

BETWEEN:

THE CO-OPERATORS GENERAL INSURANCE COMPANYH

Applicant

- and -

ACE INA INSURANCE and
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondents

AWARD

Appearances:

The Co-operators General Insurance Company (Applicant): Daniel Strigberger

ACE INA Insurance (Respondent): Evan Kopiak

Introduction:

This matter comes before me pursuant to the *Arbitration Act, 1991*, Section 268 of the *Insurance Act, R.S.O. 1980 (c. 1, 8 as amended)* and *Ontario Regulation 283/95 as amended*. I have been retained as a private arbitrator to determine an issue between the above-noted insurers with respect to a priority dispute that arises as a result of a motor vehicle accident that took place on December 2, 2016.

On that date Jennifer R. was driving a rented SUV insured by ACE on Sturgeon Bay Road near Severn Township. Jennifer lost control of the vehicle and drove off the road. The vehicle then rolled and Jennifer sustained significant injuries, including an amputation of her left arm which has resulted in a determination that she is catastrophically impaired.

Co-operators insures Debra J. who is Jennifer's mother.

At the time of the accident of December 2, 2016 Jennifer was not a named insured or a listed driver under any other policy of insurance.

Jennifer applied to Co-operators for statutory accident benefits and Co-operators has been paying and continues to pay those benefits. Co-operators takes the position that Jennifer was not principally dependent for financial support on Debra at the time of the accident and accordingly ACE is the priority insurer pursuant to Section 268 of the *Insurance Act*.

This matter proceeded to a hearing on May 1, 2019. The following documents were made as exhibits:

1. Exhibit 1 – Arbitration Agreement dated April 30, 2019;
2. Exhibit 2 – Document Brief (Tabs A through to N).

Counsel also filed excellent and very helpful Factums and Books of Authority.

Issue in Dispute:

While the issue in dispute is described more broadly in the Arbitration Agreement, it boils down to the following question:

At the time of the accident of December 2, 2016 was Jennifer R. principally dependent for financial support on her mother, Debra J.?

Result:

Having carefully reviewed all the evidence and the oral and written submissions of counsel I have concluded that Jennifer R. was not principally dependent for financial support on her mother, Debra at the time of the accident of December 2, 2016.

Background and Summary of Facts:

Jennifer was born on November 8, 1980 and was therefore approximately 36 years old at the time of the accident. She was residing at her mother, Debra's house in Welland, having moved there on or about November 25, 2016. Jennifer had only made a decision to move in with her mother a few days earlier, around November 18 or 19 of 2016.

I had available for review the transcripts of the Examination Under Oath of Jennifer which took place on January 31, 2018. According to her evidence Jennifer had grown up in Welland but approximately 10 years or so prior to the motor vehicle accident had moved north. Prior to moving on November 25, 2016 to reside in her mother's home Jennifer was living in the Town of Lavigne, which is in the District of Nipissing.

For three years up until July of 2016 Jennifer ran, with a partner, a business called D & J Variety. This was a local store that sold a variety of goods. Jennifer drew money from the business every now and then but acknowledged that she didn't get paid a great deal as the business was relatively new. She estimated that she would take out \$1,500.00 a month from the business. It should also be noted that Jennifer is a high school graduate and as well has a health science preparatory college degree from Niagara College.

In mid-2016 Jennifer's business went bankrupt. This resulted in Jennifer declaring personal bankruptcy. According to her bankruptcy file she had debts of approximately \$95,000.00. The most significant debts were monies owed on her automobile, a 2014 Chevrolet, at \$19,999.00 which was a secured debt. There was also a claim for Chez Saint Pierre who were the landlords on the property where she ran her business. They claimed an unsecured rental claim of \$38,400.00. The evidence of Jennifer was that she had in fact paid the rent pursuant to the lease agreement and had only missed one month as she formally declared bankruptcy on April 2, 2016. The \$38,400.00 claimed represented the payment of the lease into the future as well. In addition there were claims for goods that had been purchased for the store, including \$12,000.00 from the Ontario Liquor Control Board and \$12,000.00 for merchant advanced capital and \$3,000.00 from Ontario Lottery and Gaming Corporation. The remaining debts were made up of claims for things such as Bell Canada and hydro. The unsecured debts totalled \$76,303.00 while the secured debts were comprised entirely of the money owing on the car. The reason given for her bankruptcy was:

“Business failure and financial mismanagement, therefore unable to support liabilities as they generally became due.”

