IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, and *ONTARIO REGULATION 283/95* THERETO;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIFUND ASSURANCE COMPANY

Applicant

- and -

TD MELOCHE MONNEX

Respondent

ARBITRATION AWARD

COUNSEL:

Jason R. Frost for the Applicant

Derek Greenside for the Respondent

ISSUE:

1. Was the Claimant principally dependent for financial support on her daughter, Niti Paul, at the time of the accident and therefore an "insured" under the TD Meloche Monnex policy ?

RESULT:

1. Yes, the Claimant was principally dependent for financial support on her daughter, Niti Paul, at the time of the accident. She is therefore an "insured" under the TD policy and TD is in higher priority to pay her claim in accordance with section 268(2)2(i) of the *Insurance Act.*

BACKGROUND:

1. Usha Paul was injured when a vehicle insured by Dominion of Canada struck a Toyota insured by Unifund, causing the Toyota to mount the sidewalk and strike her, while she was walking with her daughters. She suffered a fractured shoulder, fractured ribs, contusions to her head and other injuries.

2. Ms. Paul had arrived in Canada from India three months prior to the accident. She had obtained a six-month visitors' visa, and had planned to visit her two daughters, Niti and Schweta, who live in Toronto. Schweta was insured with The Personal Insurance Company, and Niti's spouse at the time of the accident was insured with TD Meloche Monnex ("TD").

3. Ms. Paul applied to Unifund, the insurer of the vehicle that struck her, for payment of accident benefits under the *SABS*. Unifund paid benefits to her and on her behalf, and subsequently pursued Dominion, The Personal and TD, alleging that they were in higher priority to pay her claim pursuant to section 268(2)2 of the *Insurance Act.* After participating in various steps in the process, Dominion and Personal were let out of the arbitration, and did not participate in the hearing.

4. Unifund alleges that the Claimant was principally dependent for financial support upon her daughter Niti, the TD insured, at the time of the accident. The parties agree that if the evidence bears this out, TD would be in higher priority than Unifund to pay her claim, by virtue of the Claimant being an "insured" under the TD policy. This was the only issue remaining at the time at the hearing, and the sole focus of the evidence presented.

ARBITRATION AGREEMENT:

The parties have asked me to record their oral agreement to the following terms:

1. I, Shari Novick, have been retained to arbitrate the question of whether the Applicant, Unifund Assurance Company or the remaining Respondent, TD Meloche Monnex, is in higher priority under subsection 268(2)2 of the *Insurance Act* to pay the claims bought under the *SABS* by Usha Paul, arising out of an accident that she was involved in on July 23, 2010.

2. Counsel agree that either party can appeal the arbitration decision within thirty days of the decision being issued, without leave, on a question of law or mixed fact and law.

RELEVANT PROVISIONS:

The system for determining the priority of insurers to pay claims is set out in section 268(2) of the *Insurance Act*. The relevant parts are set out below:

Insurance Act -

> ***268(2)*** *The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> > *2. 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 accident from which the entitlement to benefits arose,*
> > >
> > > *iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

268(3) *An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.*

Regulation 403/96:

2. *(1) In this Regulation,*

"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 of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

(i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

2.1 (6) *For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse.*

THE EVIDENCE:

5. The Claimant and her two daughters were examined under oath in April 2012, three years prior to the hearing. The transcripts of those examinations were filed and relied on by counsel, along with two signed statements from the Claimant that were provided earlier in the process. Copies of bank statements and documents related to Ms. Paul's visa status were also filed at the hearing.

6. Both the Applicant and Respondent retained accountants to review the evidence and produce expert reports for use at the hearing. These reports were also filed and relied on by the parties. Both accountants were called as witnesses at the hearing, and were the only witnesses to provide *viva voce* evidence.

7. Many important facts were not in dispute. The Claimant was sixty years old at the time of the accident. She was a citizen of India, who had never worked outside of the home. She has three children – a son, who lives in India, and two daughters, Niti and Schweta, who live in Onario. She has spent most of her life in India, but had come to Canada to visit her daughters on four occasions prior to the accident. The length of these trips varied - she and her husband had spent approximately two and one-half months in Canada in 2002 on their initial visit, and had returned in 2006 for approximately five and one-half months.

8. The Claimant's husband died in January 2008. She then came to Canada on her own in May 2009, and returned to India four months later in September 2009. Her daughter Niti had separated from her husband in August 2009, while her mother was in Canada. Niti then travelled to India in January 2010, and she and her mother returned to Toronto together a few months later in April 2010. The Claimant had obtained a six-month visitor's visa prior to leaving. The accident in question occurred three months later, on July 23, 2010.

9. The evidence indicated that when the Claimant and her husband had visited Canada in 2006, and when Ms. Paul came alone in May 2009 after her husband's death, she had stayed at her daughter Niti's home. When Niti separated from her husband in August 2009, both she and her mother had moved into Schweta's home and lived there with her and her family. The Claimant returned to India one month after that, as planned, in September 2009.

10. Ms. Paul explained that while in India, she lived in a home that she and her husband had purchased shortly before his death. Her son and his family also lived there, and she advised that her son paid for all of the expenses related to that property. She explained that her husband had experienced a business setback shortly before he died, and that they were forced to sell their larger home, and buy a smaller home on the outskirts of town. She testified that her husband had invested the remaining funds from the sale of the larger home, which she estimated to be equivalent to $30,000 (in Canadian funds), into Fixed Deposits from which she received monthly interest payments.

