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:

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

ARBITRATION AWARD

COUNSEL:

Ian D. Kirby for the Applicant

Tracy L. Brooks for the Respondent

ISSUE:

1. Was the Claimant principally dependent for financial support upon her daughter and son-in-law at the time of the accident and therefore an "insured" under their Allstate policy?

RESULT:

1. Yes, the Claimant was principally financially dependent on her daughter and son-in-law and therefore an "insured" under their Allstate policy. Priority to pay her accident benefits under section 268(2)2 of the *Insurance Act* accordingly remains with Allstate.

BACKGROUND:

1. Ming Wu Yan was struck as a pedestrian by a vehicle insured by Intact on April 28, 2013. She sustained injuries to her right ankle and shoulder.

2. Ms. Yan was seventy-six years old at the time of the accident. She was born in China, and spent most of her life there. She and her husband immigrated to Canada in 2004, to live with their daughter, son-in-law and their family. She obtained "permanent resident" status at that time. Ms. Yan's husband died in China in 2007.

3. Ms. Yan lived with her daughter's family throughout her time in Canada. Both her daughter and son-in-law worked full time in the period leading up to the accident, and Ms. Yan looked after their two daughters (her granddaughters), while they were at work.

4. Before coming to Canada, Ms. Yan had been employed as a laboratory instructor at a university in China. She received monthly pension payments after she retired, which were deposited into a bank account in China. Ms. Yan returned to China every year or two for a few months after moving to Canada, and accessed her pension funds while she was there.

5. Ms. Yan's daughter and son-in-law were insured by Allstate at the time of the accident. The Claimant submitted an application for payment of accident benefits under the *Schedule* to Allstate. Allstate accepted the application, but claims that Intact, as the insurer of the vehicle that struck Ms. Yan, is in higher priority to pay her claim in accordance with section 268(2)2(ii) of the *Insurance Act.*

6. Ms. Yan's representatives filed an objection to the proposed transfer of her claim in accordance with section 5 of *Regulation 283/95*. Adam Moras of Sokoloff Lawyers participated in the various pre-hearing teleconferences that were convened prior to the hearing, but advised that he would not be attending the Arbitration hearing. A copy of this decision will be forwarded to him, at his request.

THE EVIDENCE:

7. No *viva voce* evidence was called at the hearing.

8. The Claimant, her daughter, Min Wu, and her son-in-law, Wei Cheng, were all examined under oath in April 2015, prior to the Arbitration hearing. Transcripts of their evidence were filed and referred to by counsel in their submissions. Various documents, including Ms. Yan's income tax returns and statements from her Canadian bank account, were also filed at the hearing.

9. The Claimant's evidence at her Examination Under Oath revealed that she cannot read or write in English, and that her ability to speak English is limited. She became a Canadian permanent resident upon arriving in Canada in 2004, and became a Canadian citizen in 2014. Since arriving here, she has lived with her daughter and son-in-law, and their two daughters, aged 9 and 6 years old at the time of the accident. Ms. Yan did not contribute financially either to the rent payments on the family's four-bedroom apartment, or toward any other household expenses.

10. The Claimant testified that her daily routine included assisting her granddaughters to get ready for school, and walking them to school in the mornings (except during winter months). She then met them at school in the afternoon, accompanied them home and cooked meals for them and the family. She stated that she was not paid for doing any of this, but that her daughter would give her $100 - $200 each month for "pocket money". Her daughter also paid for her clothing and any medication that she required.

11. Ms. Yan agreed with the suggestion made to her by counsel that it was customary in the Chinese culture for parents to live with their children in their retirement years, and to help raise any grandchildren who were at home, without pay. She also confirmed that she did not receive any income for performing any other work while she was in Canada.

12. Interestingly, the Claimant filed tax returns with the Canada Revenue Agency ("CRA") in the few years preceding the accident. The returns were filed by the parties and indicate that she reported having received various amounts for "pension income" and "other income" over these years. When she was asked about the amounts reported, Ms. Yan testified that her son-in-law had prepared and filed the returns for her, and that while she had signed them, she "did not understand the content". She confirmed that despite various amounts being claimed on her return for "other income", she had not actually been paid anything for the care giving or housekeeping services that she had provided for the family.

