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:

ECHELON INSURANCE

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the MINISTER OF FINANCE ("MOTOR VEHICLE ACCIDENT CLAIMS FUND")

Respondent

DECISION

COUNSEL:

Jamie R. Pollack and Rebecca Brown for the Applicant

Robert W. Kerkmann for the Respondent

BACKGROUND:

1. Shayne Haynes was seriously injured when the All-Terrain vehicle that he was driving was involved in a single-vehicle accident on August 31, 2014 in the Kawartha Lakes region of Ontario. He suffered a traumatic brain injury, multiple facial fractures, a right tibial fracture, and other injuries. He has been declared to be catastrophically impaired under the *SABS*. The ATV was not insured at the time of the accident.

2. Mr. Haynes was twenty-seven years old at the time, and had been living with Jessica Trepanier in the months leading up to the accident. He and Ms. Trepanier are the natural parents of two young children. She was a named insured under an automobile policy issued by Echelon Insurance ("Echelon") at the time, and Mr. Haynes submitted an Application for payment of accident benefits to Echelon. They accepted his application and have paid benefits to him and on his behalf.

3. Echelon contends that Mr. Haynes was not a "spouse" of its insured at the time of the accident. As he was not insured under any policy and was driving an uninsured vehicle, it contends that the Motor Vehicle Accident Claims Fund ("the Fund") is in priority to pay his claim pursuant to section 268(2)1(iv) of the *Insurance Act.* The parties agree that as parents of children who were not legally married, Mr. Haynes and Ms. Trepanier would meet the definition of "spouses" in the *SABS* if they have lived together in a conjugal relationship outside of marriage "in a relationship of some permanence".

4. Shayne and Jessica began dating when they were both seventeen years old. The evidence indicates that they were involved in an "on and off" relationship over the ensuing eleven years leading up to the time of the accident. They have lived together for certain periods, but have also spent much of that time living apart. The question to be determined is whether at the time of the accident, they were living "together in a conjugal relationship", and that the relationship was one "of some permanence".

RELEVANT PROVISIONS:

Section 268 of the *Insurance Act* provides –

> *(2) The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> *1. 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 incident from which the entitlement to statutory accident benefits arose,*
>
> *iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.*
>
> *(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy* ***or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured,*** *the person shall claim statutory accident benefits against the insurer under that policy.*

The parties agree that if the Claimant is determined to be a "spouse" of Ms. Trepanier, Echelon is the priority insurer pursuant to subsection 268(2)1(i) of the Act. If not, given that he was not insured under any policies, the vehicle that he was in at the time of the accident was not insured and that no other vehicle was involved, the Fund would be responsible to adjust and pay his claims.

Section 224(1) of the *Insurance Act* defines a "spouse" as follows:

> *"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 3(1) of the *Statutory Accident Benefits Schedule* provides:

"Spouse" has the same meaning as in Part VI of the Act

THE EVIDENCE:

5. The parties filed many documents in advance of the hearing, including a signed statement from Jessica Trepanier obtained in March 2015, a transcript from an Examination Under Oath conducted on Ms. Trepanier in May 2015, and a transcript from an Examination Under Oath conducted of Bridgette Haynes, the Claimant's mother, in April 2016. Copies of post-accident hospital records and medical reports that refer to the parties' relationship were also submitted.

6. Jessica Trepanier and Bridgette Haynes also both appeared at the hearing and provided *viva voce* evidence. The Claimant was unable to provide any evidence in the course of the proceeding, given the nature of his injuries.

7. The evidence provided both by Ms. Trepanier (who I will refer to as Jessica) and Ms. Haynes (who I will refer to as Bridgette) was very detailed, and traced the history of the parties' relationship. While much of their testimony was consistent, there were some notable differences. I will summarise the evidence given by each witness, and highlight the important areas in which their testimony differed. While I found both witnesses to be credible, detailed in their recollections and sincere in their approach, I accept Jessica's evidence over that provided by Bridgette in the areas in which they differ, given Jessica's more direct involvement in the relationship.

