

IN THE MATTER OF AN ARBITRATION  
PURSUANT TO S.148.2(1) OF THE REVISED REGULATION TO THE *INSURANCE  
(VEHICLE) ACT*, B.C. REG 447/83 AND THE *ARBITRATION ACT*, R.S.B.C. 1996, C.55

BETWEEN:

[REDACTED]

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

**ARBITRATION AWARD**

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ARBITRATOR:  
Date of Award:

DONALD W. YULE, QC  
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## INTRODUCTION

1. The Claimant, [REDACTED] [REDACTED] (the Claimant), seeks access to excess underinsured motorist protection (UMP) coverage in connection with a motor vehicle accident that occurred on October 26, 2009 when as a pedestrian he was struck by a motor vehicle at the intersection of 10<sup>th</sup> Street, NW, and 3<sup>rd</sup> Avenue, NW, in Calgary, Alberta (the Accident). This hearing was to determine entitlement to excess UMP coverage only. The coverage is sought from the Owner's Certificate of the Claimant's mother, [REDACTED] [REDACTED] (Mrs. [REDACTED]) who at all material times resided with her husband, Kenneth [REDACTED] (Mr. [REDACTED]) in the "family" home in Cranbrook, BC (the Family Home).
2. The narrow issue is whether at the date of the Accident the Claimant was a member of Mrs. [REDACTED] household where household is defined by *Regulation* to mean: *Every person ordinarily residing in the same dwelling unit*. Entitlement therefore involves a two part requirement. The Claimant must be a "member" of Mrs. [REDACTED] household. The Claimant must also be "ordinarily resident" in the Family Home in Cranbrook.
3. The Claimant had spent the majority of the time between 2005- 2009 living in Calgary, Alberta, where he was participating in 4 year program to obtain his journeyman qualification as an electrician. The program required both class attendance and a specific number of hours of employment with a licensed electrical firm.
4. The Claimant submits that throughout the time he was living in Calgary, he remained a member of Mrs. [REDACTED] household. Alternatively, if he ceased to be a household member whilst living in Calgary, he rejoined the household as a member in June, 2009 when he transported all of his belongings by U-Haul truck from Calgary back to the Family Home in Cranbrook. In the further alternative, if the Claimant continued to be ordinarily resident in Calgary, in September-October, 2009, then he was at the same time still ordinarily resident in Cranbrook and a member of the household there.
5. The Respondent, Insurance Corporation of British Columbia (ICBC), submits that the Claimant ceased to be a member of Mrs. [REDACTED] household in 2005 when he left home to undertake the apprenticeship program in Calgary. Thereafter, he was always "ordinarily resident" in Calgary, and the subsequent visits to the Family Home in Cranbrook were merely "visits" or "sojourns". Moreover, after moving to Calgary in 2005, the Claimant was an independent person and never thereafter met the legal requirements of "membership" in a household.
6. With some significant exceptions, many of the basic facts are not in dispute. I will summarize those basic facts, noting for separate consideration areas in which there is a dispute. The credibility of the Claimant, and most of his witnesses, is challenged, and I will address that issue separately as well.

## BACKGROUND CIRCUMSTANCES

7. The Claimant was born on December 20, 1983 in Cranbrook, BC. He has one younger brother, Brett [REDACTED] now age 30. Brett [REDACTED] is currently married and living in Calgary. His wife is also from Cranbrook.

8. The [REDACTED] boys attended elementary and high school together in Cranbrook. There is a large, extended, family mostly still living in Cranbrook. This includes the Claimant's paternal grandmother and maternal grandparents, aunts, uncles, cousins, nieces and nephews. The Claimant saw his grandparents on a regular basis. Members of the extended family participated in family events particularly on holidays such as Thanksgiving and at Christmas.
9. The Claimant participated in and enjoyed multiple outdoor activities growing up. The family owned property on a lake and in the summer the Claimant, his brother and their circle of friends spent a lot of time in water sport activities such as wakeboarding, waterskiing, swimming, boating, and fishing. They also engaged in motocross riding. In the winter the boys and their friends engaged in snowmobiling and snowboarding. The boys went hunting with Mr. [REDACTED]. The Claimant struggled at school and obtained needed assistance from both Mrs. [REDACTED] and Brett [REDACTED]. All the family members who gave evidence said that they were a "tight knit" family.
10. Upon graduation from high school, the Claimant decided to undertake an apprenticeship to become a journeyman industrial/commercial electrician. The nearest available location to obtain this training was in Calgary, Alberta. He accordingly obtained an apprenticeship with a Calgary based firm, [REDACTED] and enrolled at the Southern Alberta Institute of Technology (SAIT) in Calgary. The significance of the Claimant's choice of an industrial/commercial electrician's ticket is an issue.
11. When the Claimant first moved to Calgary in 2005, he lived with Mr. [REDACTED], who at the time was working out of Calgary and owned 1/2 of a duplex there. The family then purchased an Investment Property at [REDACTED] Alberta (the Investment Property). It was owned jointly by the Claimant, Brett [REDACTED] and Mrs. [REDACTED]. Brett [REDACTED] was attending the University of Calgary, obtaining an Engineering Degree at the time and the brothers lived at the Investment Property together with three other rent paying tenants. Mrs. [REDACTED] was in charge of receiving the rents and paying the mortgage and other house expenses. The Claimant and Brett [REDACTED] did not pay any rent, except during times when they were working. The Investment Property was sold in March, 2009 and the sale proceeds were split equally among the Claimant, Brett [REDACTED] and Mrs. [REDACTED]. In the late spring, 2009, Brett [REDACTED] was finishing his University Degree and had obtained a job with Canadian Natural Resources in Medicine Hat, Alberta. For a short time after the sale of the Investment Property until the Claimant finished his hours and classes, he rented a room from a friend, [REDACTED] ([REDACTED]).
12. While he was living in Calgary from 2005-2009, the Claimant returned to Cranbrook as often as he could, which included all holidays and many weekends. He still had his room with some of his possessions and some clothes in the Family Home. He had a circle of friends in Cranbrook with whom he engaged in the recreational activities they enjoyed. His own recreational equipment remained in Cranbrook. He visited members of his extended family. There were occasions when he was able to modify his work schedule at [REDACTED] so as to take an extra day at home on the weekend. He sometimes stayed over in Cranbrook Sunday night and returned to Calgary very early, Monday morning. While he was at home, his parents provided free room and board and he did some chores. The extent of the Claimant's participation in the family unit, after 2005 is an issue.

13. The apprenticeship program at SAIT involved successive periods of work with [REDACTED] followed by two or three months of classes and then further work for [REDACTED]. The Claimant last worked at [REDACTED] on April 23, 2009. By that point he had accumulated sufficient work hours to be able to proceed to take the last three months of class work from September to December, 2009. The circumstances of the Claimant's leaving [REDACTED] and whether he intended to return there upon graduation are an issue.
14. At the end of June, 2009, the Claimant packed up all his possessions in Calgary, into a U-Haul van, and brought them back to the Family Home. This included all the furniture, clothes and kitchen utensils. He left nothing in Calgary.
15. He spent the summer in British Columbia (BC). For the month of July, 2009, he went to Kelowna with [REDACTED]. For the most part they relaxed. The Claimant did a bit of work in Kelowna but the nature and extent of it is an issue going to the Claimant's credibility.
16. The Claimant returned to the Family Home in Cranbrook over the August long weekend. The Claimant remained at home until returning to Calgary, on or about September 24, 2009. The Claimant did a bit of work in August with another friend, [REDACTED]. Otherwise the Claimant enjoyed recreational activities and was enjoying some time with a female friend, [REDACTED].
17. In late September the Claimant drove back to Calgary to attend the last three months of classes. He took with him a duffle bag of clothes and a laptop. He did not take any furniture. He rented a single room from another friend, [REDACTED]. He had been living there for about a month when the Accident occurred. He had returned home to Cranbrook over the Thanksgiving weekend.
18. From time to time between 2005 and 2009 his parents gave him money when he needed it.
19. The Claimant maintained his BC Medical Services Plan (MSP) coverage throughout the time he was in Alberta. MSP reimbursed the Alberta hospital and healthcare system for the cost of his medical care in Alberta, after the Accident. The Claimant maintained his BC Driver's License through the time he was in Alberta.
20. The Claimant purchased two vehicles while he was in Alberta but licensed and insured them both in BC.
21. The Claimant used the address of the Family Home as his mailing address for some purposes. Some bank and credit card statements were sent to his Calgary address.
22. On the income tax returns for the years 2006, 2007 and 2008, he is described as a "resident" of Alberta and taxed on that basis.
23. Following the Accident, he applied for 'no fault' accident benefits from The Economical Insurance Company (the Economical), the insurer of the vehicle that struck him. Some of the correspondence to the Economical describes the Claimant as a resident of Alberta.

24. Since discharge from hospital in Calgary, after the Accident, the Claimant has continuously lived at the Family Home with his parents.

#### **CREDIBILITY OF THE CLAIMANT AND THE CLAIMANT'S WITNESSES**

25. ICBC submits that the [REDACTED] family members are not independent and have all tailored their evidence to advance the Claimant's claim. The Claimant himself is alleged to have made statements that were deliberately wrong in order to support his claim.

26. I accept that Mr. and Mrs. [REDACTED] and Brett [REDACTED] are not true independent witnesses; they are family members with a natural wish for the best for their son and brother. This relationship calls for their evidence to be assessed carefully, with that interest in mind. It does not mean that their evidence must necessarily be discounted or disregarded on that account. The tailoring of evidence is a serious allegation implying an element of deliberate deception. I reject the allegation for the following reasons. First, each of the family members gave their evidence in a forthright manner, without evasiveness or debate with cross-examining counsel.

27. Second, with respect to Mr. [REDACTED] ICBC says that his evidence that the Claimant had decided to live at home and work in the north, at Fort McMurray from the very time in 2005 he decided to get his electrician's qualification was inconsistent with the Claimant's conduct in the summer/fall 2009 when he did not take any tangible steps to find employment in the north or at Fort McMurray. ICBC says that the true facts were that the Claimant was either going to go back to work at [REDACTED] in Calgary or alternatively he had not decided exactly what he was going to do. It was put to Mr. [REDACTED] in cross-examination that going to Fort McMurray was an option for the Claimant but not a set plan. Mr. [REDACTED] disagreed. There is only a conflict if on the true facts the Claimant had decided to work at [REDACTED], or was undecided as to where he was going to work. For reasons that follow later in this decision, I have found the Claimant did intend to return to Cranbrook and seek employment in northern Alberta from home; hence the alleged conflict does not arise. Moreover, Mr. [REDACTED] is a 63 year old man, still working with no plans to retire. He admitted being a bit focused about money. The prospect of one of his sons earning \$250,000 per year in Fort McMurray is understandably something he might encourage. His evidence of this long-standing intention is neither inaccurate nor tailored.

