

IN THE MATTER OF SECTION 268 OF THE *INSURANCE ACT*,
R.S.O. 1990, c.I.8,

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CO-OPERATORS INSURANCE COMPANY

Applicant

and

ING INSURANCE COMPANY OF CANADA/HALIFAX

Respondent

AWARD

This matter comes before me as an Arbitration pursuant to Ontario Regulation 283/95 and pursuant to the *Arbitration Act*, 1991. Mr. Mark Donaldson appeared for the applicant and Mr. Chris Blom appeared for the respondent.

The two parties are insurers carrying on the business of automobile insurance in the Province of Ontario. As a result of an accident which took place December 9, 2001 statutory accident benefits are payable with respect to Maria Araujo. Maria Araujo sustained injuries and has made claims for benefits and those claims have been made to the Co-operators. In accordance with the provisions of Ontario Regulation 283/95 Co-operators has responded to the claims of Maria Araujo but now brings this proceeding seeking a finding that ING Halifax is the proper insurer obliged to pay the statutory accident benefits. If Co-operators is correct, then ING Halifax has the obligation to reimburse Co-operators in amounts to be determined and would have the obligation with respect to any continuing benefits payable.

The parties have executed an Arbitration Agreement which is marked as Exhibit "1" to these proceedings. The parties have asked me to consider the following questions:

- (a) Was Maria Araujo a dependant of the Co-operators' insureds, within the meaning ascribed to that term in the Bill 59 Statutory Accident Benefits Schedule, at the time of the subject accident;
- (b) If the answer to (a) above is no, the indemnity amount to be paid by the ING Halifax to the Co-operators;
- (c) What is the amount of interest, if any, payable on such indemnity amount as may be found to be owing; and
- (d) The determination of the costs of the arbitration and the burden of payment of same.

At the present time it is understood that I am asked to answer question (a) and (d). The parties have reserved to a later occasion determination of questions (b) and (c) if necessary.

BACKGROUND OF THE DISPUTE

At the time of the accident Maria Araujo was not the occupant of an automobile when she was struck by an automobile and sustained injuries. It appears that she was not a driver at any time and, not surprisingly, was not a named insured under any policy of insurance issued by an insurer. At the time of the accident she resided with her daughter and her daughter's husband in their home. Jose and Zelia Almeida, were insured by the applicant, Co-operators, under a policy of insurance bearing policy number 207912999.

The vehicle which struck Maria Araujo was a 1992 Honda Accord which was insured by the respondent, ING Halifax.

THE LEGAL FRAMEWORK

In accordance with section 268 of the *Insurance Act*, a hierarchy is created setting out which insurer must respond when more than one insurer potentially provides coverage for statutory accident benefits. Under that hierarchy it is clear that Co-operators is obliged to pay the benefits if the injured person is a dependant relative of the named insured under the Co-operators policy or the spouse of that named insured.

However, if the injured person doesn't have recourse as a dependant relative of a named insured under some policy, the individual, not being the occupant of an automobile, may claim benefits against the policy on the vehicle involved in the accident, in this case the policy issued by ING Halifax.

Hence the issue of which insurer must pay, as between Co-operators and ING Halifax, turns on the question of whether or not Maria Araujo was dependent upon the Co-operators' insured.

In accordance with the statutory accident benefits regulation, dependency is defined as existing when a person is principally dependent for financial support or care upon the named insured. Therefore the question which determines the respective obligations of the insurers in this particular case is the question of whether or not Maria Araujo is principally dependent for financial support or care on one or both of Zelia and Jose Almeida. If so, then Co-operators has the obligation to pay the statutory accident benefits and no reimbursement is due to them by ING Halifax. However, if Maria Araujo is not financially dependent for financial support or care on Jose or Zelia Ameida, then ING Halifax has the responsibility for the statutory accident benefits.

The Proceedings

Subsequent to a number of preliminary telephone conferences and pre-hearing discovery processes, the hearing on the dependency issue took place in Toronto on April 13, 2006. At that time the parties submitted a number of documents to me as evidence in the proceeding and also tendered the *viva voce* testimony of two witnesses. I received as Exhibit "2" to the proceedings a document brief which includes nineteen documents touching on the issues in this litigation. Marked as Exhibit "3" to the proceeding was a transcript of the examination under oath of Zelia Almeida with respect to testimony given December 12, 2003.

