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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Applicant

- and -

DESJARDINS INSURANCE GROUP / CERTAS DIRECT INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Derek Greenside for the Applicant

Thelson Desamour for the Respondent

BACKGROUND:

1. Helen Halliday was injured when she was struck by a vehicle driven by a co-worker's wife in the parking lot of her workplace on March 30, 2014. She applied for payment of accident benefits under the *Schedule* to RSA. RSA insured David Zorony, with whom Ms. Halliday was living at the time of the accident. RSA accepted her application and has paid benefits to her and on her behalf.

2. RSA contends that Certas, as the insurer of the vehicle that struck her, is in higher priority to pay her claim. There is no evidence to suggest that she was principally dependent upon Mr. Zorony for financial support at the time of the accident. RSA also claims that the Claimant was not a "spouse" of its insured at the time of the accident, and that section 268(2)2(ii) of the *Act* would apply.

3. Ms. Halliday and Mr. Zorony have been living together in Mr. Zorony's mother's home since February 2013, about thirteen months before the accident. They are not legally married. The dispute in this case centres on the nature of the couple's relationship in the two years preceding the date that Ms. Halliday moved into the Zorony home, given the requirement in the definition of "spouse" that a couple be living together "in a conjugal relationship outside marriage …continuously for a period of not less than three years".

4. Prior to moving in with Mr. Zorony at his mother's home, the Claimant lived with her mother and adult daughter in an apartment in Mississauga. Once she and Mr. Zorony began dating in 2008, she spent every weekend with him at his mother's home. Both Ms. Halliday and Mr. Zorony explained that they each lived with their mothers during that period so that they could provide them with care and assistance as they aged.

RELEVANT PROVISIONS:

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

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,*
> >
> > > *(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, ...*

Insurance Act

224. *(1) In this Part,*

> *"spouse" means either of two persons who,*
>
> > *(a) are married to each other,*
> >
> > *(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or*
> >
> > *(c) have lived together in a conjugal relationship outside marriage,*
> >
> > > *(i) continuously for a period of not less than three years, or*
> > >
> > > *(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child;*

Section 268

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

THE EVIDENCE:

5. Both Ms. Halliday ("Helen") and Mr. Zorony ("David") were examined under oath in August 2015. David subsequently forwarded two letters to counsel clarifying and correcting part of the evidence he provided at the examination. He also testified at the Arbitration hearing.

6. Counsel referred to his *viva voce* evidence, the evidence provided at the examinations, as well as various documents that they had collected at the hearing. The following facts are largely uncontested:

7. Helen and David have never been legally married, and have no children together. They each have one child (both now adults) from earlier relationships, neither of whom lives with them. They knew each other in high school, but drifted apart when they each met and married other people. They reconnected and began dating in 2008, when David was living at his mother's home in Brampton. At that point, Helen was living with her mother and adult daughter in an apartment in Mississauga. Shortly after they began dating, Helen began spending every weekend at David's mother's home with David. They participated in various activities together, and their relationship was physically intimate.

8. The couple also went out socially and spent time with each other's friends and family members. Helen would assist David in caring for his mother, and occasionally went to her home to help out with various tasks if David was not available.

9. Helen eventually moved in to David's mother's home in Brampton in early 2013. While the exact date of the move is not known, David, Helen and David's mother all agree that it was either in January, February or March of 2013. When asked why Helen moved into the Zorony home at that point, David and Helen both explained that he began working as a long-haul trucker at that point, and it made sense for Helen to move in on a full-time basis so that she could provide care for his aging mother in his absence. Helen testified at her Examination Under Oath that her mother was younger than David's mother, and that her daughter and her niece, who had moved into the apartment, were able to look after her mother's needs after she moved out.