28. With respect to Brett [REDACTED], ICBC attacks his evidence that he never changed his BC Driver's License until he bought a house in Medicine Hat because his dream was to live in Cranbrook. The Medicine Hat house was purchased in late June, 2009 between trips to Asia for 6 weeks and Europe for 5 weeks. He moved to Medicine Hat at the beginning of August, 2009; his first day of work in Medicine Hat was August 8, 2009. I do not think there is any inconsistency in Brett [REDACTED]'s evidence in this regard. He did not obtain an Alberta Driver's License throughout the years he was at the University in Calgary. He only obtained an Alberta Driver's License when he moved into what was intended to be a permanent residence in Medicine Hat. I do not find this evidence to be either inaccurate or tailored.

29. With respect to Mrs. [REDACTED], she is a potential source of information provided to the Economical regarding the Claimant's residency that is now said to be incorrect. Mrs. [REDACTED]

either denied or could not recall providing the evidence or seeing a letter copied to "client". The information must have come from either Mrs. [REDACTED] or the Claimant. Whether it was in fact in correct I will address subsequently. On other aspects of her evidence, Mrs. [REDACTED] agreed without hesitancy to facts not helpful to the Claimant's case. She agreed that while the Claimant was living in Calgary, he was establishing himself as a self-sufficient independent adult. She agreed that in the summer of 2009 the Claimant was taking a bit of a break (and by implication on a holiday). ICBC relies upon this evidence. As noted earlier, I found Mrs. [REDACTED] to be a forthright unevasive witness and I reject the allegation that her evidence was tailored.

30. With respect to the Claimant, the most compelling evidence in support of the attack on his credibility is a statement on oath in an Examination for XFD (XFD) in the underlying tort action when he said that, if the Accident had not happened, once he became a journeyman electrician, his plan was "in the direct future to go work as a journeyman for [REDACTED]". What the Claimant would have done after finishing his schooling is one of the vital factual issues in relation to his entitlement to excess UMP coverage. The Claimant's evidence under oath subsequently and at the arbitration hearing was that upon completing of his schooling, he intended to return home to Cranbrook and to seek employment in northern Alberta or Fort McMurray from Cranbrook on a fly-in/fly-out basis. ICBC invites the conclusion that the Claimant's evidence on XFD in the tort action was correct and his subsequent different evidence was deliberately false. ICBC also points to the Claimant's inaccurate description again on XFD in the tort action of the nature of his work in Kelowna in July, 2009. ICBC also points to a statement the Claimant made post-Accident to a psychologist expressing concern that he not do anything to jeopardize his excess UMP insurance claim. I shall address this evidence when I consider the Claimant's evidence subsequently, but I have come to the conclusion that the Claimant has not been deliberately misleading in his testimony. Some of his evidence was innocently incorrect (the identity of a girlfriend in the summer, 2009); some of his evidence was exaggerated (the extent of the electrical contracting work done in July, 2009); and some of his evidence was carelessly expressed. These concerns require careful scrutiny of his evidence, but when the evidence regarding his actions, and the evidence of other witnesses is considered as a whole, I conclude that the Claimant is an honest although not always reliable witness.

## THE EVIDENCE

31. The two principal factual issues that require determination are (1) the Claimant's intentions about where he would work and live after completing his schooling; and (2) the nature of his participation in Mrs. [REDACTED]'s household after 2005
32. I will now summarize the evidence of the witnesses relevant to these specific topics.

Mrs. [REDACTED]

33. Mrs. [REDACTED] is a retired school counsellor. Growing up, her sons spent their whole life in Cranbrook. They were close, only two years apart, and engaged in many activities together, particularly at the lake properly. The boys are still best friends; the Claimant was best man at Brett [REDACTED] wedding. The family was one that did things together. The Claimant as a

youth was quite outgoing with lots of friends. At the time of the Accident, 50% of his school friends were still living in Cranbrook. The Claimant was not a good academic student. He was never interested in University. He liked "hands on" activities and working on his own. It was the Claimant's choice to be an electrician which Mrs. [REDACTED] thought was a good fit. The Claimant's interest was to be a commercial/industrial, electrician for which training was not available in Cranbrook. When the Claimant moved to Calgary he initially lived with Mr. [REDACTED] who owned half a duplex there. Mrs. [REDACTED] and the two boys then purchased the Investment Property which was Brett [REDACTED] idea. They built a house on it big enough for five occupants. When the Claimant moved to Calgary in 2005, he did not own a car and used a family truck to transport his possessions. The boys maintained the Investment Property. The Claimant only paid rent when he was working at [REDACTED]. The profits on sale of the Investment Property were split equally among the two boys and Mrs. [REDACTED]. Between 2005-2009, Mrs. [REDACTED] would give the Claimant money if he was in a financial bind. Between 2005-2009 the Claimant came home as much as he could. His job was Monday to Friday so he had weekends off. In the summer he could work longer hours and take Fridays off. He came home most weekends in the summer. The Claimant's room at home remained the same as when he left for Calgary. He left personal possessions and clothing behind as well as all his sports equipment, wakeboard, snowboard and fishing, golfing, and hunting equipment. The lake cabin was winterized and they spent New Year's together as a family. All the family participated in water activities at the lake.

34. When the Claimant finished classes in June, 2009, the next day he packed up and moved to Cranbrook. He brought in a U-Haul all of his furniture, personal possessions, kitchenware, etc. Everything was out of Calgary and put in the garage at home in Cranbrook. The Claimant "took a break" in July, 2009, and went to Kelowna with [REDACTED]. He returned home at the beginning of August and remained there until the end of September. During that time, he helped Mrs. [REDACTED] by mowing lawns, washing dishes, and "bringing in" her garden of potatoes and carrots. He visited his grandparents and participated in chores because "everyone does their part". The Claimant was not charged for rent or food. When the Claimant returned to Calgary at the end of September, 2009, he took a duffle bag and a computer. He had a bedroom in a house rented by [REDACTED] that was close to SAIT. Upon finishing schooling, the Claimant's future plan was to live with Mr. and Mrs. [REDACTED] in Cranbrook, work at Fort McMurray, flying in and out, and eventually buy his own home in Cranbrook. Since the Accident, Mr. and Mrs. [REDACTED] and the Claimant have operated a modular home business together.
35. In cross-examination Mrs. [REDACTED] agreed that she encouraged the Claimant to be independent and it was his decision to become an electrician. While living in Calgary, the boys looked after themselves, maintained the Investment Property, and ensured that the tenants paid rent. She agreed the Claimant spent the four years prior to the Accident in Calgary except for weekends and the summers. The Claimant was establishing himself as a self-sufficient, independent adult. She either did not see or did not recall seeing various letters between the Claimant's lawyer and Economical (Exhibit 1, Tabs 7, 9, 10 and 11) some of which refer to the Claimant as a resident of Alberta.



Brett [REDACTED]

36. Brett [REDACTED] has a Bachelor of Science Degree in Mechanical Engineer from the University of Calgary, having graduated in April, 2009. He is now employed by Canadian Natural Resources Limited in Calgary.
37. He grew up in Cranbrook. He was close to the Claimant. They enjoyed mostly outdoor activities together such as motocross, hunting, fishing, water-skiing, wakeboarding, snowboarding, and snowmobiling. The family was close. There was an extended family in Cranbrook. The family did everything together and went as a family to the lake.
38. The Claimant was not a strong student at school. Brett [REDACTED] helped him with his academics. The Claimant was however super fit, a leader, and independent. They had a core of friends that bridged their age gap. They are still close. About half their friends still live in Cranbrook. Some of the group do live in Cranbrook and work in northern Alberta flying in and flying out. There is a "draw" to come back to Cranbrook. The practice is "really common". Brett [REDACTED] was aware of the Claimant's aspirations to work up north, fly in and fly out, and live in Cranbrook. He needed a commercial grade electrician's certificate to work up north which is why he attended SAIT in Calgary. The brothers lived together in the Investment Property in Calgary with three other roommates. Mrs. [REDACTED] looked after paying the bills. The other tenants provided post-dated cheques. Brett [REDACTED] came home on weekends and holidays as much as he could. When at home, the parents paid for food and any expenses. It was "not a point of conversation".
39. Brett [REDACTED] kept his BC Driver's License until he bought a home in Medicine Hat and moved there. He kept his BC Driver's License because he had always dreamt that he would return to Cranbrook. The Medicine Hat house was purchased in late June between trips to Asia and Europe. He moved to Medicine Hat in early August, 2009. His first day at work was August 8, 2009.
40. After the Investment Property was sold Brett [REDACTED] sent all his belongings except the bare essentials back to Cranbrook. When the Claimant was finished schooling in June, 2009, he also transported all his belongings and furnishing by U-Haul truck back to Cranbrook. The Claimant took a month vacation in Kelowna. In September, 2009, the Claimant moved into a "flop room" in a house belonging to [REDACTED]. Brett [REDACTED] cleaned out the room post-Accident. There was a duffle bag, clothes and toiletries and a mattress on the floor. That was all. A dresser in the room was not the Claimant's.
41. Brett [REDACTED] believes that both he and the Claimant came home over the Thanksgiving weekend, just before the Accident.

Ken [REDACTED]

42. Mr. [REDACTED] has lived 42 years in Cranbrook. He has had a variety of jobs in his career. Currently, he operates Pinnacle Home Sales with the Claimant and Mrs. [REDACTED]. He has no plans to retire. His family is very close. His mother is 87 years old. When the boys were younger he joined them at hunting and water sports at the cabin. The Claimant did not like school and his mother mentored him. The Claimant's plan was to get an

industrial/commercial electrician's certificate, live in Cranbrook and go to work at Fort McMurray. All kinds of friends live in Cranbrook, drive to Calgary, and fly in and out of Fort McMurray. Ten percent of the Cranbrook population does it. There is no industrial/commercial electrician work in Cranbrook. The program was offered at SAIT in Calgary. There was less money as a residential electrician. Mr. [REDACTED] was a bit focused on money. He supported the Claimant's choice to fly in and out of northern Alberta but live with the [REDACTED] in Cranbrook. When the Claimant moved to Calgary, initially he stayed with Mr. [REDACTED] in half a duplex that he owned there. The family then purchased the Investment Property where the boys stayed until it was sold in 2009 and the profits split. As Mr. [REDACTED] was in the car business at the time, when the Claimant moved to Calgary Mr. [REDACTED] found a car at a wholesaler which the Claimant bought. It was registered and insured in BC (and tax was paid on the sale) because the Claimant did not intend to live in Calgary.