Jessica Trepanier

8. Jessica testified that she and Shayne began dating in 2004, when they were both seventeen years old and living in Lindsay, Ontario. They moved in together in 2006, after she became pregnant, and their son Andre was born in August 2006. She recalled that the couple split up about five months after Andre was born and that the Claimant moved out of the apartment that they had rented.

9. Jessica described her relationship with Shayne in the years that followed as "on and off". She stated that they lived together at various times, but not for more than two or three months at a time. She described Shayne as someone who has had many problems over the years, including drug addiction and undiagnosed psychological issues. She stated that he has spent time in jail on a few occasions, as a result of drug related convictions. She advised that he also had relationships with other women, and in particular, with a woman named Crystal.

10. Jessica testified that she and her son moved to Sherbrooke, Quebec in 2011 or 2012, and lived in an apartment there that they shared with a friend and her daughter. Shayne came to Sherbrooke to live with her shortly afterwards, but she apparently told him to leave when he quit a job that he had started after only having worked there for a few weeks.

11. When asked about her living arrangements in the year prior to the accident, Jessica stated that Shayne had come to Sherbrooke in August 2013, and lived with her there for a few months. She recalled that he moved out in either October or November 2013, after which he spent some time in jail. She testified that her father had acted as a surety for Shayne upon his release from jail.

12. Jessica recalled that Shayne then returned to live with her in Sherbrooke from April 2014 until late May or early June, after which he moved back to Ontario to look for work. She testified that the reason for him doing so was to find a job before an upcoming court

date, so that he could advise the court that he had secured employment, which he had hoped would reduce his sentence.

13. Jessica gave birth to a daughter, her second child with Shayne, on June 1, 2014. She stated that she went back to Ontario to have the child, and that Shayne was at the hospital for the delivery.

14. Jessica explained that Shayne's grandmother found him a job with people she knew that were involved in the business of moving buildings, around that time. She stated that he liked the people he worked with and really enjoyed the work. He decided to rent a house in Bowmanville, and looked around for a place that was large enough for him to share with Jessica and their two children. She advised that once he found a suitable place, she signed the lease for the rental, explaining that her credit rating was much better than his.

15. Jessica then moved to Bowmanville, and lived there with Shayne and the two children through the summer. Notably, she resisted the suggestion made at the hearing that she had moved to Bowmanville permanently in order to be with the Claimant, stating instead that she was "visiting" Shayne for the summer with her son and new baby. She explained that she had left many of her belongings in Sherbrooke, and that she traveled back there from time to time over the course of the summer.

16. Jessica agreed, however, that she had decided to spend a few months living with Shayne over that summer, to see whether their relationship could work out. She stated unequivocally that she hoped that it would. She also advised that she had intended to continue her schooling at the Humber College campus near there, once she completed her maternity leave.

17. When asked to describe the nature of their relationship from April 2014 when Mr. Haynes came to live with her in Sherbrooke, until the end of August when the accident occurred, Jessica agreed that they had a monogamous relationship and that they had "lived as a couple". They ate meals together, socialised together with friends and both of their

families, and had sexual relations. She stated that during the few months before the accident in late August 2014 "we were nowhere near perfect, but it was better than it had ever been".

18. Shayne did not provide any financial support to Jessica or the children over that period, or at any time.

19. Jessica also advised that she had a close relationship with Bridgette Haynes, the Claimant's mother, and described her as being "like a mother to me". She stated that she was also close with the rest of Shayne's family, and often visited his relatives with the children.

20. When asked to describe her relationship with Shayne overall, Jessica stated that it was difficult to do so because it was "on and off" and "changed by the day, week or month". She advised that he had asked her to marry him on a few occasions, but that she had declined, explaining that she felt that he was too unstable. She stated that she had not considered him to be her "common-law spouse" as they had not lived together for more than a few months at any one time, and that he had not financially supported her or contributed to the children's support.