11. It was agreed that these monthly payments were the only regular source of income for Ms. Paul. She estimated during her Examination Under Oath that the interest payments amounted to the equivalent to $167 per month (Canadian funds). At another point, she testified that the monthly amount that she received was the equivalent of $250. Either way, she testified that these funds provided just enough for "one and one-half to two meals each day" while she was living in India. The parties agree that the Claimant did not receive these interest payments while she was in Canada, and that she did not earn any income while staying here.

12. The evidence indicated that while Niti and her mother were in India together in early 2010, Schweta had made arrangements to rent a two-bedroom apartment in Mississauga for her sister and her mother to live in, upon their return to Canada that April. Schweta paid the first and last month's rent, amounting to $2,800, and had purchased furniture for the apartment. She estimated the cost of the furniture to be approximately $10,000. Both sisters testified that Niti had likely repaid her sister for the two months of rent that she had put down, but had not repaid her the money she had spent to furnish the apartment.

13. The Claimant testified that she had decided to come to Canada in April 2010 in order to help Niti. When asked to provide further explanation, she stated that Niti lived alone and worked full-time, and that she intended to help her with household activities like laundry, cooking and cleaning. She testified that she in fact had done so, for the three months that she was in Canada prior to the accident. Ms. Paul stated that she had not contributed any funds toward the $1400 monthly rent for the two-bedroom apartment that they shared, and that Niti had paid for all of the groceries and other household expenses.

14. The Claimant had not scheduled a return date to travel back to India at the time of the accident, but suggested that it would have been no later than October 2010, when her visitor's visa would have expired. She explained that she applied for an extension of her visa after the accident, as her injuries prevented her from traveling back by October. Her visa was extended to December 2012, and she has now been granted permanent residency status. When asked how often she had planned to visit Canada in the event that the accident had not occurred, Ms. Paul

answered “whatever time – whatever- I don’t have my husband. Whatever time plan would have permitted me, I would have come here to help Niti”.

15. Aside from the transcript of her evidence from the Examination Under Oath, counsel also referred to a signed statement provided by Ms. Paul to a Unifund representative on August 24, 2010, some four months after the accident. In this statement, she states that she would “not be considered financially dependent on anyone for support at the time of the accident” and that she paid for her own medical coverage. She repeated “I support myself financially” at a later point in the statement.

16. The Claimant provided a further signed statement to The Personal approximately nine months later, in May 2011. She repeated in that document that she did not financially depend on either of her daughters, and that she was living with her daughter Niti at the time of the accident. She provided the following details –

> *My daughters in Canada do not support me financially. My daughters supply the groceries but sometimes I pay for groceries as my son in India sends money, a bank transfer from my own account in India to my daughter Niti’s account in Canada for my spending expenses. I do not pay rent to my daughters to live with them. I do not have to pay any utility expenses. I buy my own clothes while in Canada. I pay for my own diabetic medication from the money my son transfers to Canada. I pay for all of my own expenses in Canada. My daughters do not support me financially in any way.*

17. At another point in this statement she provides that her son had transferred around $4,000 to her daughter’s account since she had arrived in Canada, although it is not clear whether that was before or after the accident. Interestingly, both Niti and Schweta each provided signed statements at the same time stating that “I do not support my mother Usha Paul financially while her stay in Canada”.

18. I note that in the Application for a Visa Extension filed on the Claimant’s behalf on September 2, 2010, one week after she had provided the first statement outlined above, Ms. Paul confirmed that she had $5,000 in Canadian funds and that “my daughters Niti Paul and Schweta Aggarwal support me with all my needs.”

19. Clearly the notation in the Visa Application is at odds with what is set out in the Claimant's signed statements. And, much of the evidence provided by Ms. Paul and both of her daughters in the course of their Examinations Under Oath was inconsistent with the information set out in the statements above. Given that the testimony provided in the course of the examinations was much more detailed, and was provided in response to thorough questioning by counsel representing three different parties to the priority dispute, I find it to be more persuasive.

20. I also note that the first statement that Ms. Paul provided to Unifund was provided in the context of the adjusting of the accident benefits claim. It is possible that the Claimant skewed her answers in a way that she may have perceived was most beneficial to her claim. She was not asked by counsel at the examinations why her evidence differed from the contents of the signed statements in a material way. In any event, I accept the evidence that the Claimant and her daughters provided at the examinations whenever it conflicts with that provided in the other documents filed.

21. Niti Paul testified that she had paid for most of her mother's expenses when she had come to visit her in Canada in 2009 for four months. The Claimant testified that Niti had paid for half of the cost of her airline ticket to come over, while she had paid for the other half. Niti acknowledged that her sister Schweta would have purchased and paid for some groceries during that visit, if they would all be eating together. She also agreed that when the two of them had moved into Schweta's home in August 2009, after she separated from her husband, that Schweta would have paid for groceries and other expenses during their stay. Schweta confirmed that her mother had not contributed financially to any of the the household expenses, but that she had performed household chores like cooking meals and cleaning while she stayed there.