43. Whilst in Calgary, the Claimant came home at every opportunity; he was home "more weekends than not". The Claimant came home for the summer, 2009, and went to Kelowna for a holiday. Before the Claimant returned to Calgary at the end of September, Mr. [REDACTED] paid about \$1700 to fix up his car. Half the Claimant's friends were still in Cranbrook although there were also quite a few in Fort McMurray.
44. When the Claimant left Cranbrook at the end of September 2009 the plan was that he would finish his schooling in three months, and then return to Cranbrook and go to Fort McMurray where he would be a Red Seal Electrician.
45. In cross-examination, Mr. [REDACTED] disagreed with the suggestion that working in Fort McMurray was an option rather than a set plan. The purpose of going to SAIT was to get the qualifications needed to work in Fort McMurray. The Claimant never wavered from his intention to work in the north.

[REDACTED]

46. Ms. [REDACTED] has a Bachelor of Science in Kinesiology from the University of Lethbridge, having graduated in 2009. She is presently employed as a health and safety manager in Edmonton, Alberta. Her evidence was taken by video conferencing. She was born and raised in Cranbrook, BC. She was one of the group of friends with the Claimant and Brett [REDACTED]. They attended elementary and high school together. She began a relationship with the Claimant in approximately September/October, 2007. They would exchange text messages and see each other when they could. She was in Lethbridge and he was in Calgary. However, they both came home for holidays as much as they could. They were both back home in Cranbrook in the summer 2009. She was there about a month before moving to Vancouver. That summer they "hung out" together and engaged in the summer lake activities. She visited his home and saw him doing some cooking and cleaning. He was very engaged with his family.

47. She maintained her BC Driver's License and BC vehicle insurance and registration and BC health card whilst at the University of Lethbridge. Cranbrook was her home; Lethbridge was just where she was going to school. She was not specifically aware of the Claimant's

employment plans other than he intended to finish his electrician's courses and then get a job to earn money which meant working in Alberta.

48. In cross-examination she agreed that a good percentage of her friends went away to school or University and that most have left Cranbrook to pursue opportunities although a good portion have returned to Cranbrook to either work there or work from there. She declined to sign a statement following an interview with an adjuster retained by ICBC alleging errors in the statement.

[REDACTED]

49. [REDACTED] gave evidence by video conference from Cranbrook. He is a long-time friend of the Claimant. He has lived in Cranbrook since he was 13 years old. After high school graduation he took a three month pre-apprenticeship course to become a millwright at SAIT in Calgary. He did not pursue that program but instead went to work in the oil fields for two years because of the money. He lived throughout in Cranbrook and worked "two weeks in-one week out". He maintained his BC Driver's License and BC healthcare coverage. He described Cranbrook as being a "huge bedroom community" for workers in Fort McMurray because of the money. He returned to Cranbrook to work because of a good opportunity. He currently owns a drilling company. He knew that the Claimant always came home from Calgary on weekends and holidays. He thought the Claimant was home for the whole summer of 2009 and expressed surprise when it was suggested that the Claimant was in Kelowna for the month of July and only returned to Cranbrook at the beginning of August. The Claimant did help [REDACTED] in his business on a casual basis in the summer 2009. [REDACTED] was aware that the Claimant was returning to Calgary in the fall 2009 for his last term and then planned to try to get a job up north. The Claimant discussed his plan with Hoeschmann that summer.

50. In cross-examination [REDACTED] agreed that he was interviewed over the telephone by an adjuster. He did not recognize the name of the person (Sharon Colby) nor her firm, Claims-Pro Inc. He denied telling the interviewer that he was not sure whether the Claimant was living with his parents or on his own in the summer 2009. He did not recall telling the interviewer that he had not discussed with the Claimant the Claimant's plan after he finished his schooling. He similarly did not recall telling the interviewer that he had not discussed with the Claimant where the Claimant would be living after he finished school. Subsequently [REDACTED] said he did not deny saying these things and might have said them but explained that he was caught off guard by the telephone call and was not sure who the interviewer was or what was going on.

51. On the morning of the third day of the hearing, when it was anticipated that counsel would be making their respective submissions, ICBC applied to call Ms. Colby as a witness. Initially, it was proposed that her evidence be taken by phone and subsequently by video conferencing to be arranged. The purpose was to put into evidence Ms. Colby's version of her conversation with [REDACTED]. Overnight counsel for ICBC had provided to the Claimant's counsel Ms. Colby's notes and a brief report to client of the conversation. The application was opposed by the Claimant on several grounds. First, the adjuster's notes and report were not listed specifically or properly on ICBC's List of Documents. In addition, if Ms. Colby

were allowed to give evidence, then the Claimant would wish to call other witnesses who had apparently been interviewed by Ms. Colby and who had issues with the accuracy of the statements Ms. Colby attributed to them. Finally, the Claimant took the position that disclosure of Ms. Colby's notes and report constituted a waiver of privilege over ICBC's entire investigation file, not merely the documents relating to the interviews conducted by Ms. Colby. The application to call Ms. Colby was refused.

52. [REDACTED] concession that he may have made statements to the interviewer that he now says were not true causes me to place little weight on his evidence that in the summer 2009 he and the Claimant actually discussed the Claimant's future plans and the Claimant said he was going to get a job up north. What I do accept is [REDACTED] evidence that in 2009 Cranbrook was a bedroom community for many persons who worked at Fort McMurray. I conclude that [REDACTED] had a general understanding that the Claimant intended to go up north to work on completion of schooling just as many other young men from Cranbrook were apparently doing. [REDACTED] was not asked whether the Claimant ever indicated he intended to work for [REDACTED] on completion of his schooling.

#### The Claimant

53. The Claimant, is now 32 years of age and lives with his parents at #600, 16<sup>th</sup> Street South, Cranbrook. He grew up in Cranbrook, attending elementary and high school there. He was close to his brother, Brett [REDACTED]. They engaged in many outside activities together. The family had a trailer on Kootenay Lake and later a cabin on Moyie Lake. The family spent much of the summer at the lake enjoying fishing and multiple water sports. The boys went hunting and fishing with Mr. [REDACTED]. The Claimant was and remains close to his parents. He spent time with an extended family and golfed with an uncle.
54. The Claimant identified four friends who currently work in Fort McMurray but live in Cranbrook. It would have been "ideal" for him to live where he grew up, leave to go to work, but enjoy leisure time and all the outdoor activities where he wanted to be. Working up north meant more money. Living in Cranbrook where he would have liked to start a family would have enabled his parents to be involved in his children.
55. The Claimant was not great at school and did not enjoy it. He got help from Mrs. [REDACTED] and Brett [REDACTED]. He described himself as outgoing, athletic, and friendly, hardworking and motivated and someone for whom lifestyle was important.
56. He talked with his parents about what to do after high school. He chose an industrial/commercial apprenticeship as an electrician rather than a residential electrician because it would have made him more hireable up north. The nearest available program was at SAIT in Calgary. It was a four year program involving working for a licensed electrician to accumulate a specific number of hours interspersed with school sessions of 2-3 months' duration. He began his apprenticeship work with [REDACTED] in Calgary in 2005. He enjoyed working for [REDACTED]. He liked the physical aspect of the work and the degree of responsibility he was given. He did not enjoy living in Calgary. He had no friends there, just work associates. He did not like the traffic or crowds. He came home to Cranbrook every opportunity he could. On occasion he arranged with [REDACTED] to work longer hours Monday

through Thursday so he could have Friday off and stay longer in Cranbrook. On occasion he got up at 4am Monday morning to drive to Calgary for work, enabling him to spend all of Sunday at home.

57. When he lived in Calgary he stayed briefly in part of duplex with Mr. [REDACTED] but then lived with Brett [REDACTED] and three other renters in the Investment Property. It was sold in March/April, 2009. He stayed in an apartment with [REDACTED] until the end of June, 2009.
58. When he left for Calgary in 2005 he left in Cranbrook all his sporting equipment for camping, fishing and water sports because he could not use it in Calgary and did use it when he returned to Cranbrook. He left clothes in "his" room at home. He finished his required hours of apprenticeship work with [REDACTED] in April, 2009. He could have returned to [REDACTED] at the end of June 2009 when he finished his courses, but he did not need to do so to accumulate additional work hours and wanted out of Calgary. He packed all of his belongings into a U-Haul and took them to Cranbrook. This included: couches, kitchen table, chairs, his clothing, his motorcycle, and all his personal possessions. He left nothing Calgary.
59. When he lived in the Investment Property, Mrs. [REDACTED] looked after paying the bills. He paid rent only when he was working for [REDACTED]. Mrs. [REDACTED] occasionally helped him with grocery money or when he was simply short of money. When he was at home, his parents did not charge him rent, paid for all the groceries and Mr. [REDACTED] fixed up his car before he returned to Calgary in September, 2009.
60. He bought both a Mazda in 2005 and a Harley Davidson motorcycle privately in either 2008 or 2009, both of which he registered and insured in BC. He maintained his BC Driver's License and MSP coverage. When he returned home at the end of June, 2009 he went to Kelowna with [REDACTED] for the month of July. He could have been earning money at [REDACTED] but did not want to be there. He and [REDACTED] did a few odd jobs but basically he "took a break". He returned to Cranbrook in August, 2009 and did a bit of work, about 2 days per week when needed, helping his friend [REDACTED] drilling water wells. When in Cranbrook he enjoyed activities with his friends, including a relationship with Ms. [REDACTED].
61. He returned to Calgary at the end of September to do the final three months of classes. He took a duffle bag of clothes, his laptop and car. He took no furniture nor his motorbike. He rented a room from [REDACTED] for three months. It had a bed, a milk crate and an end table.
62. When he returned to Calgary in September 2009 he did not contact [REDACTED]. He did not have any job lined up with [REDACTED] or anyone else. After classes finished in December, 2009 he intended to go back to Cranbrook and look for work in the oil fields. If he could not find anything there, his plan "B" was to look for other work, in Calgary if he had to, including at Rezcom.
63. His tax returns were completed by H&R Block when he was in Calgary. He gave them his T4 slip and got a cheque the same day. He gave them a Cranbrook mailing address.
64. He received accident benefits from Economical. He did not recall filling in a form. A Proof of Loss bearing his signature is in the handwriting of Mrs. [REDACTED] and gives his home address.

