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

AND IN THE MATTER OF THE ARBITRATION ACT, S.O. 1991, c. 17, as amended;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PAFCO INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY & WESTERN ASSURANCE COMPANY

Respondents

DECISION

COUNSEL:

Nawaz Tahir for the Applicant

Tim Gillibrand and Julianne Brimfield for the Respondent, Wawanesa

Derek Greenside for the Respondent, Western

BACKGROUND:

1. Austin Henry, Jr. was injured in an accident when the vehicle that he was driving was struck from behind by another vehicle as he was about to turn left through an intersection. He was ejected from the vehicle, and suffered serious injuries. Mr. Henry, Jr. ("the Claimant") was twenty years old at the time of the accident, and had never held a driver's license. He was operating a 1998 Honda Civic, that was believed to have been uninsured at the time of the accident. The other vehicle was insured by Wawanesa Mutual Insurance Company ("Wawanesa"). The accident took place on the Oneida First Nations reserve, close to where the Claimant lived with his parents.

2. The Claimant's father, Austin Henry, Sr., was a named insured under a policy issued by Pafco Insurance ("Pafco") at the time. The Claimant submitted an Application for payment of accident benefits under the *SABS* to Pafco, and they paid benefits to him and on his behalf. Pafco disputed that the Claimant was an "insured" under the policy, and provided notice of its intent to dispute its obligation to pay benefits to the Claimant, in accordance with section 3 of *Regulation 283/95,* to both Wawanesa and the Motor Vehicle Accident Claims Fund ("the Fund"). Pafco then commenced arbitration against both of those parties in March 2015. The Fund was released from the proceeding in June 2015.

3. I was retained to arbitrate this dispute in September 2015. Nine or ten pre-hearing calls ensued, at which the issue of the Claimant's dependency on his father and various other issues were discussed. In May of 2017, based on documentation that had been requested and provided by Western Assurance Company ("Western"), Wawanesa brought Western into the proceeding. Western had issued a policy covering the Honda Civic involved in the accident in 2011, to an individual named Eugenia Mendez. Western sent a notice to Ms. Mendez' broker advising that the policy would not be renewed and would expire in August 2012. Wawanesa contends that this was done in contravention of the company's declination rules and is invalid. It argues that the policy accordingly remained in force at the time of the accident, and that Western is in higher priority pursuant to section 268(2)1(ii) of the *Insurance Act.*

4. Five further pre-hearing calls were held involving counsel for the three insurers. An Arbitration hearing was finally convened to determine two issues – whether the Claimant was principally dependent upon his father for financial support at the time of the accident, and whether the Western policy that had covered the Honda Civic driven by the Claimant on that night remained in force at that time.

5. A witness with knowledge of Western's underwriting practices was called to testify on the second day of hearing. She testified about the reason for the non-renewal of the policy in 2012, and the application of Western's declination rules. It became clear in the course of her testimony that not all relevant documents had been provided to counsel, and that the documents in her possession gave rise to further arguments. It was agreed that the hearing would be adjourned at that point, and that I would consider the evidence and the parties' submissions relating only to the financial dependency issue. We agreed that the hearing would resume in order to hear further evidence on the second issue, if required.

ISSUE:

Given the above, the sole issue I consider at this stage is:

1. Was Austin Henry, Jr. principally dependent for financial support upon his father, the Pafco insured, and therefore an "insured" under that policy ?

RESULT:

1. Yes, the Claimant was principally dependent for financial support on his father at the relevant time, and was accordingly an "insured" under the Pafco policy. Pafco is therefore the insurer with the highest priority to pay benefits under section 268(2)1 of the *Insurance Act.*

THE EVIDENCE:

6. The parties filed a lengthy Statement of Agreed Facts relating to the dependency issue. Many other documents were filed, including signed statements, transcripts from Examinations Under Oath conducted of the Claimant and his father, and the Claimant's

Ontario Works file. Pafco and Wawanesa each retained accountants to analyse the information obtained and produce expert reports, four of which were filed into evidence. Finally, both accountants appeared and provided *viva voce* evidence at the hearing.

7. The evidence establishes the following facts: Austin Henry, Jr. was twenty years old at the time of the accident in late June 2014. He was living with his mother and father at the time, in a home owned by his mother in Muncey, Ontario. Muncey is a community located within the Munsee-Delaware Nation (Reserve) located southwest of London, Ontario. Mr. Henry, Jr. grew up in that home.