21. When asked why Mr. Haynes would have indicated that he was her spouse on the Application for benefits that he submitted to Echelon, Jessica stated – "we were together for eleven years…and as much as we were on and off again, we always looked at each other like we belonged to each other, regardless of whether we lived together or not. So even after we broke up, he assumed that he was going to be coming back home at some point." When asked whether she had also assumed that to be the case, she replied that she had not.

22. Jessica also testified that she was very involved in Shayne's care after he was injured in the accident. She stated that she slept in a chair in his hospital room for a few weeks after he was injured, waiting for him to "wake up." He sustained a traumatic brain

injury and had impaired cognition, and she was appointed as his substitute decision maker. She was identified in many of the medical assessments and hospital documents as his spouse, although she explained that it was Shayne who had described her in that way. When asked why she chose not to correct that description, she responded that she would not have been permitted to have as much access to Shayne as she had, or be involved in decisions made regarding his care, if she had said that she was his girlfriend.

23. Finally, Jessica advised at the hearing that her relationship with the Claimant ended in February 2015, approximately six months after the accident.

Bridgette Haynes

24. Shayne's mother testified that she has always been close with her son and with Jessica as well over the course of their relationship. She stated that Shayne had always confided in her about their relationship, and that she became very involved in their lives. She advised that she saw Shayne and Jessica, as well as the children, on a regular basis in the period preceding the accident.

25. Ms. Haynes testified that her son had told her that he hoped to marry Jessica at some point. She felt that the conflicts that arose between them from time to time resulted from Jessica being "very demanding", and Shayne not liking to be told what to do. She acknowledged that they had split up at various times over the eleven years that they had known each other, but suggested that it was never for very long. She estimated that the two of them had lived together for approximately 85% of the time since they first began their relationship as teenagers.

26. When asked whether she was aware that her son had also been involved with other women over the years, Bridgette acknowledged that he had had one other girlfriend "during the year that he and Jessica broke up", but stated that that was several years before the accident. When it was suggested to her that Shayne was involved with a woman named Crystal after he was released from jail in November 2013, nine months before the accident,

Bridgette denied that, stating that it was unlikely that Jessica's father would have acted as his surety if that were true.

27. When asked about the state of Shayne and Jessica's relationship in the year prior to the accident in August 2014, Ms. Haynes testified that they were "definitely a couple" at that point. She recalled that their relationship was "going great" when they lived together in Bowmanville during the few months prior to the accident. She felt that they were newly committed to each other, that Shayne really liked his new job, and that they had a new baby, all of which suggested that they were beginning a new chapter in their relationship.

28. When asked about her son's drug habits and periods of incarceration, Ms. Haynes seemed to minimise both the duration and seriousness of those things, as well as the effect they had on his relationship with Jessica. When it was suggested to her that the hospital records from Shayne's post-accident admission refer to a history of addiction to crack cocaine and opioids over many years, and a habit of smoking 10 grams of cannabis per day, Ms. Haynes denied that her son suffered from drug addiction and suggested that his use of drugs was a "party thing".

PARTIES' ARGUMENTS:

29. As outlined above, as unmarried parents of two children, Shayne and Jessica will meet the definition of "spouses" under the *Act* if at the time of the accident, they were living together in a conjugal relationship outside of marriage "in a relationship of some permanence". The parties filed written submissions after the evidence was heard, in which they summarised the witnesses' testimony, and applied the principles from various earlier cases to the evidence tendered.

30. Shortly after those submissions were received, an appeal decision was released in *Royal and SunAlliance Insurance v. Desjardins Insurance Group* [2018] O.J. No. 3665, overturning my award issued earlier in that case. I then received a further round of detailed, written submissions from both parties, commenting on that decision and referring to additional authorities. I will summarise both sets of arguments below.

