CITATION: Pafco Insurance Co. v. The Wawanesa Mutual Insurance Co., 2022 ONSC 6325
COURT FILE NO.: 141/19
DATE: 20221108

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN: PAFCO INSURANCE COMPANY, Applicant (Appellant)

AND:

THE WAWANESA MUTUAL INSURANCE COMPANY and WESTERN ASSURANCE COMPANY, Respondents

BEFORE: Justice R. Raikes

COUNSEL: Nawaz Tahir - Counsel, for the Applicant (Appellant)

Tim Gillibrand - Counsel, for the Respondent, Wawanesa Mutual Insurance

Derek Greenside – Counsel, for the Respondent, Western Assurance Company

David Williams and Mana Khami – Agents for the Lawyers for Applicant

HEARD: May 11, 2022

ENDORSEMENT

[1] The parties agreed to arbitrate an insurance priority dispute. The decision was released by Arbitrator Novick on December 21, 2018. The Appellant, Pafco Insurance Company (Pafco), appeals from that arbitration decision pursuant to para. 15 of an Arbitration Agreement dated May 11, 2018.

[2] The Respondents oppose the appeal on its merits but also assert that the Appellant did not comply with the time limits prescribed for an appeal in the Arbitration Agreement. Accordingly, the appeal should be dismissed.

[3] I will deal with the issue of compliance with the time limits for appeal first.

Timeliness of Appeal

[4] The material facts for this issue are largely undisputed.

[5] On May 11, 2018, the parties entered into an Arbitration Agreement. The Agreement was negotiated and signed by counsel for each party.

[6] The Agreement specifically addresses the right to appeal. At para. 15, the Agreement states:

> 15. The award of the arbitrator shall be binding upon the current parties, but any party may automatically appeal the arbitrator's award, on a point of law or a point of mixed fact and law, to a Judge of the Ontario Superior Court of Justice, without leave of that Court, by way of written notice within thirty (30) days of the release of the arbitrator's written award. Further appeals to the Ontario Court of Appeal and beyond are contemplated.

[7] Arbitrator Novick released her decision on December 21, 2018 at approximately 3:27 p.m..

[8] Counsel for the Appellant obtained instructions to appeal the decision. He had those instructions within the 30 days from release of the decision.

[9] He prepared a notice of application to appeal the decision. By email sent the evening of January 17, 2018, Appellant's counsel instructed his assistant to serve and file the notice of application. He indicated that he wished that to be done by the end of day on January 18, 2018.

[10] The notice of application was issued by the London courthouse on January 18, 2018. It was faxed to Respondent's counsel at 9:21 a.m. on January 22, 2018.

[11] It is undisputed that prior to receipt of the notice of application on January 22, 2018, the Respondents and their counsel had no prior notice that Pafco intended to appeal. There was no correspondence, no email, not even an oral communication of the intention to appeal.

[12] The delivery of the notice of application on January 22, 2018 was outside the agreed upon 30 day time limit for an appeal by roughly nine hours (9) and 22 minutes.

[13] There is no evidence that the Respondents have suffered any prejudice from the late notice. For example, no evidence was lost, no documents were destroyed.

[14] The Appellant takes the following positions:

1. Issuance of the notice of application on January 18, 2018 (within the 30-day appeal period) constitutes notice to the world, including the Respondents, of the appeal.

2. The parties contracted out of provisions for appeals under the *Arbitration Act, 1991* and, as a result, the timeline for an appeal or institution of court proceedings is governed by the *Limitations Act, 2002* and the *Rules of Civil Procedure*. The issuance of the notice of application is well within those time limits.

3. If necessary, this Court should exercise its discretion under s. 98 of the *Courts of Justice Act* to provide relief from forfeiture.

Does Issue of the Notice of Application constitute effective notice under the Arbitration Agreement?

[15] The Appellant relies on the decision *Re St. Paul Fire and Marine Insurance Co. and Guardian Insurance Co. of Canada* (1983), 43 O.R. (2d) 326 (ON CA) for the proposition that the commencement of an action (application) constitutes notice to the world of litigation (the appeal) pending between the parties.

[16] In *Re St. Paul Fire and Marine*, an application was brought to determine which of two insurance companies was primarily liable to the insured lawyers for payment of settlement monies and defence costs. The lawyers were sued for professional negligence. A writ was issued during the currency of the St. Paul Fire and Marine policy but was not served, nor was notice given to the insured until after the Guardian policy came into force. The St. Paul Fire and Marine policy insured against "a claim made or suits brought". The Guardian policy insured against "claims made". The trial judge held that St. Paul Fire and Marine had primary liability. It appealed to the Court of Appeal.

[17] The Court was unanimous in dismissing the appeal but there was a clear disagreement regarding how they arrived at that conclusion. That disagreement is critical to this issue.

[18] The Appellant relies on the minority decision written by Goodman J.A.. In his reasons, he wrote:

> … I agree with the trial judge that "claims against" the insured in the sense that the words "claims made" in the Guardian policy do not relate to an intention or right to claim which some person has against an insured but notice of which has not been communicated to the insured. The terms of the policy make it clear the claim must be made during the terms of the policy. *A claim, other than one made by way of the institution of legal proceedings, can only be made by notifying the person against whom the claim is being asserted of such a claim. Prior to the giving of such notice, there can only be an intention to make a claim. On the other hand, where an action has been commenced by writ by a plaintiff against a defendant who is the insured person, there is then in existence a public record of a claim made against the insured and a document issued under the hand and seal of an officer of the court in which such claim is asserted.* The law is clear that the issue of the writ is the act of the party and is not a judicial act: see Clarke v. Bradlaugh (1881), 8 Q.B.D. 63 at p. 68 (C.A.).
>
> *It is equally clear that at common law the issue of a writ creates notice to the world at large that litigation is pending between the plaintiff and defendant and accordingly that a claim has been made by one against the other.* In Worsley v. Earl of Scarborough (1746), 3 Atk. 392, 26 E.R. 1025, Lord Chancellor Hardwicke said:

> … but it is the pendency of the suit that creates the notice; for as it is a transaction in a sovereign court of justice, it is supposed that all people are attentive to what passes there…
>
> … accordingly, I am of the view that the insured lawyers must be deemed to have had notice of the claim made against them at the time the writs were issued and that the issue of the writs constitutes a claim made against the insured at the time of such issue.
>
> … [Italics added.]

