CITATION: Royal & Sun Alliance v. Desjardins/Certas, 2018 ONSC 4284
COURT FILE NO.: CV-17-572059
DATE: 20180710

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, Appellant

– AND –

DESJARDINS INSURANCE GROUP/CERTAS DIRECT INSURANCE COMPANY, Respondent

BEFORE: E.M. Morgan J.

COUNSEL: *Derek Greenside*, for the Appellant
Thelson Desamour, for the Respondent

HEARD: July 9, 2018

ENDORSEMENT

[1] The Appellant applies to judicially review the decision of Arbitrator Shari L. Novick dated February 24, 2017. In that decision the Arbitrator determined that the Appellant is in higher priority than the Respondent to pay the accident benefit claims of Helen Halliday, who was injured in a car accident while in the parking lot at her place of work. The Respondent is the insurer of the driver that struck Ms. Halliday.

[2] Ms. Halliday's claim against the Appellant flows from her relationship with David Zorony, with whom she resides and who is the Appellant's insured. Ms. Halliday sought accident benefits from the Appellant through Mr. Zorony's policy as his spouse. Pursuant to the priorities set out in section 268(2)2(i) of the *Insurance Act*, a non-occupant of an automobile such as Ms. Halliday has recourse, firstly, against "the insurer of an automobile in respect of which the non-occupant is an insured." Only if recovery is unavailable against her own insurer does section 268(2)2(ii) provide for recovery against "the insurer of the automobile that struck the non-occupant".

[3] The "spouse of the named insured" falls within the definition of "insured person" in section 3(1) of the *Statutory Accident Benefits Schedule*, O Reg 34/10. Ms. Halliday and Mr. Zorony cohabitated at the time of the accident, but were not formally married and do not have children together. For the purposes of an accident benefits or other claim, section 224(1)(c)(i) of the *Insurance Act* defines the word "spouse" as including "either of two persons who…have lived together in a conjugal relationship outside marriage, continuously for a period of not less than three

years". The Respondent submits that Ms. Halliday and Mr. Zorony fall within this definition of "spouse". The Appellant submits that they do not.

[4] The standard of review on a judicial review application such as this is generally one of "correctness in relation to questions of law and reasonableness in relation to questions of mixed fact and law": *Ing Insurance Co. v Co-Operators Insurance Co.*, 2013 ONSC 4885, at para 4. As Leitch J. stated in para 5 of *Ing*, which raised a similar question of definition, "[t]he Arbitrator's interpretation of the term 'spouse' in s. 224(1) of the Act is challenged on this appeal. This is a clear question of statutory interpretation, which is a question of general law outside the Arbitrator's specialized area of expertise."

[5] Counsel for the Respondent relies on *Intact Insurance Co. v Allstate Insurance Co.*, 2016 ONCA 609, in arguing that the present case raises a mixed question of fact and law and that a correctness standard should not be applied to the Arbitrator's decision. He notes that in *Intact*, at para 35, the Court of Appeal indicated that "determining whether a person is 'principally dependent' on another is a question of mixed fact and law… And this court has already confirmed that, on appeals from insurance arbitrations involving an interpretation of dependency under SABS, mixed fact and law questions are reviewed for reasonableness."

[6] Here, the dates and duration of Ms. Halliday's and Mr. Zorony's residences, both separately and together, were not in dispute. What was in dispute before the Arbitrator – the sole issue that the Arbitrator had to decide – was the definition of the word "spouse" to be applied to section 224(1) of the *Insurance Act*. While this can potentially be characterized as a purely legal question, as counsel for the Appellant urges, it inevitably has factual components built into it. One cannot determine what the words "lived together" or "conjugal relationship" mean without taking the factual context into account. The exercise here is similar to that which the Court of Appeal faced in *Ing* in defining and applying the phrase "principally dependent". I am willing to consider this a question of mixed fact and law, such that a reasonableness standard of review applies.