There was no evidence given in the arbitration about the role of Jennifer's partner in the business or in the bankruptcy.

The bankruptcy file disclosed that Jennifer's monthly income was at that time zero. In addition it disclosed her living expenses as totalling \$1,545.00. This was made up of the following:

- Car lease payments: \$350.00
- Repair/maintenance: \$300.00
- Telephone: \$120.00
- Hydro: \$250.00
- Smoking: \$200.00

As a result of the bankruptcy and the loss of her business Jennifer had to move out of the rented home that she was living in. She moved in with her friend, Brenda, some time in July of 2016. Her arrangement with Brenda was that Jennifer would pay whatever she could towards assisting with the expenses. However, in her evidence at her examination under oath Jennifer confirmed that by and large she lived there rent free and did not contribute to groceries as she was being fed by Brenda and her husband who had access to a farm.

Jennifer was also married for the first time in April of 2016. Her husband was incarcerated approximately a week later and they have remained separated ever since.

In September of 2016 Jennifer applied for and was approved for Ontario Works. She was approved effective September 16, 2016 and her first payment came in on October 3, 2016 in the amount of \$295.50.

By that time Jennifer had lost her car. She had been unable to keep up with the insurance payments. Her policy with Dominion of Canada General Insurance Company (who was originally a respondent in this Arbitration but was later let out) was cancelled effective August 24, 2016. Unfortunately Jennifer was pulled over by the police some time in early September of 2016. At that time they determined that she was driving a vehicle without insurance and her vehicle was impounded. She was not able to afford to pay the impound fees (between \$300.00 and \$500.00 and had not done so at any time prior to the accident). Jennifer was now without a car.

Jennifer began looking for work and she first found work at Castle Building Supplies some time in August of 2016. According to the Ontario Works file Jennifer was fired from Castle Building Supplies on August 30th. According to her evidence Jennifer says when she started working there she was told by some of the other workers that business was going to be slowing down. She therefore alleges that she voluntarily left this job.

Shortly thereafter Jennifer found employment at Mac's Milk. She was only there one week when she was fired. Jennifer admits in her evidence that she was fired from Mac's Milk and indicates that she had done something wrong. She also noted that she found it difficult to work for someone else having been self-employed for so long.

According to the Ontario Works file the job at Mac's Milk ended on September 10, 2016. Again, according to the Ontario Works file the employment at Mac's Milk was from September 1 to September 10. Her ROE was sent to EI.

By November 15, 2016 Jennifer had secured employment at Creative Meats in Warren, Ontario. This was a 20 minute drive from Brenda's home. Jennifer's evidence is that she paid Brenda \$20.00 to drive her there and back each day. This was a butcher store and her job involved packaging meat products and preparing customer orders. In her Ontario Works self-declaration regarding employment she indicates that it is full-time employment, more than 30 hours per week. Jennifer also applied to Ontario Works for some assistance with respect to buying work boots that she needed for her employment. This was granted and Ontario Works paid \$200.00 towards her work boots. A request made at the same time for a vehicle for transportation in the amount of \$1,000.00 was denied.

Jennifer's evidence was that she enjoyed working at Creative Meats. She was paid \$11.40 per hour. In her first pay period of seven days she worked 29 hours and earned \$330.60. In her second pay period (another 7 days) she worked 23 hours and earned \$262.20. Therefore she earned in 14 days a total of \$592.80 from Creative Meats. Jennifer's evidence was also that she would have been able to survive on the income that she was earning at Creative Meats. While she had only worked there a brief period of time there was room for advancement.

At this point into the picture comes Jennifer's mother and her family back in Welland. Jennifer's evidence is that at no time during the year of 2016 and up until the time of the accident did she receive any financial help from her mother and in particular she never received any cash. However, in or around the time Jennifer began working at Creative Meats her mother was not doing well. Debra lived in Welland with her husband and her mother. Apparently her mother was unwell and Debra had to care for her mother. Debra herself was unwell. Debra was on disability and Jennifer's father had retired. According to the examination under oath Debra had lupus and rheumatoid arthritis. Her daughter was concerned about Debra's ability to care for herself and to care for her mother. There was some discussion about the fact that Debra may need to hire people to come in and help the family. Therefore after one of these conversations Jennifer describes herself as feeling very stressed about her mother's situation and she decides that she is going to move back to Welland to "help take care of my mother to help take care of my grandmother."