[19] Thorson J.A. expressly disagreed with the principle of law quoted above from the reasons of Goodman J.A.. He wrote:

> … my brother Goodman accepts that this is so but answers that, where an action has been commenced by the issue of a writ, the consequences in law of the writ's issue is that the claim must be taken as having been made at that time, on the common law principle that the defendant must be deemed to have had notice of it at that time.
>
> *With great respect I am unable to agree that this is a correct statement of the law as it applies in this province. I do not take the Worsley case as standing for the proposition that in all circumstances, except where the common law principle has been modified by statute, the mere issue of a writ ("the act of the parties alone and not a judicial act") constitutes notice to the world at large of the making of a claim. I do not accept that the Worsley case go so far, and I am unaware of any use made of the doctrine of implied or constructive notice by which the courts, since 1746, have extended its application so far.* [Italics added.]

He then noted that the principle cited by Goodman J. was confined to cases involving real property disputes where a *lis pendens* [now certificate of pending litigation] was obtained.

[20] Houlden J.A. concurred with the reasons given by Thorson J.A.. Thus, two of the three judges in *Re St. Paul Fire and Marine* expressly rejected the principle that commencing the court proceeding by issue of an originating document constitutes notice to the world. It follows that issuing the notice of application was not written notice to the Respondents until they were served with it or received some other form of written notice of the appeal.

[21] Further, the Arbitration Agreement was negotiated by the parties. Lawyers were involved on all sides. The Agreement expressly requires written notice within 30 days. It does not say "written notice or commencement of an application to appeal within 30 days". All Pafco's counsel had to do was send a letter or email advising that he had instructions to appeal and would be issuing an application. He did not.

[22] I do not agree that the issue of the notice of application on January 18, 2018 satisfied the written notice requirement, nor that doing so amounted to constructive or deemed notice of the appeal to the Respondents.

Is the time limit for commencement of the appeal governed by the *Limitations Act, 2022* and *Rules of Civil Procedure*?

[23] The Appellant submits that:

1. The parties were entitled to and did establish their own limitation period for an appeal by agreement: see para. 15 of the Arbitration Agreement and s. 22(5) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

2. Subsection 2(1)(b) of the *Limitations Act, 2002* provides that the Act applies to claims pursued in court proceedings "other than" proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court".

3. Where the timeframe for commencing court proceedings in the nature of an appeal is not governed by an Act or rule of court, the two-year limitation period found in s. 4 applies.

4. The parties contracted out of the time limits in the *Arbitration Act, 1991* for an appeal. Accordingly, the two-year limitation period applies, and the application brought was well within that time limit.

5. The *Limitations Act, 2002* does not prescribe the time for service. The Rules of Civil Procedure require service of an application at least 10 days before the hearing. That was done in this case.

6. Rule 2.01 provides that the failure to comply with the rules is an irregularity and does not render the step taken a nullity. The court may make such orders as are necessary to secure the just determination of the matters in issue on their merits.

[24] In summary, the Appellant contends that the parties contracted out of the *Arbitration Act,1991* time limits and are therefore subject to the two year time limit under s. 4 of the *Limitations Act, 2002*. I disagree.

[25] Section 2(1) (b) of the *Limitations Act, 2002* states:

> 2(1) This Act applies to claims pursued in court proceedings other than,
>
> …
>
> (b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court; …

[26] The *Arbitration Act, 1991* sets time limits for appeals from a private arbitration. Section 19 of the *Limitations Act, 2002* establishes a schedule of other legislation with limitation periods that are not subject the *Limitations Act, 2002*. The *Arbitration Act, 1991* is one of the statutes listed.

[27] Section 3 of the *Arbitration Act, 1991* expressly permits parties to a private arbitration to vary or exclude any provision in the Act. There is nothing in the *Arbitration Act, 1991* that restricts or limits the parties' ability to mutually agree to vary rights of appeal including time limits or the manner by which an appeal may be commenced. The Act does not say that if the time limits are varied or the manner of commencement of appeal changed, the provisions of the *Limitations Act, 2002* will apply.

[28] The Arbitration Agreement in question specifically sets out what is required for an appeal – written notice within 30 days of the decision. It does not address how that appeal is to be made except that the appeal is to a judge the Ontario Superior Court of Justice; *viz.* it does not say by way of application. I note that it does not say that the appeal must be commenced by issue of the notice of application within 30 days, only that written notice be given within that time limit. Arguably, a letter stating an intention to appeal within the 30 days and issue of the notice of application after the 30 days would suffice.

[29] The *Limitations Act, 2002* does not apply in these circumstances because:

1. The *Arbitrations Act, 1991* expressly provides for time limits for appeals and allows the parties to vary those time limits by agreement. Any such variation is still a time limit authorized under that Act.

2. The *Arbitrations Act, 1991* is expressly exempted from the application of the *Limitations Act, 2002* by s. 19.

3. There is nothing in the Arbitration Agreement that indicates that the time for commencement of the appeal would be governed by *Limitations Act, 2002*. To the contrary, they negotiated at arm's length and agreed on, *inter alia*, para. 15.

4. It is entirely contrary to a plain and ordinary reading of the Arbitration Agreement, and para. 15 in particular, to imply any time limit for providing written notice of appeal longer than 30 days.

[30] The remedial provisions of the Rules do not apply. It is not open to this court to vary the terms of the Arbitration Agreement by waiving the Appellant's failure to give written notice: *Wong v. Wires Jolly LLP*, 2010 ONSC 4835, at para. 55.

Should this court exercise its discretion under s. 98 of the *Courts of Justice Act* to grant relief from forfeiture?

[31] Section 98 of the *Courts of Justice Act* states:

> 98. A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

[32] Relief from forfeiture refers to the power of a court to protect a person against the loss of an interest or right because of a failure to perform a covenant or condition in an

agreement or contract: *Kozel v. Personal Insurance Company*, 2014 ONCA 130, at para. 28.

[33] The exercise of the power is predicated on the existence of circumstances in which enforcing a contractual right of forfeiture, although consistent with the terms of the contract, visits an inequitable consequence on the party that breached the contract: *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, at para. 87.