Circumstances surrounding car accident

8. As noted above, the Claimant did not have a driver's license. Despite that fact, he apparently purchased a Honda Civic on the day of the accident, for which he paid $450 in cash. The evidence suggests that he obtained these funds from casino winnings at a casino in Windsor earlier in the day. While the Claimant had no recollection of the accident or what had transpired in the hours before the accident, it is clear that he had not arranged for any insurance coverage on the vehicle.

Living arrangements

9. The Claimant graduated from high school in London in June 2013, approximately one year before the accident. As stated above, he had lived with his parents on the Reserve throughout his life. He had two older sisters who did not live at home at the relevant time. Mr. Henry, Jr. and his girlfriend (who had been living in his family's home) moved out of the home in October 2013 and lived together in a rented apartment in London for about six months. The relationship ended in April 2014, and the Claimant then moved back into his parents' home on the Reserve. He remained there for the few months leading up to the accident in late June.

10. The evidence indicates that the family home had been passed down to the Claimant's mother from her parents. The Reserve on which it is located is a rural area, and covers approximately 3 square kilometres. It had a registered population of 547

people at the relevant time, approximately one-third of whom lived in the community. The home was financed through a loan arrangement with the Chippewas of the Thames Band. The evidence indicated that this loan was still being paid off at the time of the accident, and that the Claimant's parents paid approximately $200 per month to the Band to cover the loan and insurance for the property.

11. The Agreed Statement of Facts provides that there was a shortage of housing on the Reserve, and that there were no rental properties there. As such, upon moving home from London, the Claimant would have had to live with either family or friends while on the Reserve.

Claimant's earnings

12. Mr. Henry, Jr. was receiving approximately $600 per month from Ontario Works at the time of the accident. He began receiving this assistance in early October 2013, when he left his family home and moved to London with his girlfriend. He had initially applied for social assistance in June 2013 while still living with his parents, but that application appears to have been rejected because he was living in their home. Notably, he continued to receive these funds once he moved back to his parents' home in April 2014.

13. The documents in the Ontario Works file indicate that the Claimant sought and qualified for assistance in October 2013 on the basis that he was living with his grandparents at the time, and needed help in paying expenses. All of the other evidence in this case points to the Claimant having moved in with his girlfriend in London in October 2013, and this discrepancy was never explained. Of the $600 provided each month, an amount of $350 was designated to cover "rental payments".

14. The Claimant also earned a modest amount of income from occasional work he did in the year prior to the accident. These earnings came from two sources – a summer job doing maintenance for the KiiiKeeWanNiKaan healing lodge for which he was also "on call" during the year, and cash he received from his father for helping him with

custodial work that he had contracts for. Mr. Henry, Jr. testified at his EUO that he was paid minimum wage for his occasional work at the healing lodge. The accountants estimated that the Claimant received $913 in income for this job in the twelve months before the accident.

15. The Claimant's father testified at his EUO that he had two contracts for custodial work during that period. He worked approximately 25 hours per week cleaning and occasionally setting up for events at the Chippewa Community Center. He also provided janitorial services on Sundays at the Southwestern Aboriginal Health and Access Centre. He testified that his son occasionally helped him out with these tasks, and that he paid him $15 per hour for his assistance. His evidence with respect to the Access Centre job was that the Claimant helped him out "once in awhile", and that it was "not a steady thing". He stated that if they both worked together, it would take an hour and a half to complete the Sunday cleaning job.

16. Both accountants estimated that in the twelve months prior to the accident, the Claimant received $504 in cash from his father for his assistance with cleaning the Chippewa Community center, and $1800 in cash from his father for his assistance with the janitorial contract for the Health and Access Center on Sundays. When these amounts are added to the $913 from the on-call maintenance job at the healing lodge, his total earnings for the twelve months before the accident amount to $3217. When questioned about how the $1800 figure was arrived at, Ms. Olsen, the accountant retained by Wawanesa, stated that the Claimant's father estimated at his EUO that he gave his son on average $150 per month in cash for his assistance.

17. The Claimant did not report any of the above earnings to Ontario Works. He continued to receive $600 per month from October 2013 to the time of the accident.

FASTT program

18. The Claimant was enrolled in a program called Fostering Aboriginal Success in Trades and Technology (FASTT") at the time of the accident. The program began in

early June 2014, a few weeks before the accident, and was scheduled to run to the end of August. Training and instruction was provided to the participants in different trades, at different locations each week. All expenses for accommodation, supplies and books were provided by the program without cost, and a $40 per diem stipend was provided to each participant to cover the cost of meals and incidental expenses.

