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

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

THE WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

TRAVELERS INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL

Michael L. Kennedy – McCague, Borlack LLP
Counsel for the Applicant, The Wawanesa Mutual Insurance Company
(hereinafter referred to as "Wawanesa")

Lorraine E. Takacs – Gorbet & Associates
Counsel for the Respondent, Travelers Insurance Company of Canada
(hereinafter referred to as "Travelers")

ISSUE - DEPENDENCY

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, Texan Coke, with respect to personal injuries sustained in a motor vehicle accident which occurred on October 8, 2015. The determination of priority involves an analysis as to whether the claimant was a "listed driver" under the Wawanesa policy at the time of the accident and an analysis of "financial dependency".

PROCEEDINGS

[2] This arbitration proceeded on the basis of oral evidence from the claimant Texan Coke and his mother, Lintebell Tait, adduced on September 7, 2017, followed by document briefs, written submissions and books of authority in April 2018.

FACTS

[3] The Claimant Texan Coke, born September 20, 1992, was 23 years of age at the time of a motor vehicle accident on October 8, 2015, when the vehicle in which he was a rear-seated passenger, struck a guardrail while travelling northbound on the Don Valley Parkway in the City of Toronto. There were no other vehicles involved in the accident.

[4] The vehicle involved in the accident had been rented from Practicar Rental by the Claimant's friend, Cassidy Alleyne (who was a front-seated passenger), and was being operated by an individual named Silas Marriott. The Motor Vehicle Accident Report identifies Travelers Insurance Company of Canada (policy number 5RZ00022O78) as the insurer of the rented vehicle.

[5] The claimant does not own his own vehicle, although he previously owned an Altima (which he paid for by himself). He is not aware of any other insurance policies available to him.

[6] Following the accident, the Claimant applied for accident benefits through Wawanesa on January 4, 2016, which insures the Claimant's mother (Ms. Tait). The Claimant's name does not appear anywhere on the Certificate of Insurance, either as a named insured or as a listed driver. Broker log notes indicate that the Claimant was removed from the policy effective June 26, 2013, with a corresponding reduction in premium. Ms. Tait's evidence was that the Claimant was at one point listed as an occasional driver on her policy with Wawanesa, but that he was removed on November 1, 2013.

[7] As in many "dependency" cases, the available evidence was far from perfect and there was considerable discrepancy between the evidence of the Claimant and his mother, as to the Claimant's contributions to the household expenses.

[8] At the time of the accident, the Claimant was living at apartment 101, 25 Durnford Road in Scarborough, Ontario. He was living with his mother and sister. Ms. Lintebell Tait confirmed that this address is subsidized housing, that her rent was in the range of $500.00 to $600.00 per month - "five something" and that her rent is tied to her income, as well as the amount of people that live with her. In other words, her rent was higher when her children (including the Claimant) lived with her. No documentary support was provided to confirm the evidence of Ms. Tait.

[9] The Claimant previously lived on his own (albeit with roommates) for roughly a year between 2013 and 2014, but he moved back with his mother in November 2014. There was some evidence that it was because his rent went up. He testified that his share of the rent went up from $400 to $600 per month. Prior to his rent increasing, Coke claimed that he was having no problems managing his rent and living expenses. However, his mother indicated in her evidence that the move home was because he had lost his job.

[10] As for income, the only documentation available is the 2015 (year of accident) tax return and an OCF-2 Employers Confirmation Form.

[11] Although he was living with his mother at the time of the accident, the Claimant's evidence, both on his Examination Under Oath and at the arbitration hearing itself, was that he supported himself financially. Specifically, the Claimant confirmed that he was working full-time at Closeout King since March 2015 (although the Claimant may be mistaken on this date as the OCF-2 Employers Confirmation of Income would indicate that he had only been with Closeout King for ten weeks) up until the date of the accident on October 8, 2015. He claimed that he worked 40 to 50 hours per week and earned between $11.00 and $11.40 per hour. His bi-weekly pay was $700.00 to $800.00 (which calculates to an annual income of $18,200.00 to $20,800.00). Such earnings are confirmed by an Employer's Confirmation Form (OCF-2) that shows he was earning an average of $401.00 in each of the four weeks before the accident.