[7] When applying a reasonableness standard, "a court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at para 50. That is, the court must respect the fact that interpreting and applying administrative schemes must account for "the imperatives and nuances of the legislative regime": *Ibid.*, at para 49, quoting D.J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity" (2004), 17 CJALP 59, 93.

[8] In *Ing*, at para 53, Leich J. indicated at para 53 that, "The three years prior to the accident is the relevant time frame that must be assessed". Under the terms of the *Insurance Act*, Ms. Halliday and Mr. Zorony would have had to cohabitate together from February 24, 2011 to the date of Ms. Halliday's accident on February 24, 2014. They clearly were not living together in the literal sense for the requisite three years. Mr. Zorony, in cross-examination, was specifically asked when he and Ms. Halliday moved in together, and he indicated that it was in February or March 2013 – i.e. one year prior to the accident.

[9] Prior to that time, Ms. Halliday and Mr. Zorony were involved in a romantic relationship but maintained separate residences. Indeed, the evidence indicates that they had been seriously

dating since at least 2008. The Arbitrator found that from 2011 to February/March 2013, they saw each other on weekends and usually slept over at one or the other's home on weekends – most often at Mr. Zorony's home. They did not co-mingle their assets, have joint bank accounts, or financially support each other in any consistent way during this period.

[10] Mr. Zorony testified that in February or March of 2013, he took a job as a long distance truck driver, and it was at that point that they actually moved in together. In cross-examination, Mr. Zorony was asked about the delay in living together, and he provided an explanation that the Arbitrator, at para 42 of her decision, found to be factually accurate:

> As stated above, Helen [Halliday] was living with her mother prior to moving into the Zorony home in order to provide care to her. David [Zorony] 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.

[11] The Arbitrator looked at the nature of their relationship prior to their living together in order to determine the meaning of "spouse" in the *Insurance Act*. She did so based on *Family Law Act* interpretations of the same word and its defining phrase. In doing so, the Arbitrator relied on the Supreme Court of Canada's decision in *M v H*, [1999] 2 SCR 3, which indicated that the meaning of "spouse" for the purposes of spousal support in the event of marital breakdown requires a more global or "unitary" approach that takes into account a number of features of the couple's life together and contains appropriate flexibility. Much of this, the Court indicated, turns on how the couple is socially perceived – especially in the context of a same-sex relationship which was at issue in *M v H* – as different types of relationships may be subject to varying social perceptions.

[12] In the present case, Mr. Zorony and Ms. Halliday are an opposite-sex couple, and so the societal perception issue that the Supreme Court addressed in *M v H* is not engaged in the same way. However, the Arbitrator applied a similarly holistic approach to the question by looking at a wide number of lifestyle factors listed in *Molodowich v Penttinen* (1980), 17 RFL (2d) 376 (Ont Dist Ct). That decision, which was cited approvingly in *M v H*, was another that arose in the family law context, and that applied a flexible definition of "spouse" for the purposes of awarding support to one partner by another where no formal marriage had been entered into. As stated by the Arbitrator, at para 14, these factors include "shelter, sexual and personal behavior, shared services, social and societal activities, economic support and children."

[13] Counsel for the Respondent relies on several cases that apply the *Moldowich* factors in what he contends is the appropriate way and which support the Arbitrator's decision. In *Stephen v Stawecki*, [2006] OJ No 2412, the court looked at *Family Law Act* claims following a car accident and death of a family member, drawing on the family support context raised in such circumstances. There, the couple were found to be "spouses" after having lived together for 25 months and having spent most of their nights together for the other 11 months of the relevant 3-year period, although one of them had continued to maintain a separate residence.

[14] Likewise, in *Thauvette v Malyon*, [1996] OJ No 1356, the court looked at a question of spousal support for the female partner where she and the male partner had been engaged in a continuous, long term "affair"-type of relationship. For the relevant 3 years, the couple spent 4 to 5 nights out of every week together. As in *Stephen v Stawecki*, need and financial dependence,

combined with the couple having spent a majority of their time living under the same roof, all factored into the analysis. Importantly, the court determined that the female partner had been misled by the male partner, and that their relationship had instilled in her an expectation that he considered her to be like a spouse and would financially support her like a spouse. All of this added up to the court declaring them to have been in a spousal relationship for *Family Law Act* purposes.