10. David testified at the hearing that he and Helen loved each other, and that he had considered her to be his "partner" prior to her moving into his mother's home. When asked whether he had spent any nights with Helen at her mother's apartment between March 2011 and February 2013, when she moved into his home, he recalled doing so on approximately five occasions. When asked why he and Helen had not moved in together earlier, he confirmed his earlier evidence provided at the Examination Under Oath that they had both felt that their respective mothers needed their care, and that if that had not been the case they would have done so.

11. While it is clear that David and Helen may have helped each other out financially from time to time, the couple managed their finances separately until Helen moved into the Zorony home in Brampton in early 2013.

PARTIES' ARGUMENTS:

Certas' submissions

12. Counsel for Certas submitted that Helen and David met the definition of "spouses" under the *Act* as of the date of the accident. He acknowledged that while they had not been physically living under the same roof every day for three years before that date, the cases that have analysed that requirement have rejected the idea of applying a "bright line test" to that part of the definition.

13. Counsel urged me to adopt the approach that has developed in the family law case law regarding how to determine whether two people who are not legally married are spouses over a certain period. He noted that the relevant part of the definition of "spouse" in the *Insurance Act* in issue here – namely whether the Claimant and Mr. Zorony lived together in a "conjugal relationship outside marriage ...continuously for a period of not less than three years" - essentially mirrors the definition found in the *Family Law Act*, and that a consistent approach should be taken.

14. Counsel for Certas cited the decision in *Molodowich v. Pettinen* (Ont. Dist. Ct.) 1980 CanLii 1537, an application for spousal support under the *Family Law Reform Act*, in which seven components of "cohabitation" are identified to help determine whether two people who are not legally married meet the definition of "spouse" in that statute. They are described under the categories of shelter, sexual and personal behavior, shared services, social and societal activities, economic support and children. Justice Kurisko stressed that while these are generally accepted characteristics of a "conjugal relationship", the degree to which each will be present in a relationship will vary with the circumstances in each case. Counsel noted that this list of factors was cited and relied on by the Supreme Court of Canada in its landmark decision in *M v. H.* [1999] 2 S.C.R. 3.

15. Mr. Desamour contended that Helen and David's relationship featured all of the above components during the two-year period prior to Helen moving into David's mother's home, save for the fact that they had not slept under the same roof every night and had not raised children together. He emphasized the evidence that they each provided explaining that they would have moved in together before February 2013 had it not been for the need to care for their aging mothers.

16. Counsel relied heavily on the Court of Appeal's ruling upholding the lower court's finding in the case of *Stephen v. Stawecki* [2006] O.J. No. 2412. The court in that case determined that a couple had cohabited in a conjugal relationship for three years prior to the unfortunate death of one of them, despite the fact that they had maintained

separate residences until approximately twenty months before the date of the accident. Counsel noted the Court's statement that a "mechanical bright line test" is not possible when considering the three-year residency requirement in the definition of "spouse", and that the parties' arrangements for shelter are only one of several factors to be considered when assessing whether a couple has been "cohabiting".

RSA's submissions

17. Counsel for RSA disputed that David and Helen's relationship would have passed the "spousal test" in the two years prior to her moving into his mother's home. He suggested that their relationship at that stage was more like "dating" than a "marriage-like relationship", as was found to exist in cases in which the courts have determined that couples who did not live under the same roof were "spouses".

18. In that regard, Mr. Greenside noted that the bank documents filed indicate hat they did not have signing authority on each other's bank accounts prior to Helen moving in, and that they waited until March 2014, a full year after Helen moved into the Zorony home, to open a joint account. He also noted that during the two-year period preceding her move, the couple had only spent the weekends living and staying together, save for five occasions when David stayed at Helen's mother's home during the week.

19. Counsel acknowledged that arbitrators who have been tasked with determining whether a claimant is a "spouse" in a Priority Disputes under *Regulation 283/95* of the *Act* have considered the seven factors elucidated in the *Molodowich* decision cited above. He noted, however, that the *Insurance Act* definition of "spouse" does not contain the term "cohabit". Given that this was the term considered by the judge in *Molodowich, supra,* counsel contended that those factors are only relevant to the analysis of whether the parties' relationship was "conjugal".