[12] The Claimant previously worked as a line cook at Milestones (September 2014 until March 2015) and previous to that at The Keg. He claims to have left the Milestones job because the Closeout King job was closer to his house. Both The Keg and Milestones positions were full-time and paid $12.50 per hour. He was therefore fully employed since at least September 2014 (i.e. more than a year before the accident) with a brief period of unemployment between the Milestones and Closeout King jobs. His income tax return from 2015 shows reported earnings of $10,773.00 (although it is possible that some of the money earned as tips through his employment at The Keg and Milestone's was not included in his returns). He testified that he was making $40-$60 per week in tips. Considering the Claimant only worked a maximum of 40 weeks in 2015, the accountant retained by Wawanesa calculated that his income of $10,773.00 as disclosed on his tax return was the equivalent of an extrapolated annual gross income of $14,043.38 and an annual after tax income of $12,796.47.

[13] Ms. Tait's evidence confirms that the Claimant was working full-time (working every day) for about a year prior to the accident. She believed he made $300.00 to $400.00 every week or every other week.

[14] In addition to his formal employment, the Claimant also worked freelance as a photographer and videographer. He worked on around five photoshoots in the year before the accident, earning around $80.00 to $100.00 per shoot. He explained that the money he made was simply "extra cash so I can get better equipment". He paid for the equipment (being the camera, lights, lenses, batteries, stands and backdrops) associated with this work

by himself in 2014. His plan was to go back to school to study media, for which he was saving to pay for himself (as well as possibly through a student loan). There was no evidence adduced as to any concrete steps taken to move in that direction.

[15] In terms of other financial resources, the Claimant's evidence was that he had savings of about $1,000.00 at the time of the accident. He also had a Capital One MasterCard with a balance of $100.00, for which he was managing the minimum payments (plus a little more).

[16] In terms of financial assistance from the Claimant's mother, Ms. Tait's evidence was that she has not worked since 2012 and supports herself through ODSP and CPP payments totalling $1,000.00 per month. She did not receive any support payments from the Claimant's father, nor was Ms. Tait aware of any payments made by the Claimant's father to the Claimant. As such, Ms. Tait could not afford to provide her son much financial assistance. Instead, Ms. Tait specifically told the Claimant that if he was working, he had to give her money. If he was ever short on the amount he owed her, they would fight (but this did not happen often).

[17] Ms. Tait's evidence was that the amount of financial support provided to the Claimant was limited to "$20.00 or so" if he did not have any money. However, this did not happen often, as "[the Claimant] always have [sic] a good job." In the year before the accident, Ms. Tait estimates only giving the Claimant $20.00 two or three times. Ms. Tait clarified that she never loaned her son money, but would only give him change. She would buy him the occasional T-shirt if he was not working. She used her credit card to buy the Claimant a computer, but she expected the Claimant to pay her back. The Claimant agreed that he was planning on paying his mother back for the cost of the computer until the accident "messed [him] up." Clearly, the main source of contribution by the Claimant's mother was the accommodation she provided at a monthly contribution to rent far less that what rent would have been on the open market.

[18] In terms of expenses, there was inconsistency in the evidence making it all but impossible to get an accurate sense as to actual expenses. The Claimant's evidence was that he paid between $250.00 to $534.00 in rent every month over and above his contributions to food and cable. His mother testified that he contributed about $200 per month toward rent, food and cable when he was working. His mother testified that his money went directly to the landlord. Ms. Tait's evidence was that the total rent at the time of the accident was "five something" and that the Claimant sometimes gave her $100.00 for rent when he could. He gave his mother $50.00 every other week (being $100.00 per month) for groceries. He would also buy groceries himself twice per month, using his own money. Ms. Tait's evidence was that the Claimant would pay about $60.00 (of a $200.00 bill) per month for food and the cable/internet bill (of which Ms. Tait paid nothing). Both the Claimant and Ms. Tait agreed that the Claimant paid for his own bus fare, gas money (if she drove him places), cell phone ($60.00 per month), clothing ($200.00 to $300.00 per month), work lunches (approximately $20.00 per week), recreation ($300.00 to $400.00 per month), dates with his girlfriend ($50.00 to $150.00 per date) and travel. Coke testified that there were

