IN THE MATTER OF an Arbitration under the *Arbitration Act*, 1991 and pursuant to the provisions of Section 268 of the *Insurance Act* and Ontario 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 :

TD INSURANCE COMPANY

Applicant

- and –

CERTAS HOME & AUTO INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Derek Greenside – Kostyniuk & Greenside
Counsel for the Applicant, TD Insurance Company
(hereinafter referred to as "TD")

Celina Aguero – Desjardins General Insurance Group
Counsel for the Respondent, Certas Home & Auto Insurance Company
(hereinafter referred to as "Certas")

ISSUE - DEPENDENCY – FOREIGN INCOME AND ASSETS TO BE CONSIDERED?

[1] In the context of a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to the Claimant, Xiaofang Wang, with respect to personal injuries sustained in a motor vehicle accident which occurred on October 19, 2017. Such determination involves the issue of dependency and more particularly, whether a foreign pension and foreign assets ought be excluded from the analysis.

PROCEEDINGS

[2] The matter proceeded on the basis of Document briefs, Books of Authority, written submissions and oral submissions, which took place on December 17, 2020.

APPLICABLE LEGISLATION

[3] A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the *Insurance Act*, R.S.O. 1990, c.I.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

[4] As the Claimant, Xiaofang Wang, was a pedestrian struck by a vehicle insured by Certas at the time of this motor vehicle accident, the priority rules with respect to "non-occupants" are applicable. They are set out in Section 268(2) of the *Insurance Act,* which is set out as follows:

> In respect of non-occupants,
>
> **i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured;**
>
> **ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant;**
>
> iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose;
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.
>
> [emphasis mine]

[5] Section 3(1) of O. Reg 34/10 Statutory Accident Benefits Schedule defines "insured person" as follows:

> "insured person" means, in respect of a particular motor vehicle liability policy,
>
> (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 dependant of the named insured or of his or her spouse,

[6] Section 3 (7) 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 dependent of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse"

[7] The bolded sections of s. 268(2) of the *Insurance Act* as set out above would make the insurer of the striking vehicle responsible for the payment of statutory accident benefits, provided the claimant was not an "insured" under some other policy. The Respondent Certas claims that the Claimant Ms. Wang was principally financially dependent on her daughter and son-in-law, insured by TD, making the claimant an "insured" under the TD policy and placing TD at the highest rung of the priority ladder set out in s. 268(2). TD has submitted that the Claimant was not principally financially dependent on their insureds, making the insurer of the striking vehicle, Certas, the priority insurer.

FACTS

[8] The Claimant (Xiofang Wang) was born in China on January 10, 1952 and was 65 years of age at the time of the subject motor vehicle accident. The Claimant was residing with her daughter (Mingxin Guan a.k.a. Cindy Guan), son-in-law and grandson at 123 Hildenboro Square, in the City of Scarborough, Ontario, when she was struck (while a pedestrian) by a vehicle insured with the Respondent (Certas Home & Auto Insurance) on October 19, 2017.

[9] The Claimant submitted her completed Application for Accident Benefits to the Applicant (TD Insurance Company) on October 27, 2017. The Applicant TD insured a vehicle owned by the Claimant's daughter, Cindy Guan. The Claimant has submitted her accident benefits claim to the Applicant on the basis that she was principally financially dependent on the TD named insured. The Applicant TD disputes this and served the Claimant and Respondent Certas with their Notice to Applicant of Dispute Between Insurers on December 15, 2017.

[10] The Claimant Ms. Wang was a widow. Her husband died in 2001. She came to Canada in October 2013 on a temporary Visitor's Visa which was set to expire in June 2018. This was a special class of Visa referred to as a "Super Visa" which granted a longer temporary stay than would ordinarily be the case. However, in 2014 the Claimant applied to be a permanent resident of Canada and was granted that status in 2018. Her immigration status in Canada prohibited her from any employment.

[11] The Claimant's first language is Chinese and she has never taken any English language courses.