20. Mr. Greenside contended that if, after considering the *Molodowich* factors, I found the couple's relationship to be "conjugal", I must then still determine whether they lived together continuously for a period of not less than three years. He stated that even if

David and Helen are found to have satisfied the "conjugal relationship" part of the test, which he disputes, they clearly had not lived together continuously for three years before Helen moved into the Zorony home, and so would not meet the definition of "spouses".

21. Counsel referred to three decisions in which the definition of "spouse" in section 224 of the *Insurance Act* has been considered in the context of a Priority Dispute. In *ING Insurance Company of Canada v. Co-operators Insurance Company* (appeal decision of Arbitration award, September 11, 2013), Justice Leitch overturned the arbitrator's finding that two teenagers were spouses at the time that one of them was involved in an accident. Instead, the judge reached the conclusion that the couple, who had stayed together on weekends at the home of one of their parents, had a "dating" relationship rather than a "marriage-like relationship throughout the three-year period prior to the accident".

22. Counsel also referred to two cases decided by Arbitrator Bialkowski in this regard. He noted that a woman who had lived with her partner and child for only two and one-half years prior to the child being involved in an accident was found not to qualify as a "spouse" under the Act in *Intact Insurance Company v. Economical Mutual Insurance Company (*July 17, 2014).

23. He also referred to Arbitrator Bialkowski's decision in *Gore Mutual Insurance v. AXA Insurance* (December 22, 2014), in which he considered whether a young couple in their 20's who had lived together in different premises for approximately three years before the accident were "spouses", in the face of Gore Mutual's contention that they had not shown a commitment to accept each other as spouses and were merely "playing house". The Arbitrator first accepted the evidence suggesting that they had lived in the same premises for three years, and then determined that their relationship was "conjugal" based on a consideration of the *Molodowich* factors.

ANALYSIS & FINDINGS:

24. The question to be determined is whether, on the evidence before me, Helen Halliday was a "spouse" of David Zorony on March 30, 2014, as that term is defined in section 224(1) of the *Insurance Act.* As they were not legally married, nor the parents of a child, the only way that Helen could meet that definition is if she and David had "lived together in a conjugal relationship outside marriage, continuously for a period of not less than three years" as of that date.

25. While the parties' submissions focused mainly on the legal analysis required, I must start with the facts. None of the relevant facts are in dispute. As set out above, the parties agree that Helen moved in to the Zorony home in Brampton to live with David in early 2013. While the exact date of this move is unknown, they agree that it was likely in February 2013. Before that, she had been living with her mother in Mississauga. RSA concedes that for the thirteen or fourteen months from the date of her move to the date of the accident the couple was "living together in a conjugal relationship". RSA takes the position, however, that before that date they were not. I must therefore consider the evidence closely regarding the nature of their relationship from late March 30, 2011 (three years before the accident) to February 2013.

26. The evidence indicates that during this time, Helen spent all of her weekends with David at his mother's home. David occasionally spent the night with Helen at her mother's place during this period, although he estimated that only occurred on five occasions. It is uncontested that the couple had a loving, exclusive relationship. They were physically intimate, and did many activities together. They spent time with friends and each other's families, and were considered a couple by others. Helen testified that she would occasionally visit David's mother when he was not in town to help her out with various tasks, if required.

27. David testified at the hearing that he considered Helen to be his "partner" prior to the date that she moved into his mother's home. When asked whether the couple would

have moved in together earlier if it were not for the need to provide care to their respective mothers, he confirmed that they would have done so.