19. The evidence suggests that the Claimant attended the program for twenty days, and would have received a total of $800. His father drove him to the town at which the training was being provided (which varied by the week) each Monday morning, and picked him up on Friday afternoon. He stayed on the Reserve during the weekends, at his parents' house.

Father's contributions

20. Both the Claimant and his father testified that Mr. Henry, Sr. provided the Claimant with $50 per week in "spending money" at the time of the accident, and had done so over the few years leading up to that time. His father stated that he provided his son with additional financial support from time to time, if he needed money to cover some of his expenses. The parties agree that Mr. Henry, Sr. bought groceries for the Claimant and his girlfriend once or twice per month while they were living in London. They also agree that he drove his son wherever he needed to go, as there was no public transport available on the reserve. Mr. Henry, Sr. stated that he had driven his son around on occasion while the Claimant lived in London.

Household expenses

21. The Agreed Statement of Facts provides that the accountants retained by Pafco and Wawanesa agree on the following monthly needs for the Claimant:

Internet	$20
Utilities	$102
Cleaning Supplies	$9
Cable	$32

Food	$157
Cigarettes	$115
Entertainment	$120
Clothing	$100
Groceries/Personal	$200
Cell Phone	$50
Transportation	$317

22. The total of the items listed above is $1,222, and amounts to $14,664 pro-rated on an annual basis. The list does not include an amount for housing or accommodation. I note that some of the items on the list, such as the amounts for utilities, cable TV, internet, transportation expenses and cell phone expenses were paid directly by Mr. Henry, Sr. Many of the other expenses such as the amounts listed for cigarettes, entertainment and clothing were paid for by his father, as noted in the first accounting report prepared by the accountant retained by Pafco.

23. The Claimant testified at his Examination Under Oath that he paid rent of $200 per month to his parents, and contributed $100 per month toward the family's groceries. There is no other evidence supporting or corroborating this contribution for groceries. Mr. Henry, Sr. also stated at his EUO that his son might have had an agreement with his mother to pay $200 toward the rent or household expenses. However, in a letter received a few weeks after the Examination, counsel for the Claimant corrected the above and stated that there had not been a written agreement by which the Claimant paid $200 per month toward household expenses. The letter also states that Mr. Henry Jr.'s parents advised that the Claimant "did not make any material financial contributions toward the household at any time after he returned home from living in London until the time of the accident".

Accounting evidence

24. As noted above, both Pafco and Wawanesa retained accountants to provide opinions on whether the Claimant was principally dependent on his father at the time of

the accident. Pafco retained Jessy Hawley of Davis Martindale, and Wawanesa retained Janet Olsen, who at the time of her first report was with H&A Forensic Accounting, later becoming BDO. Each accountant prepared a report in late 2014, and a second one in mid-2017, after the EUO evidence of the Claimant's father and the Ontario Works file was obtained. It is the information in the second round of reports that is the most useful for our purposes. Both Ms. Hawley and Ms. Olsen also testified at the hearing.

25. Both accountants calculated the Claimant's resources and the cost of his needs over a three-month and twelve-month period preceding the accident. Ms. Olsen also included calculations for the nine months preceding the accident in her report. They both referred to evidence obtained from the parties to calculate his "actual expenses", and also referred to the Statistics Canada Catalogue for Low Income Cut-Off ("LICO") figures to estimate his expenses. LICO data for a one-person household for both rural areas and a community size of less than 30,000 inhabitants was referenced.

26. Ms. Hawley, the accountant retained by Pafco, determined that Mr. Henry, Jr. was not principally dependent upon his father for financial support at the time of the accident. She opined that the three-month period before the accident was the most appropriate time frame to use, and that the question to answer was whether the figure representing twice the amount of the Claimant's resources over that period exceeded his expenses over the period. She calculated the figure for twice his earnings over the three-month period to be $6,288, and his needs for that period to be either be $4,374 (using figures for actual expenses) or $4,147 (LICO figure for rural area), and determined that he was therefore financially independent over that period.

27. Ms. Hawley also reached the same result for the twelve-month period before the accident. The "twice his earnings" figure for that period was $18,728, compared to either $18,480 (actual expenses over the period) or $16,587 (LICO figure for rural area).

28. Not surprisingly, Ms. Olsen, retained by Wawanesa, came to a different conclusion. She suggested that a twelve-month period was more appropriate to use in the

analysis, but that even if a period of three months was used, the figure representing twice the Claimant's means would not exceed his needs for that period, leading to the conclusion that he was principally dependent for financial support on his father.