65. In cross-examination, the Claimant agreed that on XFD he had said that he worked three to four weeks in Kelowna in July, 2009 doing “electrical work” for his friend, [REDACTED]. He corrected his evidence by stating that he just did odd jobs for [REDACTED] as a construction laborer.

66. The Claimant agreed that between the end of June, 2009 and the Accident he did not do anything to advance his plans for employment except discuss with other students at SAIT what they were doing or planning to do. He intended to wait until he received his journeyman ticket before sending out resumes. He did not intend to return to [REDACTED] as he had not talked to them.

67. On XFD , in the tort action, on November 16, 2012 the Claimant gave evidence as follows (Transcript p36, lines 2-20):

Q And what was your plan if this accident had not have happened?

A When I became a journeyman electrician, in the direct future to go to work as a journeyman for [REDACTED] but then there was also a lot of opportunity for electricians up north, like, in Fort McMurray up in the oil sands.

Q Right. And that was your intention?

A I would have liked to have gone up there, yes.

Q And you were a month and a half or so away from finishing your program. Had you made any inquiries as to what jobs were available and what they would pay and that sort of thing?

A I had friends that were working up there. So I had asked, like, friends and stuff who they worked for and what they were making and what they paid journeyman and stuff like that, and I hadn't formally sent resumes there or anything like that until I had my actual journeyman ticket.

68. On XFD on December 10, 2015 in these proceedings the Claimant gave evidence as follows (Transcript, Q216- p33, Q218):

Q And you were talking to people about where you might be able to find work in northern Alberta, but I think what you are saying – your intention was in the meantime, once you were finished the course, you would be back in Cranbrook as your home?

A Until I started working, yeah.

Q Okay

A And then live there and go up to work.

Q Did you have any intention whatsoever of going back to [REDACTED].

A No sir.

69. On a further XFD in these proceedings on August 15, 2016, the Claimant gave this evidence in explanation of his prior XFD evidence that "in the direct future" he intended to work as a journeyman for [REDACTED] (Transcript, p101, Q539-p103, Q550:

A I might have, yeah. But my -- I remember my intentions were to go up north. Like, I even say right here, I would have liked to have gone up north. I was making -- making my contacts in school to try to make that happen.

540 Q Well--

A I could have had the -- probably had the choice to go back to [REDACTED] if they knew -- if they offered me a great opportunity, I may have considered it, sure.

541 Q Well, the way you're answering there, I think, is that when you say "in the direct future," I would -- see, that's what you were saying is, I would have gone back to [REDACTED] until I got a job up north?

A Well, I didn't have a job at [REDACTED] at the time.

542 Q Yeah.

A Right.

543 Q But you knew you were welcome?

A I probably could have gotten a job back there, yeah. For sure.

544 Q Okay. So basically the point is, what you're saying in that answer is, my "direct future" meaning -- that would be your immediate future would have been go to [REDACTED] until you were able to find a job up north. Is that what your answer was?

A That's what it reads as, but that -- that wasn't my intention. I wanted to go up north right away. I was -- I was -- I didn't have a home in Calgary. I couldn't have worked for [REDACTED]

545 Q Why not?

A Well, if I would have moved back to Calgary, I could have, for sure. But I wasn't -- I didn't have any of my things there. All I had there was clothes and a car.

546 Q Because you sold your house

A Yeah.

547 Q -- a few months earlier?

A And was living with a friend just while I went to school. As soon as I was done school, I was going home.

548 Q Okay. Well --

A I'm sorry for the misunderstanding.

549 Q You agree you said that? These words?

A I probably did, yeah.

550 Q Okay, And are the words true?

A Well, if [REDACTED] would have made me the right offer, I would have considered working for them, for sure. They weren't bad to work for.

70. Ultimately, the Claimant said his answer concerning an intent to work at [REDACTED] "in the direct future" was a "mistake" for he apologized.
71. He agreed that the apprenticeship application and contract (Exhibit 1, Tab 1) which he signed was completed in the handwriting of Mrs. [REDACTED] and gave a Calgary mailing address.
72. He agreed that an Employer's Report of Injury (Exhibit 1, Tab 2) which he did not sign also shows the same Calgary address.
73. He agreed that his tax returns for years 2006, 2007, and 2008 show Alberta as his province of residence but also show his home Cranbrook address. The return was prepared by H&R Block. He took in his T4s; they prepared the return and gave him a cheque the same day. He does not recall giving H&R Block any address, but his home Cranbrook address was the one he "always used".
74. The Claimant agreed that some credit card statements and some bank statements were sent to him at Calgary addresses.
75. The Claimant agreed he could have told Claire Dupuis of Healthy Dynamics on or about January 28, 2010, that he was frustrated and angry about his loss of independence since having to return home to live with his family.
76. Larry Branswell, a treating mental health clinician at the Cranbrook Health Unit recorded in his clinical records on December 14, 2011 and August 18, 2011 the Claimant expressing anxiety that he might do something that would jeopardize his insurance claim. The Claimant explained these statements as attributable to Mr. [REDACTED] having settled his own prior accident claim too early.
77. Correspondence between the Claimant's lawyer's firm and the Economical were put to the Claimant (Exhibit 1, Tabs 7, 9, 10 and 11). The correspondence contains assertions or references other correspondence containing assertions that the Claimant was an Alberta resident at the time of the Accident. The correspondence arose in connection with the claim



for 'no fault' accident benefits. The Claimant did not recall seeing any of the letters nor being able to find any of the letters among his papers. The letter dated December 8, 2009 (Exhibit 1, Tab 7), contains the assertion that "Mr. [REDACTED] was a resident of Alberta for the past four years". That statement appears to have been accepted by the Economical in concluding that the Claimant was entitled to Alberta accident benefits but not Part 7 'no fault' benefits under BC auto insurance plan (Exhibit 1, Tab 11). With respect to the December 8, 2009 letter, the Claimant says that he would have been medicated at the time and does not believe he provided the information in the letter. His date of birth in the letter was incorrect.

78. On further questioning, the Claimant confirmed through his bank records that he continued to receive Employment Insurance (EI) benefits after he ceased working for [REDACTED] in April, 2009. This caused him to conclude that he did talk with one of the [REDACTED] owners, [REDACTED] that he was returning to Cranbrook and should be "laid off" so as to continue to be entitled to receive EI benefits. Mr. [REDACTED] was not called as a witness. An employer letter (Exhibit 1, Tab 6) states that the Claimant left to go to school at the end of April and was supposed to come back to work in June upon completion of school. He did not contact [REDACTED] and did not return to work and it was presumed that he had quit.

#### SUBMISSION OF THE CLAIMANT

79. The Claimant submits that he was always a member of Mrs. [REDACTED] household. Even when he was living in Calgary, he satisfied the legal test of ordinary residence in Cranbrook. In the alternative, the Claimant submits that when he packed up all his belongings at the end of June 2009 and returned to Cranbrook, he rejoined in Mrs. [REDACTED] household and Cranbrook thereafter became his ordinary residence. The return to Calgary in the fall, 2009 was a temporary, short-term (three months) fixed purpose (a semester) stay or sojourn.
80. The Claimant points to the following factors as indicia of his continued ordinary residency in Cranbrook and membership in Mrs. [REDACTED] household:
- He maintained a BC Driver's License;
  - he registered and insured two vehicles in BC although they were purchased in Alberta;
  - he maintained BC MSP coverage;
  - he used the family home in Cranbrook as his primary mailing address;
  - he pursued an industrial/commercial electrician apprenticeship because it would allow him to work in northern Alberta and live in Cranbrook;
  - he returned to Cranbrook at every opportunity where his immediate family, extended family, and close friends all resided;
  - he continued to enjoy with his family and friends all the year-round outdoor recreational activities that he had grown up with;

- he participated in family events in the functioning of the family home.
- his parents provided some financial support;
- he agreed with the sale of the Investment Property;
- he did not return to [REDACTED] after completing the requisite hours of work nor did he contact them when he returned to Calgary in September 2009;
- he moved all his personal belongings from Calgary to Cranbrook in June 2009 and took minimal possessions back to Calgary in September 2009;
- his accommodation in Calgary in September 2009 was a rented room with Spartan furnishings;
- he returned home to Cranbrook at Thanksgiving 2009 shortly before the Accident.
- he did not enjoy living Calgary and over four years made no close friends there. His friends continued to be those he knew from growing up in Cranbrook; and
- post-Accident for almost 7 years he has lived with his parents who have provided all the care and financial support he has needed.

81. With respect to caselaw, the Claimant relies upon the overarching principle of statutory interpretation that remedial legislation such as the UMP entitlement scheme must be accorded such fair, large, and liberal construction and interpretation as best to ensure the attainment of its objectives. This requires a purposive approach (*Undisclosed v ICBC*, Arbitration Award JJ Camp QC September 17, 2009)

82. With respect to specific caselaw and the Claimant relies upon:

- *Thomson v Minister of National Revenue* (1946) SCR 209
- *Wawanesa Mutual Insurance Company v Bell* (1957 SCR 581)
- *Chiu v ICBC* (Arbitration Award, Arbitrator Orchard, 30 September 2003)
- *Morican v ICBC* (2010 BCSC 1024)
- *Gray v ICBC* (1987 Can LII 2513 (BCCA))
- *Wade v Canadian Northern Shield Insurance Company* (1986 Can Lii 933 (BCSC))
- *Mathieu v ICBC* (1985) BCWLD589 (BCCA); and
- *Leray v ICBC* (1996) 25 BCLR (3<sup>rd</sup>) 260.

83. The Claimant submits that the arbitrator should accept his evidence of his intention to return to Cranbrook after finishing his schooling and to look from there for employment in northern Alberta. His XFD answer of working for [REDACTED] "in the direct future" was sloppy and wrong. It is inconsistent with his moving all of his possessions to Cranbrook at the end of June 2009 and his conduct in leaving [REDACTED] at the end of April 2009 and having no further contact with them. The answer is also contrary to the rationale is attending SAIT in the first place and to the evidence of other witnesses of a consistent intent to seek employment in northern Alberta.
84. The Claimant relies particularly upon the *Morican (supra)* decision and also submits that the cases of *Gray, Wade, Mathieu, and Leray*, in which the claimants were found not to be household members or ordinarily resident, by their factual distinctions support the Claimant's assertion of ordinary residence and membership in Mrs. [REDACTED]'s household.