13. Ms. Yan also confirmed that she received a monthly pension from the Chinese government that was directly deposited into a bank account in China. While she knew that the amounts paid out had increased over the years, she was unsure of the actual amounts that she received in the years leading up to the accident.

14. The Claimant testified that she had returned to China "every couple of years" after she moved to Canada, and that she usually stayed there for two or three months. She confirmed that she had gone to China in 2012, the year before the accident, and that her daughter had paid for the cost of her return flights. She explained that she would have withdrawn money that had accumulated in her Chinese bank account from her pension payments in order to cover her living expenses while she was there. She explained that she only used these funds while she was in China, and that she would not bring any of the money back with her or access these funds while in Canada.

15. Finally, the Claimant testified that she had a bank account in Canada, but that she did not know what funds it contained. She explained that her daughter and son-in-law had historically used this account to make deposits and withdrawals on her behalf. Copies of the statements from this account were provided by Claimant's counsel one day prior to the arbitration, and were filed at the hearing. The documents essentially show monthly deposits from "Provincial Payment Canada", and quarterly deposits for a "GST/HST rebate", the amounts for which totalled approximately $1,400 in 2014.

16. The Claimant's daughter, Min Wu, was also examined under oath prior to the hearing. She stated that she had sponsored both of her parents to come to Canada in 2004. She essentially confirmed her mother's testimony that Ms. Yan had not contributed any funds toward the family's household expenses, and that she did not receive any pay for looking after her two children and cooking for the family. Ms. Wu corroborated her mother's statement that she was only able to access her Chinese bank account in which her pension payments were deposited while she was in China, and that she had not transferred or brought any of those funds back to Canada.

17. Wei Cheng is the Claimant's son-in-law. He confirmed in his testimony that he had prepared the Claimant's tax returns for the years in question. He also confirmed that the balance showing in the bank records obtained for Ms. Yan's bank account in Canada resulted from amounts that she received from provincial tax credits and GST/HST credits.

18. The parties were able to obtain copies of the Claimant's tax returns for the years 2010, 2011, 2012 and 2013. The amount of "pension income" reported varied from a low of $4,745 in 2010 to $10,251 in 2013. When Mr. Cheng was questioned on the basis for the pension figures reported on the tax returns, he stated that he had asked the Claimant how much she had received over the course of any given year, and that she had provided him with a figure in Chinese currency. He then calculated the exchange rate and reported the figure in Canadian dollars. He testified that he had not reviewed any

documentation relating to her pension earnings prior to noting the amount on the returns, and had not confirmed the amounts in any way.

19. The amounts of "other income" reported by Ms. Yan also varied among the four years for which tax returns were obtained. The Claimant reported $6,600 in other income in 2010, $4,200 in 2011, $8,600 in 2012 and $3,200 in 2013. Mr. Cheng, her son-in-law, testified that these amounts reflected the value of the services that she provided to the family, but acknowledged that no money had actually changed hands.

20. When Mr. Cheng was asked why the figure reported in 2012 was more than double what was reported in 2011 and in 2013, he could not provide an explanation. Under cross-examination, he acknowledged that Ms. Yan had travelled to China in 2012, and that she had not done so in 2011. He accordingly agreed that it was not logical that the amount reported in 2012, the year that she was out of the country for two to three months, would be significantly higher than the amount reported in 2011.

21. Mr. Cheng also gave evidence regarding the family's basic living expenses. He estimated that the total household expenses amounted to approximately $3,875 per month or $46,500 yearly at the time of the accident. As the household was comprised of five people, if split equally, this would result in each person "consuming" $9,300 in expenses each year.

22. None of the witnesses were able to respond with any certainty when asked about the value of the Claimant's pension in China. Ms. Yan testified that she had received approximately 700 RMB (Chinese currency) per month initially, but that that amount had increased to 3,000 RMB per month (approx equivalent to $491 in Canadian dollars in April 2013, the month of the accident). That monthly amount would translate into annual pension earnings of $5,892. I note however, that the amount of pension income reported on Ms. Yan's 2013 income tax return was $10,251.