[12] The Claimant Ms. Wang had purchased pre-construction a condo in Da Chang City, He Bei Province, China, in 2013. Through an interpreter, the Claimant referred to it as a "home" on her Examination Under Oath, but her daughter Cindy clarified that the property

was a "condo". An explanation of the banking records also make reference to withdrawals for condo fees. The construction of that condo was completed in 2015. The value of that condo was estimated in excess of 600,000 Chinese Yuan. This would be about $117,000 Canadian dollars. The Claimant has never lived there. The condo was never decorated and sits empty. When asked why, she stated on her Examination Under Oath "I plan to live there". However, later in her testimony she stated, "I was planning to stay here (Canada) for the long term". As indicated earlier, the Claimant became a permanent resident of Canada in 2018.

[13] The Claimant was receiving a government pension (from China) prior to her involvement in the motor vehicle accident. The Claimant testified that it was in the amount of 4,300 Chinese Yuan monthly. This would amount to approximately $10,500 Canadian dollars annually. The bank records show deposits of various amounts but totaling about $10,500 Canadian. That pension is deposited into the Claimant's bank account which is located in Shang Gan Ling District, Yichun City, China. The evidence indicated that the Claimant's sister in China also had access to that account. Such access by the Claimant's sister was confirmed in a satisfied undertaking. The Chinese bank accounts make reference to withdrawals, but it is unclear exactly who withdrew the monies and for what purpose. The Claimant's evidence was that she did not transfer money from her Chinese bank accounts to her Canadian accounts and had only accessed those monies when she visited China. It would therefore appear that it was the Claimant's sister that was making these withdrawals while the Claimant was in Canada. There was no specific evidence adduced as to whether there were ongoing costs associated with the condo in China such as property taxes, utility costs or condo fees aside from information provided by the sister in China who indicated by way of a satisfied undertaking that some of the withdrawals were for condo fees and the Claimant's living expenses and medications.

[14] The Claimant's son (located in China) sent the Claimant $6,000 Canadian dollars after the accident, which she used to pay for her visiting traveler health insurance, laser eye surgery and return airfare to China for a visit. The Claimant's nephew (located in China) sent the Claimant $3,000-$4,000 Canadian dollars after the accident to help cover the Claimant's expenses.

[15] The Claimant came to Canada in 2013. She returned to China in September 2015 for approximately four months to visit her relatives and introduce them to her new grandson. She was accompanied by her daughter Cindy, who was on maternity leave, and her new grandson. They returned to Canada in January 2016. Over the 4 year period before the accident, this was her only trip to China.

[16] After the birth of her grandson in 2015, the Claimant looked after her grandchild in Scarborough, Ontario, 10 hours per day, Monday through Friday between January 2016 and the accident on October 19, 2017. The Claimant also spent two hours each day cleaning her daughter's/son-in-law's home and spent two to three hours each day preparing meals and cooking for the family in Scarborough, Ontario. The Claimant was not paid for these services.

The evidence indicates that there was no arrangement that she would be provided with food and accommodation in exchange for her services.

[17] The Claimant had her own room in her daughter's home. At no time did she pay rent. Her daughter provided all food consumed by her mother. The daughter helped with the costs associated with a cell phone from time to time. The Claimant would occasionally receive a cash allowance of $100 from her daughter. As the Claimant did not have a driver's license, most of the Claimant's transportation needs were provided by her daughter. The Claimant occasionally used a TD credit card and the daughter would make the monthly payments. The daughter also paid for trips to Niagara Falls and Canada's east coast. The daughter would also occasionally pay for gifts purchased by her mother for friends and relatives in China, occasionally provide $100 cash for spending money, as well as public transportation tokens.

Expert Evidence Regarding Financial Dependency

[18] Zainab Walji and Jim Forbes (PricewaterhouseCoopers LLP) completed an analysis on behalf of the Applicant TD, relating to the claim of principal financial dependency, and authored a report dated September 16, 2020, documenting the following:

- the Claimant's pension income from China, between October 2016 and October 2017, was $10,489.92 Canadian dollars (paragraph 22 of report)

- the bank balance in the Claimant's bank accounts in China, on October 20, 2016, were:

  Debit Card $1,856.74 Canadian dollars (paragraph 24 of report)

  New Line Retailing Account $322.25 Canadian dollars (paragraph 25 of report)

- the Claimant's annual income/means was $14,002.00 Canadian dollars prior to her involvement in the motor vehicle accident (paragraph 32 of report). This includes the annual pension income and the bank balances in her two Chinese bank accounts.