Echelon's initial arguments

31. Counsel for Echelon contended that when the evidence above is considered against the definition of "spouse" in the Act, and the criteria established in the earlier case law on this issue, it is clear that the Claimant was not a "spouse" of its insured at the time of the accident. Counsel emphasized Jessica's testimony that the parties had not lived together for more than two or three months at a time over the course of the many years that they had known each other, and that Shayne had not contributed to her financial support or that of the children.

32. Mr. Pollack also referred to Jessica's statement that she was just "visiting" Shayne when she moved into the Bowmanville house over the summer of 2014, and noted that she had still maintained her apartment in Sherbrooke, Quebec during that time. He also noted that Jessica had declined to marry Shayne on the few occasions on which he had asked her, and that she stated that she considered him and their relationship to be too unstable to consider marriage, given his drug use and undiagnosed psychological issues.

33. Mr. Pollack referred to Arbitrator Malach's decisions in *Zurich Canada v. Pilot Insurance Company and Royal v. SunAlliance Company of Canada* (October 20, 2000) and *Pilot Insurance Company v. State Farm Mutual Automobile Insurance Company* (May 18, 2005), and his review of earlier rulings by FSCO Arbitrators and judges who were asked to determine a party's spousal status in a family law context. Drawing on those decisions, Arbitrator Malach stated that in order to determine whether a spousal relationship existed, decision makers should look beyond the mere fact of whether the parties were physically living together, and should consider other factors, such as the duration and stability of the relationship, the parties' intentions, their interdependence and shared responsibility for household services and children, the existence of a sexual relationship, the couple's interaction in a family and social context and their financial arrangements and support. [1]

[1] I note that the relevant definition of "spouse" in the *Insurance Act* at that time simply required unmarried parents of a child to have "cohabited in a relationship of some permanence", and did not refer to conjugality.

34. Counsel for Echelon submitted that a general consensus developed among arbitrators in the cases that followed that the factors applied by Arbitrator Malach noted above cases provide a "flexible yet objective tool for examining the nature of relationships on a case by case basis" (see *Wawanesa Mutual Insurance Company v. Kingsway General Insurance Company* (Jones, April 2005), *Intact Insurance Company of Canada v. Economical Mutual Insurance Company* (Bialkowski, July 17, 2014), and *Intact Insurance v. Jevco Insurance Company* (Bialkowski, October 13, 2011)).

35. Counsel for Echelon also cited Arbitrator Bialkowski's decision in *Gore Mutual Insurance v AXA Insurance* (December 22, 2014) in which he adopted the "generally accepted characteristics of a conjugal relationship" set out in the case of *Molodowich v. Penttinen* (1980) 17 R.F.L. (2d) 376 (Ont. Dist.Ct.), in determining whether two people met the definition of "spouses" under the *Insurance Act*.

36. Finally, counsel contended that when Ms. Trepanier's evidence regarding the instability of her relationship with the Claimant is considered, along with the fact that Shayne had had relationships with other women during that period, I should conclude that Shayne was not a "spouse" of Echelon's insured at the time of the accident.

Fund's initial arguments

37. Counsel for the Fund acknowledged that Jessica had testified that her relationship with the Claimant was "on and off" over the course of several years before the accident. He emphasized, however, that she had also stated at the Arbitration hearing that "we were together for eleven years" and that despite the on and off nature of their relationship, "we always looked at each other like we belonged together, regardless of if we lived together or not".

38. Counsel pointed out that Shayne and Jessica had lived together for approximately nine months during the year preceding the accident in late August 2014. He noted that Shayne had lived with Jessica in Sherbrooke from August 2013 to November 2013, during

which they had a romantic and sexual relationship[2]. The couple then lived together again from April 2014 to the date of the accident in late August, initially in Sherbrooke, and later in Bowmanville, following the birth of their daughter. He also noted that while Jessica had kept her apartment in Sherbrooke during that time, she agreed with his suggestion that after moving to Bowmanville and beginning full-time work that he really liked, Shane had "turned a corner in his life", and that they had both sincerely hoped at that point that their renewed commitment would last.