Mr. Norman McCully a chartered accountant was called to offer testimony on behalf of ING Halifax. His CV is marked as Exhibit "4" to the proceedings and a report dated March 2, 2005 is marked as Exhibit "5" to the proceedings. Additionally, Mr. McCully

delivered additional appendices to his report and I received those as Exhibit "6" in the proceedings. At the request of counsel for ING Mr. McCully also prepared a schedule to identify the present value of \$9,400.00 in 1985. That document was marked as Exhibit "7" to the proceedings.

EVIDENCE OF ZELIA ALMEIDA

Zelia Almeida testified at the hearing and also testified in a pre-hearing process. The transcript of her testimony in the pre-hearing process was marked as Exhibit "3" to the proceedings.

Through her testimony Zelia Almeida is identified as the daughter of the injured Maria Araujo. She lives at 94 Kesteven in Brampton, Ontario and that is where she lived at the time of the motor vehicle accident. She lives there with her husband and her son and daughter. Maria Araujo moved into the household in about 1996 or 1997. Previously Maria had lived somewhat independently with her husband in other premises. Her husband, Zelia's father, was required to move to a nursing home and at that point the family assets were sold and Maria Araujo moved in with her daughter and family.

The evidence of Zelia supported the notion that Maria Araujo didn't have much choice about living anywhere else because she could not afford to live elsewhere. It was also clear, from the testimony, that family support is very important in this case and Zelia made it clear that she expected that her mother would live with her and her family indefinitely into the future.

The family circumstances at the time of the accident are highly relevant. Zelia, at the relevant time, was employed at Quality Meats. This was a full time job. It required her to start early in the morning. She left the home daily at 5:30 a.m. She would finish work and return home in the mid to late afternoon. She might be home as early as 3:30 p.m. if she had no other errands to take care of on her way home.

Her husband, Jose, worked in construction. He worked steadily although the testimony indicated there might have been some occasions in which Jose didn't work because of

adverse weather, it was clear that this was exceptional and that Jose typically left the home early in the morning between 5:30 and 6:00 a.m. to go to his work in construction.

This left Maria Araujo remaining in the household to deal with seeing the children off to school. The children, 14 and 10 at the time of the accident were in full time attendance at school during the school year. Maria Araujo took responsibility for preparation for their day in school, including preparation of meals and taking them to the bus pick-up point, which was nearby the residence. At the end of the school day Maria would be at home in order to receive the children when they returned home.

Additionally, during school holidays when the parents were at work, Maria was the adult in the household attending to the needs of the children more extensively. This was not the total extent of Maria's contribution to the household activities. It is clear that she also performed light housekeeping duties around the home. She did not do the heavier work such as vacuuming and laundry. But she did contribute to other activities around the home, picking up after the kids and so forth. There was some discussion about the role of Maria in the preparation of evening meals. Zelia Almeida testified that the preparation of evening meals divided up between Zelia and her mother about "50/50".

In the household there were five people, Mr. and Mrs. Almeida, their two children, and Maria. Maria shared a bedroom with her granddaughter. Maria had all of her personal belongings in the basement of the house. She had full run of the premises.

It was also clear that Maria enjoyed the benefit of some of the services provided to her by the other members of the family. It was other members of the family who attended to heavier work around the house such as vacuuming, laundry, lawn maintenance, and snow removal.

In the context of this case the parties have given serious consideration to the difficulty of quantifying the value of services provided between the family members. Other family members also provided some services which were specifically a benefit to Maria and in particular she was provided with transportation and assistance by her daughter when it was necessary for her to attend at medical appointments.

Her health, prior to the accident, was relatively good. It was acknowledged that she had high blood pressure controlled by medication for which she received medical attention from time to time. The picture that has been painted by the evidence, however, is of a relatively healthy woman who was able to get about on her own and who frequently went shopping on her own. Indeed, at the time of the accident she was on her own waiting for a bus to take her to church.

During the course of the testimony of Zelia there was reference to some of the documents at tabs 5, 8, and 9 of Exhibit "2". At tab 5 of Exhibit "2" is a document which sets out some of the household expenses as identified by Zelia Almeida. This is a form that was provided to her by Co-operators for completion. The form asks for identification of certain information about the household. The purpose of the form is to assist in determining dependency.