23. The amounts reported for pension income in prior years were - $6,652 in 2012, $5,511 in 2011 and $4,745 in 2010.

24. Given the wildly different estimates of the Claimant's pension earnings provided by the different witnesses at the examinations, Ms. Yan's representative undertook to obtain documentation regarding the quantum of her pension. An email message sent by her counsel to counsel in this proceeding on the day prior to the arbitration hearing states –

> *There is no way to obtain proof of her pension, unless somebody goes to China to do that. Because Ms. Yan is a senior, she doesn't have any internet access to her pension file, nor her bank A/C, if she ever needs any information for these, she would have to go to the government, or the bank in person, in China. The pension has been deposited into Ms. Yan's bank A/C in China directly for her to use, only when she comes to China.*

25. Counsel also filed statistics compiled by Statistics Canada entitled "Low Income Cut-Offs" ("LICO"), representing the average expenditure per household for households of different sizes, in communities of different sizes. Counsel for Intact noted that the family lived in Richmond Hill, Ontario, which forms part of the Census Metropolitan Area, and is accordingly a community of over 500,000 people. If the pre-tax LICO figures are referenced for a community of that size, the average estimated cost of living for an individual is $23,298. If the after-tax figures are used, the estimated cost of living is $19,307.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act -

> ***268(2)*** *The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> *2. In respect of non-occupants, (of an automobile)*

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,

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

Regulation 34/10 – Statutory Accident Benefits Schedule

3. (1) *In this Regulation,*

"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,*

3. (7) *For the purposes of this Regulation,*

(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse

PARTIES' ARGUMENTS:

Allstate's submissions

26. Counsel for Allstate contended that Ms. Yan was not financially dependent upon her daughter and son-in-law, as she had ample resources to meet her limited financial needs.

27. Mr. Kirby referred to the three factors considered by the court in *Miller v. Safeco* (1984) 48 O.R. (2d) 451, (upheld by the Ontario C.A. at (1985) 50 O.R. (2d) 797) – namely, the time frame to be considered in a dependency analysis, the financial needs of the claimant, and her means or ability to be self-supporting. He noted that the time frame

was not in issue in this case, as Ms. Yan's life circumstances or routine had not changed in the few years prior to the accident.

28. Counsel highlighted that Ms. Yan was eligible to work in Canada ever since she arrived in 2004, and in that way her circumstances differed from those of claimants in other cases who have moved here from other countries to live with their families in their senior years. He noted that Ms. Yan also received a monthly pension from her previous employment in China, and that these funds allowed her to be self-supporting when she returned to China every few years.

29. Mr. Kirby also noted that the Claimant reported two types of income on her tax returns. He acknowledged that while the evidence provided at the Examinations Under Oath regarding the amounts reported was vague. He contended, however, that these amounts should be taken as *prima facie* evidence of her earnings, given that people generally do not report income that they do not earn to the CRA.

30. Mr. Kirby also noted from the bank records filed that Ms. Yan received approximately $1,400 per year in government rebates. He submitted that this amount should be added to her declared income each year.

31. Counsel noted that two approaches have been followed in determining whether or not a person is principally dependent for financial support upon someone else. The "traditional approach" involves a calculation of a claimant's living expenses from the evidence provided, and a determination from that evidence as to whether she is able to fund more than 50% of those needs from her own resources. The more recent approach, outlined in Arbitrator Cooper's decision in *Allstate Insurance v. ING Insurance & Aviva Canada (*May 2014, upheld on appeal 2015 ONSC 4020, leave to appeal to Court of Appeal pending*)*, involves the same calculation, but estimates the claimant's living expenses through the use of statistics, rather than gathering evidence from the parties.

32. Mr. Kirby contended that under either approach, it is clear that Ms. Yan's earnings were greater than 50% of her financial needs at the time of the accident, leading to the conclusion that she was not financially dependent upon her daughter and son-in-law. Applying the "traditional approach", he referred to counsel for Intact's estimate that the Claimant's financial needs were between $9,300 and $10,800 per year, depending on whether the cost of a return flight to China is included in the calculation. He noted that she had reported $8,600 in "other income" on her 2012 income tax return, and received approximately $1,400 in government rebates, totalling $10,000.

33. Mr. Kirby submitted that Ms. Yan's pension earnings from China should be added to the above amounts. While he acknowledged that the exact value of her pension was difficult to establish, he noted that the amounts reported for her pension alone amounted to more than 50% of the Claimant's expenses for 2011, 2012 and 2013.