29. Ms. Olsen calculated the "twice his means" figure for the three-month period to be $4,688, compared to his actual needs of $4,801, or LICO estimate of expenses of $4,699 (using data for a community size of less than 30,000 people). The twelve-month figure representing twice his means was $17,128, which she determined was less than his actual expenses over the period of $19,464, or his LICO estimated needs of $18,868 (again using data for community size of under 30,000). Ms. Olsen acknowledged in cross-examination that if the LICO figures for a rural area were used instead of those for a community size of less than 30,000, the opposite result would be obtained (i.e. he would be financially independent).

30. As always, the different figures above result from different assumptions being applied by the accountants. There were three key differences in the approaches taken- Ms. Hawley (for Pafco) included the $40 per day stipend the Claimant received while attending the FASST program, totalling $800, in calculating his "means', while Ms. Olsen did not. Ms. Olsen claimed that these funds were not "income" and were provided to offset expenses for meals while the participants were away from home. Ms. Hawley conceded in cross-examination that if the FASTT stipend was excluded from her calculations, Mr. Henry, Jr. would be principally financially dependent on his father over a twelve-month period, if the figure representing his "actual expenses" were used.

31. Secondly, the accountants used different approaches to estimate the cost or value of the Claimant's accommodation at his parents' home on the Reserve. Ms. Hawley applied a value based on the average monthly rent of $709 for a three-bedroom apartment in Chatham, Ontario, a town approximately 90 kilometres away. Dividing this amount between the three inhabitants of the home, she attributed $236 to the Claimant for this expense. She explained that while there were other towns that were closer to where the Claimant lived, she thought that this was the best "cost proxy" for the value of housing

on the Reserve, as the Chatham area encompasses some rural areas, and includes another First Nations Reserve in its territory.

32. In contrast, Ms. Olsen used the sum of $400 per month to estimate the cost of Mr. Henry, Jr.'s accommodations. She noted that he and his girlfriend had paid rent of $800 per month for the apartment they rented in London from October 2013 to April 2014, and had split that expense. She also noted that this is the only figure available to the parties that reflects what the Claimant actually paid over the relevant period, and suggested that it represents the most realistic option of what he would pay for accommodations if he was not living on the Reserve with his parents.

33. The only other difference in the accounting figures, as noted above, relates to whether the LICO data for rural areas should be used to estimate the Claimant's expenses, or whether the data for communities with fewer than 30,000 inhabitants should be applied. Ms. Hawley (Pafco) suggested that the data for rural areas should be used, as the land on the Reserve spans 3 kms, with approximately 180 residents, making the comparison to a community of up to 30,000 people meaningless. Ms. Olsen preferred the data for a small community, noting that the Claimant spent half of the year preceding the accident living in London, which is much more densely populated than a rural area.

34. Ms. Olsen was cross-examined at the hearing about what the result would be if the LICO figure was calculated based on the Claimant having lived for six months in a community the size of London, and six months in a rural area. She responded that he would be found to be principally dependent for financial support on his father, assuming that the $800 FASTT stipend was not included in the calculations.

35. I also note that Ms. Hawley explained in her testimony that the household spending surveys on which the LICO data is based specifically excludes families living on First Nation Reserves, likely because they are derived from tax returns filed.

RELEVANT PROVISIONS:

These provisions are relevant to my determination of this matter:

Insurance Act:

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

Statutory Accident Benefits Schedule:

> *3(7) For the purposes of this Regulation,*
>
> > *(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;*

As provided above, if Mr. Henry, Jr. is determined to be principally dependent for financial support on his father, he is deemed to be an "insured" under the Pafco policy, and Pafco would be in higher priority to pay his claim.

PARTIES' ARGUMENTS:

Pafco's submissions

36. Counsel for Pafco submitted that the evidence supports his client's contention that the Claimant was not principally dependent for financial support on his father at the relevant time. He acknowledged that Mr. Henry, Jr. received some financial support from his father, but that aside from the $50 per week in spending money, any other funds provided were modest and occasional. Counsel noted Arbitrator Samis' comments in

Federation Insurance Company v Liberty Mutual Insurance Canada (May 7, 1999) that dependency implies more than the receipt of some financial support from a parent, and that a child should only be determined to be an "insured" under the parent's policy when "principal dependency" can be established.