39. Mr. Kerkmann referred to the "seven *Molodowich* factors" from the case of *Molodwich v Pentinnen, supra,* cited above, including shared shelter, sexual and personal behaviour, shared household services, participation in social and shared family activities, societal perception of the couple and economic support. He noted that the Supreme Court of Canada had explicitly endorsed these as being the generally accepted characteristics of a conjugal relationship in its landmark ruling in the case of *M v. H* [1999] 2 S.C.R. 3 (at para.59). He also noted that Arbitrator Bialkowski considered these when determining whether a couple had a conjugal relationship in a priority dispute involving *Wawanesa v. State Farm and Aviva* (April 11, 2017). Counsel submitted that almost all of the above factors were present in this case, and that I should therefore conclude that Shayne and Jessica were involved in a conjugal relationship at the time of the accident.

40. Counsel for the Fund also submitted that the evidence supported a finding that Shayne and Jessica were involved in a "relationship of some permanence" at the time of the accident, given their past behaviour, but also their mutual hope at that time that things would work out over the long term. He emphasized the Claimant's newfound stable and full-time employment, the fact that they had a new baby and had rented an apartment that was large enough for them all to live in, as well as Jessica's stated hope to continue her schooling at Humber College near Bowmanville the following September.

[2] Given that their daughter Nadine was born on June 1, 2014, it appears that she was conceived during this period.

Echelon's Reply

41. Counsel for Echelon pointed out that the Claimant did not provide any financial support to either Jessica or the children at any time before the accident, regardless of whether or not he was working. He also suggested that the stated hope that their relationship would somehow be different during the period in question, and would lead to a long term commitment or "relationship of some permanence", was simply not borne out by the pair's longstanding history. He noted Jessica's earlier statement that she and Shayne had spent more time apart than together over the eleven years that they had known each other, and suggested that Shayne would have reverted back to his old habits of consuming drugs and leaving jobs, which would have likely led to another separation.

42. Counsel also submitted that Bridgette Haynes' evidence should be disregarded, and her statement that Shayne and Jessica had spent 85% of their time together ignored, given Jessica's statement that they had never lived together for more than two or three months at a time. He stated that Bridgette clearly refused to acknowledge her son's longstanding issues with drug abuse and addiction, which had a significant effect on his relationship with Jessica, as well as his ongoing, albeit sporadic, relationship with another woman.

43. Counsel for Echelon noted that the Fund relied on many decisions which refer to the *Family Law Act* definitions of "cohabit" and "spouse", and submitted that the *FLA* definition of the term "spouse" does not include a requirement for a "relationship of some permanence", and that the cases were therefore of limited application to priority disputes[3]. Counsel suggested that the decisions by Arbitrator Malach and Arbitrator Bialkowski referred to in Echelon's initial submissions are the leading cases on the issue, and that given the different definitions in the two statutes, the *Molodowich* and *M v. H* decisions – both decided under the *FLA* provisions - should not be considered.

[3] This contention is incorrect. While the definition of "spouse" in section 1(1) of the *FLA* refers only to persons who are either married to each other or have entered into a marriage that is voidable or void, section 29 of that Act provides that for the purposes of Part III (Support Obligations), two people can be "spouses" if they have cohabited in a relationship of some permanence if they are the parents of a child.

44. Finally, counsel for Echelon acknowledged that while Arbitrator Bialkowski had considered the "Molodowich factors" in determining whether a conjugal relationship existed in a priority dispute in *Wawanesa v State Farm and Aviva, supra,* he noted that he had also stated that the expectations and intentions of the parties should be considered. Counsel stated that Jessica's statement that she did not believe that her relationship with Shayne was stable and that she did not view them to be in a spousal relationship should lead to a finding that the relationship in question was not one of "some permanence".