34. Mr. Kirby noted that the LICO pre-tax estimate of Ms. Yan's annual living expenses is $23,298, while the post-tax estimate is $19,307. He suggested that the post-tax figure, being the funds that are actually available to the individual, is the more appropriate figure to use. He submitted that if either of these figures are used to calculate Ms. Yan's expenses, the total of her reported earnings, pension income received and tax rebates for 2012 far exceed 50% of these expense estimates, and leads to the conclusion that she is financially independent.

35. Finally, Mr. Kirby acknowledged the Court of Appeal's decision in *Wawanesa v. Security National (2014 ONCA 850),* in which the court upheld the arbitrator's decision that Mr. Kibria, a grandfather who lived with his son's family and looked after his grandson, was financially dependent upon his son. He contended that the instant case is clearly distinguishable from that case, as Ms. Yan was eligible to work in Canada while Mr. Kibria was not, and that she had filed income tax returns reporting income each year.

Intact's submissions

36. Counsel for Intact agreed that the court's findings in *Miller v. Safeco, supra,* and the various cases that have followed instruct us to first consider what time frame to apply, and then to determine both the claimant's financial means and needs during that period.

37. Ms. Brooks submitted that it is clear from the testimony provided at the Examinations Under Oath that Ms. Yan did not actually earn any income. She noted that all of the witnesses acknowledged that the Claimant was not actually paid for the child care she provided to her granddaughters, despite what was reported on her tax returns, and that she did not work outside of the home. Counsel referred to the daughter's statement that she would give her mother $100 - $200 per month for "pocket money", and suggested that this figure was a more accurate reflection of her income.

38. Alternatively, if the amounts that the Claimant reported for "other income" are included in the analysis, counsel noted that the $8,600 reported in the year prior to the accident (2012) was more than double the amounts reported in either 2011 ($4,200) or in 2013 ($3,200), the year of the accident. She submitted that this did not make sense, given Ms. Yan's evidence that she had spent two or three months in China in 2012, when she would have spent less time providing childcare and homemaking services for her daughter's family, than she would have in 2011, when she spent the entire year in Canada. Counsel noted that Ms. Yan's son-in-law could not explain why her reported income in 2012 was far greater than in other years, and contended that these amounts should be ignored and the Claimant's reported earnings in 2011 be used instead.

39. Ms. Brooks acknowledged that the amounts received by Ms. Yan in government or tax rebates should be counted as "earnings", but noted that that amount was $1285 in 2013, and less than that in 2012.

40. Counsel for Intact contended that Ms. Yan's pension earnings from China should not be taken into account in the dependency analysis. She stated that the oral evidence

provided on the value of the payments received was so inconsistent as to render it completely unreliable. Ms. Brooks noted Wei Cheng's statement that he did not refer to any documentation when he prepared the tax returns, and had simply recorded what Ms. Yan had told him. Counsel also noted that while Ms. Yan testified that the pension amounts that she received had increased to 3,000 RMB per year (equivalent to either $5,700 in Cdn. dollars in 2012, or $5,892 in 2013 dollars), this amount does not accord with the amounts declared on her tax returns, which were $6,652 in 2012 and $10,251 in 2013.

41. Counsel noted that it was not disputed that the Claimant's pension earnings were not available to her while she was in Canada. She noted Arbitrator Bialkowski's findings in *Unifund Assurance v. RBC General Insurance* (August 2, 2012), in which a claimant who had access to a pension from India while living in Canada was determined not to be financially dependent upon his son, with whom he lived. Counsel contended that that case was distinguishable from the instant one, as Ms. Yan clearly did not have access to her pension funds while in Canada, but that its reasoning could be relied on to support her argument that she was dependent upon her daughter.

42. In the alternative, counsel submitted that if Ms. Yan's pension earnings from China are to be included in the analysis, her estimate of 3,000 RMB per month (equivalent to approximately $475 Cdn monthly in 2012, or $5,700 annually) should be accepted, as that figure is relatively close to the $5,511 that she reported on her 2011 tax return.

43. Counsel also acknowledged that the case law suggests that a claimant's capacity to be self-supporting should be considered in the analysis of financial dependency. She contended, however, that even though Ms. Yan was legally permitted to work in Canada, she would not have done so outside of her daughter's home, given her age, her limited use of English and her lack of marketable skills.