times he was unable to pay his cell phone bill or his portion of the cable when his hours were cut. He added that there were times he struggled to pay rent to his mother. All told, and as I have indicated, it was very difficult to get any accurate sense as to the Claimant's needs or expenses.

[19] When asked point blank at his Examination Under Oath if he was essentially supporting himself, the Claimant's answer was, "Yes." When asked at the arbitration hearing if he was financially dependent on his mom before the accident, the Claimant's answer was, "No, no, no, no. It was basically all me because I got a job for a reason, to help her out." In cross-examination, he admitted that he was not making enough money to live on his own away from his mother's apartment, but would have been able to if he had a roommate.

[20] Similarly, Ms. Tait's evidence was that the Claimant supported himself before the accident (as she did not have any money to give him). Ms. Tait's evidence was that the Claimant could have afforded to move out on his own if he wanted to, but that she "guess [sic] he didn't want to."

[21] To determine whether the Claimant was financially dependent upon his mother, Wawanesa (through its counsel) retained Matson Driscoll & Damico Ltd. (MDD) to analyze the evidence and provide an expert accounting opinion. The conclusion was as follows:

> *In all scenarios, presented, as the claimant's income covers 51.00% or greater of his needs, we conclude that the claimant is not financially dependent on his mother, Ms. Lintebell Tait.*

[22] To determine financial dependency, the accountants compared the Claimant's annualized 2015 after tax income (being $12,796.47) and then determined what percentage of his expenditures this would cover in the following scenarios: (1) the rent per the Claimant's household at the time of the accident as well as the average expenditures in Ontario; (2) the average market rent in Scarborough (generally) and the average expenditures in Ontario; and (3) the Low Income Cut-Off ("LICO") approach based upon census data regarding income and consumption patterns of households. The results were as follows:

Rent per the claimant's household at time of accident:	*Claimant 73.38%* *financially independent*
Average market rent in Scarborough:	*Claimant 51.10%* *financially independent*
LICO approach:	*Claimant 60.07%* *financially independent*

[23] Of note, the accountants were clear that although their opinion was based upon limited information, they were nevertheless able to determine that the Claimant's financial resources would allow him to pay for more than 51% of his expenditures in all three scenarios. Travelers did not file a responding accountant's report.

ANALYSIS AND FINDINGS

[24] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

[25] Since the Claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

> *(i)* *The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
>
> *(ii)* *If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> *(iii)* *If recovery is unavailable under (1) or (2), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose;*
>
> (iv) *If recovery is unavailable under (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*
>
> [emphasis mine]

[26] Section 3(1) of the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010, Ontario Regulation 34/10 defines an "insured person" as follows:

> (a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependent of the named insured or of his or her spouse
>
> [emphasis mine]

[27] Section 3(7)(b) of the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010, Ontario Regulation 34/10, as amended, reads as follows:

> "a person is dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse"

[28] I will firstly deal with the issue as to whether Mr. Coke was at the time of the accident a "person specified in the policy as a driver", so as to be considered an "insured" under the Wawanesa policy. I am satisfied on the evidence before me that Mr. Coke, although a listed driver at one point in time, was no longer a listed driver at the time of the accident. I accept the evidence of his mother Ms. Tait in that regard and that disclosed in the Certificates of Insurance produced and the contents of the broker's log notes.

[29] As for the "dependency" issue, the facts indicate that at the time of the accident, the Claimant was a passenger in a vehicle insured by Travelers. He presented his accident benefits claim to Wawanesa on the basis that he was principally financially dependent on his mother who was insured with Wawanesa. If principally financially dependent on his mother, then on the basis of the aforesaid legislation, he would be an "insured" under the Wawanesa policy and Wawanesa would stand in priority by reason of s. 268(2)(i), as opposed to simply being an "occupant" under s. 268(2)(ii). If not principally financially dependent, then Travelers would stand in priority.