- the applicable after-tax LICO (Low Income Cut Off) for a one-person family in 2017 was $20,998.00 Canadian dollars (paragraph 35 of report). Accordingly, the Claimant with an income/means of $14,002.00 was providing 67% of her needs in the year preceding the subject accident and therefore not principally financially dependent on her daughter and son-in-law insured by TD.

[19] It should be noted that the accounting report makes reference to account balances and deposits, but makes no reference to withdrawals. A review of the banking records also shows intermittent withdrawals from the Claimant's two Chinese bank accounts throughout the two year period pre-accident, despite the evidence of the Claimant that none of these monies were sent to Canada. For example, the account confirms $10,489.92 in deposits from the Claimant's monthly pension, yet the last balance shown prior to the accident was about $6,000 Canadian. In the 12 month period preceding the accident, the bank records show withdrawals of approximately $7,300 Canadian from the two accounts. Many of the withdrawals were by ATM, indicating that it was her sister making the withdrawals.

ANALYSIS AND FINDINGS

[20] It is clear that the priority determination is dependent on the finding of whether the Claimant was principally financially dependent on her daughter and son-in-law at the time of the accident.

[21] 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.

[22] 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.

[23] Arbitrator Lee Samis confirmed that it was necessary to examine a claimant's "ability to be self-supporting" at the time of the accident when considering the issue of financial and care dependency in *Co-operators v. Halifax Insurance Company, 2001 CarswellOnt 10724.* He indicated that the question to be answered is whether or not the claimant had the ability to be self-supporting by providing for their own needs, more than such provision was required from any other source. It was found that it was appropriate to measure dependency by examining the individual's capacity to provide for their own needs.

[24] 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.

[25] 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.

[26] 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.

[27] 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.

[28] 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 Myers 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 Myers 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*".

[29] More recently and in a move toward a more statistical analysis of dependency, jurisprudence has emerged wherein information from Statistics Canada's Market Basket Measure has been employed. That data provides "the cost of meeting basic modest needs for different family sizes, for different parts of the country, segmented by size of community". In *The Wawanesa Mutual Insurance Company v, State Farm Insurance Companies* (Arbitrator Samis - September 13, 2018) the arbitrator preferred use of the statistical data of the "Market Basket Measure" or "MBM" approach to the other approaches aforesaid. Arbitrator Samis writes at p. 10 of his decision:

> "In order to compare resources to the cost of meeting needs I prefer to look at statistical information from Statistics Canada as I find the statistical approach is likely to be more reliable than the evidence of the witnesses here. I also thing that the components of the Market Basket Measure are more focused on the costs of meeting needs than the alternative of simply compiling an inventory of any and every expenditure.
>
> Statistics Canada publishes the "Market Basket Measure" data which gives us the cost of meeting basic modest needs for different family sizes, for different parts of the country, segmented by size of community. Additionally, the measure is adjustable to all sizes of families.
>
> According to information from Statistics Canada, the "basket" of goods and services measures a "specified basket of goods and services representing a modest, basic standard of living. Taken into consideration are the costs of specified quantities and qualities of food, clothing, footwear, transportation...". This is compiled by work done by Human Resources and Skills Development Canada during the 1990's.
>
> According to Statistics Canada the Market Basket Measure is a measure more sensitive to geographical variations and other scales.
>
> By reference to the Market Basket Measure we can credibly get a number that represents the denominator making the when making the 50% calculation that the regulation requires.
>
> I find the "Market Basket Measure" an appropriate source for this purpose."

[30] In cases where there are several contributors to a claimant's needs, another approach has emerged with respect to the analysis of dependency. It has been referred to as the "plurality approach". It finds its 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.

[31] 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.

[32] 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.

[33] 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.

[34] 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.

[35] 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.

[36] As jurisprudence currently stands the "mathematical", "LICO", "MBM" and "plurality" approaches are being applied by arbitrators of priority disputes involving dependency issues.

[37] Both parties seem to be in agreement that the 12 month period pre-accident represents the appropriate time frame for analysis.