44. On this point, counsel noted that in *Wawanesa v. Security National*, *supra*, Arbitrator Robinson found that no income should be attributed to Mr. Kibria, in circumstances that were very similar to those in the instant case. She acknowledged that Mr. Kibria was not entitled to work in Canada, but submitted that the arbitrator did not base his finding solely on that fact, and that he distinguished between the ability of a young person to earn income and that of a senior citizen who resided with family members and cared for grandchildren.

45. Ms. Brooks noted that the Court of Appeal upheld the Arbitrator's decision in that case. She contended that the case therefore stands for the proposition that an arbitrator has discretion, based on the particular facts of each case, to determine whether a monetary value should be imputed to the childcare or care giving services provided by a grandparent. She argued that no value should be given to the services provided by Ms. Yan, given her evidence that it was customary in her culture for a parent to live with their children in their retirement years, and to help raise any grandchildren, without pay.

46. Counsel contended that given all of the above, Ms. Yan's earnings for the period in question would consist only of the $100-200 per month that her daughter gave her for spending money, as well as the $1,285 in government and tax subsidies that she received, for a maximum total of $3,685. She submitted that when this figure is considered against her expenses – either from the evidence provided for the household's expenses or the LICO estimates – it is clear that Ms. Yan's means do not cover more than one-half of her financial needs, and that she is therefore financially dependent upon her daughter and son-in-law.

Reply comments:

47. Mr. Kirby disagreed that Ms. Yan had no marketable skills outside of the home, and noted that while she may have been in her mid-70's at the time of the accident, she was relatively healthy and was fluent in Mandarin. He suggested that her capacity to earn income outside of the family structure should be considered, as it was possible that other

Mandarin-speaking families may have required child care services and would have been prepared to pay Ms. Yan for performing those tasks.

FINDINGS & ANALYSIS:

48. As in most cases, each analysis of financial dependency must be conducted with the unique circumstances of the relationship in question, and the relevant legal principles, in mind. These principles were outlined in *Miller v. Safeco, supra,* as referenced by both counsel in this case. While this remains the seminal case in this area, the decision by the Court of Appeal is quite brief, and contains only a basic analysis. As I stated in *Unifund v. TD Meloche Monnex (*July 14, 2015*)* the court's finding is premised upon the judge's 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, a notion which has shifted in the thirty years since that case was decided.

49. Justice Myers has recently refined the principles enunciated in *Miller v. Safeco, supra*, in his decision in *Allstate Insurance v. ING Insurance and Aviva Canada, supra*. While making the point that the appellant's argument was flawed because it assumed that the "mathematical result necessarily and solely determines the outcome", he stated –

> *In my view, the math is just part of the test that has arisen out of the seminal decision in Miller v. Safeco. 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 math is an important factor it is not the only factor. The legal issue is whether R was principally dependent on her mother...In Miller, the Court of Appeal approved four factor 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.*
>
> *(at para.4)*

50. Later in that paragraph Justice Myers warned that the focus should remain on the "big picture" rather than a calculation that may cross "a magical mathematical line". I understand that leave is being sought to appeal this decision to the Court of Appeal.

51. This same thread has been enunciated in many earlier cases as well. Counsel for Intact cited Arbitrator Robinson's reference to Justice MacDonald's comments in *Co-operators General v. Halifax Insurance Co. [2002] O.J. No. 2459)*, to the effect that each analysis must be based on a "realistic assessment of the parties' actual financial circumstances at the time of the accident" (at para. 14). It is with these comments in mind that I consider the parties' relationships in this case.

52. At the time of the accident, Ms. Yan was an elderly Chinese woman who could not read or write in English. While she was legally entitled to work in Canada, it is clear that the reason she came here was to live with her daughter and her family, and to help care for her grandchildren, as opposed to seeking paying work outside of their home. While Ms. Yan did spend several hours each day care giving and cooking for the family, she testified that it was customary in the Chinese culture for a parent to live with their children in their retirement years, and to help raise any grandchildren they may have, without pay.

53. All of Ms. Yan's financial needs, including room and board, clothing and the cost of her medication were covered by her daughter and son-in-law while she was in Canada. Her daughter paid for her flights back to China every few years, where Ms. Yan was able to access her pension payments from her previous employment in China. These payments were directly deposited into her Chinese bank account, and the evidence indicated that she was unable to access these funds while she was in Canada. The only money that she received in Canada was a nominal monthly amount paid by her daughter for "spending money", and the tax rebates from the federal and provincial governments that were directly deposited into her Canadian bank account.