[34] Section 98 is remedial in nature and courts should give s. 98 a wide scope to provide relief where the result would be otherwise inequitable or unjust: *Kozel*, at paras. 49 and 55.

[35] The power to relieve from forfeiture is discretionary and fact-specific: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at p. 504. It is an equitable remedy: *Nguyen v. SSQ Life Insurance Company Inc.*, 2014 ONSC 6405, at para. 44. Relief from forfeiture is granted sparingly and the party seeking that relief bears the onus of making the case for it: *8477 Darlington Crescent*, at para. 87 citing *1497777 Ontario Inc. v. Leon's Furniture Ltd*. (2003), 67 O.R. (3d) 206, at paras. 67-69, 92 (C.A.).

[36] Much of the caselaw has arisen under of s. 129 of the *Insurance Act*, R.S.O. 1990, c.I.8 and similar provisions found in insurance legislation in other provinces. It is helpful to set out that provision to assist in putting the caselaw in context:

> 129. Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against forfeiture or avoidance on such terms as it considers just.

[37] In *Elance Steel Fabricating Co. v. Falk Brothers Industries Ltd.*, [1989] 2 S.C.R. 778, Elance steel claimed under a bond issued by the Canadian Surety Company for a debt due and owing, together with interest, for the supply of metal to Falk Brothers Industries. Elance Steel failed to give notice of its claim within the period specified in the bond. It made its claim 28 days after expiry of the 120-day period for notice provided in paragraph 6 of the bond. Elance applied for a declaration that it was entitled to relief from forfeiture. The relevant statutory provision was s. 109 of the Saskatchewan *Insurance Act* which is identical to s. 129 above.

[38] At the Supreme Court of Canada, the court held that relief from forfeiture applies to both statutory and policy conditions: see p. 784. Next, the court considered whether Elance's failure to give notice within the prescribed time period amounted to imperfect compliance or non-compliance. McLachlin J. (as she then was) wrote at pp. 784-85:

> …The distinction between imperfect compliance and non-compliance is akin to the distinction between breach of a term of the contract and breach of a condition

> precedent. If the breach is of a condition, that is, it amounts to non-compliance, no relief under s. 109 is available.
>
> The case law has generally treated failure to give notice of claim in a timely fashion as imperfect compliance whereas failure to institute an action within the prescribed time period has been viewed as non-compliance, or breach of condition precedent. Thus, courts have generally been willing to consider granting relief from forfeiture where a notice of claim has been delayed: [citations omitted].
>
> On the other hand, cases in which failure to meet a time requirement has been held to be non-compliance rather than imperfect compliance, have largely been cases in which the time period was for the commencement of an action rather than for the giving of notice: [citations omitted.]
>
> The reasons for the distinction are bi-fold. First, failure to give notice of claim has been viewed as a breach of a term rather than a breach of condition. Clearly, being akin to failure to meet a limitation period, failure to bring an action within the time required is a more serious breach than failure to give timely notice. A notice of claim simply informs the insurer of the possibility of a future action, thereby allowing the insurer some time to investigate the merits of the claim and to negotiate a settlement; the actual bringing of an action, however, is the legal crystallization of the claim which sets its parameters and magnitude. Second, and probably more importantly, failure to give notice of the claim within the time required is a defect in provision of proof of loss for which relief against forfeiture is, by the terms of the statute, available. … [Underlining in original.]

[39] Thus, the threshold issue under s. 129 of the *Insurance Act* is whether the failure to comply with the terms of the contract amounts to imperfect compliance or non-compliance. If it is the latter, relief from forfeiture is not available. Put another way, if the breach is a breach of a condition precedent, not a breach of a term of the agreement, relief from forfeiture is not available.

[40] In *Kozel*, the Court of Appeal held that s. 98 of the *Courts of Justice Act* applies in an insurance contract context notwithstanding a specific relief from forfeiture provision in the *Insurance Act:* see para. 57. Further, the Court held that s. 98 has broader application than s. 129 of the *Insurance Act* which is restricted to imperfect compliance with the terms of the policy after the loss has occurred: see para. 58.

[41] In an insurance context where the party seeking relief from forfeiture is the insured, a court should find that an insured's breach constitutes non-compliance with a condition precedent only in rare cases where the breach is substantial and prejudices the insurer. In all other cases, the breach will be deemed imperfect compliance, and relief against forfeiture will be available: *Kozel*, at para. 50.

[42] The Respondents characterize the Appellant's failure to provide actual written notice before expiry of the 30-day appeal period as breach of a limitation period. It is a

condition precedent to the right to appeal which, if not performed in a timely manner, amounts to non-compliance.

[43] The Respondents also point to commercial cases where the requirement to provide notice in a commercial contract has been strictly applied: see *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597, at paras. 29, 35-36; *Carmel Cove Resort & Spa v. 0747825 B.C. Ltd.*, 2016 BCSC 1251, at paras. 53-56, aff'd on appeal, *KPMG Inc. v. 0747825 B.C. Ltd.*, 2017 BCCA 277; *Urban Mechanical v. University of Western Ontario*, 2018 ONSC 1888, at para. 115; *Corpex (1977) Inc. v. The Queen in right of Canada*, [1982] 2 S.C.R. 643.

[44] In *Technicore*, a flooded tunnel necessitated extra work. The construction contract contemplated that possibility and provided that if such a claim was made, the contractor was required to submit a detailed claim "no later than 30 days after completion of the work affected by the situation". The claim was made 65 days after the work was completed. It was 35 days outside the 30-day claim period. Partial summary judgment was granted dismissing the bulk of the defendant's counterclaim.

[45] On appeal, the defendant argued that because none of the relevant clauses included a "failing which" clause, the contract did not have clear language necessary to deprive it of the right to proceed with its full counterclaim against the City. The Court of Appeal upheld the motion judge's decision. Relying on the Supreme Court's decision in *Corpex*, the Court held that the notice provision set out a mandatory procedure for filing claims including the requirement to submit claims within 30 days. The notice provision did not require a "failing which" clause for it to bar the claim.

[46] In *Carmel Cove*, KPMG acted as Receiver for the sale of a resort. It entered into a sale agreement that provided that the agreement was subject to approval by the British Columbia Supreme Court within 21 days of acceptance. The clause was stated to be for the sole benefit of the seller. The agreement contained a further clause that the contract would be terminated if the benefitting party did not provide written notice of satisfaction or waiver of a condition on or before the date specified for that condition. Court approval was obtained on the 21st day but the seller failed to notify the purchaser in writing until four days later.