28. Perhaps most importantly, the evidence indicated that one of the reasons that Helen moved in to the Zorony home when she did was that David began working as a long-haul truck driver at that point. He would therefore not be as available as he had been to provide care to his mother, and the couple decided that Helen's consistent presence at the home could make up for that gap. In my view, this is clear evidence of a mature and serious relationship, with the parties agreeing to share in the care of an elderly parent. To my mind, it shows a commitment to support each other and to plan a shared future.

29. Given the above, I do not accept RSA's contention that this phase of their relationship was more akin to "dating" than a "marriage-like relationship", to use the words of Justice Leitch in the appeal decision in *ING Insurance v. Co-operators, supra.* In my view, the facts outlined above show a "loving relationship with a commitment to fidelity on a long-term basis", a phrase used by Arbitrator Bialkowski in the *Gore Mutual v. AXA, supra,* decision cited by Mr. Greenside, when he found that the relationship between two young adults was spousal.

30. Consequently, I find that Helen and David satisfy the part of the "spouse" definition in the *Act* requiring them to be "have lived together in a conjugal relationship outside marriage".

31. Much of the case law cited to me arises in the context of family law disputes. It is widely accepted that the factors to be considered in assessing whether a couple were "cohabiting" are spelled out in the case of *Molodowich v. Penttinen, supra.* These were cited by the Supreme Court of Canada in the seminal *M. v. H., supra,* decision. While I appreciate that the underlying context in a determination of whether an applicant in a family law proceeding was a "spouse" is different than that in a priority dispute between two insurers, the Molodowich factors have consistently been applied by arbitrators and

the courts when asked to determine whether a claimant meets the definition of "spouse" in the *Insurance Act.*

32. Counsel for RSA noted that the "Molodowich factors" were elucidated by Justice Kurisko to assist in considering whether the couple in that case had been "cohabiting". Counsel also noted that this term does not appear in the *Insurance Act* definition of "spouse", and contended that the authorities relied on by Certas in this regard are consequently of limited value to this determination.

33. I cannot agree with this contention. While the relevant definitions in both the *Family Law Reform Act* (the applicable statute when Molodowich was decided) and the *Family Law Act* (in place when the later cases were considered) define a spouse as someone who has cohabited with someone else for the requisite period of time, the word "cohabit" is further defined in those statutes to mean "live together in a conjugal relationship, whether within or outside marriage". It is that phrase that appears in subsection (c) of the "spouse" definition in the *Insurance Act* and in that way, the *Insurance Act* definition perfectly mirrors the definition in the *FLA.* In other words, when the definition of "cohabit" in section 1(b) of the *FLA* is plugged in to the "spouse" definition in that statute, the wording is identical to that of the definition of "spouse" in the *Insurance Act.*

34. Counsel for RSA further contends that two distinct steps must be taken in determining whether two people who are not legally married or the parents of a child meet the definition of "spouses" in the *Insurance Act* - a consideration of whether the parties engaged in a conjugal relationship, and if so, a second and separate determination of whether they lived together in that fashion continuously for a period of at least three years. He contends that even if I find that Helen and David's relationship before February 2013 (when she moved into the Zorony home) met the "conjugal test", it is clear that they were not living together for three years before the accident in March 2014 and so do not meet the definition of "spouses". Counsel relied on Justice Leitch's comments in *ING Insurance v. Co-operators, supra,* and Arbitrator Bialkowski's decisions in *Intact*

Insurance v. Economical Mutual Insurance, supra, and *Gore Mutual v. AXA Insurance, supra,* in this regard.

35. While I appreciate that the words "living together" may at first blush suggest that a couple must occupy the same premises to meet the test, the Court of Appeal has made it clear that the analysis must be broader than that. The case of *Stephen v. Stawecki, supra,* cited by counsel for Certas, was a claim for damages resulting from the alleged wrongful death of the Plaintiff's spouse in a car accident. The couple had been physically living together under the same roof for two years prior to the accident, but had maintained separate residences before that. The Plaintiff would only be entitled to the damages sought if she met the definition of "spouse" in section 29 of the *Family Law Act*, which requires continuous cohabitation for a period of not less than three years. As noted above, the term "cohabit" is further defined in that Act as living "together in a conjugal relationship, whether within or outside marriage".