[38] With respect to the Claimant's status in Canada, the Applicant TD has submitted that the decision by Xiaofang Wang to maintain her home in Da Chang City, He Bei Province, China and bank account(s) in China and return to China post-accident for the purpose of maintaining her Chinese passport, strongly supports a conclusion that Xiaofang Wang had not made a decision to remain in Canada permanently before the motor vehicle accident on October 19, 2017. The fact that she pursued permanent residency and had no definite plans to return to China suggests otherwise. On whole, I am satisfied that the Claimant's plan was to stay in Canada for the foreseeable future so as her daughter and son-in-law, both working full-time, had someone to see the grandson off to school and look after him after school until his parents returned home.

[39] The Applicant TD has submitted that it would be appropriate in the present circumstances to apply the statistical approach. The applicable after-tax LICO (Low Income Cut Off) for a one-person household in 2017 according to Statistics Canada was $20,998.00. The pre-tax LICO figure is $25,338. According to the accountant retained by TD, the Claimant's annual income/means was $14,002.00 Canadian dollars prior to her involvement in the motor vehicle accident on October 19, 2017. Her means were in the form of a pension from the Chinese government and small bank balances in each of the two accounts in China. According to TD, the Claimant was entirely at liberty to return to China at any time and live independently in the circumstances which prevailed prior to 2013 and during the interval she was living in China between September 2015 and January 2016. Therefore, TD has maintained that the Claimant was not principally financially dependent (having income/means of more than 50% of her after-tax LICO needs) on her daughter and son-in-law at the time of the accident and therefore not an "insured" under the TD policy. The insurer of the striking vehicle, Certas, would therefore stand in priority.

[40] In response, Certas has claimed that the Claimant was principally financially dependent on her daughter at the time of the accident. She was 65 years old and retired for at least a decade. She did not have legal capacity to work in Canada, nor did she speak English. She was unable to support herself in Canada. Most importantly, Certas has claimed that the Claimant's foreign pension income and assets must be excluded in the dependency analysis. Certas has claimed that there are appellate and arbitral decisions to support this proposition.

[41] The jurisprudence to which I have been referred have facts very similar to the facts in the case before me. They all deal with elderly claimants who have come to Canada and were residing with their children providing childcare and other household services. In each case, the claimant had assets or income in their home country. Nevertheless, in each case it was

ultimately held that that the elderly claimant was principally financially dependent on their child while residing in Canada. TD claims that these cases are distinguishable.

[42] In *Wawanesa Mutual Insurance Company* v. *Security National Insurance Co. (Arbitrator Robinson – April 30, 2012),* the claimant Mr. Kibria had come to Canada on a Visitor's Visa two years before the accident to live with his son and daughter-in-law. His Visitor's Visa had twice been renewed. His return airline ticket had expired. The evidence was that he had no intention of returning to Bangladesh. He was 81 years of age at the time of the accident. His son and daughter-in-law provided for his room and board while he was in Canada. He took care of his grandchildren some 30–35 hours per week, but was not compensated. He had a small pension of about $150 Canadian per month which ceased when he left Bangladesh. He owned assets in Bangladesh in the form of a home and an interest in a family-owned 50 acre parcel of land. Before leaving Bangladesh, he had handed over the keys to his home to his brother and allowed his brother to keep any income derived from the lease of the family-owned track of land. Given his immigration status in Canada, he was not permitted to work in Canada and had no source of income in Canada. He received no income from any source while in Canada. Factually, it was clear that the claimant's stay in Canada was permanent or at least for the foreseeable future. Wawanesa argued that Mr. Kibria's age and immigration status were dominant factors to be considered as was the "monies worth" of the extensive childcare services he was providing. Security National disagreed and argued that a strict mathematical approach should be taken and that with no source of income, the claimant was principally financially dependent on his son and daughter-in-law while in Canada. Arbitrator Robinson did not impute any income form the childcare services provided by the claimant. Despite evidence of foreign-owned assets, Arbitrator Robinson found that Mr. Kibria had no independent means to be self-supporting in Canada outside his relationship with his family. He found Mr. Kibria to be principally dependent on his son and daughter-in-law for financial support with Security National being the priority insurer.