37. Counsel noted that Mr. Henry, Jr. began receiving social assistance payments in the amount of $600 per week in October 2013. He contended that while his father's contributions must be considered, the income he received from Ontario Works was much more significant and permitted him to meet his basic needs. He stated that the accountants' calculations indicate that Mr. Henry, Sr.'s contributions were simply not sufficient to justify the conclusion that his son was principally dependent upon him.

38. Mr. Tahir submitted that the three-month period before the accident best reflects the reality of the Claimant's circumstances at the time of the accident. He suggested that the twelve-month period considered by the accountant retained by Wawanesa requires that the six months that Mr. Henry, Jr. lived in London be taken into account, and submitted that that period was an anomaly, given that the Claimant had lived on the Reserve throughout his life up to that point, and continued to do so once he returned from London.

39. Counsel contended that if statistics are to be relied on in determining principal dependency, care must be taken to use the correct data sets. He submitted that it is not appropriate to use LICO data for a non-rural community to estimate the Claimant's expenses, as Ms. Olsen did, as the Reserve on which he lived was a rural area. He noted that when the figures for rural communities are considered, the calculations support the conclusion that the Claimant was not principally dependent for financial support on his father.

40. Mr. Tahir also pointed out that the accountant retained by Wawanesa estimated Mr. Henry, Jr.'s accommodation expense to be $400 per month for the entire year before the accident, despite the fact that he had only paid that amount in rent for the six months

that he lived in London with his girlfriend. He submitted that that figure significantly overstates his expenses for the six months he lived on the Reserve, and that the monthly $236 figure used by Ms. Hawley should be accepted as being more accurate, as the average cost of a similar sized dwelling in Chatham was a more comparable cost proxy.

41. Mr. Tahir suggested that the $800 stipend received from FASTT should be included in the Claimant's earnings for the relevant period. He pointed out that Mr. Henry was allowed to keep whatever funds were left over, if he did not spend it all on meals. He noted that in any event, if this amount is not included in the calculations, the amount attributed toward his food expenses for the month of June should be decreased to reflect the fact that his meals were being subsidised.

42. Counsel also contended that the Claimant's capacity to earn money should be taken into account. He noted that a job fair was scheduled to take place at the end of the FASTT program, and that while there was no guarantee that the Claimant would be offered a job, he would have been provided with the opportunity to apply for work as a result of having participated in the program.

43. Finally, Mr. Tahir cautioned that a "big picture" analysis in a case like this should only be undertaken to verify the result reached by the accountants' calculations, based on the actual information obtained. He emphasized that the appropriate lens must be used for assessing the "big picture" of the Claimant's life at the relevant time, noting that as a native person living on a Reserve, his life circumstances were different than others, and that any assessment regarding his costs for housing must reflect the fact that there was a housing shortage on the Reserve and that his other options for housing were limited.

Wawanesa's submissions

44. Mr. Gillilbrand contended that the evidence tendered leads to a conclusion that the Claimant was principally dependent for financial support on his father. He submitted that a twelve-month time frame is preferable to the three months suggested by counsel for Pafco, as it would allow many of the important changes and events that occurred in the

Claimant's life to be included in the analysis, and is more reflective of his circumstances at the time of the accident.

45. Counsel suggested that the evidence submitted points to several indicia of dependency. He noted the letter sent by counsel for the Claimant after the father's EUO advising that there was no written or formal agreement in place by which Mr. Henry, Jr. contributed $200 per month toward the household expenses, and that the Claimant had not made any material contribution to the household at any time after he returned home from London, to the time of the accident.

46. Counsel noted that most of the "earnings" attributed to the Claimant in the year prior to the accident actually came from cash he received from his father, in exchange for the assistance that he provided with the custodial contracts that he had. He questioned whether these funds should be counted as "earnings", given that Mr. Henry, Jr. was completely dependent on his father for these funds. He also noted that his father drove him to and from the worksite each time he assisted with the work.

47. Counsel also questioned whether the funds received from Ontario Works should be considered in the analysis, given that the Claimant seems to have qualified for this social assistance by falsely reporting that he was living with his grandmother.

48. Mr. Gillibrand contended that the FASTT stipend should be excluded from the calculation of the Claimant's earnings, as it was meant to compensate him for meals and travel expenses incurred, given that the training was provided at different locations each week. He also suggested that the $400 monthly figure for rent used by Ms. Olsen was more realistic, as that was the actual amount that the Claimant had to pay while living in London for six months, but also because the Reserve was surrounded by the London Central Metropolitan Area, and was much closer to London than to Chatham. He submitted that if Mr. Henry, Jr. chose to leave his family home and live off of the Reserve, he would likely move to London as he had done earlier, or would move to a closer town like Strathroy, which had similarly priced accommodations to London.