[15] Respondent's counsel particularly emphasizes *Hazelwood v Kent*, [2000] OJ 5263, which he says is analogous to the present case in that for several years the couple spent only weekends together. He submits that this demonstrates that living under a single roof is only one factor in the "living together in a conjugal relationship" analysis. As Appellant's counsel points out, however, the court in *Hazelwood* found the parties to be a relationship of permanence based on the fact that they had a child together. It was the existence of the child that cemented the relationship that, on living conditions alone, would not have qualified as a continuous relationship of cohabitation.

[16] It is the Appellant's position that the Arbitrator's decision relies on sociological factors – lifestyle, friends and social habits, careers and support of one for the other's career or education, etc. – that are appropriate to the family law context when it comes to spousal support, but are not necessarily appropriate to the insurance context. In this, the Appellant reflects the view articulated in Ca*therwood v Young Estate*, [1995] OJ No 3658, where Ferguson J. observed that the *Family Law Act* scheme and the *Insurance Act* scheme are quite different and apply to people in very different social and economic contexts. The court indicated, at para 20, that the fact that both statutes both use the word "spouse" or "conjugal relationship" does not mean that they have the same contextualized meaning:

> [T]he No-Fault Benefit Schedule is not part of a coherent package of family law legislation. It provides automatic benefits to spouses regardless of need unlike the *Family Law Act* which provides a scheme for court-ordered support where need is established. In addition, the Schedule specifically states that a claimant under the category of spouse will only be entitled to benefits if that person is a spouse at the time of the accident.

[17] This view has, in turn, been endorsed by the Court of Appeal in *Economical Mutual Insurance Co v Lott* (1998), 155 DLR (4th) 179, at para 17 (Ont CA):

> In so far as the motions judge, in arriving at his interpretation of 'spouse', considered the policy of the no-fault provisions to be the same as that of the support sections in the *Family Law Reform Act, 1978*, I must also disagree. In this regard, I agree with the reasons of DS Ferguson J in *Catherwood v Young Estate*…"

[18] The Court of Appeal has therefore made it clear that the meaning of words used in the *Family Law Act* is not necessarily the same as the meaning of the identical words as used in the *Insurance Act*. But even if the Arbitrator's approach was wrong, was it unreasonable?

[19] As indicated, the *Insurance Act* requires that an insured party and his or her spouse "live together in a conjugal relationship" for a period of 3 years. The Arbitrator noted that in their ordinary meaning, the statute's words seem to require that the couple actually live together – i.e. "occupy the same premises", as the Arbitrator put it at para 35 – for 3 years. She then went on in

the same paragraph to comment that notwithstanding that literal interpretation, "the Court of Appeal has made it clear that the analysis must be broader than that." Based on that mandate for a broader interpretation, the Arbitrator applied the reasoning in the Supreme Court of Canada's innovative *M v H* decision in order to expand the definition of "spouse" beyond what it had previously meant.

[20] The Arbitrator also was careful to mention that the case law, including the Court of Appeal case law that she specifically relied upon, all came from the family law context. What she ignored, however, is the Court of Appeal's admonishment in *Intact*, *supra*, that the insurance law policy context is for all relevant purposes distinct from the family law policy context. Instead of addressing the policy context of the respective legislative schemes, the Arbitrator simply noted, at para 33 of her decision, that the phrases used in the respective statutes are the same:

> 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*.