[47] On a motion for a summary trial, Rogers J. rejected the seller's argument that the defendant should have known the outcome of the court application so written notice was unnecessary. At paras. 55-56, he wrote:

> [55] The difficulty with the plaintiff's position here is that it is, really, an invitation to the court to rewrite the terms of the parties' contract. The notice provision in clause 3 is easily parsed by any literate person. It is not ambiguous. The clause does not require interpretation. There is no need to refer to parole evidence to sort out what it means.
>
> [56] By its clear language, the notice provision in clause 3 requires the party benefiting from the condition - in this case the plaintiff - to give written notice –

> eg. a letter, and e-mail, penciled advice on a post it note - that the condition - here court approval - has been satisfied on or before the date specified for the condition – i.e. not more than twenty-one days post plaintiff's acceptance.

[48] As a result, Rogers J. found the contract was terminated in accordance with its terms. His decision was upheld on appeal where the Court of Appeal reviewed several cases from multiple jurisdictions including Ontario that confirmed the power to waive a condition must be exercised strictly in accordance with its terms.

[49] Finally, in *Urban Mechanical*, the subcontract agreement expressly provided that the subcontractor was "deemed to have accepted the decision of the Contractor" and to have waived and released the contractor from any claim dealt with in that decision "unless, within 7 Working Days after receipt of that decision", the subcontractor sent a notice in writing of the dispute. The subcontractor failed to send the required notice as required. At para. 115, Grace J. wrote:

> [115] … The language is clear. Urban was bound. It did not serve the required notice within the applicable period. The subcontractor is deemed to have accepted Norlon's decision concerning the Victaulic Claim.

[50] I note that relief from forfeiture was not sought and was not an issue in any of the commercial contract cases relied upon by the Respondents. As is evident, the case before me is factually distinguishable from the commercial contract cases relied upon by the Respondents, although similar written notice requirements were in play.

[51] By the same token, this is not a case where an insured will be deprived of the benefits of an insurance policy if his or her failure to act in a timely manner is not relieved against. This is a priority dispute between insurers – sophisticated parties who were at all material times represented by experienced counsel. They negotiated and signed a binding agreement to govern the process by which that dispute would be resolved. The wording of para. 15 is clear and unambiguous.

[52] Strict adherence to the wording of the clause does not deprive Pafco of a determination on the merits because all parties had a full opportunity to adduce evidence and make submissions on the merits to the arbitrator. Rather, para. 15 makes that determination final and binding unless written notice of appeal is provided within 30 days of release of the decision. What is lost is the right to appeal.

[53] Is the requirement of written notice within 30 days a limitation period? Is it a condition precedent?

[54] The 30 days is a time period that the parties agreed would apply. At the time the Agreement was entered into, no one knew the outcome of the arbitration. The clause was there for the benefit of both winner and loser of the arbitration. It ensured finality to the process and/or timeliness for any appeal.

[55] The requirement of written notice is also a deliberate choice made by the parties. They could have but did not simply provide that the appeal would be commenced by application issued within 30 days.

[56] The requirement of written notice within 30 days for an appeal is a prerequisite to the right to appeal. That is clear from the wording of para. 15 which states that the arbitrator's decision is final and binding unless such written notice is provided within 30 days of release of her decision. Delivery of the written notice within the 30 days suspends the final and binding nature of the decision until the appeal is done.

[57] In my view, para. 15 is not a limitation period in the sense that it bars any claim from being made *ab initio*. It is not on the same footing as, for example, s. 2 of the *Limitations Act, 2002* which operates to bar a claim for damages for negligence or breach of contract. To use a civil litigation analogy, para. 15 is akin to r. 61.01(4) dealing with appeals from final orders, albeit with some clear differences including restrictions on the scope of any grounds of appeal.

[58] Should the court in these circumstances relieve the Appellant from its breach of para. 15 of the Arbitration Agreement?

[59] In exercising its discretion to grant relief from forfeiture, a court must consider three factors: 1) the conduct of the party asking for relief from forfeiture, 2) the gravity of the breach, and 3) the disparity between the value of the property or right forfeited and the damage caused by the breach: *Saskatchewan River Bungalows*, at p. 504; *Kozel*, at para. 31; *Nguyen*, at para. 45.

[60] The first factor requires an examination of the reasonableness of the breaching party's conduct as it relates to all facets of the contractual relationship, including the breach in question and the aftermath of the breach: *8477 Darlington Crescent*, at para. 89. A party whose conduct was unreasonable will not obtain relief from forfeiture: *Williams Estate v. Paul Revere Life Insurance Co.* (1997), 34 O.R. (3d) 161, at p. 175; *Saskatchewan River Bungalows*, at pp. 504-05.

[61] The second factor examines both the nature of the breach itself and the impact of that breach on the contractual rights of the other party: *8477 Darlington Crescent*, at para. 91.

[62] The third factor requires a proportionality analysis. If there is a large difference between the value of the property to be forfeited and the amount owing as a result of the breach, equity will favour relief from forfeiture: *8477 Darlington Crescent*, at para. 92.

[63] With respect to the first factor, the failure to provide written notice is a product of solicitor's inadvertence. There was an intention to appeal by Pafco as evidenced by issue of the notice of application. Had counsel's directions been followed, the issued notice of application would have been served before expiry of the 30-day time limit. There is no suggestion that Pafco or its counsel acted unreasonably in relation to the conduct of the arbitration – that delay was part of an ongoing pattern of disregarding the terms of the Arbitration Agreement.

[64] Appellant's counsel corresponded with Respondent's counsel to explain what happened. He did so promptly upon being advised that the delay was in issue.

[65] This factor favours relief from forfeiture.

[66] With respect to the second factor, the issued notice of application was served at 9:21 a.m. the day following the end of the appeal period. There is no evidence that the Respondents suffered any prejudice from the late delivery beyond that inherent in the breach itself. No steps were taken in reliance on the passage of the 30 days. Files were not destroyed. Witnesses were not lost – by then the evidence was already adduced and known. The Respondents are in no worse position than if the notice of application had been served at the close of business the day before save that they cannot rely on the deemed final and binding nature of the arbitral decision. The appeal proceeded and was heard on its merits. The Respondents were not prejudiced in preparing or arguing the appeal. There is no harm that cannot be remedied by costs.