Jennifer's evidence was that if she did not move back to Welland to help her mom they would have to bring someone else in and that was going to be difficult financially.

As a result of this decision Jennifer quit her job at Creative Meats. Her last day worked was November 25, 2016.

On November 30, 2016 Debra rented the car from Enterprise and Jennifer was noted as an additional driver. Debra paid for this car by credit card as Jennifer's credit cards were frozen. While Jennifer gave evidence that she had moved to Welland on or about November 25, 2016 the car was needed to go back north to pick up some of her possessions and this was when the accident occurred. Therefore Jennifer had only been living in her mother's home between November 25th and December 2nd.

Other relevant evidence is that at the time this accident occurred Jennifer had approximately \$10.00 in her bank account. She had reapplied for Ontario Works. Her evidence suggests she really had no clear plan as to how things were going to work with her mother because there had not been enough time to develop any plans. She was going to live in the basement where she had her own bedroom and bathroom. The kitchen facilities were upstairs and her mother was going to cook. They were going to put a door on the stairs of the basement in order to give her some privacy. Jennifer also said that she was thinking that she would work while she was in Welland once she sorted out how much time was needed in terms of providing care. She also

gave evidence that she was thinking about going back to school, maybe Brock, to take a psychology course. All of this is speculation.

Perhaps the situation at home in Welland can best be described in Jennifer's own words:

"When I arrived the plan was I needed... I had half of my stuff with me and was still moving in. That was _____. The plan was just to move in and figure things out."

Jennifer was asked during her EUO as to whether her financial situation had anything to do with her decision to move back to Welland. Her answer was "No, cuz I was getting - It was getting better." However Jennifer also gave evidence that it was uncomfortable for her to rely on her friend Brenda to help her out. She said that it "took a lot less pride" to rely on her parents.

Position of the Parties:

Co-operators position is that on the facts on this case it cannot be concluded that Jennifer is principally dependent for financial support on her mother. The Co-operators submits that it is critical to remember that that is the question for my determination and not whether Jennifer was in a financial crisis on the date of the accident.

Co-operators as indeed does ACE points to the criteria set down by the Ontario Court of Appeal in *Miller v. Safeco Insurance Company of Canada*, 48 O.R. (2d) 451 as the starting point. The four criteria are set out below:

1. The amount of dependency;
2. The duration of dependency;
3. Financial or other needs of the alleged dependent;
4. The ability of the alleged dependent to be self-supporting.

I will review the parties' positions with respect to each of the four criteria.

Turning first of all to the duration of dependency. Again, the parties are in agreement with respect to the law in this area. Both point out that one must look at a period of time that accurately reflects the true nature of the relationship between the parties at the time of the accident.

Co-operators position is that in this case a true characterization of the dependant relationship requires a review of that relationship over a period of time. (*Oxford Mutual Insurance Company v. Co-operators General Insurance Company*, 2006 CanLii, 37956 Ont.C.A. Co-

operators submits that the appropriate time period to be considered in Jennifer's case is the 12 months prior to the accident. Co-operators submits that in the 12 months prior to the accident Jennifer showed that she had a significant working history and had lived independently before moving back with her mother in the week before the accident. In fact, Jennifer had been living away from her parents for more than 10 years. Co-operators points out to her work history, including her self-employment business in the first six months of 2016, her three jobs that she was able to secure as all relevant factors that one must look at with respect to the duration of dependency. Co-operators submits that a briefer period as proposed by ACE does not accurately reflect the true nature of the relationship between Jennifer and her mother.