#### SUBMISSION OF ICBC

85. ICBC submits that throughout the time the Claimant was living in Calgary from 2005-2009 he was ordinarily resident in Calgary and that ordinary residency was not altered by his six-week stay or sojourn in Cranbrook from the beginning of August to the end of September 2009. As at the date of the Accident he remained ordinarily resident in Calgary. He had not been a member of Mrs. [REDACTED]'s household since moving to Calgary in 2005.
86. The factors that ICBC points to as *indicia* that the Claimant was no longer a member of Mrs. [REDACTED]'s household or ordinarily residing in Cranbrook are:
- when living in Calgary the Claimant had established himself as a self-sufficient independent adult;
  - his income tax returns showed his Province of residence as Alberta;
  - credit card statements and bank statements were mailed to the Investment Property address in Calgary;
  - the apprenticeship application form completed by Mrs. [REDACTED] showed the Claimant's address as the Elgin View address in Calgary;
  - the sale of the Investment Property was prompted by Brett [REDACTED]'s move to Medicine Hat, and not by the Claimant's intention to return to Cranbrook;
  - the Claimant spent the summer of 2009 "taking a break". This is a consistent with a short-term holiday;
  - the movement of his possessions back to Cranbrook at the end of June 2009 is a neutral factor, not indicative of an intent to return to Cranbrook permanently;
  - the Claimant's evidence of his intent to return to Cranbrook and from there seek employment in northern Alberta is self-serving and should not be accepted. His answer on XFD in the tort action of working for [REDACTED] "in the direct future" is the truth. It

was made at a time when the question of his residency as a condition of entitlement to UMP was not yet an issue; and

- the communications to the Economical on the Claimant's behalf assert he was a resident of Alberta. The information must have come from either Mrs. [REDACTED] or the Claimant.

87. In addition to the Claimant being ordinarily resident in Calgary, and therefore disentitled to UMP coverage, ICBC also says that the Claimant maintained a separate identity of life that was not substantially merged with that of his parents such that he does not meet the legal requirements for "membership" in "Mrs. [REDACTED] household".

88. ICBC relies upon the following authorities:

- *Wawanesa Mutual Insurance Company v Bell* (supra)
- *Thomson v Minister of National Revenue* (supra)
- *Gray v ICBC* (supra)
- *Wade v ICBC* (supra)
- *Gust v ICBC* (1996) Can Lii 2809 BCSC)
- *Mathieu v ICBC* (supra)
- *Lux v ICBC* (Arbitration Award, Arbitrator Patrick Williams, January 10, 1997)

89. ICBC distinguishes the *Morican* (supra) case.

90. ICBC also makes the following points:

- i. the Claimant must satisfy the legal requirements of both "membership" in the household and "ordinary residency" in the household; and
- ii. post-Accident events are irrelevant; the relevant time is at the date of the Accident.

#### **WHAT WOULD THE CLAIMANT HAVE DONE AFTER FINISHING HIS SCHOOLING?**

91. A very important factual issue that requires determination is what the Claimant intended to do, as at the date of the Accident, after finishing his schooling at SAIT in December, 2009. Would he have returned to reside in Cranbrook and sought employment in northern Alberta from there (his evidence at the hearing) or would he have returned to [REDACTED] in Calgary to work as a journeyman electrician (his XFD evidence in the tort action)? It is an important factual issue because his ordinary residency and household membership may be different in different personal circumstances.

92. On this critical issue of his intentions after December, 2009, the Claimant's evidence is troubling. It has been:

- a) In the “direct future” work for [REDACTED] (XFD, November 16, 2012);
- b) No intention whatsoever of going back to [REDACTED] (XFD, December 10, 2015);
- c) I would have considered working for [REDACTED] if they made me the right offer (XFD, August 15, 2016); and
- d) I would only return to [REDACTED] as a plan “B” if I could not obtain work in northern Alberta (evidence at hearing).

All of these statements were made under oath.

93. ICBC invites the conclusion that the tort XFD answer is correct and conclusive and all the subsequent statements are false, self-serving and intentionally given to bolster the UMP claim once the importance of residency was appreciated. I have very carefully weighed that submission but have concluded that I do not accept it for the following reasons:

- i. The Claimant’s actions are inconsistent with a decision to work for [REDACTED]. He left [REDACTED] in April, 2009 and did not contact them again about employment. He considered [REDACTED] to be a good employer and he enjoyed working for them. His departure was sufficiently abrupt that [REDACTED]’s office administrator considered he had quit. In particular, the Claimant never contacted [REDACTED] again after returning to Calgary in September, 2009;
- ii. The Claimant moved all of his possessions from Calgary to Cranbrook in June, 2009. If he expected to work for [REDACTED], it would have made more sense leave them in Calgary, possibly in storage or with a friend for the summer and to use them again upon his return at the end of September;
- iii. More significantly, having moved all his possessions back to Cranbrook in June, 2009 the Claimant took only minimal possessions with him to Calgary in September, 2009 staying at rented, short term, spartan accommodation;
- iv. His unchallenged evidence was that the decision in 2005 to attend SAIT was to facilitate work in northern Alberta;
- v. The consistent evidence of family members is that the Claimant intended to work in northern Alberta from a home base in Cranbrook;
- vi. The witness who is closest to being independent, the former friend, [REDACTED], did not say that the Claimant told her in their brief time together in the summer of 2009 that he intended to work in northern Alberta after finishing schooling, but she did say as one member of the group of friends from Cranbrook that she was aware of the Claimant’s intention to get a job for good money which meant northern Alberta;
- vii. There is no evidence apart from part of a single XFD answer that the Claimant intended to work at [REDACTED] after completing his schooling;

- viii. Working in northern Alberta from a base in Cranbrook was not a rare or speculative possibility. On the evidence, a good number of Cranbrook residents, including some of the Claimant's immediate friends did so;
- ix. The Claimant made no friends in Calgary during the four years he was there. He did not like the city life. All his good friends and the recreational activities he enjoyed were in Cranbrook;
- x. ICBC argues that the answer in the tort XFD was "calculated" to advance the Claimant's tort claim, because the immediate prospect of full-time employment with ██████████ would support an early commencement of a loss of earnings claim. While that proposition is correct, the apparent ability to earn substantially higher wages working in northern Alberta suggests that the total loss of earning capacity claim would likely have been higher if the Claimant said he intended to proceed straight to employment in northern Alberta. In addition, the allegation of "calculation" implies that the answer was not wholly correct; yet ICBC submits that the statement was in fact true.

94. For the foregoing reasons I accept the Claimant's evidence at the hearing and find that, but for the Accident, after finishing his schooling, he intended to return home to Cranbrook and seek employment in northern Alberta using Cranbrook as his base.

#### THE STATUTORY FRAMEWORK

95. The *Insurance (Vehicle) Regulation* (BC Reg 447/83) provides in s.148.1(2) that the Corporation shall provide UMP compensation to an "insured".

Section 148.1(1) defines "insured" to mean, *inter alia*:

"insured" means

(b) a person who is

(i) named as the owner or renter in the Owner's Certificate where that person is an individual,

...

(ii) a member of the household of a person described in subparagraph (i)...

96. The *Insurance (Vehicle) Regulation* s1(1) defines "household" to mean "every person ordinarily residing in the same dwelling unit."

97. Mrs. ██████████ had an excess UMP policy which incorporated all of the terms, conditions, provisions, definitions, and exclusions of Part 10, Division 2 of the *Insurance (Vehicle) Regulation* which provides the underlying UMP coverage.

## WAS THE CLAIMANT ORDINARILY RESIDING IN CRANBROOK ON OCTOBER 26, 2009?

### The Law

98. The seminal case on the meaning of residency or ordinarily resident remains *Thomson v MNR*. The issue in that case was whether Mr. Thomson resided or ordinarily resided in Canada in 1940 so as to be liable to pay Canadian income tax. The *Income War Tax Act* required payment of tax on the income of every person “(a) residing or ordinarily resident in Canada during such year; or (b) who sojourns in Canada for a period or periods amounting to 183 days during such year”. Mr. Thomson spent part of his time in an expensive home in North Carolina and part of his time in an expensive home in New Brunswick. He meticulously ensured that his stays in Canada were less than 183 days per year. His wife had family ties in New Brunswick; he maintained servants to look after the Canadian home when he was not in occupancy; he was a golf addict to which he devoted most of his time and a substantial part of his money when in Canada. The Court found that he was taxable in Canada.

99. Rand J. said at pps 224-225:

*The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance “residing” is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.*

*The expression “ordinarily resident” carries a restrictive signification, and although the first impression seems to be that of preponderance of time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is therefore relevant to a question of its application.*

...

*Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.*

*But in the different situations of so-called “permanent residence”, “temporary residence”, “ordinary residence” “principal residence” and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories and social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is*

*thought of, unlimited. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".*

100. Estey J. at pages 231-232 said as follows:

*Reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinary resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently stays or visits. In the former the element of permanence; in the latter that of temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.*

101. In *Morican* the claimant sought entitlement to Part 7 benefits arising from an accident in Nunavut. She could establish entitlement either through her Driver's License by proving she was ordinarily resident in BC at the time of the accident or alternatively through her husband's Owners Certificate if she could establish she was a member of his household at the time of the accident. Both the claimant and her husband accepted teaching contracts in Nunavut, and moved there. They maintained a townhouse in Victoria, BC. The claimant taught at Nunavut on a series of one year contracts for six years. The claimant's husband was diagnosed with cancer and returned to Victoria in September 2006. The claimant gave notice of resignation from her teaching position effective at the end of December 2006. All their possessions except for the bare minimum were barged down the Mackenzie River in late August 2006 to transport them to Victoria. The claimant was struck by an uninsured unlicensed truck in Nunavut in November 2006. She had planned to fly home to Victoria on December 19, 2006. The tenants of their Victoria townhouse had been given notice to vacate. Whilst working in Nunavut, the claimant and her husband returned home to Victoria every summer and once at Christmas. The Victoria townhouse was rented yearly but with a provision for vacancy on three months' notice. The claimant employed a cleaner and gardener to maintain the house; she paid strata fees and property taxes; she had placed household possessions not needed in Nunavut in storage in Victoria at a cost of \$25,300. Both the claimant and her husband maintained BC Driver's Licenses and a vehicle in Victoria remained insured. Their banking was through a branch in Victoria. In Nunavut they lived only in the government provided rental accommodation. On an accountant's advice the claimant listed Nunavut as her territory of residence (in order to be entitled to a northern allowance) but gave her Victoria address as her mailing address on her tax returns.