That household expense form shows a monthly mortgage amount of \$1,052.00, credit card payments of \$200.00, heating costs of \$170.98, water costs of \$110.19, electrical costs of \$63.54, cable television costs of \$178.11 for three months, telephone expense of \$62.57, monthly property taxes of \$442.00, annual insurance costs of \$351.00, automobile insurance costs of \$1478.88 every six months, other insurance costs of \$44.00, food expenses of \$800.00, and miscellaneous medical expenses of \$100.00. In the documentation and in the cross examination it was acknowledged that the monthly payment for credit cards is not directly attributable to anything paid for on behalf of Maria Araujo, nor is the monthly insurance expense attributed to anything that benefits Maria Araujo.

The amount for car expenses, insurance, is only a very indirect benefit to Maria Araujo. There were two cars in the household but Maria was not a driver and didn't use either car. On the infrequent occasion that she required transportation to visit a doctor and she was taken by her daughter, one of the cars would be used but it is clear that the major use of the automobiles was for purposes unrelated to Maria.

From the review of the documents contained in Exhibit "2" at tabs 15, 16 and 18, I question the accuracy of some of the entries contained in the form found at tab 5. From my review of the underlying invoices it appears that the actual monthly cost of heating

was, not surprisingly, variable but actually approximates about \$80.00 per month. Similarly the cost of water and sewage appears to be actually about \$25.00 a month, no doubt some confusion arises from the billing cycle. Finally, the property tax documentation suggests an annual tax bill of about \$2600.00 or about \$220.00 per month. It appears to me that the Co-operators form has been improperly completed by Zelia and has overstated the household expenses inadvertently by about \$400.00 per month.

From these figures we gain some insight into the cost of operating the household in which Maria lived. It is highly germane to recognize that Maria paid no amount with respect to the household expenses. She was not required to pay any rent or contribute to board. Conversely, Maria was paid nothing for the services that she provided to the family in terms of daycare or meal preparation and so forth.

It is clear that the family relationship is not defined by economic considerations.

There was considerable evidence offered with respect to the economic situation for Maria Araujo. At tab 5 of Exhibit "2" there is the tax return for the year 2000, the year prior to the accident. That tax return shows total income of \$8,191.00. It is to be noted that no tax is payable for her on that income and indeed she receives an Ontario Tax Credit of \$100.00 so that documentation indicates an annual income of approximately \$8,300.00 for Maria Araujo. The income consists of Canada Pension Plan benefits, the Old Age Security Pension, and a Net Federal Supplement. The federal supplement was, in 2000, \$1,910.10.

At tab 9 of Exhibit "2" are the statements of Old Age Security and Canada Pension Plan, issued for Maria Araujo for the year 2001. The Canada Pension Plan benefit indicates benefits in the year of \$1,232.88. The statement of Old Age Security indicates pension paid of \$5,232.27 and also indicates "net supplements paid" of \$2,139.10.

There is some question about whether the Net Federal Supplement was actually paid to Maria in the year prior to the accident. Although the statement issued by Human Resources Development Canada indicates a payment of \$2,139.10 as a supplement, when one reviews the banking records of Maria Araujo, at tab 10 of Exhibit "2", it is

difficult to identify the payment of that supplement. It is easy to identify the Canada Pension Plan payments put in monthly and also it is clear that Old Age Security payments were put in monthly. On December 12, 2001 there is an entry of \$1,144.57 cents, which is identified as Old Age Security that one suspects may have been a partial payment with respect to the net federal supplement. Unfortunately the witness Zelia and her mother are not in a position to clarify this situation.

The best evidence available does tend to suggest that the net federal supplement was paid during the year 2001, and I so find.

EVIDENCE OF NORMAN McCULLY

Norman McCully was called to testify as an expert accountant and to offer his opinion evidence to the process. Counsel agreed to receive his opinion evidence on consent. His brief resume was marked as Exhibit "4" to the proceedings and his report was marked as Exhibit "5" to the proceedings. His subsequent appendices prepared were also marked as Exhibit "6" to the proceedings.

I found Mr. McCully's evidence on this case quite helpful and I thought he testified in a forthright manner, which was of great assistance in understanding the issues in this case.

Mr. McCully readily recognized that there are many difficulties in assessing financial dependency in a case of this nature. There are the challenges of assessing the value of services, and there are the usual challenges of trying to understand the true costs of the operation of a household. Even if one can determine those true costs, it is difficult to attribute the value of those costs to one member of a multi-party household.

