

***IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,  
c. I. 8, SECTION 268 and REGULATION 283/95 OF THE ACT***

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

***AND IN THE MATTER OF AN ARBITRATION***

***BETWEEN:***

***INTACT INSURANCE COMPANY***

***Applicant***

***- and -***

***AVIVA GENERAL INSURANCE COMPANY  
(formerly known as RBC General Insurance Company)***

***Respondent***

**AWARD**

**COUNSEL:**

Matthew Lefave for the Applicant

Jessica Green for the Respondent

## **BACKGROUND:**

1. Andrzej Kloc was struck as a pedestrian by a vehicle insured by Intact Insurance Company (“Intact”) on January 14, 2014. He suffered serious injuries and has been determined to be catastrophically impaired as defined in the *SABS*. He submitted an application for payment of accident benefits to Intact, and they have paid benefits to him and on his behalf.

2. The Claimant arrived in Canada from Poland approximately four years before the accident. Two of his brothers had moved to Canada several years earlier, and he moved in to an apartment that they shared in Mississauga. His brother Leszek (“Les”) was a named insured under a policy issued by RBC General Insurance (“RBC”) at the time. Intact contends that Mr. Kloc was principally dependent for financial support on his brother Les at the time of the accident, and that he was therefore an “insured person” under the RBC policy. If so, RBC would be in higher priority to pay his claim by virtue of section 268(2)2(i) of the Act.

3. Mr. Kloc was 48 years old at the time of the accident. He did not have a work visa, but worked on a casual basis in construction over the four years that he was in Canada prior to the accident. He was paid in cash, and did not file any tax returns.

## **ISSUE:**

1. Was the Claimant principally dependent for financial support upon his brother Leszek Kloc, the RBC insured, at the time of the accident, and therefore an “insured person” under the RBC policy?

## **RESULT:**

1. The Claimant was not principally dependent for financial support on the RBC insured at the time of the accident, and is not therefore an insured person under the RBC policy .

## **THE EVIDENCE:**

4. Both the Claimant and his brother Les were examined under oath in the course of this proceeding, and the parties relied on transcripts from these examinations at the hearing. Bank records and records of wire transfers of funds sent by the brothers to family members in Poland were filed and also relied on. No witnesses were called to testify at the hearing

5. Most of the relevant facts are not in dispute. The Claimant arrived in Canada on a travel visa in 2010. He moved into an apartment in which his two older brothers, Leszek and Slawomir, had been living in Mississauga, and remained there through the years leading up to the accident. Les was a long-haul truck driver, who was often away for extended periods. Slawomir was not employed during the relevant period, and collected WSIB benefits as a result of having sustained a workplace back injury. Slawomir traveled to Asia during the winters and remained there for a few months. He unfortunately passed away while in Asia approximately one month after the Claimant's accident.

6. Mr. Kloc was not working at the time of the accident in January 2014. He had, however, worked for various periods prior to that time. He testified that his last period of employment before the accident was from July to October 2013, when he did some roofing work. He stated that he worked approximately sixty hours per week, at an hourly rate of \$14, and that he was paid in cash. Assuming that he had worked for four full months, his total earnings would be approximately \$14,500. He had no documentation to support these earnings, and advised that he has never filed tax returns while in Canada.

7. The evidence of Mr. Kloc's work history and earnings prior to July 2013 was vague. He stated that he had worked on construction sites for varying periods of time, and that he was always paid in cash. The evidence suggests that the four months that he worked at the roofing job over the summer and early fall of 2013 was his longest period of continued employment. He recalled that the other jobs he had in 2013 lasted one week or less.

8. Mr. Kloc did not contribute toward the rent for the apartment that the brother's lived in, nor did he pay for any other household expenses. While the evidence regarding the brothers'

living expenses was scant, Les testified that the rent at the time of the accident, including utilities, was \$1,150 per month, He estimated that the cost of television and internet was approximately \$250 per month, for a total of \$1,400 monthly. The bank records filed generally support these estimates. Les testified that Slawomir split the expenses with him, although not always equally, given that he earned more than Slawomir did.

