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

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 :

NORTH WATERLOO FARMERS MUTUAL now known as HEARTLAND FARM MUTUAL

Applicant

- and –

THE GUARANTEE COMPANY OF NORTH AMERICA and AVIVA CANADA

Respondents

DECISION

COUNSEL

Mark Donaldson – Dutton, Brock LLP
Counsel for the Applicant, Heartland Farm Mutual
(hereinafter referred to as “Heartland”)

Taalal Bond – Matthews, Abogado LLP
Counsel for the Respondent, The Guarantee Company of North America
(hereinafter referred to as “Guarantee”)

Jason Frost and Rebecca Udler – Schultz, Frost LLP
Counsel for the Respondent, Aviva Canada
(hereinafter referred to as “Aviva”)

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, Christopher Haas, with respect to personal injuries sustained in a motor vehicle accident which occurred on November 16, 2015. This determination involves findings with respect to dependency.

PROCEEDINGS

[2] The matter proceeded on the basis of Document briefs, Examination Under Oath transcripts, Books of Authority and written submissions.

FACTS

[3] This matter has been brought to arbitration to determine whether or not, at the time of the subject loss, the injured claimant Christopher Haas ("Christopher"), was principally dependent for financial support or care upon his parents, Michael Haas ("Michael"), and Tammy Curzon ("Tammy").

[4] On November 16, 2015, Christopher was the driver of a vehicle owned by his grandfather, Werner has was insured by Heartland. Christopher was a listed driver on that policy.

[5] At the time of the accident, Christopher was a high school student in Grade 12 at Jacob Hespeler Secondary School in Cambridge, Ontario.

[6] The claimant's mother Tammy was insured by Guarantee.

[7] The claimant's father Michael was insured by Aviva Canada ("Aviva").

[8] The claimant lived part-time with each of his separated parents.

[9] North Waterloo Farmers Mutual now known as Heartland Farm Mutual ("Heartland") insured Christopher's grandfather, Werner Haas ("Werner"). Christopher was insured as a listed driver on Werner's policy at the time of loss.

Evidence of Werner Haas (grandfather)

[10] Christopher is his grandson.

[11] Werner and his wife owned two vehicles, a 2008 TrailBlazer and a 2009 Colorado, which were both insured under the same policy with Heartland. Christopher was listed as an occasional driver on that policy.

[12] Christopher lived part-time with his father, Michael and part-time with his mother, Tammy. Christopher does not live with his grandparents.

[13] Christopher was not financially dependent upon his grandparents whatsoever.

[14] Werner added Christopher as an occasional driver to his Heartland policy effective August 10, 2015.

Evidence of Tammy Curzon (mother)

[15] Christopher is her son with Michael. She and Michael Haas were never married.

[16] She and Michael shared custody of Christopher at the time of the accident in 2015.

[17] Prior to Christopher starting high school, he lived full-time with Tammy and spent every other weekend with his father. Once Christopher started high school, he would spend whatever time he wished at his father's house, perhaps a night or two during the week.

[18] Michael provided child support of $517.00 per month with respect to Christopher. This amounts to $6,204 on an annual basis.

[19] Christopher's home address for the purpose of school was Michael's, as Christopher's high school was in his father's jurisdiction.

[20] Christopher's mailing address for his driver's licence was Tammy's house.

[21] Christopher lived pretty much 50/50 in each of his mother and father's homes.

[22] Tammy paid her rent, utilities and also for Christopher's cellphone.

[23] Tammy paid the veterinary and food expenses for Christopher's cat.

[24] Tammy also contributed towards Christopher's football related expenses which could be in the range of $2,000.00 per year. Tammy was responsible for organizing membership and participation in various football programs for Christopher.

[25] Michael would contribute $500.00 per year towards football expenses above and beyond child support. Tammy would pay the balance, or approximately $2,100.

[26] Tammy covered Christopher's school related expenses.

[27] Christopher never lived with his grandfather, Werner.

[28] Tammy receives approximately $6,000.00 per year in child support from Michael. Christopher's expenses related to his cellphone, football and school are all covered by the support payments she receives.

[29] Prior to the accident, Christopher was working during the summer, saving his money to put towards a car.

[30] Christopher never gave any of his earnings to his mother or made contributions toward household expenses.

[31] Christopher's Record of Employment showed pre-accident earnings of approximately $3,800.00.

[32] Christopher had access to each of his parents' healthcare benefits through their respective employers.

[33] Michael had an RESP arranged for Christopher which was valued at approximately $4,000.00. Tammy did not have any money set aside for Christopher's post-secondary education.