ACE on the other hand submits that I should consider the one week prior to the motor vehicle accident. ACE points to a number of cases where short time periods have been selected for the duration of dependency. ACE submits that Jennifer was an individual in transition and that the cases involving individuals in transition is relevant to my determination. ACE makes reference to the case of *Dominion of Canada General Insurance Company v. Her Majesty the Queen in the Right of Ontario* (2013, ONSC 4717) where the Court stated that some of the most challenging dependency cases are those where the pre-accident history shows a changing environment. Similarly in the case of *Intact v. Allstate Insurance Company of Canada* 2016 ONCA 609 the Court of Appeal in overturning an arbitrator's decision concluded that a seven week period in which a new couple had moved in with one another was the appropriate time period that truly reflected the facts of that case. I do note that the cases relied upon by ACE generally did not involve an individual where it was argued that they had an earning capacity. ACE's position is perhaps best described by quoting directly from their Factum in paragraph 43:

"ACE INA submits that the relevant time period for consideration is the one week period in which 'Jennifer' was living with her mother in Welland, Ontario. Jennifer clearly underwent an immense 'ground shift' in 2016 and was forced to rebuild her financial wherewithal from nothing. Despite her best efforts she was unable to secure steady employment due to the realities of employment opportunities in Lavigne, Ontario. Her dire financial straits were further complicated by the fact that she lost her ability to transport herself, pay for rent, food, clothing, utilities and all the other necessities of life. By the time she moved to Welland her financial situation had not improved in the slightest and she was in the same financial position as when she declared bankruptcy on August 2, 2016. Jennifer's move to her mother's house was a 'life change' in an attempt to start over, to rebuild her financial security after it had crumbled and she entered financial ruin."

For reasons that follow I agree with Co-operators that the proper time period that most accurately reflects the true nature of the relationship from a dependency perspective between Jennifer and her mother is the one year prior to the accident.

With respect to the amount of dependency Co-operators points to the fact that Debra made little or no contribution financially in the year prior to the motor vehicle accident to her daughter's financial needs. She did not pay her any cash. While she did rent a car for her it was only for a few days and that in and of itself would not substantiate a 51% dependency of Jennifer on her mother. Co-operators submits that simply providing her with shelter for one week is insufficient to establish a principal dependency. Co-operators also submits that there is no evidence that Jennifer's choice to move in with her mother was as a result of financial needs but rather it was a voluntary decision on her own part for the purpose of going and living with her mother and grandmother and providing care. Co-operators points out that Jennifer only lived with her parents for one week in the entire year pre-accident and therefore her mother could not possibly have provided her with 51% of her needs during that one year period.

ACE on the other hand submits that Jennifer was in dire financial straits and unable to provide for herself and therefore it must follow that she was dependent on her mother. ACE characterizes Jennifer's move back home as a "lifeline she clung to" in order to survive her bankruptcy from which she had not yet recovered. They submit that she had no money for food, shelter, transportation or a cell phone and was not employed and had \$10.00 in her bank account.

The question of the amount of dependency revolves around the determination of the duration of dependency to some extent. However, even in that one week prior to the accident there was still no evidence that Jennifer was receiving any money from her mother. Her dependency would have been limited to shelter and as will be reviewed further she had elected to stop work in order to return home to care for her mother. That is a key fact in my view.

Turning now to the financial needs of Jennifer. Co-operators in their submissions suggested that Jennifer had significantly reduced her financial needs due to her deteriorating financial situation. There was no evidence led with what her expenses were prior to moving in with Brenda. However, once she moved in with Brenda she had minimal expenses. She had told Brenda that she would pay rent when she was working. She paid Brenda \$20.00 a day to drive her to Creative Meats. She estimated she spent \$60.00 a month on cigarettes. With respect to clothes she claims she wouldn't spend any more than \$50.00 a year on clothes. With respect to anticipated expenses when she moved to Welland, while again this is speculative, there was evidence at the EUO that Jennifer would pay her mother rent, contribute to groceries, perhaps buy one of the family's cars, pay for her own cell phone and other necessities. That had not yet happened as by the time the accident occurred she had only been in Welland one week and no plans had materialized with respect to how her stay in her mother's home would develop.

ACE points to the bankruptcy file as providing some evidence of the insured's expenses. The total expenses described as "monthly discretionary expenses" for telephone, hydro, smoking, car lease payments and repairs and payments to the Estate came to \$1,545.00 per month. ACE submits that Jennifer was not able to meet 51% of those needs.

Lastly and most critically is ability to be self-supporting.

Co-operators submits that Jennifer had a significant earning capacity and that her ability to be self-supporting was that of an independent adult. She had been financially independent for years. Even in the difficult year prior to the motor vehicle accident with her personal bankruptcy she demonstrated the ability to find work in rural areas in Northern Ontario. Co-operators submits that one can infer that Jennifer would likely have found work in Welland relatively quickly.

