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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALLIANZ CANADA

Applicant

- and -

THE GUARANTEE COMPANY OF NORTH AMERICA

Respondent

DECISION

COUNSEL:

Mark K. Donaldson for the Applicant

Maura Thompson for the Respondent

ISSUES:

Was Jamie Towegishig a dependent of Guarantee's named insured within the meaning of the term found in Bill 59, and if so, is Allianz entitled to recover accident benefit payments from Guarantee?

DECISION:

Jamie Towegishig was a dependent of Guarantee's named insured at the time of the accident and accordingly Allianz is entitled to recover accident benefit payments made, from Guarantee.

HEARING:

This hearing was heard in the city of Toronto, Ontario on October 22, 2005 before me, M. Guy Jones. No witnesses were called at the hearing and it proceeded by way of an agreed statement of facts and documentary evidence was filed.

FACTS & ANALYSIS:

This arbitration arises out of an accident which occurred on August 11, 2003 at which time Jamie Towegishig, a pedestrian, was struck by a vehicle insured by Allianz Canada. At the time of the accident Mr. Towegishig was fifteen years of age and by virtue of a Protection Application brought by Dilico Ojibway Child and Family Services, was a ward of the Crown and committed to the care of Dilico. An application for accident benefits was submitted to Allianz on behalf of Mr. Towegishig and Allianz made payments pursuant to the statutory accident benefits schedule. On February 17, 2004, Allianz served a Notice of Dispute Between Insurers upon Guarantee, taking the position that Mr. Towegishig was a "dependent" of Guarantee's named insured, Dilico.

Guarantee submits that it is not responsible to reimburse Allianz for two reasons:

1. Jamie Towegishig was not dependent upon Dilico at the time of the accident, and

2. the Statutory Accident Benefits Schedule only contemplates dependency relationships between natural persons and not relationships between natural persons and corporate entities or the Crown.

I will deal initially with the first issue. Prior to the accident of August 11, 2003, Jamie Towegishig had been a ward of the Crown since 1996. While Jamie's mother, Melanie Towegishig and his grandmother, Joyce Bannanish, had visiting rights, neither of them had any financial responsibility for Jamie. Since April 2001 Jamie had been residing at the Real Futures group home in Belleville, Ontario, which received a per diem payment from Dilico. Melanie Towegishig lived in Thunder Bay during this time frame and would visit Jamie in Belleville and Jamie would go to Thunder Bay and Longlac, where his grandmother lived, for visits. On June 25, 2004 Jamie went to Thunder Bay for an access visit with his mother and visited his grandmother in Longlac from June 29 to July 9, 2003. On July 10, 2003 he returned to Thunder Bay and stayed with his mother, as his scheduled return to the Real Futures group home in Belleville had been delayed. On August 10, 2003 Jamie returned to Longlac to visit his grandmother and on August 11, 2003 Jamie was hit by a car while in Longlac. During his visit, Dilico provided his mother with $50 a week in A & P vouchers to pay for food.

Pursuant to section 2 (1) of Bill 59, the Statutory Accident Benefits Schedule for accidents on or after November 1, 1996, an "insured person" means:

> the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependent of the named insured or spouse, if the named insured, specified driver, spouse or dependent is involved in an

accident in or outside of Ontario that involves the insured automobile or another automobile

For an individual to be "dependent" for the purpose of Bill 59, the person must be "principally dependent for financial support or care on the other person or the person's spouse".

The case law that has developed with regard to the issue of financial dependency has developed such that individuals are considered financially dependent only if their own contribution to their financial support is less than the contribution from other sources of support. In interpreting the concept of dependency, the courts have focused on the following criteria as set out by the Court of Appeal in Miller vs. Safeco (1986) 13 C.C.L.T. 31.

1. Amount of the dependency
2. Duration of the dependency
3. The financial or other needs of the alleged dependent and,
4. The ability of the alleged dependent to be self-supporting.

Based on the evidence before me, there is no doubt in my mind but that Jamie Towegishig was a dependent of Dilico at the time of the accident. Jamie was only fifteen at the time of the accident. He had not earned any income prior to the accident and was totally dependent upon Dilico to provide him with the funding for shelter, food and other necessities of life. Neither his mother nor grandmother provided any financial support. This situation had existed at least as far back as 1996, or more than 7 years prior to the accident. Whatever support was required was provided by Dilico.

Counsel for Guarantee suggested that Jamie had been staying with his mother or grandmother for approximately six or seven weeks prior to the accident and that Dilico had only been paying $50 a week for food. Since the mother and grandmother had been providing shelter during that time, it was Guarantee's position that Jamie was dependent not upon Dilico but rather his mother or grandmother at the time of the accident. I am prepared to accept that arbitrators and the courts, when dealing with financial dependency issues, are prepared to put a "deemed value" to the services and goods provided, including shelter. The difficulty that I have with Guarantee's position in this case involves the timeframe in which one looks at the issue of dependency. Numerous arbitrators and judges have noted that you do not necessarily look at just the date of the accident when determining the dependency issue. Rather you look at the entire picture to determine what would be a realistic timeframe in order to determine the issue. In this case Jamie was merely visiting his mother and grandmother for a short period of time. It was a very temporary situation. One should not look just at the day or two before the accident to determine financial dependency. If one were to take that approach then a child who was visiting a friend for a few days or weeks might conceivably be found to be financially dependent upon the persons he was visiting. Each case must naturally be decided upon its' own unique set of facts. In this particular case, the overwhelming preponderance of the evidence suggests that Jamie remained financially dependent upon Dilico at the time of the accident. The trip to Thunder Bay and Longlac was simply a temporary access visit and nothing more. Jamie remained financially dependent upon Dilico at the time of the accident.