36. At first instance, the Superior Court judge found that even though the couple had maintained separate residences and did not share expenses for part of the three-year period in question, they met the definition of "spouses" in the *Act.* He found that the evidence indicated that they had an exclusive relationship, were planning a long-term future together, participated in various activities together, socialised with friends and family and were considered a couple by their respective families, friends and neighbours.

37. On appeal, the Court of Appeal rejected the appellant's argument that a "bright line test" should be imposed. It did not accept the argument that as the couple had not moved into the same home at least three years prior to the accident, they were not "living together". The court stated the case law recognizes that "given the variety of relationships and living arrangements, a mechanical bright line test is simply not possible", and would be inconsistent with the flexible approach taken by the Supreme Court of Canada in *M v. H., supra.*

38. Further, the Court of Appeal stated that the jurisprudence has interpreted the phrase "live together in a conjugal relationship" as a unitary concept and that "the specific arrangements made for shelter are properly treated as only one of several factors in assessing whether or not the parties are cohabiting". Finally, the court stated the fact that one party continues to maintain a separate residence does not preclude a finding that the parties are living together in a conjugal relationship.

39. I must heed these clear instructions from the Court of Appeal. Their statement that the phrase "live together in a conjugal relationship" is a unitary concept must be interpreted as meaning that once a couple is found to meet the "conjugal requirement" of the test, they cannot be excluded from the definition by the simple fact that they did not occupy the same address for the entire three-year period in question. As stated, the parties' arrangements for shelter is only one of the factors to assess in the determination of whether they are "spouses" under the Act.

40. Mr. Greenside pointed out that Arbitrator Bialkowski approached the analysis in a different way in the two cases cited above, separating the test into two distinct components. I agree with that assessment, but must respectfully disagree with the approach followed by the arbitrator, in light of the Court of Appeal's clear comments in the *Stephen v. Stawecki* case. I note that this decision is not referenced in either of the awards issued by Arbitrator Bialkowski, and it is possible that it was not put before him (although decided eight years prior). In any event, I am bound by the Court of Appeal's decision and comments, and find that they apply directly to the question before me.

41. I also note that Justice Roy determined in *Thauvette v. Malyon* [1996] O.J. No. 1356 that two individuals who were not legally married or parents of a child together and maintained separate residences for most of the three-year period in question met the definition of "spouses" under the *Family Law Act*. The evidence in that case indicated that each party had children from previous marriages, and had decided that it would be easier to spend time with their respective children while living in different homes. The evidence also indicated that while the defendant spent three or four nights each week at

the plaintiff's home, he had also carried on relationships with other women at the same time. The court determined that the fact that the defendant maintained a separate residence "does not in itself mean he did not cohabit with the plaintiff", and that the court should look at all of the circumstances and consider the reason for maintaining another residence.

42. As stated above, Helen was living with her mother prior to moving into the Zorony home in order to provide care to her. David testified that if it had not been for that fact, they would likely have moved in together earlier. I find that this must be considered in the analysis.

43. For all of the reasons set out above, I find that Helen Halliday was a "spouse" of David Zorony, the RSA insured, at the time of the accident, under the definition in section 224(1) of the *Insurance Act*. Accordingly, RSA is in higher priority to pay her claim for accident benefits.

ORDER & COSTS:

44. The Arbitration is hereby dismissed against Certas. As a result, RSA is responsible for paying the legal costs incurred by Certas, as well as the arbitration fees and any related disbursements.

45. If counsel cannot agree on the quantum of costs payable, they may contact me and I will convene a teleconference in order to discuss the issue.

DATED at TORONTO, ONTARIO this 24th DAY OF FEBRUARY, 2017.

Shari L. Novick
Arbitrator