Mr. McCully took several approaches to the dependency determination problem. He considered measuring Maria Araujo's available income in relation to: (1) the cost of living in a retirement home, (2) the cost of living alone at the poverty line and (3) an apportionment of the aggregate household living expenses for the household as it then existed.

There is some validity to each of these approaches when one is challenged to determine whether or not a person is principally dependent for financial support on others.

According to Mr. McCully's evidence Maria Araujo only had about 49% of the resources necessary to pay the monthly cost of living in a retirement home and she would have had additional living expenses beyond that. Therefore, based on Mr. McCully's analysis, if we approach the question of dependency by looking at the ability of Maria Araujo to live in a retirement home independently, she did not have 51% of the financial assets required to do so and therefore, to live in that circumstance would have been principally dependent for financial support on others. Of course, at the time of the accident Mrs. Araujo was not living in a retirement home, nor was there any plan or need for her to do so.

The second analysis that Mr. McCully undertook was comparing Mrs. Araujo's financial resources with the annual income that, according to Statistics Canada, constitutes the borderline for a person living alone at the poverty line. Again, this hypothetical example contemplates an individual living in family circumstances very different than those actually existing in the Araujo/Almeida household. However, Mr. McCully's calculations at Exhibit "6" show that in terms of after tax income, Mrs. Araujo had 58% of the financial requirements to be living alone "at the poverty line per Statistics Canada" at the time of the accident. Thus, to the extent that this can be taken as a measure of independence, it demonstrates that Mrs. Araujo had the financial wherewithal to live alone, at the poverty line, without being principally dependent for financial support on any other person. It is important to bear in mind that the regulations under consideration require us to address "principal dependency". Numerous cases have recognized that principal dependency means more than 50%.

Mr. McCully's third approach demonstrated in Appendix A.2 of Exhibit "6" is to evaluate the dependency based on the actual household expenditures. For this approach Mr. McCully has calculated the annual cost of household expenses, which he has assumed to be about \$35,984.00. This assumption is possibly reasonable on the evidence that was presented to Mr. McCully but requires a great deal of interpretation with respect to the amount paid by Mrs. Araujo towards household expenses, which Mr. McCully has

estimated at half of Mrs. Araujo's cash withdrawals from the bank over the year. This may be a reasonable assumption but there is certainly no specific evidence to back it up. Additionally, Mr. McCully was presented with the list of household expenses at tab 5 of Exhibit "2" with respect to other household expenses and for the reasons previously outlined, I am not satisfied that this is correct.

Mr. McCully then has taken the total household expenditure and allocated 20% of the household expenditure as being the costs applicable to Maria Araujo. I fully understand Mr. McCully's approach here and I think, again, it is a reasonable approach as it allocates the household expenses "per capita" to each of the individuals in the household. One might argue that this is attributing too much of the household costs to Mrs. Araujo since she is sharing a room but, in a rough way it seems to be an appropriate distribution. However, one might challenge whether or not the figures used for household expenses should include insurance payments, which were not for the benefit of Mrs. Araujo or credit card expenses, which apparently were not for the benefit of Mrs. Araujo.

In any event, using this approach Mr. McCully has concluded that the household expenses applicable to the Mrs. Araujo were about \$7,200.00. To this he has added the personal expenses of Mrs. Araujo of \$3,084.27. This number represents half of the money that was withdrawn from the bank by Mrs. Araujo. There is no evidence to support the suggestion that half of the money withdrawn by Mrs. Araujo went for her personal expenses. I think this assumption is somewhat generous. Clearly all of the money withdrawn from the bank was expended by Mrs. Araujo in some form but it is difficult or impossible at this point to say how much went into household expenses, how much was spent by Mrs. Araujo on herself for necessities, and how much may have gone to other expenditures, gifts for family members, contribution to church activities and so forth. Nonetheless Mr. McCully when using this approach comes to the conclusion that the insured's annual cost of living is \$10,281.00 which, when compared to the insured's financial resources indicates that she was capable for providing for about 85% of the calculated annual cost of living.

These calculations, in all three scenarios, neglect the value of services provided by Mrs. Araujo and the value of services provided by the other family members that benefited Mrs. Araujo.