49. Mr. Gillibrand noted Ms. Olsen's evidence that if a "blended" LICO figure was used – being six months for a rural area and six months for a CMA the size of London – the numbers would support a finding that the Claimant was principally dependent on his father over the twelve-month period before the accident.

50. Finally, counsel for Wawanesa suggested that given the difficulties inherent in calculating the items above, a "big picture" analysis should be applied. He contended that the fact that Mr. Henry, Sr. consistently provided spending money to his son, bought groceries for him when he was short of funds while living away from home, drove him everywhere he needed to go and was the source of much of his earnings, should lead to the conclusion that the Claimant was dependent upon his father to the required degree. He added that the fact that Mr. Henry, Jr. had not demonstrated any real ability to find employment one full year after finishing high school, coupled with the above factors, should lead to the conclusion that he had not achieved financial independence at the time of the accident, and that he continued to be principally dependent for financial support on his father.

Western's submissions

51. Counsel for Western supported Wawanesa's contention that the Claimant was principally dependent for financial support on his father. He also suggested that the twelve-month period before the accident was the appropriate time frame to use, arguing that a three-month period was too short a time to consider in the case of a young person in transition, who was trying to establish their financial footing.

52. Mr. Greenside submitted that the $40 daily stipend received from the FASTT program should not be included in the Claimant's earnings, as it was only provided to defray the additional expenses incurred by participants in the program who had to travel away from home. He cited the decisions in *The Personal Insurance Company v Allstate Insurance* (2009) CanLii 64827, *Jevco Insurance v TD General Insurance* (Densem, October 16,2015) and *The Co-operators General Insurance Company v. RSA, TD Insurance, Intact Insurance and Western Assurance Company* (Bialkowski, May 16,

2017) in which the court and Arbitrators chose not to include scholarship funds or funds received from OSAP in the calculation of a claimant's earnings, ruling that these should be "neutral factors".

53. Finally, counsel noted that Ms. Hawley, the accountant retained by Pafco, acknowledged in cross-examination that if the FASST funds were not counted in the Claimant's earnings, and a twelve-month pre-accident time frame was used, Mr. Henry, Jr. would be principally dependent on his father, and urged me to reach that conclusion.

ANALYSIS & REASONS:

54. The task of determining whether a young person who has recently finished school and has not yet embarked on a stable path of earnings remains principally dependent for financial support on a parent at the time of an accident is often a challenging one. As I stated in *Dominion of Canada v Intact Insurance and Unifund Assurance Company* (July 28, 2014), aff'd at 2015 ONSC 3689 (CanLii), it is often an exercise in "crystal ball gazing", and arbitrators and courts are in no better position than anyone else to predict how a claimant's life would have unfolded if an accident had not happened.

55. The jurisprudence on this issue and the approach taken in determining dependency has evolved over the years, but the basic principles underlying that question are longstanding. The factors set out in *Miller v Safeco* (1984) 48 O.R. (2d) 451 (H.C.J.), as affirmed by the Court of Appeal at (1985) 50 O.R. (2d) 797, remain the starting point of the analysis, and require that four factors be considered – the amount of dependency, the duration of dependency, the financial needs of the individual in question and their ability to be self-supporting.

56. This instruction from the court has been quantified in a manner that the focus is now on whether it can be demonstrated that a person receives more than half of their support from another person, and if so, they are considered to be principally dependent for financial support upon that person. (*Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada* [2000] O.J. No. 1234 (C.A.), aff'g [1999] O.J. No. 5777 (Div

Ct.), aff'g (May 7, 1999, Arbitrator Samis)). The corollary to this is known as the "51% rule", meaning that if a claimant can provide for at least 51% of his or her expenses or needs, they are not principally dependent on anyone else.

57. Typically, parties to a priority dispute will make great efforts to obtain specific financial information from the parties, and/or retain accountants to quantify a claimant's financial needs or living expenses. While many decisions have been based on that frustrating exercise, that approach has now largely given way to the use of statistics to estimate a person or household's expenses, based on the size of the community in which they live. That shift occurred as arbitrators and judges reviewing arbitration awards came to realise that the information received by parties or assumed by accountants was unreliable at best, and more likely "highly artificial and necessarily inaccurate" as stated by Justice Myers in *Allstate Insurance Company v. ING Insurance and Aviva Canada Inc* (2015) ONSC 4020 (CanLii).