Having deciding the financial issue, the question remains whether a person can be dependent upon a corporation or the Crown for the purposes of the statutory accident benefits schedule. Guarantee takes the position that a person cannot be a dependent upon a corporation or the Crown, relying upon the Court of Appeal decision in R.L. vs. Harkness [1998] O.J. No. 2461. In that case, the trial judge simply found that the injured party was not an "insured person" under the no fault benefit schedule, section 2 (d) and (e) and section 3 of Ontario Regulation 273/90. The Court of Appeal in very short reasons, simply stated:

> "to succeed, the appellant must establish that the plaintiff is an insured person under either or both of the CAS and Province policies. The resolution of that issue depends upon the interpretation and application of section 2(e) of the statutory accident benefit schedule. In our view, section 2(e) only contemplates dependency relationships between natural persons and not relationships between natural persons and corporate entities or the Crown".

The Court, in the R.L. vs. Harkness decision was interpreting an earlier statutory accident benefit schedule, commonly known as the Ontario Motorist Protection Plan (OMPP) section 2 (e) of which schedule reads as follows:

> "insured person" in respect of a particular motor vehicle liability policy means, … the named insured his or her spouse, and any dependent of either of them who is not the occupant of an automobile or of rolling stock that runs on rails who is involved in an accident".

Counsel for Allianz notes that there has been a change in the wording of the applicable section of the legislation which applies in this case. Section 2 (1)(a) of Bill 59 states:

> "insured person" in respect of a particular motor vehicle liability policy, means, (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse or same sex partner of the named insured, and any dependent of the named insured, spouse, or same sex partner . . .

Counsel for Allianz argues that the change in the wording is significant and that a natural person can now be a dependent of a corporation or the Crown.

Unfortunately the Court of Appeal did not set out their reasoning in detail and we were therefore left to speculate on how they arrived at their conclusion.

Counsel for Allianz relies on the Interpretation Act, R.S.O. 1990, c.I 11, section 29 (1), which states:

> In every Act, unless the context otherwise requires, . . . "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.

Counsel for Allianz also relies on section 1 (1) of the Interpretation Act which states:

> The provisions of this Act apply to every Act of the legislature contained in these revised statutes or hereafter passed, except in so far as any such provision, (a) is inconsistent with the intent or object of the Act; (b) would give to a word, expression or provision of the Act an interpretation inconsistent with the context; or (c) is in the Act declared not applicable thereto.

While not expressly saying so, the Court of Appeal, in R.L. vs. Harkness presumably found that section 29 of the Interpretation Act meaning of "person" did not apply to the OMPP definition of "named insured" as it would have been inconsistent with the intent or object of the Act, or have been inconsistent with the context.

The OMPP definition of "insured person" used the words "the named insured, his or her spouse and any dependent of either of them". Clearly a corporation cannot have a spouse, and the Court of Appeal presumably decided that to apply section 29 of the Interpretation Act definition of "person" would lead to an interpretation inconsistent with the context.

I note that the definition of insured person found in Bill 59 does not use the phrase "his or her spouse". I am of the view that the change in the wording of the definition is important in this case. It is trite law that the legislature is deemed to have intended something when changing the wording of legislation, and in this case it is reasonable to suggest that the change in the wording would result in the Interpretation Act applying to this section.

I am reinforced in my belief that the term "person" should include a corporation or Crown by examining the Insurance Act as a whole. There are various sections where the term "person" is used and includes a corporation. For example, in section 1 of the Insurance Act the term "insurance" means the "undertaking by one person to indemnify another person against laws or liability . . .". Also, "insurer" means the person who undertakes or agrees or offers to undertake a contract". It is clear that in these instances "person" includes a corporation. Similar references to person, which would clearly include a corporation, can be found in section 224 (1) and section 244 of the Insurance Act.

I also note that the legislature used the term "person" when referring to the term "insured person" rather than "individual". The term individual is used, for example, in section 66 of Bill 59 and

therefore clearly refers to a person rather than a corporation. While this point is not determinative of our issue, it does tend to support the argument that if the legislature clearly wanted to exclude corporation or the Crown in the definition of "insured person", it could have done so very easily.

In light of the above, I find that the definition of "insured person" in section 2 of Bill 59 does contemplate dependency relationships between natural persons and corporations and the Crown. As such Jamie Towegishig was a dependent of Dilico for the purposes of the statutory accident benefit schedule and Guarantee is liable to pay Allianz for payment of accident benefits paid to or on behalf of Jamie Towegishig.

In the event the parties cannot agree on the issue of costs I may be spoken to.

Dated in the city of Toronto, this _____ day of November, 2005

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M. Guy Jones
Arbitrator