54. In my view, when this evidence is considered and a "big picture" view of Ms. Yan's relationship with her daughter's family is taken, it is clear that she was principally dependent upon them for financial support at the time of the accident. While she may

have been self-supporting for the few months every couple of years that she spent in China, that is not what I am being asked to assess.

55. The unusual feature of this case which mandates a closer review of the evidence compiled is the fact that the Claimant filed income tax returns with the CRA in the years preceding the accident. She reported receiving both "other income" as well as pension income on the returns. Counsel for Allstate argued that the fact that these amounts were reported should be taken as *prima facie* evidence that they were earned by Ms. Yan.

56. I do not agree with this contention. With respect to the amounts claimed for "other income", all of the witnesses clearly stated that no money changed hands, and that the Claimant did not receive any pay for the services that she provided to the household. Her son-in-law, who completed the tax returns on Ms. Yan's behalf, was not able to explain why the amounts appearing on the returns varied each year. My hunch is that this income was reported in order to qualify the Claimant for the tax rebates that she received from the federal and provincial governments. In any event, the motive for reporting these figures is not relevant to my ultimate determination, given the clear evidence that no money actually changed hands.

57. The question then becomes whether a monetary value should be imputed to the services that Ms. Yan provided to the family. Counsel cited Arbitrator Bialkowski's decision in *Unifund v. RBC, supra,* in which a nominal amount (approximately $125 per month) was attributed to "services" provided by a grandfather who with his wife, looked after the grandchildren in the household while his son and daughter-in-law were at work. Prior to his parents' arrival in Canada, the son's family had paid an independent caregiver to look after their children. I note that the claimant in that case had also paid his son approximately $6,000 upon his arrival in Canada in order to cover the added expenses in having two extra people absorbed into the household. He also contributed between $500-$600 each month toward the family's household expenses.

58. I find that the fact that these funds were exchanged between the claimant and his son render that case sufficiently distinguishable from those of the instant case. The facts of this case are more similar to those presented to Arbitrator Robinson in *Security National v. Wawanesa, supra,* in which Mr. Kibria, the grandfather from Bangladesh, was not paid anything for the time he spent caring for his grandchildren. While I appreciate that Mr. Kibria was not legally entitled to work in Canada, whereas Ms. Yan was, the fact remains that she had not worked outside of the home for the nine years that she spent in Canada prior to the accident, and it is questionable whether she would have been able to secure any such employment, given her very limited English language skills and her advanced age.

59. Accordingly, I agree with Arbitrator Robinson that in this type of scenario "the objective circumstances of this case" do not translate into a "money's worth analysis" (at p. 12). In my view, when a grandparent receives free room and board and the payment of their other expenses from a child with whom they live, and provides caregiving and housekeeping services to the family in order to assist parents who work outside of the home, this relationship of interdependence should generally not lead to a finding that the claimant is financially independent. If the grandparent ceased providing those services – either because they are injured in a car accident, or become ill for some reason – their needs will continue to be met, in most cases, by that household.

60. In some instances, a financial "bargain" may be struck between the parties, which may lead to a different result. In this case, however, despite the figures reported on her tax returns, the evidence is clear that Ms. Yan did not receive any compensation for the services that she provided. She testified that it was customary in her culture for a grandparent to live with a child and help care for the grandchildren, without pay, and this is what she was doing. I therefore do not attribute any monetary value to the caregiving services provided by Ms. Yan.

61. Counsel for Allstate urged me to also consider Ms. Yan's capacity to earn, in accordance with the decisions in *Miller v. Safeco, supra*, and *Federation Insurance v.*

Liberty Mutual (Arbitrator Samis, May 7, 1999). He noted her legal entitlement to work in Canada, and disputed Ms. Brooks' contention that as a person in her senior years with limited English skills, she did not have any marketable skills. I cannot agree with this contention. While a claimant's capacity to be self-supporting is an important consideration in the dependency analysis, I find that on a realistic assessment of Ms. Yan's circumstances in Canada, she simply did not have the ability to be self-supporting.

62. It was undisputed that the Claimant was given some "spending money" on a monthly basis by her daughter. She estimated this to be between $100-200 per month. Given that this came from her daughter and was not "self-generated", it should not be included as income in the dependency calculation.