APPEAL DECISION – RSA v. DESJARDINS [2018] ONSC 4284:

45. As noted above, this was another priority dispute that raised the question of whether a claimant met the definition of "spouse" in the *Insurance Act*. Based on the evidence presented, I determined that RSA was in priority to pay a claimant's accident benefits claims because she was the spouse of an RSA insured (and was not an insured under any other policy). The couple in question were not legally married and were not parents of any children, so would only be considered "spouses" under the *Act* if they were determined to be living together "in a conjugal relationship outside marriage, continuously for a period of not less than three years" under part c(i) of the definition.

46. The evidence in that case established that the couple had moved in together approximately one year before the accident. They had, however, been involved in a serious relationship for several years prior to that, while maintaining separate residences. During that time, they were each living with their elderly mothers, in order to provide care for them as needed. They typically spent their weekends together, and stayed together for a few nights each week. I found that despite the couple not having lived together in the same space for the requisite three years, they otherwise met the criteria for having had a "conjugal relationship" as set out in *Molodowich v. Pentinnen, supra,* and as approved by the Supreme Court of Canada in *M v. H*, *supra,* and determined that the claimant was accordingly a "spouse" of the RSA insured.

47. RSA appealed my decision. Justice Morgan allowed the appeal, finding that the application of criteria from the *FLA* decisions outlined above to the "three-year living

together" test in the *Insurance Act* was unreasonable. He noted that I had applied a "similarly holistic approach" in reaching my conclusion by considering a wide number of lifestyle factors listed in *Molodowich, supra,* as had the Supreme Court of Canada in *M. v. H, supra,* but found that the insurance law policy context is distinct from the family law policy context.

48. Justice Morgan referred to two court decisions relied on by RSA - *Catherwood v. Young Estate* (1995) 27 O.R. (3d) 63 and the Court of Appeal's decision in *Economical Mutual Insurance v. Lott* (1998) 37 O.R. (3d) 417[4]. In this latter case, Associate Chief Justice Morden stated that to the extent that the motions judge "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* in arriving at his interpretation of the term "spouse", he disagreed. Justice Morgan concluded from this comment that the Court of Appeal had determined that the underlying policy of the *SABS* and the *Insurance Act* should not be assumed to be the same as that of the support provisions in the *FLA,* and ruled that my decision to embrace "a body of *FLA* cases that eschew a literal interpretation of the phrase live together in a conjugal relationship" was unreasonable. He stated – (at paras. 26 and 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.*
>
> *In that sense, Ms. Halliday and Mr. Zorony can be said to have "lived together" for only 1 year … They therefore did not qualify as each other's "spouse" under the Insurance Act.*

[4] Neither of these cases were submitted or referenced by RSA at the arbitration hearing

49. Desjardins applied for leave to appeal Justice Morgan's decision to the Court of Appeal, but subsequently withdrew their application.

PARTIES' SUBMISSIONS ON ABOVE APPEAL DECISION:

50. As mentioned above, both parties filed detailed, supplementary submissions after this decision was released, addressing its relevance and the application of Justice Morgan's comments to this case.

Echelon's submissions

51. Counsel for Echelon submitted that the above decision is directly on point and is a binding precedent that I must follow. Counsel acknowledged that the focus in *RSA v. Desjardins* is on a different branch of the "spouse" test, but stated that Justice Morgan's comments regarding the applicability of *Family Law Act* decisions to priority disputes are relevant to this dispute. Counsel submitted that the binding principle to be followed is that as the policy underlying the insurance and priority dispute provisions is distinct from the family law policy context, the criteria considered in the priority dispute decisions referred to in its initial submissions should be preferred over the factors cited in the *FLA* cases relied on by the Fund.

Fund's submissions

52. The Fund made lengthy submissions on a few issues raised by Justice Morgan's ruling. Counsel submitted that Justice Morgan's direction that *FLA* decisions should not be considered when determining whether someone meets the definition of "spouse" in the *Insurance Act* is "seriously flawed" and should not be followed, as it is inconsistent with a long line of cases, including the Supreme Court of Canada's decision in *Miron v Trudel* [1995] 2 S.C.R. 418.