While Co-operators accepts that Jennifer was fired from one or two jobs they rely heavily on the fact that she was able to secure that work in the first place. They also point out to the nature of her work with Creative Meats. She had been there for two weeks. She voluntarily chose to leave that work to move back home to care for her mother. She was not fired. Jennifer's evidence is that she liked the job and there was opportunity for advancement.

Co-operators provided an analysis of Jennifer's capacity to earn at Creative Meats based on the assumption that she did not quit that job but stayed there and worked for a year. They assumed that she would not have worked more than 26 hours a week (a conservative estimate in their submission) and that she would have continued to earn \$11.40 an hour. They allowed a time off work (4 weeks) and they calculated her ability to earn at Creative Meats had she not voluntarily left that job at \$14,227.20. Co-operators submits that that is her earning capacity. Co-operators also included in their materials the Market Basket Measure (MBM). These statistics have been used more frequently by arbitrators since Arbitrator Samis first recognized the helpfulness in his case *Certas Direct Insurance Company v. Security National* (decision of Arbitrator Samis, August 9, 2018). In taking the MBM Co-operators points out that Levigne falls within the Census subdivision of the Municipality of West Nipissing. This is a municipality with a population of 14,364 in 2016. In 2015 the related MBM for those small population centres was \$18,254.00 and in 2016 it was \$18,501.46. Even taking the part-time work at 26 hours per week as Jennifer's capacity to earn, the \$14,227.20 would provide her with more than 50% of either the 2015 or 2016 MBM. Co-operators also submitted that if Jennifer worked 40 hours her earnings would be \$21,648.00 which would cover the MBM over 100%. Co-operators therefore submits that using any of these calculations Jennifer's capacity to earn supports that she would not be principally financially dependent on anyone.

Finally Co-operators submits that even if it is determined that due to her financial situation as opposed to her earning capacity that Jennifer was unable to fund 51% of her needs by herself Co-operators submits there is no evidence whatsoever that she was receiving more than 51% of her financial needs from her mother.

ACE on the other hand points to the insured's bankruptcy in 2016, the fact that she did not work from the time of her bankruptcy until some time in August, that she only received one payment from Ontario Works, that she was fired from one if not two jobs and since her personal bankruptcy in July of 2016 had not been able to get herself in a position where she

was not relying on the good will of her friend Brenda to provide her with support. ACE submits that such an individual could not be found to have the ability to be self-supporting. Further ACE submits that at the time of the accident Jennifer was unemployed with no immediate job prospects and with no source of income.

Analysis:

I now turn to an analysis of the law and my reasons for concluding that Jennifer is not principally dependent for financial support on her mother. The Statutory Accident Benefits Schedule effective September 1, 2010, Ontario Regulation 34/10 defines a dependent under Section 2(6) as someone who is “principally dependent for financial support” at the time of the accident. Therefore, in order for Jennifer to qualify as a dependent on her mother it must be established she was principally dependent for financial support at the time of the accident.

There is a long line of cases that has set out this test for financial dependency. This is commonly known as the 51% rule. To be principally dependent for financial support the individual must receive more than 50% of her financial needs from someone other than herself. If Jennifer is able to meet 51% of her financial needs then she cannot be principally dependent for financial support on others (*Federation Insurance v. Liberty Mutual (Samis, May 7, 1999)* affirmed *Liberty Mutual Insurance Company v. Federation Insurance Company (Ontario Div. Ct. September 15, 1999)* and [2000] O.J. #1234 Court of Appeal).

As set out earlier, both Co-operators and ACE agreed that the starting point in any dependency analysis is the four criteria from the decision in the Court of Appeal in *Miller & Safeco* (supra). I have looked at each of those four criteria carefully and the evidence as I have reviewed it available to me in reaching my conclusion. I agree with Co-operators that in this case the most relevant criteria, although not the only criteria, is that of the ability of Jennifer to be self-supporting.

It is also important to keep in mind the question that I am asked to determine. “Was Jennifer principally dependent for financial support on her mother?” Irrespective of the ability to be self-sufficient I must look at what financial support Jennifer’s mother provided to her. Lastly, I have to choose the duration of dependency or a time period for my analysis that most accurately reflects the true nature of the relationship between Jennifer and her mother at the time of the accident.