9. The Claimant stated that he used the money that he earned to buy clothing, some food and cigarettes. He did not have a cell phone prior to the accident. He did not have his own bank account before the accident, but apparently “shared” an account with his brother Slawomir. He stated that when he was not working, he did much of the cooking, as well as the cleaning of the apartment and laundry, although there was no formal agreement that these chores were done in exchange for not having to contribute toward household expenses.

10. The Claimant was not married at the time of the accident. He had previously been married and has three daughters, who were living in Poland at the relevant time. Both the Claimant and Les testified that they sent money home to Poland to their family members on a regular basis at the time of the accident. Les explained that he would generally send a monthly amount to their parents, and that the Claimant would add some of his own money to that amount to be provided to his girlfriend, for the support of their daughter. The money was sent through Western Union.

11. The Western Union records were filed at the hearing. They indicated that eight such transfers were made in 2013, in the twelve months prior to the accident. The amounts varied from \$700 to \$950, with most of the transfers being \$900 or \$950. While Les stated that there was no fixed split or formula, he suggested that if \$950 was sent, he would have contributed \$600 to be provided to his parents, and the Claimant would have provided \$350 for his daughter. If a total of \$700 was sent one month, it was likely that half of that amount was contributed by him, while the other \$350 would have come from the Claimant.

12. Les estimated that while his gross income in the year before the accident was approximately \$67,000, his net income after deducting all of his driving-related expenses, was

only \$20,000. He testified that he had a gambling habit and that aside from the money that he saved each month to send back to Poland, he spent the rest of his money gambling. He stated that he did not loan or give the Claimant any money, nor paid for any of his bills.

13. The evidence indicated that Slawomir, Mr. Kloc's other brother, had paid for his flight to Canada, both when he arrived to stay in 2010, and once before, when he had come on an extended visit. Les testified that he had not been aware that his brother would be coming to Canada to live, when he arrived.

### **RELEVANT PROVISIONS:**

The following provisions are relevant to my determination of this matter:

#### ***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,*

**268(5)** *Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.*

#### ***Statutory Accident Benefits Schedule –***

**Section 3(1)** *“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,*

**Section 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:**

#### *Intact's submissions*

14. Counsel for Intact contended that the evidence supports a finding that the Claimant was principally dependent on his brother Les for financial support at the time of the accident. He acknowledged that Mr. Kloc had worked for approximately four months in mid-2013, but contended that the evidence suggests that this was his longest continuous period of employment. He noted that he was not employed at the time of the accident, and that he had otherwise worked sporadically at other jobs that had lasted for one week or less.

15. Mr. Lefave emphasized that the Claimant did not contribute toward the rent for the apartment he shared with his brothers, or to the household expenses. He noted that the bank records filed show that Les had paid the rent from his bank account, and that he had testified that his other brother Slawomir made some contributions toward that and other expenses, but that Les had paid a larger share of the expenses..

16. Counsel submitted that while the court in *Miller v. Safeco* (1985) 50 O.R. (2d) 797 instructs us to consider Mr. Kloc's earnings and living expenses in the analysis of dependency, more recent case law directs us to consider the "big picture" of the parties' financial relationship. He submitted that given that the Claimant was not legally entitled to work in Canada, and had no steady source of income, the "big picture" analysis leads to the conclusion that the Claimant was unable to support himself during the relevant period.

17. Counsel for Intact contended that a longer, rather than shorter time frame should be used for the dependency analysis, as that would be more reflective of the reality of the parties' financial relationships. He urged me not to focus unduly on the four months during which Mr. Kloc had steady employment in mid-2013, as that would not accurately reflect the level of his earnings in Canada.

18. Mr. Lefave cited the case of *Oshana v. Progressive Casualty Insurance Co.* [1994] O.I.C.D. No. 132 in support of his position. In that case, a brother arriving in Canada from Syria was determined by Senior Arbitrator Naylor to be financially dependent on his brother who had arrived in the country earlier and with whom he lived. That brother also paid all of the household expenses.