[67] This factor favours relief from forfeiture.

[68] Finally, the strict application of para. 15 of the Arbitration Agreement as the Respondents submit would deprive the Appellant of its right to have the appeal determined on its merits. The decision would stop here. Regardless my assessment of the merits of the appeal, that strikes me as an entirely unjust result. It would likely beget more litigation where the merits of the appeal would have to be assessed and, depending on the outcome of the merits of this appeal, it potentially enriches the Respondents who benefit from the arbitration decision made. Equity favours granting relief from forfeiture in the circumstances of this case.

[69] Accordingly, I am satisfied that this is an appropriate case to grant relief from forfeiture pursuant to s. 98 of the *Courts of Justice Act*; specifically, the Appellant's failure to provide written notice of its intention to appeal until the day following expiry of the 30-day period is relieved against. The appeal shall be determined on its merits in accordance with the Arbitration Agreement.

Appeal of Arbitration Decision

[70] The Appellant raises the following grounds of appeal:

1. The Arbitrator disregarded and did not apply the correct legal test to the assessment of whether Austin Henry Jr. was a dependent?

2. The Arbitrator disregarded the evidence at the hearing and relied upon speculation that the Claimant obtained Ontario Works assistance by false pretences.

3. The Arbitrator disregarded consensus accounting evidence on income and expenses of the Claimant and failed to adjudicate on the two or three areas of disagreement between the experts. Instead, she disregarded the accounting evidence altogether in reaching her decision.

4. The Arbitrator improperly relied on post-accident living arrangements in arriving at her conclusion as to the state of affairs at the date of the incident; specifically, she relied on the fact that the Claimant was required to reside with father as a result of charges arising from the incident.

Factual Background

[71] On June 30, 2014, Austin Henry Jr. (the Claimant or Henry Jr.) was involved in a motor vehicle accident while driving a 1998 Honda Civic.

[72] Henry Jr. was rear ended by a Chevrolet Equinox at approximately 3 a.m. while turning from Oneida Road to Fairgrounds Road on the Oneida Reserve in Middlesex County.

[73] At the time of the accident, Henry Jr. was not a licenced driver, nor had he ever been a licenced driver.

[74] Henry Jr. was 20 years old at the time of the accident.

[75] His father, Austin Henry Sr. (Henry Sr.) was insured by Pafco under policy numbers 558010335 and 546888169. Henry Jr. was not listed as a driver on either policy at the time of the accident, nor was he an excluded driver on those policies.

[76] The Chevrolet Equinox that struck the vehicle driven by Henry Jr. was insured with Wawanesa Mutual Insurance Company (Wawanesa) on that date.

[77] Henry Jr. applied to Pafco for statutory accident benefits.

[78] Pafco sent a standard form Notice to Applicant of Dispute Between Insurers to Wawanesa and Henry Jr. on September 8, 2014.

[79] Pafco initiated private arbitration against Wawanesa and MVCAF on March 5, 2015. MVCAF was released from the priority dispute on consent.

[80] Wawanesa added Western Assurance Company (Western) to the proceeding because Western issued an insurance policy for the Honda in 2011 to a previous owner. The dispute between Wawanesa and Western is deferred pending the outcome of this appeal.

Henry Jr.'s Pre-Accident Living Arrangements and Education

[81] On the date of the accident, Henry Jr. resided with his parents in a home owned by his mother located on the Munsee-Delaware Nation Reserve. His mother paid $200/month to the First Nation on account of the loan advanced for that purchase.

[82] Henry Jr. grew up in that home. He lived with his parents except for a six-month period in 2013-14 when he resided with his girlfriend in an apartment in London. Their relationship ended and he moved home to his parents approximately three months before the accident.

[83] Henry Jr. graduated high school in June 2013. He did not pay rent or contribute to household expenses when in school.

[84] In June 2014, Henry Jr. enrolled in the FASTT program (Fostering Aboriginal Success in Trades and Technologies). The program was to end August 27, 2014 at which time there was to be a career fair for the students.

[85] There was a housing shortage on Reserve. As such, upon moving home from London, Henry Jr. needed to live with either family or friends while on Reserve.

Sources of Income

[86] On October 2, 2013, Henry Jr. was approved for financial support by Ontario Works. He received $600 per month and continued to receive that income after he moved home with his parents.

[87] While enrolled in the FASTT program, he received $40 per school day for meals and incidentals. The program itself was free. His books, supplies and accommodation were covered. The program could take him to different communities for job sites. Henry Jr. continued to reside with his parents while enrolled in the FASTT program.

[88] Henry Sr. drove his son to and from the program. Henry Sr. also paid the gas expense for such travel.

[89] Henry Sr. did janitorial work on Reserve for which he was paid. Henry Jr. occasionally assisted his father for which he was paid by his father $15 per hour. Henry Sr. could not say how often Henry Jr. worked for him except that it was “once in a while”.

[90] Henry Jr. worked at the Healing Lodge on Reserve in the summer and was on call if needed.

[91] Henry Sr. also gave his son $50 each week as spending money.

Monthly Expenses

[92] While living with his girlfriend in London, they shared the rent of $800 per month.

[93] Henry Sr. bought groceries for Henry Jr. once or twice a month when Henry Jr. resided in London.

[94] Henry Jr. had a cell phone debt of $800 which he accumulated before moving home from London. That debt was in collections. He also owed $400 for an outstanding fine for driving without a licence. The fine and cell phone debt were outstanding when he moved home in 2014.

[95] After he moved home, Henry Sr. paid $50 per month for Henry Jr.’s cellphone on an ongoing basis.

[96] There was no public transportation available on Reserve. Henry Sr. drove his son wherever he needed to go. He gave his son rides when he lived in London.

[97] Both sides hired accountants to provide expert opinion evidence as the financial dependency. The accountants agreed on Henry Jr.'s monthly needs which total $1,222. That is $14,664 annually if pro-rated. I note that the agreed upon list of monthly expenses does not include any expense for accommodation.

Arbitrator's Decision

[98] The sole issue before the Arbitrator was: "Was Austin Henry, Jr. principally dependent for financial support upon his father, the Pafco insured, and therefore an "insured under that policy?".