[43] On appeal to the Superior Court, *Security National Insurance v. Wawanesa Mutual Insurance, 2013 ONSC 7589*, Morgan J. accepted the position advanced by Wawanesa that no income ought be imputed to the claimant for the childcare services provided by the claimant, which had been valued by the economist at between $13,285 and $17,271 annually. However, Morgan J. was critical of Arbitrator Robinson for failing to consider Mr. Kibria's assets consisting of a home and a family own piece of land) in Bangladesh. The Appeal Judge allowed the appeal on the basis that the claimant's visit to Canada was voluntary and that he could have returned to his home in Bangladesh where he had the resources to be entirely self-supportive. He noted that the assets entrusted to his brother would presumably be available to him if he were to return.

[44] On further appeal, the Ontario Court of Appeal in *Security National Insurance v. Wawanesa Mutual Insurance,* 2014 ONCA 850, overturned Morgan J.. The Court of Appeal disagreed that Arbitrator Robinson had erred in failing to account for the voluntary nature of the claimants dependence on his son and daughter-in-law. The Court of Appeal found that

Arbitrator Robinson's findings were reasonable given the circumstances of the case before him. The decision of the Court of Appeal is not detailed and may well lead to a conclusion that foreign owned assets, as opposed to available income, ought not be considered in the dependency analysis. TD has claimed that the background facts in the appeal decision are distinguishable from the facts in the case before me. I agree. Unlike the situation in *Security National*, Ms. Wang had more than simply an interest in property in her country of origin. Ms. Wang, unlike Mr. Kibria, had a pension income being deposited monthly into her Chinese account that TD claims were available to her while she was in Canada.

[45] The issue of whether foreign-owned assets should be considered in the dependency analysis was also raised in *Unifund Assurance Company* v. *TD Meloche Monnex (Arbitrator Novick - July 14, 2015)*. In that case, Ms. Paul, a retired Indian national, had arrived in Canada three months before the accident. She was 60 years of age. She had a 6-month Visitor's Visa. The Arbitrator found that the claimant's stays in Canada were considerable and likely to increase. The claimant had made four previous visits to Canada. The claimant's husband had passed away in the year preceding the accident. She had come to Canada on this occasion to help her recently separated daughter. An apartment had been rented for the claimant and her daughter. At issue was whether her assets in India, said to be a small house that she had shared with her son and his family and a $30,000 Fixed Deposit, should be considered in the analysis of whether she had the capacity to be self-supporting. Interest on the fixed deposit provided for a monthly income of about $167 - $250 Canadian dollars. Arbitrator Novick found that she was bound by the Court of Appeal's decision in *Security National* (supra) which preferred Arbitrator Robinson's approach of not including foreign-owned assets in the analysis. TD has claimed that this is a misinterpretation of the Court of Appeal findings in *Security National* (supra) and I would have to agree. As I read the decision, it would appear that the Court of Appeal found that foreign assets (which in that case consisted of a home that his brother was using, but presumably could be used by the claimant if he were to return to Bangledesh and a share in a 50 acre parcel of land) ought not be considered in a dependency analysis. On careful review, I take the references in the appeal to be only with respect to "assets" and not necessarily available "income". Keep in mind that Mr. Kibria in *Wawanesa* (supra) had no income as his government pension ceased when he left Bangladesh. TD in the case before me claims that Ms. Wang had a pension income being deposited monthly and some savings that were "available" to her and of sufficient size to provide for more than 50% of her basic after-tax LICO needs as established by Statistics Canada.

[46] Certas has also claimed that the facts of the present case are similar to those in *Allstate Insurance* v. *Intact Insurance* (Arbitrator Novick - October 5, 2015). The claimant Yan was an elderly grandmother with a Chinese pension. She was 76 years of age at the time of the accident. She had been in Canada for several years and had become a permanent resident. She provided caregiving services and some housekeeping as both her daughter and her son-in-law worked full-time. Her Chinese pension had an annual value of slightly in excess of $10,000 Canadian. The claimant used these funds on her return visits to China which occurred every year or two. She did not bring any of those monies to Canada

and never accessed them while in Canada. Both the claimant and her daughter confirmed this. Of particular importance is the factual finding made by Arbitrator Novick that the evidence indicated she was unable to access her pension while in Canada. Arbitrator Novick also concluded that no income ought to be imputed for the caregiving services provided. Arbitrator Novick considered whether Ms. Yan's Chinese pension should be included in the dependency analysis. She found that the claimant's pension income ought to be excluded from consideration since the claimant's pension income was not accessed, nor were they able to have been accessed according to the evidence while in Canada. Arbitrator Novick concluded that she was bound by a prior ruling of the Court of Appeal on this issue, but on this occasion stated that assets not "available" while living in Canada should not be considered.