22. Both sisters agreed that Niti had paid for groceries and other household items consumed by their mother "most of the time" during the three months that she was in Canada prior to the accident in July 2010. Niti estimated that she paid for approximately 80% of the groceries purchased during this period, while Schweta would have paid for 20%. Schweta testified that she thought that Niti had paid for her mother's airline ticket from India in 2010 as well.

23. When Schweta was asked how often she had expected her mother to visit Canada, if the accident had not occurred, she responded that she and her sister had hoped that she would come to Canada once every year or two, and stay for approximately six months at a time.

24. Both sisters also testified that they had decided to open a joint bank account with PC Financial in either 2008 or 2009, prior to the accident, in order to have an "emergency fund" for the benefit of their mother. Schweta explained that after their father's death, she and Niti realised that they may need to provide financial support to their mother, and decided that they should have some money saved up in case any unforeseen health-related expenses arose.

25. Both sisters' evidence was essentially consistent on this issue. Schweta explained that she and her sister had both agreed to contribute to the account, but that they did not have a set schedule for depositing funds, nor an expectation that they would contribute equally. The balance in the account at the time of the examinations was estimated to be approximately $8,000. They both testified that Schweta had contributed approximately $5-6,000 since the account was opened, while Niti contributed approximately $2-3,000.

26. Niti testified that the funds in this account were not used to pay for her mother's regular expenses while she was in Canada, as Niti she was able to cover these with her salary. Niti also stated that the account was sometimes used by the sisters to transfer money to each other, and gave an example of her sister lending her some money for a down payment on a house that she had purchased, and depositing it into the account so that she could withdraw it when required.

27. The bank records for the sisters' joint account were obtained after the Examinations Under Oath. They show that the account was opened in July 2007. Various deposits are shown, for varying amounts. I note that in May of 2010 an amount of $5,000 was deposited into the account, and then a withdrawal of $10,495 was made ten days later. On June 21, 2010, the records show a wire from "Global Star Holidays" was received in the amount of $1,475. This was one month prior to the accident. Unfortunately, as these records were received by counsel

after the EUO's, the sisters were not questioned on these entries. Ultimately, these documents raise more questions than they answer.

Accounting evidence

28. Robert Pellegrini was retained by Unifund to provide an expert opinion on whether the Claimant was principally dependent for financial support upon either of her daughters. Richard Cameron was retained by TD to do the same. As mentioned above, both accountants testified at the hearing. They were each tendered as expert witnesses, and accepted as such.

29. Mr. Pellegrini explained that he attempted to determine the Claimant's monthly expenses and resources from the transcripts of examinations conducted and the other documents provided to him. He also considered her past pattern of visiting Canada, and the fact that arrangements had been made prior to her arrival from India in April 2010 to rent a two-bedroom apartment for her to share with Niti. He testified that after considering all of the above information, he concluded that a three-month time frame prior to the accident on July 23, 2010 was the appropriate period upon which to base his analysis.

30. Mr. Pellegrini calculated that Ms. Paul received the equivalent of $250 (Cdn.) monthly in interest income from her fixed deposits in India. He then subtracted monthly amounts for the estimated cost of her diabetes medication and premiums for the travel insurance policy that she had purchased, and arrived at a net amount of "earnings" of $167 per month. He also imputed a value of $461.50 per month for the household services that she provided to Niti during the three months that she lived with her, a small component of which was attributable to the time she spent occasionally babysitting Schweta's young son. He accordingly arrived at an approximate total of $629 for her monthly earnings.

31. Mr. Pellegrini explained that he had reviewed the evidence collected regarding the Claimant's monthly expenses during this time frame, but found that information was lacking with regard to many key items. As a result, he relied on Statistics Canada's data found in the publication "Spending Patterns in Canada" 2009 Average Expenditure Per Household (referred

to as the "low-income cut-off" figures) for the Toronto area, and came up with a monthly figure of $1,859 to represent her expenses.

32. Based on the figures above, Mr. Pellegrini concluded that the Claimant was only able to contribute 33% toward her own financial needs, and was therefore not financially independent. He also calculated that Niti contributed 45-47% towards her mother's support, while Schweta provided approximately 20%. Following the reasoning in Arbitrator Densem's decision in *Economical v. Aviva* (January 29, 2013), he determined that Ms. Paul was principally dependent for financial support upon her daughter, Niti.

33. Mr. Pellegrini acknowledged in his testimony that aside from tabulating the hours that Ms. Paul spent on household chores, and subtracting the time that she would have spent on cooking and cleaning for her own benefit in order to reach a value of the household services she provided, it would be reasonable to simply estimate the difference in cost to Niti between renting a one-bedroom or bachelor apartment and a two-bedroom apartment, as she had done. He explained that it was fair to assume that it was reasonable for Niti to rent a more expensive two-bedroom apartment that would accommodate her mother, if she received the "value" of her mother's household services by doing so. Referring to statistics, he came up with a figure of $400 to represent this difference, and stated that this sum could also be imputed to be the value of services provided.

34. On cross-examination, the witness agreed that Niti's increased costs in renting a larger apartment and the value to her of receiving her mother's assistance with cooking and cleaning essentially amounted to a "wash", and could therefore be "removed from the equation". He testified that if the imputed value of household service provided by the Claimant was not taken into account, Niti's relative contribution to her mother's support would increase to 65%.