[30] In terms of traditional legal principles, criteria for determining dependency for the purposes of the SABS were established by the Court of Appeal in *Miller v. Safeco* (1986), 48 O.R. (2d) 451 (H.C.J.) aff'd 50 O.R. (2d) 797 (C.A.). Consideration should be given to criteria as follows in determining dependency for the purposes of the *Schedule*:

i. The amount of dependency;

ii. The duration of the dependency;

iii. The financial needs of the claimant;

iv. The ability of the claimant to be self-supporting.

[31] In *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company* (Arbitrator Lee Samis, May 7, 1999), it was determined that a person's capacity to earn must be taken into account in measuring dependency. A person can only be principally dependent for financial support if the cost of meeting their needs is more than twice their resources. This has come to be known as the 51% rule.

[32] Early jurisprudence applied this 51% rule using a detailed analysis of the claimant's income sources in comparison to the value of that provided by the person or persons upon

whom the claimant was said to be dependent. This has been referred to as the "mathematical approach". The exercise of determining the value of that provided in many cases proved to be a difficult and expensive task. In the last few years, a new approach to the analysis of dependency has emerged known as the "LICO approach". In *Allstate Insurance v. ING,* (Award of Arbitrator Vance H. Cooper, dated May 1, 2014), the arbitrator preferred to resort to an alternative approach to determine dependency, namely, to use Low Income Cut-Off measure as a qualifying number in relation to which 51% rule is to be applied (as opposed to using actual expenses of the claimant). The LICO approach focuses on statistical average needs of an individual in the geographical area where the claimant lived rather than an analysis of the claimant's specific individual needs.

[33] After hearing all evidence including evidence at cross-examinations and re-examinations of the three accountants involved in that case, Arbitrator Cooper noted that all of the accountants who gave evidence and offered expert opinions acknowledged the inherent difficulty and weaknesses when trying to gather reliable information, documentation and evidence regarding a family's expenditures and individual expenditures in relation to needs.

[34] Arbitrator Cooper referred to decisions of Arbitrator Samis in *Coseco v. ING Insurance of Canada* (Award July 21, 2010) and *St. Paul Travelers v. York Fire & Casualty Insurance Company* (Award, dated August 11, 2011). In these decisions, Arbitrator Samis explained the intrinsic difficulties of trying to ascertain the needs of the claimant by attributing to the claimant a share of household expenditures. The allocated portion of the household expenditures may be greater than the claimant's needs or lesser than the claimant's actual needs. Arbitrator Samis compared this exercise to looking at the general standard of living in household – the exercise we were directed not to follow by the *Miller and Safeco* appeal. Instead, Arbitrator Samis suggested we should follow a "*more objective valuation of the costs of meeting someone's needs*". The history of family setting may assist in calculating the costs of meeting a person's needs, but is not determinative.

[35] To that end, Arbitrator Samis used Canada LICO threshold statistic numbers as determined by Statistics Canada which he characterized as the "*best and most reliable approach to the evidence respecting one's needs*". The LICO approach was used by Arbitrator Cooper and formed the basis for his decision.

[36] Arbitrator Cooper's decision in *Allstate Insurance v. ING* was appealed to Superior Court on the ground that Arbitrator Cooper did not use the correct methodology. On appeal, as reported at 2015 ONSC4020, Justice Mayers found that mathematical calculation or application of 51% rule in relation to needs/means is an important factor, but it is not the only factor. Justice Mayers dismissed the appeal after concluding that dividing or allocating estimated gross household spending to determine one's needs is not a "*particularly meaningful proxy*" and "*is no better than looking at government statistics to determine the cost of housing in a locale*". Justice Mayers accepted the "LICO" approach as a means of determining dependency.