Mr. McCully concludes with an estimate that the child care provided by Mrs. Araujo to the family had an approximate value of \$5,000.00 per year. I would note, that in addition to this amount, the testimony was to the effect that Mrs. Araujo provided light housekeeping services around the home and also prepared about half of the evening meals. Therefore, this is a material understatement of the value of services provided by Mrs. Araujo to the household.

To be sure, there were other services provided by the family that benefited Mrs. Araujo. These were much more difficult to quantify and generally seemed to be of much less significance than the value of the services contributed by Mrs. Araujo.

With considerable insight Mr. McCully observed that the relationship in this family evidences a social contract. Mrs. Araujo lives with her child and provides assistance to the family. As time goes by it is reasonable to expect that the situation might be reversed and Mrs. Araujo might have required the care and support of her family members into the future. I don't doubt this possibility in many household situations, but I believe that the task at hand is to evaluate the dependency status as of the time of the accident without regard to what the future might have held at some distant time.

FINDINGS ON THE EVIDENCE

Based on the evidence put before me in the record, including the documentation and the testimony of the parties I have come to the following conclusions with respect to the evidence.

It is clear that Mrs. Araujo was living in the household of her daughter and her daughter's husband. She was therefore enjoying the benefit of the common household shelter and food provided. The value of that benefit is difficult to measure. I find that the proven costs of the household in which Mrs. Araujo benefited is \$30,000.00 annually. I have

reached this by examining Appendix "C" to Exhibit "6" and I have reduced this for the credit card payments and the other insurance items.

In terms of examining the financial resources available to Mrs. Araujo, I conclude that she had available to her total after tax income of \$8,704.25 in accordance with Appendix "B" to Exhibit "6". I find as a fact that Mrs. Araujo received and was entitled to the Federal Supplement and I decline to find that her income should be calculated without including the Federal Supplement. The tax reporting documents from Human Resources Canada indicate that she received that supplement. There is at least one bank book entry which tends to corroborate that. And in any event, her entitlement to that benefit, whether received or not, constitutes part of her financial resources. Mr. McCully testified that she would have been entitled to that benefit.

With respect to the relative value of services provided to and from Mrs. Araujo within the family unit I am satisfied that the services she provided to the family were of greater value than the services that the family returned to her. Counsel for ING Halifax pointed out several cases where fact finding proved difficult and arbitrators had concluded that the services provided were roughly equivalent to the services received and therefore there was no net benefit one way or another to be taken into account. I cannot make the same conclusion in this case. It is well documented that there were significant services provided by Mrs. Araujo on a regular basis in favour of the family. The services that are provided in the other direction were services that were for the whole household and Mrs. Araujo would only have enjoyed a fraction of the benefit of such services. It is difficult to make a precise estimate with this particular aspect of the case but I find that it is reasonable to conclude that Mrs. Araujo was contributing time and services with a value of at least \$2,000.00 greater than what she was receiving from the other members of the household (per year).

I find that Mrs. Araujo's capacity to earn income, in the marketplace, was very limited at the time of the accident. No doubt she was well suited to contribute to the family in the way that she was doing prior to the accident, but that is a unique circumstance where she was able to provide services and support to children that could really only be easily provided by a family member, and which she could provide notwithstanding her limited abilities in the English language.

SUBMISSIONS AND ANALYSIS

The parties' positions crystallize into an argument about the proper approach to take to a case of this nature. Co-operators submits that the mathematical analysis clearly demonstrates that the financial resources available to Maria Araujo exceed 51% of the cost of her shelter and necessities as evidenced by the analysis of household expenditures. Accordingly Co-operators urges that Maria Araujo was not principally dependent for financial support on anyone else as she was able to provide for more than 51% of her needs in the household circumstances.

Co-operators points to several cases in support of their position. In particular two cases where people in similar, but not identical, circumstances have been found to be independent of the family members with whom they resided.

ING Halifax, on the other hand, argues against a rigid mathematical approach to the case. While there is no evidence to support a finding that Araujo was principally dependent for care at the time of the accident, they argued that there was certain emotional support and security provided to her in the family context that ought to be taken into account. Furthermore ING Halifax argues that Mrs. Araujo could not have afforded to live independently and therefore must be considered a dependent.

On the latter point, I think there was considerable evidence and support of this conclusion. Indeed right at the outset of her testimony Zelia Almeida testified that her mother could not afford to live independently. On any of the scenarios proffered by Mr. McCully, Maria Araujo's financial resources would have been insufficient to meet the total needs of living independently. She would have had to be supported with some other resources.