I turn to my reasons for selecting the one year time period first. I find that the one week period that is relied upon by ACE is too short a period to accurately reflect Jennifer and her mother’s relationship. Jennifer had been independent of her mother and living up north for more than 10 years before this accident. In the three years leading up to July of 2016 she was running her own self-employed business. While that business went bankrupt there was no evidence that at that time Jennifer’s mother provided her with any financial support. Jennifer was resourceful and found help with friends. In that same time period Jennifer managed to find employment in

three different jobs in Levigne. While she may have had some difficulty with maintaining employment in those first two jobs there is no evidence that she was not fully employed and could have continued to be employed at Creative Meats.

At no time in the year prior to the motor vehicle accident is there any evidence that Jennifer's mother provided her with any financial support other than paying for the rental car for the two or three days that Jennifer needed it to move her things from her place in the north to Welland. While Jennifer's life was in transition, there is not enough evidence before me to determine what was going to happen in that transition. There was speculation as to how the care would be provided to the mother and grandmother. There was speculation as to whether Jennifer would seek employment. There was speculation as to how long Jennifer may stay in her mother's apartment. The only evidence before me is that Jennifer had given up a viable job in which she had worked 29 hours in one week, 23 in another week at \$11.40 per hour for which there was a prospect of advancement and no indication that she would lose that job, in order to go home and live with her mother. The voluntary giving up of her employment in my view is the key fact in this case. Whether I look at one year or one week my conclusion remains the same and that is that Jennifer was an able-bodied individual with an ability to be self-supporting, albeit on minimal levels, and she chose to cease her employment in order to provide care to her mother. Jennifer was capable of employment should she wish to do so and there was a proven track record of her ability to secure employment.

Having reviewed the Court of Appeal's decision in Intact Insurance Company v. Allstate Insurance Company of Canada (supra) and all the facts before me I am satisfied that the reasonable time period to analyze the dependency in this case and that most fairly reflects the status of the parties at the time of the accident is the one year period.

Turning to the law in relationship to the ability of Jennifer to be self-supporting as I have outlined above the key case is Federation Insurance Company of Canada v. Liberty Mutual (supra). That case in my view is not only on point but is binding on me. It is also of some considerable assistance in the analysis of this case.

In Federation, the dependency of a young man who had had significant periods of lay-off but also had periods of employment and earnings was examined. In the 19 weeks before the motor vehicle accident he had earned \$5,700.00. In that time he had lived at home with his parents and performed household chores. His parents provided him with free room and board plus some cash to assist. In the last few days prior to the accident he was not employed but as noted he had been employed in the year leading up to the accident.

Arbitrator Samis found it was not appropriate to look at bare capacity to evaluate dependency. He stated that one must look at whether the individual alleged to be dependent is "reasonably exercising his or her capacity by providing for his or her own needs to the extent permitted by the circumstances." Arbitrator Samis noted that while earnings were evidence of capacity many individuals may not be earning up to their full capacity. This included someone who was

not earning full capacity because of unavailability of work but also would include a person who could earn income but chose not to do so. Arbitrator Samis pointed out that someone who simply chooses not to be employed cannot be regarded as a dependent in the sense that there is a need for financial support imposed on that person. Arbitrator Samis looked at the voluntary nature of the dependency or capacity to earn and concluded as follows:

“In short, he was not providing for any of his own basic needs. Nonetheless he had the reasonable ability to do so. Jonathan Sebastian was a young able-bodied man, regularly employed, earning \$13.00 per hour, not working to full capacity he earned \$300.00 a week. On those facts I find he is not principally dependent for financial support on his parents.”