[99] She concluded that Henry Jr. was principally dependent for financial support on his father at the time of the accident and is consequently an "insured" under his Pafco policy. Pafco is therefore the insurer with the highest priority to pay the claim pursuant to s. 268(2)1(i) of the *Insurance Act*.

[100] Section 268(2) of the *Insurance Act* states:

> 268(2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 1. In respect of an occupant of an automobile,
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which entitlement to statutory accident benefits arose,
>
> …

[101] Section 3(7) of the statutory Accident Benefits Schedule states:

> 3(7) For purposes of this regulation,

> (b) a person is a dependent of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse.

[102] The evidence at the hearing comprised a lengthy Statement of Agreed Facts, documents filed including signed statements, transcripts from examinations under oath of Henry Jr. and Sr., Henry Jr.'s Ontario Works file, expert reports and *viva voce* evidence from accountants retained by Pafco and Wawanesa.

[103] Arbitrator Novick found that:

1. In the circumstances of this case, use of statistics to estimate needs was not appropriate.

2. The fact that the Claimant and his parents were status Indians resident on Reserve affected the analysis; specifically how and whether LICO data should be applied, and the manner of estimating accommodation costs.

3. Using Statistics Canada Catalogue for Low Income Cut-Off (LICO) data to estimate the Claimant's expenses ignored the reality of his circumstances for the period in question.

4. She questioned whether Henry Jr.'s Ontario Works payments should be included in income as it "is quite possible that these payments were obtained under false pretences or at least were based on false reporting".

5. It is illogical to say that a claimant is financially independent as a result of receiving social assistance payments while living in his parent's home, which, if known, would disqualify him from receiving the payments.

6. The accountants both over-estimated the claimant's income given the father's evidence that his son only worked with him "once in awhile".

7. A significant portion of the Claimant's earnings vanish if the father's contributions to the Claimant's earnings are backed out.

8. As a result of doubts with the accuracy of the estimates and appropriateness of the use of LICO statistics, the "big picture" of the Claimant's life at the date of the accident was a "more reliable approach" to determine principal financial dependency.

[104] Critical to her conclusion are the following paragraphs:

> 70. I reached this conclusion for the following reasons - at the time of the accident he was living in his parents' home, as he had done almost all of his life, save for six months when he lived with a girlfriend that he was no longer involved with. Even when he lived away from home, his father helped pay for rent or groceries as required, and drove him wherever he needed to go. As outlined above, the

> Claimant did not contribute to the household, and regularly received at least $50 per week in spending money from his father. He was receiving social assistance payments as a result of having reported that he was not living at his parents' home, and his modest earnings consisted mainly of cash paid out of his father's salary or janitorial contracts.
>
> 71. Further, the Claimant had no real history of, or prospect for, steady employment at the relevant time. In the year since graduating high school, he had earned less than $1000 on his own, from a part-time summer job and the odd on-call shift, aside from the cash he received from his father. While he was participating in the FASTT program at the time of the accident, suggesting that he was moving toward finding steady work and ultimately financial independence, he had only been in the program for four weeks. As I stated in *Dominion v. Intact supra*, there was no evidence to suggest that he had either achieved financial independence or had developed a plan to do so, at the time of the accident.
>
> 72. I also note from some of the records submitted that the Claimant was under "house arrest" at his parents' home for some time following the accident as a result of being convicted of various charges laid in relation to the accident. While my analysis is focused on the evidence surrounding his life and activities before the accident, this fact supports my finding that he had not yet reached the level of independence required to justify the conclusion that he had achieved financial independence as contended by Pafco.

Standard of Review

[105] This is an appeal under the *Arbitrations Act, 1991*. Section 45(2) and (3) of the *Arbitrations Act, 1991* allow an appeal to the court on questions of law, and fact and mixed fact and law, with or without leave if the arbitration agreement so provides. In this case, the Arbitration Agreement allows for an appeal without leave but the appeal is limited to questions of law and mixed fact and law only.

[106] The *Arbitrations Act, 1991* does not specify a specific standard of review on appeal. It subjects appeals to appellate oversight and, accordingly, the court will scrutinize the decision on an appellate basis. The applicable standard is therefore determined with reference to the nature of the question and to the jurisprudence on appellate standard of review: *Canada v. Vavilov*, 2019 SCC 65, at para. 37.

[107] The appellate standard of review is well-settled. The applicable standard of review for questions of law is correctness. For questions of mixed fact and law, the reviewing court must consider whether there is an extricable error of law. If there is an extricable error of law or a pure error of law in the application of the law to the findings of fact, the standard is correctness. If the error is part of the findings of fact, the standard is "palpable and overriding error" for the decision to be reversed: *Vavilov*, at para. 37; *Intact v. Dominion and Wawanesa*, 2020 ONSC 7982, at para. 43 citing *Housen v. Nikolaisen* [2002] 2 S.C.R. 235; see also *Wawanesa Mutual Insurance Company v. Unica Insurance Inc.*, 2021 ONSC 4266, at paras. 51-57.

Did the Arbitrator make an error of law in applying "the big picture" to determine whether Henry Jr. was financially dependent on his father?

[108] The Appellant submits that Arbitrator Novick deviated from the "established 51% test". That test holds that to be principally dependent for financial support, a claimant must receive more than 50% of his or her financial needs from someone other than him or herself: *Miller v. Safeco* (1984), 48 O.R. (2d) 451 (H.C.J.), aff'd (1985), 50 O.R. (2d) 797. Her use of the "big picture" was inappropriate and applied the wrong legal test; one that lacks any objective parameters. This was an error of law.

[109] The Appellant submits that the Arbitrator had the financial information needed to do the calculation for financial dependency. Both sides tendered expert accounting evidence. The accountants agreed on the Claimant's estimated monthly expenses - $1,800. The areas of disagreement were narrow:

1. Whether the $40/day from the FASTT program should be included in his income.

2. What figure should be used for his accommodation expenses on Reserve.

3. Which LICO statistics should be used – rural or communities of less than 30,000 population.

The Arbitrator should have grappled with and made findings on those areas of disagreement to do the calculation. Instead, she discarded that evidence entirely, without proper justification, and ultimately failed to do any financial calculation to establish whether Henry Jr. was financially dependent or independent.