35. Finally, Mr. Pellegrini acknowledged in his testimony that he had not incorporated either the principal amount of Ms. Paul's investments in India, estimated to be approximately $30,000 in Canadian dollars, or the value of the home that she or her husband's estate owned in India, into his calculations. When asked why he had not done so, he responded that the evidence was

unclear about whether she had unencumbered ownership of the house, and that she was unlikely to sell it as her son and his family lived there. He also stated that while she technically had access to the principal amount of the Fixed Deposit, she had not transferred it to Canada, did not collect her interest payments while she lived in Canada, and that as it represented her "nest egg", she was unlikely to liquidate it.

36. Richard Cameron was called by TD to provide an opinion on financial dependency. In a report dated November 27, 2014, Mr. Cameron stated that he was "unable to determine with certainty if Ms. Paul was principally dependent for financial support on her daughter Niti", but that it appeared that she was not. Mr. Cameron did not undertake any calculations or set out any tables or statistics in his report. He stated in his testimony that he had used a conceptual analysis rather than calculations based on figures, as he had not been provided with sufficient information to perform accurate calculations.

37. Mr. Cameron noted in his report that the Claimant had spent nine months of the year prior to the accident in India, and only three months of that year in Canada. He also noted that on the evidence assembled, it appeared that while in India, she was not financially dependent upon anyone, except perhaps her son who lived with her in the home that they shared. He concluded that it was therefore not appropriate to limit the dependency analysis to a three-month time frame, as Mr. Pellegrini had done. He stated that using a one-year time frame would provide a better reflection of the Claimant's financial status at the time of the accident, as her pattern of past visits to Canada seemed to fluctuate but had never exceeded four months.

38. Mr. Cameron corrected the above assumptions in his testimony at the hearing. He explained that when he reviewed the evidence more closely, he realised that the Claimant had been in Canada from May to September 2009, and then for three months in 2010 prior to the accident, and that it was more accurate to say that she had spent approximately five months in Canada, and seven months in India in the year preceding the accident in July 2010. He reviewed both the Claimant and Niti's travel schedule for this one-year period, and concluded that Ms. Paul had only stayed at Niti's home for approximately one-third of the time between late July 2009 and the date of the accident in late July 2010. He accepted that she would have been

financially dependent upon Niti during those months. He stated, however, that she would not be considered principally dependent for financial support upon Niti if the one-year period prior to the accident was considered.

39. Mr. Cameron acknowledged under cross-examination that he has generally adopted a "one-year time frame" in the twenty or so opinions that he has been asked to provide on financial dependency questions in the past. When questioned more closely, he admitted that he had not authored any reports in which he determined that anything less than a one-year time frame should be considered, although he had reviewed a colleagues' report in which a six-month snapshot was considered.

40. Mr. Cameron also provided an updated report to counsel for TD prior to the hearing, dated December 2, 2014. This report is identical to the earlier one, save for some comments regarding the Court of Appeal's decision in *Security National v. Wawanesa* (2014) ONCA 850 (CanLII). Mr. Cameron had cited the Superior Court's decision in that matter in his earlier report, noting that Justice Morgan had determined that the arbitrator had erred in finding that the claimant who had lived in Bangladesh and was self-sufficient while there was financially dependent upon his son while he was in Canada.

41. The Court of Appeal overturned this decision, and restored the arbitrator's award. Counsel for TD then forwarded this decision to Mr. Cameron for comment. Mr. Cameron suggested in his addendum report that the fact that Mr. Kibria, the claimant in that case, had been in Canada for seventeen months prior to being involved in an accident, distinguished that finding from the circumstances of this case, as Ms. Paul had only been in Canada for three months before becoming involved in her accident, and that this decision did not affect his earlier determination.

PARTIES' ARGUMENTS:

Unifund's submissions

42. Counsel for Unifund contended that the three-month period preceding the Claimant's accident is the best time frame to apply to the dependency analysis in this case. He stated that

this period, while she was in Canada living with her daughter Niti, best reflects her reality at the time of the accident. He submitted that the twelve-month period suggested by TD's expert is artificial, and does not provide a realistic picture of her life at that point in time.

43. Mr. Frost suggested that when Ms. Paul was injured in the accident in July 2010, her life was still "in transition" following her husband's death. She was coming to terms with the fact that her husband was no longer her source of financial support, and she was becoming more active in her daughters' lives. He suggested that she had not yet developed a predictable lifestyle or routine. He noted that she had spent four months in Canada in 2009, and was planning to spend another six months here in 2010.

44. He submitted that the evidence was clear that the Claimant was becoming more involved in particular in her daughter Niti's life, as she recovered from her separation and transitioned back to full-time work as a single person, and that Ms. Paul had been spending much more time with Niti, and intended to keep doing so.

45. Counsel noted that both accounting experts agreed that the Claimant was clearly principally dependent upon Niti for financial support during the three-months prior to the accident in July 2010. They also both endorsed Arbitrator Densem's approach in *Economical v. Aviva, supra*, that after selecting a time frame to analyse, an arbitrator should determine the cost of the claimant's needs, and then determine whether he or she can either provide for, or reasonably has the capacity to provide for 51% of them. If that is not the case, the arbitrator's task is to 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" (at pgs. 42-43).