[21] In other words, the Arbitrator embraced a body of *Family Law Act* cases that eschew a literal interpretation of the phrase "live together in a conjugal relationship", in favour of an interpretation that plugs that phrase into the distinctive policy context of spousal support. She then applied those cases to the *Insurance Act*, without explaining why a policy interpretation from family law should apply there. Ironically, the Arbitrator rejected a literal interpretation in favor of a contextualized, policy interpretation, only to apply that interpretation literally, and without context, to a different statutory scheme embodying a different set of policies.

[22] The Court of Appeal has explained the grounds that might be invoked in finding that a decision under review is unreasonable. In *Intact Insurance Company v Allstate Insurance Company of Canada*, 2016 ONCA 609. LaForme JA reasoned, at paras 64-65 [citations omitted]:

> When reviewing a decision for reasonableness, a court must consider the reasons proffered and the substantive outcome in light of the legal and factual context in which the decision was rendered.
>
> A decision may be unreasonable where a decision maker fails to carry out the proper analysis or where the decision is inconsistent with underlying legal principles. A decision may also be unreasonable where the outcome ignores or cannot be supported by the evidence.

[23] This approach is a further elaboration on what the Supreme Court of Canada said in *Dunsmuir*, the where it indicated that there are two senses in which a decision under review might

be unreasonable. The Court noted, at para 63, that a reviewing court must look to "the process of articulating the reasons and to outcomes." In the present case, the Arbitrator appears to have fallen short on both accounts.

[24] First, the Arbitrator failed to articulate reasons why *Family Law Act* cases should apply to the *Insurance Act*, other than to point to the literal similarity of the words used. There might be a reason to apply family law concepts to an insurance law context other than a coincidence of wording in the legislation, but the Arbitrator did not provide one.

[25] Second, the outcome of the decision was to find persons who admittedly have not lived together for 3 years to have notionally lived together for 3 years. What's more, the decision arrived at this outcome by ignoring the very "imperatives and nuances of the legislative regime" that the Supreme Court says must form the basis of the analysis: *Dunsmuir*, at para 49.

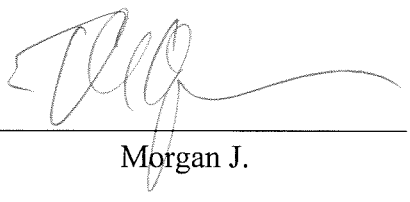
[26] In rejecting literalness in interpretation only to literally apply a different interpretation, the decision under review was an unreasonable one. As the Court of Appeal stated in *Intact*, one cannot simply interpret "the policy of the no-fault provisions [in the *Insurance Act*] to be the same as that of the support sections in the [*Family Law Act*]."

[27] Unlike the *Family Law Act*, the *Insurance Act* provides automatic benefits to spouses regardless of need. It therefore requires a context-specific approach of its own. More specifically, the insurance context contains no imperative to deviate from the ordinary understanding of what it means for two persons to "live together". In the family law sense of the term, where dependency is crucial to the spousal support context, persons can "live together" – i.e. live interdependent lives – but maintain separate physical residences. In most non-family law contexts, and particularly in the insurance law context of automatic benefits without a broad sociological foundation on which to base those benefits, people who "live together" can be considered spouses, but only if they do so in the normal sense of those words and for the requisite period of time.

[28] In that sense, Ms. Halliday and Mr. Zorony can be said to have "lived together" for only 1 year, from February/March 2013 when Mr. Zorony got his truck driving job, to March 2014, when Ms. Halliday was struck by the Respondent's insured. They therefore did not qualify as each other's "spouse" under the *Insurance Act*.

[29] The decision of the Arbitrator dismissing the arbitration brought by the Appellant is quashed. There shall be a Declaration that the Respondent stands in priority to provide statutory accident benefits to Ms. Halliday and that the Appellant is not liable to provide statutory accident benefits to her. There shall be a further Order that the Respondent pay to the Appellant the amount of the accident benefits and expenses it has paid out to date for Ms. Halliday's accident benefits claim.

[30] To their credit, counsel for the parties have agreed on costs and have advised me that there is no need to address costs here.



Date: July 10, 2018

Morgan J.