[110] The Respondents submit that the Arbitrator was entitled to use and properly applied the "big picture" approach. There are many cases where doing the math is possible and provides a clear picture. That is not this case for a variety of reasons. The circumstances here were unique.

[111] The Respondents submit that Arbitrator correctly found that the statistical data from LICO was deficient in that its sources did not include any information as to on Reserve costs. The data is derived from tax returns and most residents on Reserve do not pay tax. That made determining his needs difficult. He was in a period of transition. His entitlement to Ontario Works was questionable. The big picture may be used whenever the evidence of income and/or expenses is not reliable or is unclear. The Arbitrator did consider and apply the *Miller v. Safeco* factors in her decision, albeit without doing a mathematical calculation.

[112] In *Miller v. Safeco*, O'Brien J. identified the following non-exhaustive list of factors to consider in determining who is an "insured person": "the amount and duration of the financial and other dependency, the financial or other needs of the claimant, the ability of the claimant to be self-supporting, and the general standard of living within the family unit": see p. 452. On appeal, the Court of Appeal endorsed the factors identified by O'Brien J. except the general standard of living within the family unit.

[113] In *Allstate Insurance Company of Canada v. ING Insurance Company of Canada and Aviva Canada Inc.*, 2015 ONSC 4020, Myers J. wrote at para. 4 with respect to use of the mathematical calculation of dependency:

> [4] First, it assumes that the mathematical result necessarily and solely determines the outcome. In my view, the math is just a part of the test that has arisen out of the seminal decision of *Miller v. Safeco* …. I agree with the insightful comments of Corbett J. in State Farm v. Bunyan, 2013 ONSC 6670, at paras. 19 to 22 to the effect that while the math is an important factor it is not the only factor. The legal issue is whether R was principally dependent on her mother and her mother's spouse. In *Miller*, the Court of Appeal approved four factors to consider dependency. Even those four are not necessarily the exclusive considerations. A change in the math from 50.001% dependency to 49.999% dependency may or may not overcome other aspects of the factual dependency between the relevant parties. All of the accountants before the Arbitrator agreed that the math that they were performing was artificial. I would say highly artificial and necessarily inaccurate is a better description. A change of $8, while perhaps crossing a magical mathematical line, does not alter the "big picture" on the facts in the context of this specific case as found by the Arbitrator. … [Underlining added.]

[114] In *Security National Insurance Co. v. Wawanesa Mutual Insurance Co.*, 2013 ONSC 7589, Morgan J. similarly wrote at para. 18:

> [18] Accordingly, on any reading of the Court of Appeal's limited jurisprudence on the subject, it is the broader set of questions employed in *Miller v. Safeco* that continues to guide interpretation of the dependency question under the SABS. the seemingly mathematical formula which *Liberty Mutual* [*Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada*, Arbitrator Lee Samis, May 9, 1999, aff'd [2000] O.J. No. 1234 (C.A.)] is taken to have introduced may work in some circumstances but may be inadequate in addressing the question in other circumstances. Weather in accident victim is a "dependent" loving named insured must be analyzed in a holistic fashion, and cannot be addressed strictly by adding up the expenses covered by the insured and comparing them with those covered (or even those which could have been covered) by the victim.

The decision of Justice Morgan was overturned on appeal [2014 ONCA 850] for other reasons.

[115] In *Security National*, the Court of Appeal indicated that the issue of financial dependency is a question of fact, and absent palpable and overriding error the finding is entitled to deference on appeal.

[116] It is undisputed that Arbitrator Novick correctly cited the applicable legal test and identified the *Miller v. Safeco* factors considered to determine dependency at para. 55 of her decision. A careful review of her decision shows that she was clearly alive to the usual approach by which a claimant's income and expenses are quantified to see whether the claimant receives more than half of his or her support from another person: see para.

56. She reviewed the accountants' evidence in detail and noted where they disagreed. She was mindful of the frailties of the assumptions made by the experts particularly as it relates to LICO data.

[117] I agree with the Respondents that there were unique factors at play in this case which made reliance upon the LICO statistics problematic. The Claimant grew up on Reserve and resided with his parents in their home on Reserve for all but six months of his life. The was little evidence of cost of living on Reserve versus off Reserve. Neither the parties nor the accountants provided evidence as to what, if any, adjustments would be necessary to the LICO statistics to produce an accurate estimate of the Claimant's costs/expenses.

[118] As I understand from the evidence adduced, the LICO expense data derives from statistical modeling done to arrive at average expenses based on the population, region, and nature of the community. The information used to arrive at those average costs comes largely from tax returns. Because income earned on Reserve is not taxable, many on Reserve members do not file tax returns. The data collected for the LICO statistics does not include accommodation costs on Reserve. Is an apartment in the City of Chatham, Ontario (roughly 85 km away) where the population is less than 30,000 an appropriate comparator? What about an apartment in London which is closer but has significantly greater population? Neither expert specifically examined or compared on Reserve accommodation costs to the accommodation comparable they used for calculating accommodation costs.

[119] In these circumstances, it was entirely reasonable and appropriate for the Arbitrator to question the reliability and utility of the evidence on that issue. She was not obligated to accept one or the other expert. She was not obligated to investigate on Reserve costs and do her own analysis; in fact, it would have been inappropriate for her to do so. There was simply inadequate evidence from which she could reasonably make any adjustment to the accommodation figures put forward by the experts. She was entitled to accept all, some or none of any witness' evidence including that of the experts.

[120] Without reliable evidence as to the Claimant's expenses/needs, a mathematical calculation as to whether his income exceeded 50% plus $1 was impossible. In those circumstances, the Arbitrator used the "big picture" to assess on a holistic basis whether the Claimant was financially dependent on his father. In doing so, she considered the factors in *Miller v. Safeco*. There is some overlap or blending of the factors in her analysis, but she clearly considered those factors in relation to the evidence before her.

[121] For example, at paras 60 and 70 of her decision she examined the duration of dependency. At paras. 20- 23, 63 and 70, she considered financial and other needs of the Claimant. At paras. 11, 60, 63, and 70, she examined the degree of dependency. At paras. 68, 70 and 71, she considered the Claimant's ability to be self-supporting.