102. Having reviewed a number of authorities including *Thomson*, the Court concluded that at the time of the accident the claimant was ordinarily a resident of BC and ordinarily resided in the same dwelling unit in Victoria as her husband. At para 41 the Court said:

*I conclude that Ms. Morican was not like the young plaintiff in Leray. Ms. Morican had specific plans for the future. She was only in Kugluktuk for the purpose of carrying out her work contract and had no intention of settling in*



*Nunavut. She came from Victoria, was settled in Victoria, owned a house in Victoria with her husband, kept most of the possessions in Victoria, planned to return to Victoria to live in the house with her husband after her teaching contract was completed, and the time of the accident, all of her and her husband's belongings (except for the her bare necessities) had been barged down the Mackenzie River so they could be returned to Victoria. Ms. Morican may have been resident in Nunavut for several years, but at most, she was a temporary resident of Nunavut, or sojourning in Nunavut. I conclude that she was ordinarily a resident of BC and ordinarily resided in the same dwelling unit as her husband.*

103. The *Chiu* arbitration, involves the same legal issue as arises in this case, namely the entitlement of a claimant to excess UMP coverage through a parent's excess UMP policy. The claimant was 19 years of age at the time of the accident, in second year at SFU, and was residing at two different addresses, receiving mail at both, taking meals and sleeping at both. The entitling *Regulation* was the same. The issue was whether the claimant was a member of her father's household and ordinarily residing in the same dwelling unit as her father. Arbitrator Orchard concluded that a person for the purposes of UMP provisions may ordinarily reside in more than one dwelling unit. The claimant's parents had separated with the father moving to the home of his mother and the claimant's mother remaining in the matrimonial home. The claimant spent most of her time at the matrimonial home with her mother; however she had established a regular practice of staying a few days a week at her grandmother's house, where her father did ordinarily reside. On the facts the claimant was found to ordinarily reside in the same dwelling unit as her father.

104. At para 110 Arbitrator Orchard in discussing ordinary residence states:

*Thus, for example, an individual may leave place of ordinary residence for an extended period to sojourn at a summer cottage or post overseas for a special purpose and yet maintain his or her designation as one "ordinarily resident" in the original place of departure" citing Marsellus v Marsellus (1970) 13 DLR 3<sup>rd</sup> 383 (BCSC); Helman v Brown (1969) 2 DLR (3<sup>rd</sup>) 715 (BCSC).*

105. The *Lux* arbitration involved the claim of a 17-year-old student to UMP coverage through his father's Owner's Certificate. The claimant's parents were separated. The claimant lived part-time with his mother in California and part time with his father in BC. The evidence of both parents was unsatisfactory and Arbitrator Williams noted the absence of other potential witnesses who might have contributed relevant evidence. Arbitrator Williams concluded that a person could only be "ordinarily resident" in one place at any one time. Arbitrator Williams does not appear to consider the legal requirements for "membership" in a household and the case is determined solely on the "ordinarily resident" issue. I think the case turns primarily on its particular facts.

106. In *Gust*, the insured sought third party liability coverage in connection with an accident in which the vehicle he was operating went out of control and crossed the centerline and collided head-on with another vehicle causing one death and a serious injury. The insured did not have a valid BC Driver's License at the time of the accident and ICBC said he was in breach of his insurance coverage, relying on s.55(3)(a) of the *Regulation*. The *Motor Vehicle*

*Act* (the *Act*) required a person driving a motor vehicle on a highway to hold a subsisting Driver's License. The *Act* provided an exemption from obtaining a BC Driver's License for a period of six months from the date of last entry into BC where a person held a valid Driver's License in the place where he was "ordinarily resident" at the time the license was obtained. The issue was whether the insured was ordinarily resident in Alberta so as to be entitled to the exemption. The insured had intended to move to Alberta from BC and had visited Alberta looking for work on a number of occasions. On one of his trips he obtained an Alberta Driver's License (having been stopped by the police and informed that his BC Driver's License had expired). The Court concluded that the evidence overwhelmingly established that the insured's "ordinary residence" throughout 1990-1992 was BC. His connections with BC included MSP coverage, a family doctor and dentist in Prince George, all banking accounts in Prince George, and the vehicle he used was registered in BC. The case is another one that turns on its particular facts.

107. In *Mathieu*, the claimant sought compensation from ICBC for injuries sustained in a hit and run accident. Section 23 (12) of the *Insurance (Motor Vehicle) Act* provided that the amount payable to a claimant "who ordinarily resides outside the province" shall be the lesser of the amount limited by the BC Act or the amount recoverable from a similar fund in the jurisdiction in which the claimant ordinarily resides. The claimant was from Québec where he had lived most of his life. He traveled across Canada by road to the Okanagan where he picked fruit for approximately 6 weeks. He traveled to the Lower Mainland and stayed for a period of six further weeks when the accident occurred. He provided a statement indicating that he was in BC on vacation. He received "no-fault" benefits under Québec's automobile insurance system on the basis that he was a Québec resident. When he had recovered sufficiently from his injuries, he returned to Québec. Whilst in BC he had applied for and received a temporary Driver's License. There was some evidence indicating that, had the claimant found suitable work, he might have stayed in BC to save enough money to resume his travels either to the US or Mexico or South America. The court concluded that the claimant was a transient undergoing a sojourn in BC which was insufficient to establish either residence or ordinary residence in BC. The case is the clearest example of a tourist or visitor in a jurisdiction for a temporary time and purpose not becoming an ordinary resident.

108. In *Shah v Barnet London Borough Council* (1983) 1 All ER 226 (HL) foreign students in Britain were denied grants for university study by the local education authority. The students were entitled to the grants if they were "ordinarily resident in the United Kingdom for three years and possessed the requisite educational qualifications". The applicants had all been residents for the requisite period but some of the student applicants had entry certificates requiring them to leave the United Kingdom when the studies were completed. The Court held that the phrase "ordinarily resident" was to be construed in its natural and ordinary meaning without reference to immigration legislation. The Court rejected the education authority's contention that the proper test of ordinary residence was the "real home" test i.e. the place where the applicant had his permanent home. It is in this context that Lord Scarman at page 235, para (e) stated:

*Unless, therefore, it can be shown that the statutory framework for the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a*

*particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.*

109. In *Helman v Brown* (1969) 2 DLR (3<sup>rd</sup>) 715 (BCSC, McIntyre J) the owner of a substantial summer dwelling on Salt Spring Island, BC challenged the decision of the provincial collector of taxes that she was not entitled to the provincial homeowner grant. The grant was available to “every owner of an eligible residence who is ordinarily resident therein”. The taxpayer lived in Calgary, Alberta and for a period of years occupied the Salt Spring property for the months of July and August and a further period not exceeding two weeks in each winter and spring. The court held that it was difficult, in fact impossible, to find that a resident of Alberta owning a summer cottage in BC which is occupied for something less than three months per year is ordinarily resident in BC. The Court also observed that, at p 718 with respect to the many cases cited:

*The difficulty with the cases upon a question of this nature is that they all deal with specific statutes and specific factual situations. It is impossible to extract from the cases a general rule which can apply in all situations. Many references are made in the authorities to the inexact nature of the expression and to the elasticity of the terms “ordinarily” “residence” or “resident”. The concept of residence for the purpose of a statute concerned with income tax liability may well be different from that applicable in a statute having a different purpose.*

110. Finally, in *Leray v ICBC* (1996) 25 BCLR (3<sup>rd</sup>) 260 (BCSC) Tysoe J, the claimant sought recovery from ICBC for the value of her motor vehicle damaged beyond repair in an accident. At the time of the accident the claimant had only an Ontario Driver’s License. The BC *Motor Vehicle Act* provided an exemption for six months from the date of entry into BC in obtaining a BC Driver’s License if the person had a valid Driver’s License from another jurisdiction in which the person was ordinarily resident. The plaintiff had grown up in Ontario but moved to BC in April, 1992 intending to work and stay at Whistler at least through one winter season. She returned to Ontario in November 1992 for 2 to 3 weeks and stayed with her parents. While there she renewed her Ontario Driver’s License. She returned to BC where she was living and working at the time of the accident in March 1993. Citing *Thomson* and *Shah*, in particular, the Court held that the claimant was ordinarily resident in BC in November 1992 and was simply visiting in Ontario when she renewed her Driver’s License. Her “settled purpose” was to live in Whistler for the winter season.

111. *Leray* is distinguishable from the present case as at the time Ms. Leray obtained her Driver’s License in Ontario, she:

- a) Was living and working at Whistler, BC;
- b) She was there for an indefinite period, at least one winter;
- c) She had a boyfriend at Whistler; and
- d) She had no fixed long range plans, ie. there was no evidence that she intended to return to Ontario.

## Discussion

112. From the foregoing cases it is evident that there is no all-encompassing definition of “ordinarily resident” in common English parlance. It is a highly flexible term and it is impossible to give it a precise and inclusive definition. (*Thomson, Helman*). Thus for example it is hard to reconcile the outcomes in the *Shah* and *Morican* decisions. In *Shah*, the students who had been living in the United Kingdom for three years with a settled purpose of further education but had permanent homes outside the country were found to be ordinarily resident in the United Kingdom. In *Morican*, Mrs. Morican had been living in Nunavut for six years under a series of one-year teaching contracts, and had a permanent home in Victoria, BC but was found not to be ordinarily resident in Nunavut.
113. A good short summary of the law is I think found in Justice Estey’s judgment in *Thomson* at p 231 as follows:

*A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is “ordinarily resident” in the place where in the settled routine of his life he regularly, normally or customarily lives. One “sojourns” at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.*

114. The focus then is on living in a place as part of a customary mode of life or a settled routine. The opposite of ordinarily resident involves some special, occasional or casual residence. Although a relevant factor, the length of the stay is not determinative. Education may be a settled purpose for living in a particular place. Social connections, and family ties and recreational activities may also be relevant factors.
115. The cases also make it clear that the expression “ordinarily resident” must be interpreted in the context of the *Regulation* in which it appears (*Mathieu* at para 16; *Helman* at page 718; *Leray* at page 263; and *Chiu* at para 69). This principle continues to be applied. In *Silva v Doe* (2016 ON SC 307; on Appeal 216 ON CA 700) a Brazilian citizen who had been covertly living and working in Canada illegally for nine years was found to be person who ordinarily resides in a jurisdiction outside Ontario which disentitled him to compensation under the *Ontario Motor Vehicle Accident Claims Fund* for a hit and run accident. The Chambers judge examined the legislative purpose of s.25(1) of the *Motor Vehicle Claims Act* at paras 44-51. The decision was affirmed on appeal where the Court stated at para 24:

*De facto physical presence in Ontario, even if continuous, does not automatically establish ordinary residency in Ontario for the purpose of access to the Fund.*

116. In this case excess UMP is first party coverage designed to protect an insured and household members against loss caused by an uninsured or inadequately insured tortfeasor.