[34] Christopher kept clothing and belongings at both of his parents' homes.

[35] Tammy took charge of Christopher's medical care following an earlier accident in 2010 and also after the subject loss.

[36] If ill at school, Christopher would call his mother for pick-up.

[37] Tammy would arrange for Christopher's doctor's appointments, but Michael arranged for dentists and optometry. Michael was also Christopher's primary emergency contact at high school.

[38] Tammy considered herself 70% responsible for Christopher's care.

Evidence of Michael Haas (father)

[39] Michael is married to Lisa Haas.

[40] Michael and Lisa have three vehicles, all insured with Aviva. Michael, Lisa and their daughter, Courtney, are listed as operators on that policy. Christopher is not listed on the Aviva policy.

[41] Christopher is listed on Michael's parents' policy as an occasional driver.

[42] Christopher lives half the time with Michael and his family and the other half of the time with Tammy.

[43] Michael and Tammy were never legally married, but they do have a Separation Agreement.

[44] Michael paid child support to Tammy and Tammy received the Child Tax Credit.

[45] When Christopher stayed with Michael and his family, they paid the related expenses, and similarly when Christopher stayed with Tammy, she paid for those expenses.

[46] Christopher does not pay rent to anyone.

[47] Tammy would organize payments for Christopher's football and Michael would pay his share. The only amount Michael paid in addition to child support was football related costs.

[48] If Christopher was sick at school, the contact person was Tammy.

[49] Following the accident, Tammy probably made most of the medical decisions with respect to Christopher.

Evidence of Christopher Haas (claimant)

[50] At the time of the accident, Christopher generally split his time 50/50 between his parents' homes and that had been the arrangement since he started high school.

[51] Christopher used his father's address for school purposes but his mother's address for his driver's licence and health card.

[52] Christopher did not contribute to the household expenses at either place.

[53] His mother helped him get his cellphone in the summer before Grade 9 and she has paid the related expense from the outset.

[54] Christopher did not know who funded his football related expenses. His parents worked that out between themselves.

[55] Christopher probably used some of his own money to pay for his football equipment.

[56] At the time of the accident, there were no bills that Christopher was regularly paying.

[57] Christopher was added to his grandfather's auto policy as he believes that was the cheapest option. Christopher paid the additional premium of about $70.00 per month.

[58] Christopher primarily used his parents' vehicles and at the time of the accident, he was driving his mother's car.

[59] The claimant estimates that he used his mother's vehicle more.

[60] If Christopher used his mother's vehicle, he would put in the amount of gas he used.

[61] Christopher did not consider one parent's house his home over the other.

[62] Immediately following the accident, Christopher spent more time at his mother's house but once he became more mobile, it was back to a 50/50 arrangement.

[63] At the time of the accident, the claimant did not pay any amounts to either parent to live in their house.

[64] There was no significant difference in terms of what each parent provided in their respective homes.

[65] Christopher worked as a mover in the summer preceding the subject accident. Christopher intended to keep working occasionally on weekends during the school year and he would have kept his job with the moving company the next summer.

[66] At the end of Grade 12, he was going to return to school to take additional credits.

[67] Christopher would have come back for an extra term and then been applying to university in March of 2017.

[68] His parents had a financial plan for him to attend university. His father had an RESP for him.

[69] The summer before the accident was the first time he held a summer job.

[70] The claimant's father was responsible for scheduling and making Christopher's dental, eye doctor and doctor's appointments.

[71] If Christopher took ill at school, he would call his mother as she was more accessible at work.

[72] Christopher was saving his earnings both for university and to buy his sister's car.

[73] His mother paid for his cell phone.

[74] His cat resided at his mother's house. His mother paid for veterinary and food expenses for the cat.

[75] Throughout his whole life, Christopher had not lived with anyone other than his parents.

[76] Christopher's grandparents did not provide him with financial support.

ANALYSIS AND FINDINGS

[77] 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 or hierarchy of priority to be applied to determine which insurer is liable to pay statutory accident benefits.

[78] 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.*

[79] 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

[80] 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"

[81] Section 268(5) of the *Insurance Act* reads as follows:

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

[82] Although Christopher was a person specified as a driver of the insured automobile owned by his grandfather, Werner (insured by Heartland), should Christopher be found to have been a dependent of a named insured, then that policy would rank ahead in priority. If it is found that Christopher was a dependent of Tammy, Guarantee would be the only insurer with responsibility for this claim. If it is found that Christopher was a dependent of Michael, Aviva would be the priority insurer.