46. Mr. Frost submitted that when this exercise is undertaken in this case, it is clear that the Claimant is principally dependent upon her daughter Niti for financial support. He contended that Mr. Pellegrini's calculations lead to the conclusion that the Claimant was only able to contribute enough from her own earnings to meet one-third of her living expenses, while Niti contributed either 47% or 65%, depending on whether a value was attached to the cost of her

mother's services. He suggested that this was reasonable and is the best assessment of the Paul family's financial circumstances at the time of the accident.

47. Counsel suggested that even if a twelve-month period is used for the dependency analysis, it is clear that the Claimant did not have the means to be self–supporting. He noted her evidence that the interest that she receives from her Fixed Deposits in India is only enough to cover one to two daily meals while she is living there, and clearly therefore does not cover the cost of shelter, utilities, her medication expenses, airfare to Canada and insurance premiums. Mr. Frost noted Ms. Paul's evidence at the Examination Under Oath that "In India this small money could give me one-and-a-half to two meals a day or – as I'm over here …I'm living with my daughters so they help me out with everything. "

48. Counsel for Unifund also cited Arbitrator Cooper's comment in his decision in the case of *Allstate and ING Insurance Company and Aviva Canada,* (May 2014) to the effect that if the typical one year 'period in time snapshot' does not accurately reflect the true state of affairs at the time of the accident, the timeframe can be enlarged or reduced to better reflect the financial circumstances at the time of the loss. Mr. Frost noted Arbitrator Jones' decision in the *Co-operators v. Gore Mutual* case (February 12, 2008), in which he determined that a nine-month time frame was appropriate for the dependency analysis in that case because the claimant had transitioned into a new stage of life.

49. Mr. Frost urged me to accept Mr. Pellegrini's evidence over that of TD's expert, Mr. Cameron. He pointed out that Mr. Cameron did not apply the criteria set out in the *Miller v. Safeco* (1985) 50 O.R. (2d) 797 (C.A.) decision, such as the amount and duration of the Claimant's dependency, and her ability to be self-supporting, and that Mr. Cameron had set out in his report that he did not have sufficient information upon which to base a determination of financial dependency. In contrast, Mr. Pellegrini used the available evidence and relevant statistics in order to calculate the Claimant's needs and stream of income.

50. Counsel for Unifund also noted that Mr. Cameron suggested that it was not appropriate to restrict the analysis to the three-months that the Claimant had spent in Canada before the

accident, because she had been a visitor in Canada during that period. Mr. Frost submitted that the court was clear in its rulings in *Security National v. Wawanesa, supra,* that a claimant's visitor status is not an appropriate factor to consider when assessing dependency. He submitted that Ms. Paul was hardly a transient visitor to Canada, as she had traveled here several times, and had two daughters and a grandson living here. Her daughters had arranged to rent a two-bedroom apartment in order to provide her with her own room during her extended stays, which they expected to happen more frequently.

TD's submissions

51. Counsel for TD cited Arbitrator Bialkowski's comment in *Echelon General v. Wawanesa Mutual Insurance* (November 2008) that the case law directs arbitrators to take the "big picture" approach when deciding which time frame to consider when embarking on a dependency analysis. He contended that Mr. Cameron's opinion that a "one-year" pre-accident time frame be used in this case was more in keeping with the case law, and the big picture view of Ms. Paul's life around the time of the accident, than the much shorter time that Mr. Pellegrini, Unifund's expert, endorsed.

52. Mr. Greenside noted that the Claimant had visited Canada four times in the eight years between 2002 (her first visit) and 2010 (the year of the accident), and suggested that it was reasonable to assume that she would continue to do so every couple of years, as her health and finances permitted. Counsel pointed out that the Claimant had lived in India for seven of the twelve months prior to the accident, and had testified that she was able to live on the approximately $250 monthly in interest payments that she received while there.

53. Counsel also noted that of the five months that the Claimant had spent in Canada in the year prior to the accident, she had split her time between both of her daughters' homes, staying with Schweta and her family for one or two months after Niti's separation from her husband, and at Niti's home for three months.

54. Counsel referred to the uncontested evidence that Niti had gone to India in January 2010, and had mostly stayed in her mother's home for the three months that she was there. He

suggested that Niti would presumably have been financially dependent upon her mother and/or brother (who also lived there and paid the household expenses) for her living expenses for roughly the same period of time that her mother was dependent upon her daughters while she was living in Canada.

55. Mr. Greenside urged me not to accept Mr. Pellegrini's evidence, claiming that he had ignored or refused to acknowledge some important points. He pointed out that Mr. Pellegrini did not take into account that the Claimant owned the equivalent of $30,000 Canadian dollars in investments in India, and that she owned the home that she lived in there, with an estimated value of approximately $50-60,000 (in Canadian funds). He also noted that in calculating the Claimant's monthly expenses, Mr. Pellegrini pick and chose between the amounts in the Statscan tables and what was provided in evidence, to suit his purposes.

56. Counsel also noted that Mr. Pellegrini similarly would not consider the possibility that the $5,000 deposit that the bank records indicate was transferred into the sisters' joint account in May 2010 could have come from their brother in India. He suggested that Mr. Pellegrini had refused to consider this for the sole reason that it would force him to conclude that, following the approach endorsed by Arbitrator Densem in *Economical v. Aviva, supra,* Ms. Paul would be principally dependent for financial support upon her son in India.