[47] On appeal to the Superior Court, *Allstate Insurance* v. *Intact Insurance*, 2016 ONSC 5443, Faieta J. agreed that foreign income that is unavailable to a person should not be included in the financial dependency analysis. She found that Arbitrator Novick's decision to exclude Ms. Yan's pension income on the basis that it was not accessed, nor capable of being accessed by the claimant while she was in Canada, was not only reasonable, but also correct. TD has claimed that Ms. Wang's pension was "available" to her, unlike the situation in *Allstate* and hence the case is distinguishable. In addition, Justice Faieta confirmed that in the absence of actual financial contribution for childcare services provided, or an agreement that room and board would be provided in exchange for such services, then no monetary value ought to be imputed for those services.

[48] The arbitral and appellate jurisprudence set out above bear a striking resemblance to the facts before me but as indicated above, contain several distinguishing facts. There are some basic legal principles which emerge. It would appear that in situations where the evidence supports a finding that the claimant's stay in Canada was either permanent, or at least for the foreseeable future, the fact that the claimant had the means to return to his or her country of origin and live independently, does not mean that the claimant cannot be principally financially dependent on an individual while residing in Canada. It would also appear that in the absence of actual financial payment for childcare services provided or an agreement that room and board would be provided in exchange for such services, then no monetary value ought to be imputed for those services. It would appear that foreign assets (property) or foreign income unavailable to a claimant while residing in Canada ought not be considered in the dependency analysis.

[49] Clearly, if foreign income and assets were not to be considered in the dependency analysis, then the claimant in the case before me would without doubt be found to be principally financially dependent on her daughter, insured with TD, making TD the priority insurer. The jurisprudence outlined above requires closer scrutiny as TD has advanced the argument that the cases referred to above are distinguishable on the basis that pension income and bank deposits were "available" to Ms. Wang.

[50] I am of the view that there is merit in the arguments raised by TD as to how these cases might be distinguishable. It is therefore ever so important to analyze the evidence in the case before me as to whether the Claimant's available income and bank balances ought to be considered. To start with, there is no evidence before me as to the existence of any Chinese government restrictions on Chinese citizens removing money from the country. All that we have is the evidence that the Claimant chose not to access her bank deposits while she was in Canada. The banking records obtained (in relation to the New Line Transactions Account and Debit Card Account) from Ms. Wang's financial institution in China clearly reflect deposits of pension, but also that withdrawals were being made from her account while she was in Canada. Mingxin (Cindy) Guan confirmed that either her mother or her mother's sister would have access to those accounts and would have been the individual(s) responsible for making those withdrawals. A formal request was made by Applicant's counsel to have Ms. Wang's legal representative confirm the identity of the individual that had access to Ms. Wang's bank account(s) in China while she was in Canada. Ms. Wang's legal representative confirmed that Ms. Wang's sister, Gui Zhen Wang, was the individual that had access to the bank account(s) in China and that she helped Xiaofang Wang "do some banking transactions when needed during the time client was physically away and not able to do online banking." It can be inferred from the evidence that Xiaofang Wang, or her sister as appointee, had access to the funds which were deposited in her Chinese bank accounts during the interval of time the Claimant was in Canada. There was certainly no evidence to the contrary. Does this make the pension income and bank balances "available" to the Claimant? One might conclude that because the Claimant and her sister had access to the amounts in her bank accounts, that they should be considered "available" to the Claimant. The fact that the Claimant's son and nephew were able to forward funds to Canada after the accident leads to the conclusion that the Claimant's pension income and bank balances were available to her, should she have chosen to do so. Therefore, the case before me involving Ms. Wang is factually distinguishable from the cases outlined above.