As remedial legislation, it is to be given “such fair large and liberal construction and interpretation as best ensures the attainment of its object”. (*Interpretation Act*, RSBC 1996 c238 s8). This purpose requires a broader rather than restrictive interpretation of “ordinarily resident”.

#### Application to the Facts of this Case

117. The relevant date is the date of the accident, namely October 26, 2009. The date is important in this case because the answer to the ordinary residency question may not be the same, if the accident had occurred between 2005 and June 2009 when the Claimant was working, studying, and living most of the time in Calgary. However I do not need to decide where the Claimant was ordinarily residing then.

118. In October 2009 the Claimant's circumstances were as follows:

- he was living in temporary accommodation, a short-term rental room with minimal furnishings in Calgary;
- he was in Calgary for the limited purpose of completing his apprenticeship studies at SAIT;
- as I have found, he intended to return home to Cranbrook at the conclusion of his studies in December 2009 and from Cranbrook to seek employment in northern Alberta on a “fly in fly out” basis;
- Cranbrook had been his family home and ordinary residence throughout his life until he left for SAIT in 2005;
- he returned to Cranbrook frequently in 2005-2009 on all holidays and many weekends to participate in family activities, visit members of his extended family and enjoy recreational pursuits with his circle of local friends; and
- he had brought all his possessions including furniture back from Calgary to the family home at the end of June 2009 and, significantly in my view, took minimal possessions (a duffel bag with clothing and a laptop) back to Calgary in September 2009.

119. I find that as of the date of the accident the Claimant was not ordinarily residing in Calgary but rather was ordinarily residing in Cranbrook. His continued living in Calgary was temporary in both duration and purpose. Both would end in December, 2009. I place particular significance on the fact that when he returned to Calgary in September 2009 the Claimant took the barest essentials (a duffel bag of clothes and a laptop) and lived in spartan short-term accommodation. Had he taken back to Calgary in September 2009 all the possessions that he had brought from Calgary in June 2009, it would have supported an inference that he intended to continue to live in Calgary. As it is, that argument is undermined by what the Claimant did, quite apart from his stated intentions.

120. If the Claimant was ordinarily resident in Calgary between 2005-June 2009, that ordinary residency changed at the end of June 2009, when he brought all his possessions back to

Cranbrook. Thereafter, his return to Calgary was a temporary visit for a specific purpose, and reflected an interruption from the settled pattern of his life of living and ordinarily residing in the family home.

121. As noted by Arbitrator Orchard at para 110 of the award *Chiu*, an individual may leave a place of ordinary residence for a post overseas for special purpose and yet maintain his or her designation as one "ordinarily resident" in the original place of departure. I consider that the same analysis may apply in appropriate circumstances to a young person leaving the family home as his ordinary residence for the purpose of obtaining elsewhere an educational degree or certification. Not every person leaving the family home as their ordinary residence for further education will necessarily remain ordinarily resident in the family home and that will depend upon the particular circumstances including the home circumstances at the time of departure and the future intentions at the time of the graduation. I make this observation not to conclude that the Claimant was ordinarily resident in Cranbrook throughout the time he lived in Calgary, but for the limited purpose of demonstrating that it is possible for a person to be away from their ordinary residence for an extended period of time but the subsequent return to the ordinary residence is not an unusual, special, or exceptional event. The evidence in this case is clear that the Claimant was always welcome at the family home; he visited the home on a very regular basis between 2005-2009; and he participated in recreational and other family activities with other family members. There is no basis for concluding that the Claimant was intending to leave home permanently and end his ordinary residence there or that he would not have been welcomed back.

122. ICBC submits that the months of August-September 2009 when the Claimant returned to Cranbrook should properly be characterized as a visit or sojourn or holiday and cannot be the basis for establishing or reestablishing Cranbrook as his ordinary residence. While I agree that the Claimant's time in Cranbrook in August-September 2009 had aspects of a holiday or visit, I do not agree that they may not be the basis for establishing or reestablishing Cranbrook as his ordinary residence. The elements of holiday and visit are the short duration of the time in a Cranbrook and the holiday-like activities, primarily the absence of any sustained employment. On the other hand, the Claimant was returning to the family home, not some resort. Also, the shortness of the stay cannot be viewed in isolation. I place particular emphasis on the facts that the Claimant brought all of his possessions back from Calgary in June 2009 and took only the barest essentials back to Calgary in September 2009. The *Morican* case demonstrates that one can be living away from an ordinary residence for an extended period of time for a specific purpose and not cease to be a member of the ordinary residence.

123. With respect to some of the other factors said to connect the Claimant to residency in either Alberta or BC I have the following comments. I do not place much importance on the Claimant's tax returns showing him to be a resident of Alberta. Mrs. Morican was taxed as a resident of Nunavut based upon her accountant's advice although she also showed the address of her Victoria townhouse as her mailing address for her tax returns. Similarly, the Claimant's tax returns show a Cranbrook mailing address. ICBC argued that the mailing address on the Revenue Canada Summary Reports may only have been the Claimant's address at the time the report was requested, post-Accident. There is no evidence to support that speculative possibility. What was requested by counsel were either true copies of the tax

returns themselves or else the Revenue Canada Summary Report reproducing information contained in the actual filed returns. I decline to infer that Revenue Canada changed the Claimant's mailing address on its summary report from the mailing address shown on the actual tax returns filed. Since the Claimant was living most of the time in Calgary in 2006, 2007 and 2008, and was working and attending SAIT in Alberta, he may well have been properly considered an Alberta resident for tax purposes.

124. The Claimant's failure to obtain an Alberta Driver's License between 2005-2009, is consistent with a subjective intention not to become a resident of Alberta. Both BC and Alberta have similar legislation mandating that a person obtain a local Driver's License within a fixed period of time after becoming a "resident" but both jurisdictions also exempt students from the requirement if they are validly licensed in the jurisdiction in which they ordinarily reside.

125. The fact that some credit card and bank statements were mailed to a Calgary address (although other documents showed Cranbrook as the mailing address) is not determinative and is simply a reflection of Calgary being the place where the Claimant was living and not necessarily where he was ordinarily residing. Similarly, the references in the Claimant's lawyer's communications with the Economical to the Claimant residing in Calgary is not determinative. Entitlement to Alberta accident benefits does not appear to have depended on whether the Claimant was a resident of the Alberta rather than BC. The references likely reflected the reality of where the Claimant was living without addressing the possible distinction between living and ordinary residency.

126. The Claimant maintaining his MSP coverage and licensing and insuring his vehicle and motorcycle in BC despite being purchased in Alberta are additional factors pointing away from ordinary residency in Alberta.

127. For all the foregoing reasons, I conclude that the Claimant was at the time of the Accident ordinarily resident in Cranbrook.

**WAS THE CLAIMANT A MEMBER OF MRS. [REDACTED] HOUSEHOLD?**

128. The final question is whether the Claimant was a member of Mrs. [REDACTED]'s household at the time of the Accident.

129. A preliminary question is whether, by defining a household in terms of ordinary residency in the same dwelling unit, the legislature intended to eliminate consideration of the factors historically considered in the concept of "membership". Arbitrator Williams in the *Lux* Arbitration appears to have considered that he only had to determine whether Lux was ordinarily residing in the Nawatzki's dwelling unit at the time of the accident. Lux was of course age 17 at the time and accordingly it may not have been necessary to consider the meaning of membership.

130. Arbitrator Orchard in the *Chiu* Arbitration discusses the cases of *Wade v CNS* and *Gray v ICBC* but ultimately also seems to have identified the issue for determination (para 19, 23) and decided the issue (para 118) on the basis of ordinary residency in the same dwelling unit.

131. In the present case both counsel addressed the issues of both “membership” and “ordinary residency”. ICBC vigorously submitted that the Claimant had to satisfy both elements. Upon reflection, I agree. There is a presumption against tautology and adopting interpretations of a statutory provision that renders any portion of it meaningless should be avoided (*Prosofsky v ICBC* 2016 BCSC 1586 at para 15).

#### Submission of ICBC

132. ICBC strongly submitted that even if the Claimant was ordinarily residing “in” Mrs. [REDACTED] household, he was not a member “of” the household in accordance with the legal authorities. Relying upon the cases of the *Wawanesa Mutual insurance Co. v Bell*, *Gray v ICBC* and *Wade v Canadian Northern Shield Insurance Company* ICBC says that there was not the requisite bond or affinity or participation of the Claimant in the household. The Claimant was a self-sufficient, independent adult who did not acknowledge the authority of a head of the household. In *Gray*, a non-relative occupying a trailer with a vehicle Owner’s Certificate holder and paying \$250 a month board was found not to be an integral part of the household so as to be a member of it. In *Wade*, an adult son was housesitting his parents’ home during their absence on vacation. Although temporarily residing in his parents’ home, he was found not to be a member of his parents’ household. ICBC says there is a lack of evidence in the months of August-September 2009 indicating the Claimant was a household member.

#### Submission of the Claimant

133. The Claimant submits that he meets the test of membership set out in *Wawanesa*. He was not a border in the family home. There was no limitation on the duration of his stay in the family home. There was no limitation on his ability to use the family vehicle or anything else in the family home. His interests and concerns were directly related to family life rather than his own and he participated in all family activities. The family was extremely close or tight knit and the Claimant maintained an intimate relationship with his parents.

134. *Gray* and *Wade* are both distinguishable. In *Gray* the plaintiff was not a family member, was paying rent, and had no ties or bonds to the householder friend. The son in *Wade* was clearly only temporarily residing to perform a function (housesitting) that could have been performed by anyone whom his parents trusted, with or without compensation.