63. It was also not disputed that the Claimant received tax rebates from both the provincial and federal governments, and that these amounts were deposited directly into the Canadian bank account that her daughter had opened for her. I have reviewed these bank records and see that these deposits total $1,288.60 in 2012. These amounts were clearly received by Ms. Yan from an outside source and should be counted in the calculation of her "means".

64. I turn then to the issue of the Claimant's pension payments from China. This was the subject of much discussion at the hearing, with counsel for Allstate submitting that the amounts reported as pension income on Ms. Yan's income tax returns should be included in the calculation of her means, while counsel for Intact contended that they should not. The amounts reported varied over the few years prior to the accident – $4,475 was reported in 2010, $5,511 in 2011, $6,652 in 2012, and $10,251 was reported in 2013, the year of the accident.

65. Mr. Weng testified that he did not review any documentation when he reported the amounts on his mother-in-law's tax returns, and simply relied on what she told him to report. This is difficult to reconcile with the Claimant's testimony that while she had signed the returns, she did not "understand the content". Ms. Yan also testified that her

pension earnings had increased over the years, and estimated that she received 3,000 RMB per month at the time of the accident in 2013. According to a currency conversion chart filed by counsel for Intact at the hearing, that would amount to approximately $490 (Canadian) per month or $5,880 per year.

66. The evidence on this point is inconsistent and confusing. While very specific amounts are claimed on the tax returns, it is utterly unclear as to how these figures were arrived at. Counsel for Intact contended that given these inconsistencies, I should not include any pension earnings in the calculation of the Claimant's means. I cannot agree that if a source of earnings is difficult to quantify, it should be completely excluded from the analysis. I think that the trier of fact should consider all of the evidence available on the point, and make a finding on the issue.

67. However, there are other factors to consider in relation to this issue. The evidence was undisputed that Ms. Yan's pension payments were directly deposited into a bank account in her name in China. It is also clear that these amounts were not accessed by Ms. Yan (and were possibly not available to her) while she was in Canada. It is for this reason that I find that these amounts should be excluded from the calculation.

68. My conclusion on this point is based on the findings in *Security National v. Wawanesa, supra.* As I noted in my recent decision in *Unifund v. TD, supra,* the Court of Appeal clearly preferred Arbitrator Robinson's decision to exclude the claimant's foreign-owned assets in his analysis of whether or not he was financially dependent upon his son with whom he lived in Canada. At the first level of appeal, Justice Morgan determined that the arbitrator erred when he did not take into account the significant assets that that claimant owned in Bangladesh, and found that "but for" his decision to come to Canada to live with his son's family, he was not dependent upon him for financial support. The Court of Appeal overturned the decision of the Superior Court and restored Arbitrator Robinson's decision.

69. I am bound by the ruling of the Court of Appeal on this point. In any event, I agree that assets that are not available to a person while living in Canada should not affect the outcome of a dependency analysis undertaken to consider whether they are principally dependent for financial support upon another person, for the purposes of determining priority among insurers in Ontario pursuant to *Regulation 283/95*.

70. Accordingly, having determined that the Claimant's pension earnings received in China and the amounts claimed as "other income" on her tax returns, but not actually paid to her, should be excluded from the analysis, Ms. Yan's "means" consist solely of the amounts that she received as tax rebates from the provincial and federal governments. As noted above, these amounts total $1,288.60 in 2012.

71. This sum must then be compared with Ms. Yan's living expenses. The evidence presented through the Examinations Under Oath suggests that an appropriate estimate of her expenses would be $10,000 per year. The LICO statistics for a single-person household in her area suggest a pre-tax figure of $23,298 per year, and an after-tax annual figure of $19,307. Clearly, when any of these figures are plugged into the analysis, it is clear that Ms. Yan did not provide for more than 50% of her financial needs through her own means.

72. Accordingly, taking both the holistic or "big picture" approach and the strict mathematical approach to Ms. Yan's circumstances, I conclude that she was principally dependent for financial support upon her daughter and son-in-law. She is therefore an "insured person" under their Allstate policy, and priority accordingly remains with Allstate pursuant to section 268(2)2(ii) of the *Act.*

COSTS:

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

ORDER:

Allstate's application for arbitration is hereby dismissed.

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

_____

Shari L. Novick

Arbitrator