53. Counsel for the Fund submitted that alternatively, Justice Morgan's ruling is not applicable to this case. He noted that the focus of that decision is on how the phrase "living together…continuously for a period of not less than three years" should be interpreted, and that the branch of the "spouse" definition in issue here does not require the parties to have

lived together for three years. Counsel noted that Justice Morgan did not comment on the criteria that have been applied by judges and arbitrators to determine whether two people were involved in a "conjugal relationship", and that his decision is silent on whether the "*Molodowich* factors" should be applied in the *Insurance Act* context.

54. Counsel noted that the Supreme Court of Canada considered the definition of "spouse" in the Ontario *Insurance Act* (and the identical definition in the applicable standard automobile policy) in 1987, when it decided *Miron v Trudel, supra.* The definition at that time did not include people who were not legally married. Mr. Miron, had been living with a woman insured under an auto policy issued by Economical Insurance for four years. The couple had two children together, but were not legally married. The court described them as an "economic unit". Mr. Miron was injured while he was a passenger in an uninsured vehicle, driven by an uninsured driver. He was unable to work as a result of his injuries, and submitted a claim for accident benefits to Economical.

55. Economical denied the claim, on the basis that Miron was not a spouse of its insured. Mr. Miron sued the insurer, and Economical brought a motion prior to trial to determine a question of law, namely, whether Mr. Miron should be considered a "spouse" under the policy. The Plaintiff argued that the definition of "spouse" was discriminatory and breached the *Charter of Rights and Freedoms*, and a majority (five to four) of the Supreme Court judges found in his favour. Justice McLachlin (as she then was) wrote on behalf of herself and three others in the majority. Justice L'Heureux-Dubé issued her own reasons. Both Justice L'Heureux-Dubé and Justice McLachlin referred to the *Family Law Act* in their judgments. Justice L'Heureux-Dubé noted – (at paras.109 and 114):

> *The objective of the Standard Automobile Policy, which I accept as pressing and substantial, is to protect stable family units by insuring against the economic consequences that may follow from injury of one of the members of the family..*
> …
> *As I have already noted elsewhere in these reasons, however, the impugned insurance legislation is in effect in Ontario – a jurisdiction in which the Family Law Act has, since 1978, prescribed a mutual obligation of support for common law spouses (see s. 29 of the Act). Thus, as at August 1987,*

> *common law spouses in Ontario were, indeed, bound by an obligation of mutual support yet were excluded from a Standard Automobile Policy whose basic purpose was almost inextricably related to that mutual obligation and to the relationship of interdependency upon which that obligation is premised.*

56. Counsel noted that this view directly contradicts Justice Morgan's statements that the policy contexts of the *Family Law Act* and the *Insurance Act* are distinct, and that his decision should accordingly not be followed.

57. Counsel for the Fund then referred to the case of *Rodrigue and Canadian General Insurance Company* (OIC A005175, Sr. Arbitrator Naylor, August 30, 1995). The Commission[5] was asked to address an application for death benefits under the *SABS* which called for an interpretation of the term "spouse" under the *Insurance Act.* Senior Arbitrator Naylor relied on the *Miron v. Trudel, supra,* decision and noted Justice L'Heureux-Dube's comments excerpted above. She also stated - (at p. 6):

> *The general principles set out in the family law cases are applicable to accident benefit cases. The language of the relevant provisions of the Insurance Act and the Family Law Act is the same. Both schemes share common goals. Madame Justice L'Heureux-Dubé commented on the obligation of mutual support imposed upon common-law spouses under the Family Law Act, noting that the basic purpose of the Ontario Standard Automobile Policy is almost inextricably related to that mutual dependence and to the relationship of interdependency upon which that obligation is premised.*