However, the regulation is unambiguous in its requirement that we look at "principal" dependency and not at any other factor. Numerous decisions have concluded that principal dependency means looking at whether or not a person could provide for 51% of their own needs. If so, they are not principally dependent for financial support on some

other person. This is the effect of the decision in many cases and has been specifically referred to on Appeal in the case of *Liberty v. Federation*.

Counsel for the respondent submits that the leading case of *Miller v. Safeco* requires us to examine whether or not Maria Araujo could have lived independently without support. The suggestion is made that because she required some support, whether financial or emotional, then she must have been dependent on the family to provide her that support. In my view this argument is answered by the requirement and the current benefits that dependency means "principally dependent" for financial support or care. I observe that in the *Miller v. Safeco* case that regulation under consideration did not employ the concept of principal dependency. In any event when Justice O'Brien in the *Miller* case alludes to the ability of the claimant to be self supporting, he is including this in a list of considerations to be "kept in mind" and does not purport to say that a person can only be independent if they have the ability to be self supporting without any contribution or aid from others. I reject the argument that Maria Araujo should be considered a dependent of Mr. and Mrs. Almeida because she was incapable of living independently without some contributing support. The regulation asks us to look at her principal dependency.

I therefore examine the question of her dependency or independence in relation to the three scenarios proposed by Mr. McCully.

When measuring her financial resources against the imputed proportion of her household expenses for the existence that she had at the time of the accident, it is overwhelmingly clear that she had adequate resources to provide for more than 51% of her needs and therefore, if that is the appropriate comparison, she was not principally dependent for financial support on anyone at the time of the accident.

Similarly, if we consider the dependency of Ms. Araujo by measuring her financial resources, after tax, in relation to "the poverty line" for a person living alone in an urban area, we also see that she had more than 51% of the resources to live at that standard. It is only when we examine Mr. McCully's third option, the cost of living in a retirement home, at the resources of Ms. Araujo become inadequate to meet 51% of the costs. In

that scenario, if she were to live in that circumstance, she would be principally dependent for financial support on others.

However, I do not think it is appropriate in the circumstances of this case to look at Ms. Araujo's dependency status on a hypothetical fact situation that considers whether she could have lived in a retirement home. She did not live in a retirement home. There is no reason why she would need to live in a retirement home. There was no prospect of her living in a retirement home in the foreseeable future. In my view, this is an inappropriate scenario to employ to consider dependency.

While we should not become overly focused on looking at the general standard of living in the household at the time of the accident as a guide to dependency, in this particular circumstance I believe that the family situation at the time of the accident was a reasonable indication of the needs of a woman in Ms. Araujo's circumstance. She lived with her family. She contributed to the household. The family contributed to the household. They lived together as a family unit. Their arrangements were not driven by economic considerations and their affairs were not organized with pecuniary considerations in mind. However, based on the findings made, and the evidence put before me, I conclude that the cost of meeting the necessities for Ms. Araujo at the time of the accident was far less than twice her financial resources. In other words, her financial resources are far more than 51% of the costs of meeting her financial needs. This conclusion is supported by the calculation of Mr. McCully and the findings on the evidence that I have made.

As a result, I conclude that at the time of the accident Mrs. Araujo was not principally dependent for financial support on her daughter and son-in-law.

The critical question is therefore answered as follows:

Was Maria Araujo a dependant of the Co-operators insureds within the meaning ascribed to that term in the Bill 59 Statutory Accident Benefits Schedule, at the time of the subject accident?

Answer: No.

Although the parties have suggested that the determination of the costs of the arbitration and the burden of payment of same is a matter for me to determine, I note that paragraph 10 of the Arbitration Agreement mandates that party and party costs of the Arbitration should be fixed by the Arbitrator on a partial indemnity scale in favour of the successful party. I agree with that disposition in this case and would make that Order in any event.

I expect that the parties may wish to consider their positions in this case in view of the decision that I have arrived at and I would ask the parties to advise me within sixty (60) days whether they require me to adjudicate on the amount of costs, or the issues identified in paragraphs 2(b) and 2(c) of the Arbitration Agreement, in which case arrangements can be made for a further conference call to schedule the necessary proceedings to address those issues.

May 2, 2006



LEE SAMIS