[37] As jurisprudence currently stands, both the “mathematical” and “LICO” approaches are being applied by judges and arbitrators. It is then necessary to apply these approaches to the factual findings made with respect to income, earning capacity and expenses.

[38] The accounting opinion of Matson Driscoll & Damico Ltd. (MDD) provided three scenarios for analysis. MDD concluded that under all three approaches, it was demonstrated that the Claimant could provide more than 50% of his needs on the basis of his extrapolated after tax annual income in 2015. I am of the view that this is the very type of case (minimal documentary evidence to confirm expenses and income along with a divergence of evidence as to actual contributions by the Claimant toward expenses) where the LICO approach is best suited. However, I am nevertheless of the view that the analysis conducted by MDD using the LICO was flawed.

[39] I have no difficulty with MDD’s use of the 2015 tax return reported income in establishing on an extrapolated basis that the Claimant’s actual annual after tax income was $12,796.00. Where I have difficulty is with their use of $20,366 as the statistical cost of living in a one person household. That number is reflective of the cost in cities with populations between 100,000 and 499,000. MDD indicated that the population of Scarborough was only 112,603, supporting the use of the $20,366 cost figure for a one person household. I find that it would be wrong to consider that the Claimant lived in Scarborough as opposed to Toronto. Using LICO statistics for metro areas of 500,000 or more inhabitants reveals a cost of $23,647 for a one person household. However, even on this basis, the Claimant would still be contributing 54.11% to his statistical needs and therefore not principally financially dependent on his mother, who only had a monthly income of about $1,000 per month or $232.55 per week. Using the extrapolated income based on the Claimant’s 2015 tax return shows Texas Coke was making $270.07 on average each week. At the time of the accident at Closeout King he was averaging about $400 based on the OCF-2 Employers Confirmation of Income as supported by the claimant’s own evidence. Given the fact that the Claimant was earning more each week than his mother, it would be difficult to find that he was principally financially dependent on her.

[40] Many of these dependency claims depend upon a finding of whether the Claimant had made the transition from student to employee. I am fully satisfied that the Claimant had made such transition. He was 23 years of age and had been in the work force for more than a year. Although there was some evidence of a possible return to school to study media, no concrete steps had been taken in that regard nor did the Claimant have the savings to suggest that any such move was imminent. I do not find that “transition” was a factor here as I am satisfied that the Claimant was a full time employee and would have remained so for the foreseeable future.

[41] In further support of my finding that the Claimant was not principally financially dependent on his mother at the time of the accident, and therefore not an insured under the Wawanesa policy, is the fact that the annual income used for the LICO calculation was far less than what I feel was the Claimant’s actual capacity to earn income. The extrapolated income figure used based on the 40 week period leading up the accident clearly included a

period of unemployment. I am of the view that the earning capacity of Texan Coke at the time of the accident was that of a full time employee, making at least minimum wage of $11 per hour with possible occasional periods of unemployment. I believe he had an earning capacity of at least $20,000 annually. His earning capacity was therefore about $8,000 more than his mother's sources of income on an annual basis. There was no evidence in this case that the Claimant's capacity was affected by any physical or emotional disability or any substance abuse problems as we see in some cases.

[42] I am satisfied that the Claimant Texan Coke was not principally financially dependent on his mother and not a listed driver on her policy at the time of the accident. Accordingly, he was not an "insured" under the Wawanesa policy, leading to a finding that the insurer of the vehicle in which the Claimant was a passenger, Travelers, is the priority insurer.

ORDER

[43] On the basis of my findings aforesaid, I hereby order:

1. That Travelers is the priority insurer and responsible for payment of statutory accident benefits reasonably incurred by or on behalf of the claimant;

2. That Travelers reimburse Wawanesa for those payments made that are subject to indemnity, together with interest calculated in accordance with the *Courts of Justice Act* and costs of this arbitration proceeding on a partial indemnity basis;

3. That Travelers pay the costs of the Arbitrator.

DATED at TORONTO this 14th)

day of April, 2018.)

KENNETH J. BIALKOWSKI
Arbitrator