[83] I will firstly deal with the issue as to whether the claimant was principally dependent on either parent for care. Aviva has submitted that there is a presumption that a minor is

primarily dependant on their custodial parent for care. At the time of the accident, the claimant was 17 years of age and in good health. He was self-sufficient in all activities of daily living. He was able to dress, bathe and transport himself. He had worked a heavy manual labour job the previous summer. He did not have any mental health or addiction difficulties. In these circumstances and on the jurisprudence provided to me by counsel, it cannot be said that he was dependent for care on some other individual. This was even conceded by the Applicant Heartland. Furthermore, at age 17 and with the claimant spending equal time with each parent the facts do not support a finding that there was actually a custodial parent. At the time of the accident and on the facts before me the situation had reached a stage where both parents were custodial.

[84] This leaves the issue as to whether the claimant was principally financially dependent on either of his parents.

[85] 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.

[86] 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.

[87] 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.

[88] 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.

[89] 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 *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.

[90] 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.

[91] 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 Meyers 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 Meyers 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 statistic to determine the cost of housing in a locale*".

[92] More recently a third approach has emerged with respect to the analysis of dependency. It has been referred to as the "plurality approach". It finds it origin in *Economical Mutual Insurance Company v Aviva Canada Inc.* (Arbitrator Densem – January 2013) and involves situations where there are several contributors to a claimant's financial needs. The facts in *Economical* are very similar to the facts in the case before me.

[93] In *Economical*, the claimant was receiving financial support from both her father and mother. The financial support received from her father and mother, individually, was greater

than her own financial contribution to her own needs. Despite this, none of the parties contributed to at least 51% of the claimant's financial needs.

[94] Arbitrator Densem found that principal dependency exists where the claimant is chiefly, mainly, or for the most part (i.e. more), dependant on one, independent source of support, than he or she is on their self-supporting resources and on any other single independent source of support.

[95] The claimant can have any number of independent support sources. If one of these support sources is the largest contributor to the claimant's support, then by definition that source is the principal supporter. The value does not need to be greater than 50%, it only has to exceed the value of any other independent support contribution and that of the claimant's self-support.

[96] Using this scenario, Arbitrator Densem concluded that the claimant was only able to contribute 20% to her own financial needs, while her father was contributing 45%, and her mother was contributing 35%. With these values, Arbitrator Densem determined that the claimant was principally financially dependent on her father, as he was making the largest contribution when compared separately to his wife and the claimant herself. He found the father's automobile insurer in priority even though the father did not contribute more than 50% of the claimant's needs.

[97] If this approach is accepted as being the approach which should be used in situations where there are multiple parties providing financial support, then the formula to be used by the arbitrator would be:

- Determine the amount of the claimant's dependency by examining a sufficient length of time in the claimant's life leading up to the accident that a consistent and reliable picture of the amount and duration of the claimant's financial and care needs can be ascertained.

- Determine what the needs of the claimant are with respect to such requirements as food, clothing, shelter, the basic necessities of life, social, emotional, physical, and protection needs. In making this determination one must distinguish between the claimant's needs, and enhancements to the claimant's lifestyle provided either by the claimant or through other support sources.

- Determine whether the claimant is providing for or reasonably has the capacity to provide for 51% of the claimant's financial and care needs. If so, there can be no principle dependency. If not, determine whether there is an independent source of support that is greater than any other independent source of support, and is also greater than the value of the claimant's self-supporting resources. If so, the claimant is principally dependent upon that source.

[98] Before applying one or more of these approaches to the financial dependency analysis, it is necessary to decide on the appropriate time frame for analysis. This is really

not an issue as the situation here had been stable for the three year period pre-accident, as the 17 year-old claimant lived equally with both parents ever since he started high school. Completing the analysis on the basis of a period of one year pre-accident would be appropriate in the circumstances.

[99] In determining the needs of the claimant, I am content to use the statistical information compiled by Statistics Canada. The “low income cut off”, or as it is referred to as the LICO number, for an individual in a one person household in Cambridge in the year of the accident, was $21,186. The claimant’s resources in the year preceding the accident from his summer employment was but $3,800. Clearly, and as one might expect of a 17 year-old high school student, he was unable to provide for more than one half of his needs and therefore dependent for financial support on one or both of his parents.