[122] To the extent the Appellant's submission suggests that the "big picture" is a different test or an alternate to the *Miller v. Safeco* factors, I disagree. It is clear both from the decisions of Myers J and Morgan J. above, and Arbitrator Novick's decision that the

Miller v. Safeco factors are an integral part of the holistic approach to determining dependency.

[123] I conclude that this ground of appeal must fail. There was no error of law in the circumstances here. The Arbitrator used the correct test and considered the required factors.

Did the Arbitrator err by improperly speculating that the Claimant's Ontario Works income was obtained by false pretences and by disregarding that income?

[124] The Appellant submits that the Agreed Statement of Facts indicated that Henry Jr. was receiving $600 per month from Ontario Works on the date of the accident. He had been receiving that money for months preceding the accident. There was no evidence that he obtained Ontario Works by false pretenses. The Ontario Works file showed that it did annual check-ins – financial updates. There was no evidence that Ontario Works had any issue with Henry Jr. receiving that income. The Arbitrator engaged in speculation and innuendo which she was not entitled to do: *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609, at paras. 75-79.

[125] The Respondents submit that the Arbitrator did not say that she was ignoring that income. She had concerns that that income was not legitimate. There was a valid basis for that concern. His Ontario Works file showed that he had applied and been turned down by Ontario Works when he applied earlier. He was then living at home, and he was turned down because of that fact. He reapplied in October 2013 and listed his grandparents' home as his residence. This was around the same time as he was moving to London with his girlfriend. The Arbitrator nevertheless considered that income in her big picture analysis.

[126] At para. 13 of her decision, Arbitrator Novick wrote:

> 13. The documents in the Ontario Works file indicate that the Claimant sought and qualified for assistance in October 2013 on the basis that he was living with his grandparents at the time, and needed help in paying expenses. All of the other evidence in this case points to the Claimant having moved in with his girlfriend in London in October 2013, and this discrepancy was never explained. Of the $600 provided each month, an amount of $350.00 was designated to cover "rental payments".

[127] At paras. 66 and 67, she wrote:

> 66. I also question whether the figures calculated by the accountants representing the Claimant's earnings reliably reflect the reality of his circumstances. Mr Henry, Jr. received Ontario Works payments of $600 per month from October to the time of the accident. It is quite possible that these payments were obtained under false pretences, or were at least based on false reporting. The records filed suggested that the Claimant's first application for social assistance in June 2013 was rejected, because he was living in his parents' home. His subsequent application was accepted, when he stated that he was living with his grandparents.

> As noted above, it is not clear why, having apparently moved to London with his girlfriend, he did not report that fact.
>
> 67. In any event, the Ontario Works Client Information Report refers to a "Living with parent rule" and has another line titled "Accommodations owned by parents". I noted that the initial application filed, which was rejected, indicates that the Claimant was living with his parents, while the later one indicates that he was not. *While I do not dispute that the payments he received provided support and assisted him in meeting his needs, it is illogical and counterintuitive, in my view, to find that a claimant is financially independent as a result of receiving social assistance payments while he is living in his parents home, which if known, would disqualify him from receiving the payments*. [Italics added.]

[128] At para. 70 quoted above (see para. 104), Arbitrator Novick took into account and considered that Henry Jr. was receiving social assistance payments. She again noted that that was a result of having reported that he was not living with his parents. It is, however, noteworthy that she did not say that his income must be discounted by the Ontario Works payments or that those payments must be backed out of his income for financial dependency purposes.

[129] I agree with the Appellant that the Arbitrator speculated as to whether he obtained social assistance legitimately and whether he was entitled to continue to receive that assistance after he moved home. She did not, however, reduce his income for the purpose of assessing the extent of his financial dependency. While it would have been preferable for the Arbitrator not to have made those comments, they did not impact her analysis or her ultimate conclusion.

[130] I conclude that this ground of appeal must fail.

Did the Arbitrator err by disregarding consensus accounting evidence on income and expenses of the Claimant in her determination of financial dependency?

[131] This issue overlaps substantially with the first ground of appeal above. The Appellant contends that, in effect, the Arbitrator should have accepted the evidence of the accountants where they agreed and focused on resolving where they disagreed.

[132] First, I observe that the parties filed a lengthy Statement of Agreed Facts (SAF). That SAF could have but did not include any agreement as to the aggregate monthly earnings of the Claimant. It included some components of that income but not all. Likewise, it included agreement on some but not all components of expenses.

[133] The Arbitrator was not told by counsel at the arbitration hearing that the Claimant's income was an agreed fact such that proof was not required. Instead, the parties called expert evidence dealing with both expenses and income.

[134] For the reasons already provided, the Arbitrator was not required to accept the experts' evidence even where they agreed if she had concerns with the accuracy or reliability of

that evidence. She had no obligation to follow along an analytical path that she felt would yield an artificial or speculative result.

[135] This ground of appeal fails.

Did the Arbitrator improperly rely on post-accident living arrangements in determining dependency on the date of the accident?

[136] This ground of appeal arises from para. 72 of the arbitration decision. That paragraph is quoted in full above at para. 104 of this decision.

[137] The Appellant submits that the Arbitrator used the Claimant's post-accident living arrangements in determining his dependency on the date of the accident. That evidence is entirely irrelevant to the issue to be determined which was whether he was a dependent when the accident happened. Thus, the Arbitrator considered and relied on irrelevant evidence.

[138] I agree that the fact that the Claimant was required to live with his father after the accident as a term of his release is irrelevant to the issue of whether he was dependent on the day of the accident.

[139] However, as I read para. 72 and specifically the second sentence, Arbitrator Novick is clear that her analysis focused on his life and activities before the accident. That is what she relied upon to find financial dependency. His subsequent living arrangement supported her conclusion in that regard but was not part of that determination. She wrote, " …this fact supports my finding that …". In my view, para. 72 is *obiter*.

[140] Thus, the reference to post-accident living arrangements, while unfortunate and unnecessary, did not inform the analysis done nor the conclusion reached.

[141] This ground of appeal must fail.

Conclusion

[142] Accordingly, for the reasons set out above, I grant relief from forfeiture as it relates to the Appellant's failure to give time written notice of the appeal and dismiss the appeal.

[143] If the parties cannot agree on costs, they may make written submissions not exceeding three pages within 21 days hereof.

Justice R. Raikes

Date: November 8, 2022