57. In sum, Mr. Greenside contended that it is not enough for Unifund to suggest that the Claimant did not have the means to be self-supporting, as Mr. Pellegrini seemed to focus on. He submitted that as the Applicant in this case, Unifund bears the onus to prove, on a balance of probabilities, that the Claimant was principally dependent for financial support upon Niti, and argued that it had failed to do so.

58. Finally, counsel for TD noted that while Justice Morgan's decision on the appeal of Arbitrator Robinson's award in *Security National v. Wawanesa, supra,* was overturned on further appeal, the Court of Appeal did not criticise Justice Morgan for considering the assets that Mr. Kibria owned in Bangladesh, and suggesting that they be taken into account in the dependency

analysis. He submitted that I should therefore consider Ms. Paul's Indian assets and factor them into the analysis.

Reply submissions:

59. Mr. Frost highlighted a few points in his reply submissions. He noted that there was no evidence before me related to the source of the $5,000 deposit shown in the May 2010 bank records filed, and that I should not entertain the Respondent's suggestion that it came from the Claimant's son in India.

60. He also emphasized that in the absence of an opinion on dependency from TD's expert accountant, who reported that he could not reach a conclusion on the dependency issue due to insufficient information having been provided, I should accept Mr. Pellegrini's opinion that the Claimant was principally dependent upon Niti for financial support.

61. Mr. Frost noted that the evidence before me was inconclusive regarding whether Ms. Paul was the legal owner of the family home in India, and whether she could sell it if she chose to. He urged me in any event to take the same approach as Arbitrator Robinson followed in *Security National v. Wawanesa, supra,* and to not include any assets that Ms. Paul may have had in India into the analysis.

62. He disputed Mr. Greenside's contention that the Court of Appeal did not take issue with Justice Morgan's findings in the case that Mr. Kibria's assets in Bangladesh should be included in the analysis of whether he was financially dependent upon his son. He noted that the Court of Appeal affirmed Arbitrator Robinson's approach, and pointed out (in para. 5 of its decision) that the arbitrator had considered Mr. Kibria's ability to earn income, and the fact that he lived in Bangladesh and had property there, and that his finding of financial dependency was "a reasonable one" (para. 8). As Arbitrator Robinson had not included the assets owned by Mr. Kibria in Bangladesh in his analysis, Mr. Frost argued that the Court of Appeal's determination explicitly approves that approach.

ANALYSIS & FINDINGS:

63. Many judges and arbitrators have considered how to apply the definition of "financial dependency" in the *Schedule* to a myriad of factual circumstances, in order to determine whether a claimant is an "insured" within the context of the priority ladder set out in section 268(2) of the *Act*. While some general themes have certainly emerged from the case law, some basic questions remain regarding the preferred approach to follow. The Court of Appeal has commented on aspects of the required analysis on a few occasions, although they have not issued any ruling which could serve as a general directive on how a determination of financial dependency should be approached since upholding (most of) the Superior Court's finding in the seminal decision in *Miller v. Safeco*, *supra*, in 1985.

64. While the criteria outlined in *Miller v. Safeco* and confirmed by the Court of Appeal – namely, the amount and duration of the dependency, the financial needs of the claimant and his or her ability to be self-supporting – have been cited in almost every case in the thirty years since it was decided, the decision itself is quite brief. The issue of whether a plaintiff was a "dependent relative" was brought to the court by way of application for a determination of a point of law. The judge who heard the application did not rely on any accounting or other expert evidence. The analysis conducted is very basic, and appears to be premised upon the judge's stated view that the legislative intent of the provision in issue is to broaden insurance coverage to include family members as persons insured under the policy in question. The Court of Appeal's decision upholding the lower court's finding that a son who worked full-time while living with his parents was a "dependent" was set out in just four lines.

65. Since then, the Court of Appeal has only considered cases addressing financial dependency on a couple of occasions. The recent ruling in *Security National v. Wawanesa, supra,* will be discussed at the end of this decision. The focus of the other two cases relate to the choice of the applicable time frame. The Court approved Arbitrator Samis' analysis in *Liberty Mutual Insurance v. Federation Insurance Company* (May 7, 1999) aff'd [2000] O.J. No. 1234 regarding the selection of a time frame to consider when undergoing a dependency analysis. In *Oxford Mutual Insurance Company v. Co-operators General Insurance Company* (2006) 83 O.R. (3d) 591, Justice Lang states -

> *[27] In Liberty Mutual Insurance Co.* v. *Federation Insurance Co. of Canada, Award of Arbitrator Samis, 7 May 1999, affd [2000] O.J. No. 1234 (C.A.), the arbitrator noted that:*
>
> *[r]elationships change from time to time, perhaps suddenly. Transient changes may alter matters for a short period, but not change the general nature of the relationship. A momentary snapshot would not yield any useful information about these time-dependant relationships. . . . The evaluation should be made by examining a period of time which fairly reflects the status of the parties at the time of the accident.*
>
> *I agree.*

66. The phrase "period of time which fairly reflects the status of the parties at the time of the accident" has become standard in the dependency lexicon, and will be discussed further below.