[100] The evidence is clear that in the year preceding the accident, the 17 year-old claimant was spending an equal amount of time in the home of each parent. Each provided comfortable accommodation and food while living there. I do not believe that comparing the housing costs as between the two households is reasonable in the circumstances. For example, if one parent were paying higher rent in Rosedale while the other was paying a lower rent in Mimico ought matter not. Comparing monthly expenses per individual within the household as proposed by Aviva would not, in my mind, be appropriate. In order to determine dependency, it is therefore necessary to consider who provided the majority of support over and above the housing/food items that in my view were provided equally by both parents. To do so requires consideration of the impact of the Child Care Benefit “CCB” that the mother was receiving from the government, the child support payments made by the father and any other additional payments made by each parent to the needs of Christopher other than for housing/food.

[101] I view the Child Care Benefit or CCB as simply a benefit from another financial provider. Although it was paid to the mother, it cannot be viewed as a contribution made by her to the claimant’s needs. In any event, it was a relatively small amount when compared to the contributions made by each parent. Furthermore, in a “shared custody” situation, as had developed here since the claimant started high school several years earlier, the CBB ought to have been paid equally to both.

[102] The following is an estimate of that provided by each parent on an annual basis over and above the housing/food costs that I treat as being provided equally by the parents:

mother Tammy		father Michael	
football	$2,100	football	$500
cell phone	$2,680 - $3,020		
pet care	$100 - $300		
child support	$0		$6,204
TOTAL	$2,680 - $3,020		$6,704

[103] On this analysis, it would therefore appear that the father is contributing more than the mother if it were found that the full payment of child support went for the benefit of Christopher.

Canada Revenue Agency Guide P102, Support Payments, confirms:

(a) The "recipient" of child support is "the parent of a child of whom the payer is a legal parent" (pg. 4);

(b) "A child **cannot** be consider the recipient of support payments for income tax purposes" (pg. 4, bold emphasis in original);

(c) Spousal support "are made only to support the recipient" (pg. 5);

(d) Child support "is to support a child. … payments are **not only** made to support the recipient", (pg. 5); and

(e) The recipient (Tammy) can "use the payment at their discretion" (pg. 5).

[104] On the basis of the aforesaid Aviva has submitted that the child support payments were made by the father to Tammy, not the claimant, to be used in her sole discretion and therefore ought be considered as a contribution correctly attributed to her as the funds may or may not be spent on the claimant. On the basis of the evidence before me, I cannot help but find that the payments made for child support, as opposed to any spousal support, are made with the intention of providing for the needs of the child whether that be for clothing, cell phone, pet care or to simply ease the housing/food burden on the recipient for the benefit of the child. There was no evidence adduced in this proceeding that the monies paid by the father for child support was not used for the benefit of the claimant I cannot help but look at such payment as a contribution to the claimant's needs, thereby making the father Michael's contribution greater than those of the mother Tammy.

[105] Counsel for Aviva has submitted that the child support benefits ought to be viewed as a neutral factor just as OSAP is treated in the priority jurisprudence. I do not see it that way. OSAP payments to a claimant are not treated as a resource of the claimant as the cost of tuition and books (for which OSAP payments are made) is removed from the "needs" calculation of the claimant. Here, there is no corresponding removal of "needs" by reason of the child support payment of the father. Accordingly, the child support payment ought be viewed as a contribution to the child's needs just as the words "child support payment" implies.

[106] I have also considered the "big picture" approach and the case of *RBC General Insurance Company v. TD Meloche Monnex* (Arbitrator Bialkowski - January 5, 2008) as urged upon my by Aviva and still reach the same conclusion that each parent provided

adequate accommodation but that the father's financial contribution, over and above housing, was greater than mother Tammy's financial contributions.

[107] In the final analysis I therefore find that the use of a combination of "LICO" and "plurality" approaches most appropriate for determining dependency on the facts before me. The claimant was not in a position to look after more than 50% of his needs and that the father Michael was the largest financial contributor to those remaining needs, making the claimant principally financially dependent on his father given the case law outlined above. The father, Michael Haas, was the named insured on a policy issued by Aviva. Section 268(5) of the *Insurance Act* requires the dependent of a named insured to claim under that policy. Aviva is the priority insurer.

ORDER

[108] I hereby order that:

1. Aviva is the priority insurer;

2. Aviva reimburse Heartland for benefits paid to or on behalf of the claimant that are subject to indemnity, together with interest calculated in accordance with the provisions of the *Courts of Justice Act*;

3. Aviva pay to Heartland and Guarantee the costs of this arbitration on a partial indemnity basis;

4. Aviva pay the Arbitrator's costs.

DATED at TORONTO this 27th)

day of January, 2019.)

KENNETH J. BIALKOWSKI
Arbitrator