19. While he acknowledged that the case law directs that a person's capacity to earn income also be considered, counsel contended that there were several 'negative prognosticators' that would realistically impact upon Mr. Kloc's capacity to earn more income than he had been earning and to become financially independent. He noted that in *Co-operators General Insurance v. AXA Insurance* (2015) Carswell Ont 13237, Arbitrator Bialkowski considered the fact that the claimant in that case had behavioural problems, substance abuse issues, and a sporadic work history, which he concluded would impact on his capacity to earn income. Counsel urged me to take the same approach in this case. He contended that the fact that Mr. Kloc was not legally entitled to work in Canada, had no driver's license, was not bondable, and had issues with alcohol, all mitigated against him finding steady employment and having any meaningful capacity to earn enough money to become financially independent.

20. Finally, Mr. Lefave also noted that Arbitrator Bialkowski considered, but declined to use the Statistics Canada figure for the 'average consumption of a one-person household' to determine the claimant's living expenses over the relevant period in the above case, preferring instead to rely on the accounting evidence presented. The two accountants retained provided significantly different estimates of the claimant's "needs", and the arbitrator ultimately relied on a figure that was somewhere between the two figures arrived at. Mr. Lefave submitted that the

evidence in this case suggests that Mr. Kloc's living expenses were very modest, and that it would be inaccurate to import general statistics into the analysis.

*RBC's submissions*

21. Counsel for RBC submitted that the twelve- month period prior to the accident was the appropriate time frame to consider in this case. She agreed that there was no reason to apply a shorter period, as Mr. Kloc had been in Canada for four years prior to the accident and his life was not in transition at the time of the accident, as is the case with many other claimants for whom financial dependency is being considered. She noted that the Claimant worked in construction, which was a seasonal business, and that a one-year time frame would reflect the seasonal shifts in availability of employment in that field.

22. Ms. Green contended that the simple question to answer is whether Mr. Kloc either had earned, or had the capacity to earn enough income to constitute 51% of his needs over the twelve months before the accident. She submitted that the evidence clearly does indicate that his earnings over that period exceeded 50% of his needs, and that he should therefore not be found to be principally financially dependent on the RBC insured. She noted that Mr. Kloc would have earned approximately \$14,500 from the four-month roofing job he had between July and October 2013, and that this figure should be the minimum amount used in the calculation, given his evidence that he had also worked at other jobs earlier in the year.

23. Counsel also submitted that despite the lack of detailed information about the brothers' living expenses, it is clear that Mr. Kloc lived a relatively modest existence. She contended that it was appropriate to apply the Low Income Cut-Off ("L ICO") measure developed by Statistics Canada to determine the level of the Claimant's needs. She noted that the statistics provide an after-tax figure for 2013 for a one-person household of \$19,774, and that the figure rises to \$20,160 in 2014. Ms. Green contended that even if the minimum figure of \$14,500 is used to represent Mr. Kloc's earnings, this exceeds 51% of either of the LICO figures above by a large margin, and should lead to the conclusion that he was not principally financially dependent on his brother Les.

24. She also highlighted the evidence that Les had not given or loaned any money to the Claimant during the period in question, and that he testified that he had not even been aware that his brother would be coming to Canada. She contended that Les would not have been able to financially support the Claimant, given his evidence that the money that he was able to save was either sent back to his parents in Poland, or went to service his gambling habit. Counsel also noted that Mr. Kloc had a joint bank account with his other brother Slawomir, who had also paid for his airline tickets, and that these facts should be considered in the analysis.

25. Ms. Green noted that the records of the Western Union funds transfers show that the Claimant was able to send approximately \$350 back to his family in Poland most months during the period in question, even when he was not working steadily. She contended that someone who regularly contributes to someone else's financial support should not themselves be found to be principally dependent upon another person.