#### The Law

135. The leading case on the meaning of “a member of the household” is *Wawanesa*. It did not involve any issue of ordinary residency. The Estate of Murley Milley sought third party liability coverage under an owner’s policy held by Murley Milley (Murley). The policy afforded coverage to Murley while temporarily operating a substitute vehicle provided the substitute vehicle was not owned by any person of whose household Murley was a member. At the time of the accident Murley was living with his brother (whose vehicle he was operating) and being provided with free room and board, although he did pay his board when he was working. On the evidence, Murley had become engaged to be married and intended to leave his brother’s home as soon as he was able. Murley did not regard himself as being



subject to his brother's orders or directions and although he at times did odd jobs such as cutting the lawn, they formed no part of the arrangement between the brothers.

136. The Court held that Murley was not a member of his brother's household. The Chief Justice succinctly pointed to five factors, namely:

- i. Murley paid board;
- ii. His stay was temporary;
- iii. he was not a member of the family in the sense the children of the brother would be;
- iv. he was not under the control of his brother; and
- v. he did not share any responsibility of a householder.

137. Rand J. observed that the term "household" was of flexible meaning such that it was quite impossible to define the word in detailed terms applicable to all cases. He stated at p 584 as follows:

*The "household", in the broad sense of a family, is a collective group living in a home, acknowledging the authority of a head, the members of which, with few exceptions, are bound by marriage, blood, affinity or other bond, between whom there is an intimacy and by whom there is felt a concern with an interest in the life of all that gives it a unity. It may, for example, include such persons as domestic servants, and distant relatives permanently residing within it. To some degree they are all admitted and submit to the collective body, its unity and its conditions, particularly that of the general discipline of the family head. They do not share fully in the more restricted family intimacy or interest or concern, but they participate to a substantial degree in the general life of the household and form part of it.*

138. Rand J also distinguished between a person "of" and "in" a household noting that the circle of those "in" is larger than those "of" a household.

139. Rand J noted at p 585 as follows:

*(Murley's) interests and concerns were primarily his own and not more related to the family life of his brother than if he had been living apart. The mere occasional extension to him of minor household accommodations or participation on special occasions and more intimate family activities does not overbear the dominant and distinct individual interests of his own. That separate identity of life he maintained and in no substantial way was it merged in that of the family. It may be said that he was a person "in" the household of his brother but not "of" it.*

140. In *Wade* an adult son sought to prove that he was a member of his parents' household in order to bar a subrogation action against him by his parents' homeowner insurer as a result of a fire allegedly caused by the son's negligence while he was "housesitting" his parents' home

while they were on vacation. The son otherwise lived in his own apartment. The homeowner policy defined an insured to include the relatives of either named insured "if residents of the household". The definition did not include "membership" and the case turned on the meaning of "household". Having referred to Chief Justice Kerwin's discussion of "household" in *Wawanesa*, Chief Justice McEachern concluded at para 15, as follows:

*In this case the petitioner, while temporarily residing in his parents' home, was there not as a member of the household but for the specific purpose of accommodating his parents during their absence. His function could have been performed by anyone in whom they had trust with or without compensation and the considerations which would qualify him as being "of the household" were not present.*

141. In *Gray* the plaintiff, who was rendered a paraplegic in a car accident while riding as a passenger, sought Part 7 benefits through the Owner's Certificate of one Laura Luth (Ms. Luth). At the time of the accident, the plaintiff had been residing for about a month in a trailer occupied by Ms. Luth and her two children. Ms. Luth's husband had recently been sent to jail. The plaintiff had recently been released from jail. There was no romantic involvement between the plaintiff and Ms. Luth. He paid \$250 a month in board and in addition provided extra groceries, helped with some household chores and the children and provided the gas for the car. The relationship was mutually beneficial; the plaintiff needed a satisfactory place to live and Ms. Luth needed some income. The arrangement was intended to be of indefinite duration. The trial judge held that the plaintiff was not a member of Ms. Luth's household, as there was lacking the essential component for a bond or affinity linking him to Ms. Luth and her children. On appeal, the plaintiff argued that one could be a member of a household simply as an inmate or lodger, taking part in some degree in the household chores without more in the way of ties or intimacy to the householder. The majority in the Court of Appeal at para 9 attached significance to the use of the word "member", as the legislature could have chosen words such as "tenant" "resident" or "occupant". Thus the majority said:

*To my mind, to be a "member" of a household implies a constituent, an integral part or a component of a whole, thus supporting the trial judge's concept of a bond or affinity as an essential element of what constitutes a member of a household.*

142. The indefiniteness of the arrangement was a factor to be considered in determining the existence of a bond or affinity but standing alone was not determinative.

143. At para 11 the majority said:

*The word "household" in the statute implies a "householder", which in turn implies some form of relationship between the "member" and the "householder". This relationship imposes on the "member" a certain deference to the "householder", compliance with a degree of propriety and responsibility and an active sense of participation in "household" functions and deferral to the wishes of the "householder" in this regard. The nature and strength of this relationship,*

*which I envisage as the tie or bond referred to by the trial judge, will vary with particular circumstances of the household in question. The tie or bond will be close and strong between parent and child. However, this is not immutable, as we have the circumstances in Wade where even an adult son returning to house sit his parents' home during their absence was found not to be a member of the household. At the opposite end of the spectrum, the tie or bond will be nonexistent with the sojourning lodger.*

144. In a dissenting judgment, Lambert JA at para 30 said the following about Justice Rand's description of the characteristics of a "household" in the *Wawanesa* case:

*My second comment is that Mr. Justice Rand's description of the characteristics of the "household" was made in 1957. There are many kinds of "households" that are commonplace today that were extremely rare in 1957. The communal or group home is now a fairly customary way of sharing a domestic environment and domestic expenses. Mr. Justice Rand talked of domestic servants. There has been a great change since 1957 in the extent and way in which domestic servants are employed. Mr. Justice Rand also talked of "the general discipline of the family head". I feel that, even if it were possible to identify a family head anymore, the concept of that person imposing a discipline on members of the household is not the way in which most people think of domestic life.*

#### Discussion

145. I agree with Justice Lambert's observation regarding adherence to the general discipline of a single family head today as a component of a household membership. If this were regarded as an essential component of household membership, then two adults living together in a relationship in which they each deferred to the other on different aspects of running the household would not be a household at all which is contrary to common sense. In my view, the essence of the concept of the household is to be an integral part or component of a whole, where there is a bond or affinity and a concern with an interest in the life of all that makes the household a unity. This is more important than trying to identify the sole dispenser of household discipline. As the majority in *Gray* observe, participation and cooperation in the operation of the household as a unit is an essential element. An adult child returning to live in his parents' household may or may not be a member of the household. The necessary affinity may be present but participation or cooperation in household activities may be absent.

#### **APPLICATION OF THE LAW TO THIS CASE**


146. As Mrs. ██████'s son, the Claimant has the requisite affinity to be a household member. As Chief Justice McEachern observed in *Wade*, a family member who was raised as a member of the household can leave, possibly to establish his own household, and he can return from time to time as a visitor or guest but he does not always rejoin the unit although he may do so.

147. ICBC argues that the Claimant never rejoined the household unit. He was for four years living in Calgary as an independent adult, responsible for his own well-being and living a life apart from his parents. Post-accident he has lamented to a counselor that loss of independence. Prior to the Accident he had developed a separate identity which was not merged with the interests of his parents. Moreover in the approximate six weeks that he was living in a Cranbrook in the summer of 2009 there is no evidence of how the household was operating; the Claimant was simply taking a break, and living at home on holiday.
148. Because the Claimant was living in Calgary at the time of the Accident, it is impossible to have the kind of evidence of actual household arrangements that would have been present had the Accident occurred after the Claimant returned to Cranbrook at the end of December 2009. The best evidence available are the household relationships in August/September 2009 and to an important extent the history of the family relationship.
149. The evidence of all the family members is that they were a tight close knit family. This conclusion is supported by the following non-exhaustive facts:
- a) the family spent summers together at the lake;
  - b) Mr. ██████ taught the boys hunting and hunted with them;
  - c) Mrs. ██████ and Brett both tutored the Claimant with his schooling;
  - d) the Claimant discussed his post-high school education plans with his parents;
  - e) the Claimant used the family truck to transport his belongings to Calgary in 2009;
  - f) the Claimant lived with Mr. ██████ initially in Calgary;
  - g) the brothers lived together in Calgary from 2005-2009;
  - h) the family bought the Investment Property in Calgary where the boys lived;
  - i) Mr. ██████ found a car and motorcycle for the Claimant to purchase;
  - j) Mr. ██████ paid \$1700 to fix up the Claimant's car prior to returning to Calgary in September 2009;
  - k) Mr. and Mrs. ██████ supported the Claimant financially when he needed money in Calgary;
  - l) the Claimant was best man at his brother's wedding;
  - m) post-accident Mr. and Mrs. ██████ have been the Claimant's caregivers;
  - n) post-accident Mr. and Mrs. ██████ have started up a new business that the Claimant could participate in; and

- o) post-accident Mr. and Mrs. [REDACTED] have bought a 5 acre property on which to place a duplex where they and the Claimant will be better able to live together.
150. Mrs. [REDACTED]'s evidence is that in August-September 2009 the Claimant helped out by mowing lawns, washing dishes and bringing her garden in. He participated in chores because "everyone does their part".
151. Ms. [REDACTED]'s evidence was that in the summer 2009 when she was in Cranbrook, she was at the [REDACTED] house and observed the Claimant cooking and cleaning. He was "very engaged with his family".
152. From all of the foregoing I conclude that the Claimant met the requirements of intimacy and community so as to be as an integral part of the household. I conclude that the domestic relationships would have continued, as they had in the past, at least until such time as the Claimant obtained employment in northern Alberta or failed to do so and returned to Calgary. At that point he may have ceased to be a member "of" Mrs. [REDACTED] household or he may have ceased to reside in the household completely. There is no evidence of who established the general discipline of the household but nor is there any evidence of conflicts within the household. As noted previously, I consider this to be a much less significant factor than the elements of affinity, responsibility and participation in the household as a unit.
153. For the foregoing reasons that I find that at the date of the Accident the Claimant was a member of Mrs. [REDACTED]'s household.

#### CONCLUSION

154. I find that at the date of the Accident on October 26, 2009 the Claimant was both ordinarily residing in Mrs. [REDACTED] household and was a member of her household. Accordingly the Claimant is "an insured" for UMP purposes.

  
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Donald W. Yule, QC