59. The use of "LICO data" became popular in the aftermath of the above decision, and Justice Myers' finding (at para.13) that "there is no accurate way to measure with hindsight an individual's hypothetical needs some time in the past". More recently, arbitrators have shifted from considering LICO data, which actually represents the income threshold at which families are expected to spend 20% more than the average family on food, shelter and clothing, to relying on a statistic termed Market Basket Measure, which provides the cost of meeting basic modest needs for different family sizes, in different parts of the country, segmented by community size. (see *Wawanesa Mutual Insurance Company v State Farm Insurance* (Samis, September 13, 2018), *Pembridge Insurance Company v. Western Assurance Company*, (Bialkowski, December 6, 2018)). [1]

[1] I note that in many instances there may not be a large distinction between the Market Basket Measure figure and the LICO data, depending on the category. In this case the Market Basket Measure figure for a rural area in Ontario would be approximately $1100 higher over a twelve-month period than the LICO data for a rural area.

58. I agree with this shift to using statistics to inform the analysis of a person's needs, and have adopted that approach in some of my earlier decisions. I have come to realise that even in cases in which a person is able to provide what may seem to be an accurate list of their expenses over the relevant period of time, there is an inherent arbitrariness to these figures, and the consequent calculations of dependency, which would be influenced by things like the cost of a family's mortgage payments, or the varying cost of car insurance premiums.

59. However, a trier of fact must be careful not to jump on the "statistics bandwagon" in every case, for reasons of expediency. The point of the exercise is to consider each person's circumstances and assess whether they are dependent to the requisite degree, focusing on their specific situation. There will be cases in which the use of statistics, while tempting, will not be appropriate or suited to the specific circumstances in issue.

60. I find this to be one such case. Mr. Henry, Jr. lived on the Munsee – Delaware Nation Reserve at the time of the accident, and had lived there for most of his life. He left the Reserve and moved into an apartment with his girlfriend in London approximately nine months before the accident. He stayed there for six months, and the relationship ended. He then moved back to the Reserve, into the home owned by his mother that she had inherited from her parents. While the exact details were not clear, the evidence suggested that the home was partially financed through the Band, and that the Claimant's mother paid $200 per month during the relevant period to the Band in repayment of that loan.

61. Aside from housing, there are undoubtedly other ways in which the financial circumstances of a First Nations person or family living on a Reserve differ from those of someone who is not. These were not probed in any detail at the hearing or EUOs, other than to note that no income tax is paid on any income earned. Counsel for Pafco emphasized, however, that a different lens must be used when assessing the evidence in this case, to take into account the financial and cultural reality that the Claimant faced.

62. I agree. I find that the fact that the Claimant and his parents were "status Indians under the Indian Act" affects the analysis in two ways – how or whether the LICO data referenced should be applied, and the manner in which the cost of accommodations should be estimated. As mentioned above, Ms. Hawley noted in her testimony that the household spending surveys used to produce the LICO data specifically exclude people living on First Nations Reserves, likely because the information is collected from tax returns filed, and people who are "status Indians under the Indian Act" are not required to file returns. Given that fact, I find that using the LICO data to estimate the Claimant's expenses in this case would ignore the reality of his circumstances for much of the period in question.

63. The Agreed Statement of Facts filed by the parties states that there was a housing shortage on the Reserve, and that there were no rental properties. In light of this fact, it is difficult to determine the appropriate "cost proxy" for the Claimant's housing needs. While I appreciate that this difficulty may arise in other circumstances, it is particularly unique here. Having considered both of the scenarios offered by the accountants, I find that neither of them realistically reflects the unique scenario posed by Mr. Henry, Jr. living in the family home that was passed down to his mother by her relatives, for which the family pays $200 per month to the Band as part of a financing arrangement.

64. There was some evidence suggesting that the Claimant contributed $200 per month toward the household's expenses. Other evidence, notably the letter received from his counsel clarifying the father's EUO evidence, stated that he had not. I am inclined to accept that evidence over the testimony provided at the EUO for two reasons. Given the clear evidence from both Mr. Henry, Sr. and his son that he received $50 in spending money each week from his father, it would make little sense for the Claimant to then turn around and pay that same amount back to his parents for room and board.

65. I also note the evidence indicated that the Claimant's mother received ODSP payments and that his father earned approximately $3,500 per month. When those earnings are considered, along with the fact that the family's housing costs amounted to

$200 monthly, a contribution of $200 each month toward "rent" by the Claimant would seem disproportionately large.