[51] I am satisfied that available pension income and the interest accruing from the small bank balances in the Chinese accounts, as well as any other sources of revenue, ought to be considered in the dependency analysis. I am bound by the Court of Appeal decision in *Security National Insurance v. Wawanesa Mutual Insurance,* 2014 ONCA 850, not to consider foreign assets (which in my view would consist of properties and small bank balances) in such analysis. I am bound by the appellate decisions aforesaid not to consider whether an individual would have the means to live independently if he or she were to return home. The test for an individual residing in Canada for the foreseeable future is whether they are dependent on someone while in Canada. Lastly, I am bound by the appellate decisions aforesaid not to consider imputed income from the childcare services being provided in the absence of actual payment for those services, or an agreement that such services were being provided in exchange for room and board. In the case before me, I am satisfied that the Claimant's daughter would have supported her regardless of the provision of childcare services. The Claimant was living in Canada long before her grandson was born.

[52] Having made these findings, I am of the view that the Claimant's resources in the 12 month period, consisting of her pension income and small amount of interest on bank balances, were less than $11,000 Canadian. One must then consider what her "disposable" income was.

[53] A review of the banking records would appear to indicate that although $10,489.92 in pension income was deposited into the account during the 12 month period preceding the accident, there were also withdrawals of approximately $7,300 Canadian. The sister in China has indicated by way of satisfied undertaking that some of the withdrawals were for condo fees, the Claimant's living expenses and the Claimant's medications. There was no detailed evidence as to expenses that might have been incurred to maintain her condo investment (utilities, condo fees, property taxes). There was no evidence adduced indicating that the Claimant had to pay any income tax in China, but I would have to conclude, in the absence of such evidence, that her pension deposits were net of tax. There was no detailed evidence as to the amount withdrawn for "the Claimant's living expenses" or whether that was meant to be a reference to utilities and property taxes for her condo. There was no detailed evidence as to the costs of specific medication needed by the Claimant. The absence of complete evidence is common in dependency cases. However, on the totality of the evidence, one would reasonable conclude though that her disposable income after these expenses referred to was less than $10,000 Canadian. Comparing this to the pre-tax LICO figure of $25,338, leads to the conclusion that the Claimant was not able to provide for 50% of her basic statistical needs while in Canada.

[54] An issue raised in this proceeding was whether pre-tax or after-tax LICO statistics ought be used in the dependency analysis. Which LICO statistic to be used ought to be case specific. In most priority disputes involving a dependency issue, the income of the claimant is at a level where the claimant is paying little or no tax. If a claimant were paying a substantial amount in tax, then income levels would likely be high enough to provide for more than 50% of that individual's needs. That is why so many of the decisions in the past have used pre-tax LICO statistics to determine basic needs. I have yet to see a priority decision where after-tax LICO statistics were used. As in the case here, I cannot help but conclude on the evidence that there would have been little or no income tax payable on the Claimant's pension income of about $10,500 making the pre-tax LICO statistic of $25,338 more appropriate in the circumstances. A disposable income of less than $10,000 would be less than either 50% of either her pre-tax or after-tax statistical LICO needs in any event.

[55] Another way of looking at the dependency analysis and leading to the same conclusion, is by assessing the criteria set out in *Miller v. Safeco* (supra), as to whether the Claimant had the ability to be self-supporting. With an annual disposable income of what I have found to be less than $10,000 Canadian, a total far less than a minimum wage annual income, there is no way she could support herself while residing in the GTA. I realize that the ability to be self-supporting is only one criteria to be considered, but here it is supportive of the conclusion that her disposable income was insufficient to provide for 50% of her statistical basic needs.

[56] I am satisfied that at the time of the accident, the Claimant was principally financially dependent on TD's insureds. With application of the priority hierarchy set out in s. 268(2) of the *Insurance Act*, TD is the priority insurer as the Claimant is, with the dependency finding made, "an insured" under the TD policy, placing TD at the top rung of the priority ladder set out in the legislation.

ORDER

[57] On the basis of the findings aforesaid, I order that :

1. TD is the priority insurer;
2. The priority claim of TD is hereby dismissed;
3. TD pay the legal costs of Certas with respect to this Arbitration on a partial indemnity basis;
4. TD pay the Arbitrator's account.

DATED at TORONTO this 6th)

day of January, 2021.)

KENNETH J. BIALKOWSKI
Arbitrator