67. A recent Superior Court decision upholding Arbitrator Cooper's decision in *Allstate v. ING Insurance and Aviva Canada, supra,* provides some interesting guidance on the general approach to take on financial dependency cases. Justice Myers begins his decision by noting the Appellant's argument that if even one of the various numbers that the arbitrator applied in his analysis was varied, the result would change, given how close to the "50% line" the calculations were. The judge states:

> *This approach, while compelling to read and hear, is based upon two false premises.*
>
> *First, it assumes that the mathematical result necessarily and solely determinesthe outcome. In my view, the math is just a part of the test that has arisen out of the seminal decision of Miller v. Safeco, 50 O.R. (2d) 797 (C.A.). I agree with the insightful comments of Corbett J. in State Farm v. Bunyan, 2013 ONSC 6670, at paras. 19 to 22 to the effect that while the math is an important factor, it is not the only factor. The legal issue is whether R was principally dependent on her mother and her mother's spouse. In Miller, the Court of Appeal approved four factors to consider dependency. Even those four are not necessarily the exclusive considerations. A change in the math from 50.001% dependency to 49.999% dependency may or may not overcome other aspects of the factual dependency between the relevant parties.*

> *All of the accountants before the Arbitrator agreed that the math that they were performing was artificial. I would say highly artificial and necessarily inaccurate is a better description. A change of $8, while perhaps crossing the magical mathematical line, does not alter the "big picture" on the facts in the context of this specific case as found by the Arbitrator.*
>
> *(at para. 4)*

68. I agree with these comments, and take this to mean that arbitrators and parties should think more about the "big picture" that emerges from the evidence regarding a family's (or other parties') financial relationships, rather than the arithmetic calculations that an accountant retained to provide an opinion on dependency may come up with, based on a series of general assumptions.

69. I now consider the evidence in this case with those principles in mind. The Claimant had lived most of her life in India. She was married until her husband died a couple of years before the accident in July 2010. She had never supported herself financially. From the brief evidence she provided at her examination, it appeared that her husband had operated a successful business for several years, which took a downward turn shortly before he died. The family was forced to sell their home, and relocate to a smaller house on the outskirts of the city. The money obtained from the sale of the larger home (that was not used to purchase the smaller home) was invested with an Indian bank in a vehicle that she referred to as a Fixed Deposit. It was clear that the interest payments received by the Claimant from this investment, which she estimated at different times to be $167 or $250 per month, was the sum total of her "earnings" or income.

70. Not surprisingly, Ms. Paul's life changed significantly when her husband died. Whereas she and her husband had visited Canada on two occasions to visit their daughters in the six years before he died, she travelled to Canada on her own after he passed away in 2009 and again in 2010. These visits were separated by only seven months. Despite her limited means and the significant expense of an airline ticket from India to Canada, the evidence shows a clear pattern of Ms. Paul visiting Canada more frequently after her husband's death.

71. This shift in how and where the Claimant was spending her time was borne out by her testimony at her examination that "whatever time would have permitted me, I would have come

to help Niti". She explained that her daughter Niti lived alone and was working full-time, and that she wanted to assist her by doing the cooking, cleaning and laundry in her home.

72. Both Niti and her sister Schweta's evidence also pointed to their mother being more present in Toronto, and playing an increased role in their lives. Schweta testified that she and Niti had hoped that their mother would have come to Canada every year or two, and stay for approximately six months per visit, if the accident had not occurred. While the fact that the Claimant extended her visa after the accident, and has now obtained permanent residency status in Canada is not material to my analysis of whether she was dependent upon her daughter before the accident, it may well be that her injuries hastened what would have evolved inevitably. I find that the evidence indicates that at the time of the accident in July 2010, Ms. Paul was shifting her routine to spend more time in Canada than she had previously.

73. I find support for this conclusion in the fact that the daughters had made arrangements to rent a two-bedroom apartment for Niti and their mother to share when they returned to Canada together in April 2010. Schweta testified that she had purchased furniture for the apartment, including a full bedroom set for the room that her mother would stay in. The only reasonable conclusion to reach from this evidence is that Niti felt that the extra outlay of rent for a bedroom that she would otherwise not be using was worthwhile, as their mother would be spending significant periods of time living there.

74. I also note the sisters opened a joint bank account that they described as an "emergency fund" for their mother. The source of various deposits into the account is unclear, and many questions remain regarding the transactions shown. However, I glean from the fact that the account was opened that Niti and Schweta felt that they would at some point be required to support their mother, beyond the room and board that she was provided with whenever she came to Canada, and took real, practical steps to prepare for that eventuality.

75. The evidence was clear that during her visits to Canada both in mid-2009, and the spring of 2010, Ms. Paul stayed at Niti's home, save for approximately one month (or according to Niti, possibly two or three weeks) after Niti separated from her husband. During each of these periods,

she did not pay any rent, or contribute any payment toward utilities expenses, groceries or any of the other household items.

76. It is also clear from the evidence that Ms. Paul did not receive the interest payments from her Indian investment while she was in Canada. While the accountant retained by Unifund went through the detailed exercise of calculating a value to be imputed to the significant number of hours that she contributed to Niti's household by cooking, cleaning and doing laundry, he in effect acknowledged under cross-examination that the value to Niti of her mother's services was negated by the extra expense of renting a larger apartment. This approach is consistent with the recent case law in the area (see *Allstate v. ING and Aviva, supra,* and *Security National v. Wawanesa, supra).*

77. I am left to conclude that whether the mechanical exercise of calculating the Claimant's means and comparing them with her financial needs is undertaken, or whether the family's circumstances are considered in a more holistic or general way, it is clear that she was not financially independent during the periods of time that she spent in Canada prior to the accident. She had, in effect, no earnings and all of her living expenses were borne by her daughters, principally Niti, in whose home she lived. I therefore find that she was principally dependent for financial support upon her daughter, Niti.