Arbitrator Samis' decision was appealed and upheld by Justice O'Leary and then an appeal to the Court of Appeal was dismissed. In my view Jennifer's case falls within the same parameters as the *Federation & Liberty*. Jennifer for much of the year of 2016 and/or indeed for the one week she was living with her mother was not providing for her own basic needs. However, she had the reasonable ability to do so as evidenced by, in particular, her job at Creative Meats but also the two other jobs she managed to secure. She was also receiving Ontario Works. She was able-bodied and had been regularly employed and chose to give up that employment to come home and care for her mother. The facts of this case are similar in my view to the decision I rendered in *Unica & Wawanesa* (decision, May 9, 2018) where I concluded that the claimant was not principally dependent for financial support on his parents in circumstances where he voluntarily gave up work in order to establish a non-income level satisfactory that he would qualify for Legal Aid. During that time he returned home to live with his parents. I found he was capable of employment and choosing not to use his capacity to work and in those circumstances he was not principally dependent for financial support on his parents. I reach the same conclusion with respect to Jennifer. I agree with the analysis put forward by Co-operators with respect to Jennifer's ability to earn based on her job at Creative Meats and that she had the ability to provide for 51% of her needs. The test is one of principal financial dependency and not dependency and I did not find evidence of principal financial dependency by Jennifer on her mother. As pointed out by Justice Perell in the decision *Gore Mutual Insurance Company & Co-operators General Insurance Company (2008) O.J. #3603* a person's earning capacity is a product of many things, including formal and informal education, natural and acquired talents, physical and mental abilities and disabilities and external factors such as the availability of employment and the supply and demand for labour. Justice Perell points out that determining a person's earning capacity would involve considering these factors and also a person's prior employment history and I have considered those in this case.

While I appreciate and understand the argument made by ACE that the inference from the available evidence is that Jennifer moved home as she was financially destitute and did not want to continue to rely on Brenda but preferred to stay with her mother, I simply do not find that the evidence supports that position.

I also reviewed the cases that ACE directed me to which they felt supported their position that someone in Jennifer's position had to be found to be dependent on her mother. I found those cases were distinguishable.

In the case of State Farm Mutual Insurance Company & Her Majesty the Queen in the Right of Ontario, (2018) ONSC 4258 a decision of Justice Sanfilippo of the Superior Court the claimant had no history of employment. The claimant in that case had never worked in Canada and since being in Canada had been supported. In this case Jennifer had a clear history of employment. Unlike the case before Justice Sanfilippo there was clear evidence of earning capacity and that was a key factor in my decision.

In the Intact v. Allstate decision of the Court of Appeal (supra) the evidence was that the new partner upon whom dependency was being alleged was clearly paying for the vast majority of all the expenses. The evidence was that "Kyle" was paying for almost all the claimant's expenses. The claimant would occasionally buy some groceries or pay for a dinner. The evidence was that in the relevant seven week period that "Kyle" paid for at least 64% of the claimant's financial needs. In the case before me there is no evidence other than the rental car that the mother paid or contributed financially to Jennifer's needs during her financial crisis that developed throughout 2016.

Keeping in mind that I am not being asked to determine whether Jennifer was bankrupt or destitute at the time of the accident but rather whether she was principally dependent for financial support on her mother, I am satisfied that she was not based on the criteria laid down in Miller & Safeco with particular reference to her ability to be self-supporting.

Result:

I therefore find that Jennifer was not principally dependent for financial support on her mother at the time of the accident of December 2, 2016 and accordingly ACE INA Insurance is the priority insurer pursuant to Section 268 of the *Insurance Act*.

There was no issue with respect to the quantum of the accident benefits before me and if counsel are unable to agree on quantum I can be contacted to schedule a further pre-hearing.

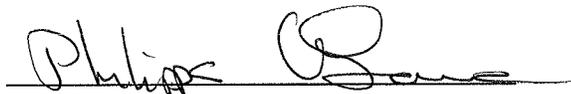
Costs:

The Arbitration Agreement provides that legal costs shall be determined by me taking into account the success of the parties, any offers to settle, the conduct of the proceedings and the principals generally applied in litigation before the Courts. I conclude that Co-operators was entirely successful in this matter and therefore ACE INA should pay their legal fees. Similarly I conclude that ACE INA is responsible for the arbitrator's account.

If counsel cannot agree on costs I would ask that they contact me so that a further pre-hearing can be scheduled and a costs hearing be set up.

I thank both counsel for their innovative and detailed Factums and oral argument before me. Both counsel should be congratulated on their advocacy.

DATED THIS 8th day of May, 2018 at Toronto.

A handwritten signature in black ink, appearing to read "Philippa G. Samworth", written over a horizontal line.

Arbitrator Philippa G. Samworth

DUTTON BROCK LLP