26. Counsel submitted that the decision in *Co-operators v. AXA, supra*, cited by Intact counsel is distinguishable on the facts, as the claimant in that case had been fired from several jobs, and had serious behavioural and addiction issues, which was not the case with Mr. Kloc. She highlighted the fact that he was a healthy and able-bodied male, and clearly had the capacity to earn more than he had been earning. She cited the decisions in *Co-operators v. Zurich Insurance & ING* (Arbitrator Samis, May 11, 2005) and *Intact Insurance Company v. State Farm Mutual Insurance* (Arbitrator Bialkowski, June 6, 2013) in which claims for financial dependency were rejected because the claimants were determined to have the capacity to earn more money than they actually did. She also noted that the Court of Appeal instructed in *Security National Insurance v. Wawanesa Mutual (2014) ONCA 850* that an individual's visa or immigration status should not be considered in the dependency analysis.

27. Finally, counsel noted and relied on Arbitrator Samis' statement in the case of *ICBC v. Federated Insurance* (July 3, 2009) to the effect that while the claimant in that case was "very much in need of the help and support of his family from time to time over the years preceding the accident...and their financial support was no doubt important, it did not create principal financial dependency ...in the context of the regulation". She contended that the same logic

should apply with reference to Mr. Kloc, and that the fact that his brothers may have paid a higher share of the household expenses does not necessarily result in a finding of principal financial dependency under the regulation.

### **ANALYSIS & REASONS :**

28. While the law regarding principal financial dependency continues to evolve, I agree with Arbitrator Bialkowski's statement in *Co-operators v. AXA Insurance, supra*, that the correct legal principles can be summarised as follows:

- In order to qualify as a “dependent” under the regulation, a claimant must not merely be reliant on someone else for financial support, but rather must be principally dependent upon them;
- if a claimant has sufficient resources to cover 51% of their financial needs, he or she will not be found to be principally dependent upon someone else;
- the time frame to be considered requires a consideration of the parties' relationship over a period of time that fairly reflects the status of the parties at the time of the accident, rather than a “snapshot” on the actual day of the accident;
- the *Miller v. Safeco* factors – duration and amount of dependency, the financial needs of the alleged dependent and his or her ability to be self-supporting – should be considered;
- a claimant's capacity to earn must also be considered.

33. I also note Justice Myers' comments in the appeal decision in *Allstate v. ING & Aviva* (2015) ONSC 4020 that while the mathematical calculation of whether a claimant's resources exceeds 51% of their needs is an important factor in the analysis, it is not the only factor to consider, and that the determination of whether someone is principally financially dependent upon someone else should be based on the “big picture” established by the surrounding facts.

34. Turning to the facts of this case, the first step is to determine the time frame in which to consider the parties' financial arrangements and relationship. Mr. Kloc was in Canada for approximately four years before the accident occurred. How far back should the analysis go? Counsel agreed that unlike some claimants whose lives are in transition at the time of an

accident, Mr. Kloc's circumstances seemed not to have changed that much over the four-year period since he arrived. Given the seasonality of the construction business, I agree that an analysis that considers the Claimant's earnings and expenses over the twelve months prior to the accident is an accurate reflection of his overall circumstances.

35. The evidence supporting Mr. Kloc's earnings comes from both his testimony provided at an Examination Under Oath, as well as that of his brother Les. While there are no supporting documents like pay stubs or tax returns, their evidence was consistent that Mr. Kloc was not working at the time of the accident, and that his last period of employment prior to the accident was for from July to October 2013. Mr. Kloc testified that he was doing residential roofing work during that period, and that he worked sixty hours weekly at an hourly rate of \$14.

36. As noted above, his earnings over that period would amount to approximately \$14,500. Mr. Kloc also testified that the other jobs he took on in the first part of 2013 lasted "three, four days, sometimes a week". Based on this evidence, I find that Mr. Kloc's earnings in the year prior to the accident amounted to approximately \$16,000.