66. I also question whether the figures calculated by the accountants representing the Claimant's earnings reliably reflect the reality of his circumstances. Mr. Henry, Jr. received Ontario Works payments of $600 per month from October to the time of the accident. It is quite possible that these payments were obtained under false pretences, or were at least based on false reporting. The records filed suggest that the Claimant's first application for social assistance in June 2013 was rejected, because he was living in his parents' home. His subsequent application was accepted, when he stated that he was living with his grandparents. As noted above, it is not clear why, having apparently moved to London with his girlfriend, he did not report that fact.

67. In any event, the Ontario Works Client Information Report refers to a "Living with parent rule" and has another line titled "Accommodations owned by parents". I note that the initial application filed, which was rejected, indicates that the Claimant was living with his parents, while the later one indicates that he was not. While I do not dispute that the payments he received provided support and assisted him in meeting his needs, it is illogical or counterintuitive, in my view, to find that a claimant is financially independent as a result of receiving social assistance payments while he is living in his parents' home, which if known, would disqualify him from receiving the payments.

68. The accountants both calculated that the Claimant received $1800 in cash from his father in the year before the accident, in exchange for assisting him with the janitorial contract at the Health Centre. In my view, this figure seems high, given the father's evidence that his son worked with him "once in awhile". The bigger point here, however, is that if the father's contributions toward the Claimant's earnings are backed out of the equation, a significant portion of these earnings – modest as they are - also vanish.

69. The doubts expressed above lead me to find that in the unique circumstances of this case, a look at the "big picture" of the Claimant's life at the time of the accident is a

more reliable approach to determine principal financial dependency, rather than relying on figures and assumptions that seem akin to fitting the proverbial "square peg into the round hole". When viewed through this lens, I am persuaded that Mr. Henry, Jr. was principally dependent on his father for financial support, both during the three months and twelve months before the accident.

70. I reach this conclusion for the following reasons - at the time of the accident he was living in his parents' home, as he had done almost all of his life, save for six months when he lived with a girlfriend that he was no longer involved with. Even when he lived away from the home, his father helped pay for rent or groceries as required, and drove him wherever he needed to go. As outlined above, the Claimant did not contribute to the household, and regularly received at least $50 per week in "spending money" from his father. He was receiving social assistance payments as a result of having reported that he was not living at his parents' home, and his modest earnings consisted mainly of cash paid out of his father's salary or janitorial contracts.

71. Further, the Claimant had no real history of, or prospect for, steady employment at the relevant time. In the year since graduating high school, he had earned less than $1,000 on his own, from a part-time summer job and the odd "on-call" shift, aside from the cash he received from his father. While he was participating in the FASTT program at the time of the accident, suggesting that he was moving toward finding steady work and ultimately financial independence, he had only been in the program for four weeks. As I stated in *Dominion v. Intact, supra*, there was no evidence to suggest that he had either achieved financial independence or had developed a plan to do so, at the time of the accident.

72. I also note from some of the records submitted that the Claimant was under "house arrest" at his parent's home for some time following the accident as a result of being convicted of various charges laid in relation to the accident. While my analysis is focused on the evidence surrounding his life and activities before the accident, this fact supports my finding that he had not yet reached the level of independence required to

justify the conclusion that he had achieved financial independence, as contended by Pafco.

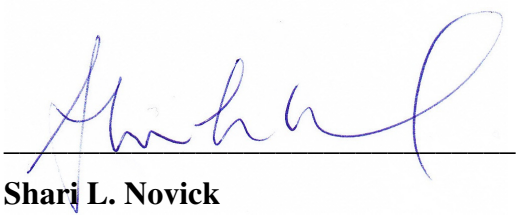
73. For the reasons outlined above, I find that Mr. Henry, Jr. was principally dependent for financial support on his father at the time of the accident, and is consequently an "insured" under his Pafco policy. Pafco is therefore the insurer with the highest priority to pay the claim pursuant to section 268(2)1(i) of the Act.

74. The Application for arbitration is hereby dismissed.

COSTS:

Given the result, Pafco is responsible to pay the legal costs borne by both Wawanesa and Western, on a partial indemnity basis, as well as the arbitration fees. If counsel cannot agree on the quantum payable for costs, I invite them to contact me so that a further teleconference can be arranged and a process to determine the issue discussed.

DATED at TORONTO, ONTARIO this ____21st __DAY OF DECEMBER, 2018



Shari L. Novick
Arbitrator