78. This was not really contested by TD. Counsel for TD and Mr. Cameron, the accountant retained to provide an opinion on dependency, acknowledged that the Claimant was financially dependent upon Niti for the three months that she was in Canada prior to the accident. They contended, however, that a twelve-month time frame was more appropriate to consider, and that in the one year period prior to the accident, Ms. Paul spent approximately seven months in India and five months in Canada.

79. TD pointed to the evidence that Ms. Paul was able to live on the interest income that was sufficient to provide her with one or two meals each day during her stay in India, while her son paid for the household expenses for the home that they shared there. He urged me to find that she was either financially independent for these seven months, or was principally dependent upon

her son during this period. Thus, even if she was principally dependent upon Niti while she was in Canada, that was not the case for the majority of the year.

80. I do not accept this contention. While it is clear that a "snapshot" of the Claimant's life at the moment of the accident is not a reliable indicator of her financial status, the courts have provided clear instruction that arbitrators are to examine "a period of time which fairly reflects the status of the parties at the time of the accident". I find that in the approximately two and one-half years between her husband's death and the accident, the Claimant was spending increasingly ore time in Canada with her daughters. All indicators pointed to her continuing to do so into the future. She lived at Niti's home, without paying rent or making any financial contributions, for the large majority of the time that she spent in Canada. I therefore find that the three-month period that she did so before the accident is the period of time that most "fairly reflects the status of the parties at the time of the accident".

81. Both accountants who testified were questioned intensively about how often they had determined, in past cases, that a period of less than twelve months was appropriate for a dependency analysis. Mr. Cameron conceded that he had never done so, but had reviewed a colleague's report in which a six-month period was recommended. It appears that a "one-year pre-accident" time frame has evolved into a "rule of thumb" or guideline, a number to be departed from only if compelling evidence exists to do so. In my view, this is incorrect. While I understand the temptation to adopt a standard and therefore predictable time frame, peoples' lives and the shifts and transitions they experience often do not follow a predictable pattern. In my view, parties, accountants and arbitrators considering financial dependency cases must remain open to considering different periods, depending on the evidence provided.

82. I therefore find that the Claimant was principally dependent upon her daughter Niti for financial support at the relevant time. I would reach the same result if I followed the approach set out in Arbitrator Densem's decision in *Economical v. Aviva, supra*. Ms. Paul was clearly not able to support herself financially during the three-month period in question, and while she was reliant to an extent on both of her daughters for financial support, Niti's contributions were by far greater than those of her other daughter, Schweta.

83. One final point remains. Counsel spent some time in their submissions on the question of whether Ms. Paul's assets in India should be considered in the analysis. The evidence was unclear whether the house that she lived in while there (with her son and his family) was in her name, remained in her husband's estate, or had been transferred to her children. It was clear, however, that she had a Fixed Deposit that was estimated to be worth $30,000, from which she earned monthly interest. Counsel for TD contended that this asset must be included in the analysis as it related to the question of her capacity to be self-supporting, one of the criteria set out in *Miller v. Safeco, supra.*

84. This issue also arose in the *Security National v. Wawanesa, supra,* case. The claimant in that case lived in Bangladesh and owned significant assets there. He came to Canada to visit his son's family, and was involved in an accident seventeen months after arriving. He had been providing child care for his grandchildren, for which he was not compensated, and was not earning any income during his stay. He was in Canada on a visitor's visa, and was not permitted to work. Arbitrator Robinson determined that despite being financially independent while he was in Bangladesh, he was principally dependent upon his son for financial support, while he was in Canada.

85. The arbitrator's decision was initially overturned on appeal. Justice Morgan determined that the arbitrator erred when he did not take into account the assets that Mr. Kibria owned in Bangladesh, and in considering his inability to work in Canada due to his visa status. He suggested that "but for" Mr. Kibria's decision to visit to Canada, he was not dependent upon his son for financial support. However, on further appeal to the Court of Appeal, the arbitrator's decision was restored.

86. While the Court of Appeal's ruling is not very detailed, and more guidance on this issue would have been useful, it is clear that the court preferred the arbitrator's approach of not including Mr. Kibria's foreign-owned assets in the analysis. I am bound by this finding, and when it is applied in this case, I must conclude that the fact that Ms. Paul had some investments

in India (and possibly owned a small home, or part of one) do not affect my determination that she was principally dependent for financial support on her daughter, Niti, the TD insured.

87. For all of the reasons set out above, I find that the Claimant is an "insured" under the TD policy, and that TD is accordingly in higher priority to pay her claim pursuant to section 268(2)2 (i) of the *Act.*

ORDER & COSTS:

88. TD is hereby ordered to repay Unifund for all of the benefits that it has paid to Ms. Paul to date, subject to any arguments it may make regarding the reasonableness of these payments. If the claim remains open, TD shall assume the adjusting of the claim.

89. Unifund is also entitled to recover its costs of the arbitration from TD. If counsel cannot agree on the quantum payable, I invite them to contact me and a teleconference to discuss the issue will be convened.

DATED at TORONTO, ONTARIO this _____ DAY OF JULY, 2015.

_____

Shari L. Novick
Arbitrator