37. The question then becomes how his "needs" should be quantified. The evidence regarding his living expenses was somewhat vague, although we do know that he shared a two-bedroom apartment with his two brothers, one of whom (Les) was not home very often. He did not contribute toward the rent, nor to any other household expenses. The total monthly expense for rent, utilities, television and internet was approximately \$1,400. Mr. Kloc did not have a cell phone or a credit card.

38. There are a few options for arriving at a figure representing his "needs". One approach would be to estimate the monthly cost of his food, cigarettes and alcohol and add that to one-third (his share) of the \$1400 total monthly household expenses. Using approximate figures of \$500 per month per food and another \$500 for cigarettes, occasional bus fare, toiletry and personal items and alcohol, that amounts to between \$1400-1500 per month or a maximum of \$18,000 per year.

39. Another approach would be to cite the LICO figure for a one-person household in Mississauga, which is approximately \$20,000 annually (after tax). I note that the “before tax” LICO figures are \$23,861 and \$24,328 respectively for 2013 and 2014. Another statistic often used by accountants, as was done in the *Co-operators v. AXA Insurance, supra*, case cited above is the Spending Patterns Report issued by Statistics Canada, which estimates the average consumption of a one-person household. That figure is approximately \$28,000 for the period in question.

40. On any of these measures, the Claimant’s estimated earnings of \$16,000 per year far exceed the 51% “threshold”, below which he would be found to be principally financially dependent. I note that if this were not the case, and his earnings were below the 51% mark, I would still have to determine whether it was his brother Les, the RBC insured, that he was dependent on, given that his other brother Slawomir paid a large share of the household expenses and had paid for his airline tickets to come to Canada.

41. While the mathematical analysis above leads me to conclude that Mr. Kloc is not a “dependent” of his brother Les at the relevant time, I am also satisfied that the “big picture” analysis leads to the same result. While I note that Mr. Kloc’s work history was sporadic and his earnings modest, it is clear that his living expenses were also quite low, given his shared accommodations. While he may have spent money on food, clothing, cigarettes and alcohol, he did not have a cell phone or credit card, and the evidence overall paints a picture of someone who was able to cover many of his own expenses.

42. The evidence also establishes that Mr. Kloc was able to send regular, monthly amounts of cash back to Poland during the year before the accident, to help support his daughters living there. While the exact amounts he contributed toward the total of \$900-\$950 that the brothers sent home on average each month was not easy to establish from the evidence, I conclude from Les’ evidence that the Claimant contributed \$350 each month to the total sent.

43. This is an important factor in the analysis. While he clearly relied on some financial support from his brothers – in terms of subsidising his share of the rent and household expenses -

in order to make ends meet, the fact that Mr. Kloc was able to send regular payments of a few hundred dollars each month home to Poland is not consistent with the profile of someone who is principally financially dependent upon someone else.

44. For all of the reasons set out above, I conclude that Andrzej Kloc was not principally financially dependent upon his brother Leszek, the RBC insured, at the time of the accident, and that Intact Insurance is the insurer in highest priority to pay his claim.

45. The application for Arbitration is hereby dismissed.

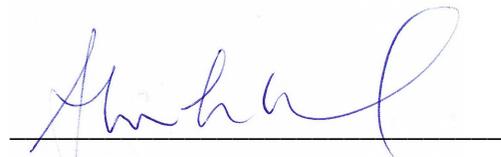
**COSTS:**

46. Given the result, Intact is responsible to pay the legal costs incurred by RBC to defend this claim, on a partial indemnity basis. If counsel cannot agree on the quantum payable, they should contact me and arrangements will be made for submissions to be filed.

47. I will forward my account for Arbitration fees and disbursements incurred to counsel for Intact under separate cover.

I thank both counsel for their helpful submissions and the efficient manner in which this hearing was conducted.

**DATED at TORONTO, ONTARIO this \_\_15<sup>th</sup>\_\_ DAY OF SEPTEMBER, 2017.**



**Shari L. Novick**

**Arbitrator**