58. Counsel for the Fund noted that the *Catherwood v Young Estate, supra*, decision referred to by Justice Morgan in the *RSA v Desjardins* appeal was issued later that year. It also addressed entitlement to a death benefit under an auto policy. The woman who brought that claim had been married to the deceased insured, but the couple divorced two years prior to this death. She was receiving support payments from him at the time of his death, and claimed that she met the definition of spouse under the policy (which was the same as in the *Insurance Act*) because she had cohabitated with him in the past. She argued that as the definition of "spouse" in the *FLA* was identical to that in the *Insurance Act*, and

[5] The Ontario Insurance Commission was the predecessor to the Financial Services Commission of Ontario

since a former spouse could claim support under the *FLA,* the court should interpret the *Insurance Act* definition to include former spouses as well.

59. The court disagreed, noting that the provisions of the insurance policy required there to be a spousal relationship at the time of the accident. Counsel for the Fund emphasized that the court in *Catherwood* did not state that the definition of "living together in a conjugal relationship" should be interpreted differently for the purposes of the *FLA* and the *Insurance Act,* and that the focus of the decision was on the temporal connection between the spousal relationship and the accident causing death.

60. Counsel for the Fund similarly noted that *Economical v Lott, supra,* the other case cited and relied on by Justice Morgan in the *RSA v Desjardins* appeal, was also a "death benefit" case. The question was the same as was posed in *Catherwood,* namely whether a person who had formerly been, but was no longer the spouse of an insured at the time of the accident, would qualify for a death benefit under his auto policy. The Court of Appeal found that she did not, again because she was no longer the spouse of the insured at the time of the accident that caused his death.

61. Counsel for the Fund then highlighted Justice Leitch's appeal ruling in *ING v Co-operators* (2013) O.J. No. 4059. This was a priority dispute in which the arbitrator found that two twenty-year olds who had been in a romantic relationship since the age of thirteen met the definition of "spouses" under the *Insurance Act.* The couple were not legally married, and had no children. The applicable part of the "spouse" definition therefore required that they live together in a conjugal relationship "continuously for a period of not less than three years". The claimant lived at his parents' home throughout this period. His girlfriend spent weekends, holidays and some weeknights with him at his parents' house, but also lived at her mother's home, as well as with a friend's family.

62. Justice Leitch noted that the arbitrator had referred to the Supreme Court of Canada's decision in *M v. H, supra*, and that court's reliance on the *Molodowich* decision, which he described as "setting out the generally accepted characteristics of a conjugal

relationship". He confirmed that the criteria specified in that case "remain the authority on the elements of a conjugal relationship". He found that the arbitrator had erred by not applying the *Molodowich* criteria to the full three years in question, and overturned the award.

63. The Fund submits that despite disputing the arbitrator's finding that the couple lived together in a conjugal relationship for three years before the accident, Justice Leitch explicitly approved the application of the *Molodowich* factors to an analysis of spousal status under the *Insurance Act* in a priority dispute. He urged me to follow this ruling, and to disregard Justice Morgan's contention in *RSA v. Desjardins, supra,* that *FLA* cases should not be considered.

ANALYSIS & REASONS:

64. I start my analysis by restating the relevant test – Shayne will meet the definition of "spouse" in the *Schedule*, and Echelon will be in priority to pay his claims under section 268(2)1 of the *Act*, if he and Jessica "lived together in a conjugal relationship outside marriage…in a relationship of some permanence" at the time of the accident. Because they are natural parents of two children, part (i) of subsection © of the definition does not apply, and there is no requirement for them to have lived together continuously for three years.

65. For that reason, I find Justice Morgan's ruling in *RSA v Desjardins, supra,* to be of limited assistance to this analysis. As noted above, the couple in that case were not parents of any children, and the question to be addressed was whether they had lived together in a conjugal relationship for at least three years before the accident. Mr. Justice Morgan disagreed with my conclusion that they had done so, and determined that I had applied the reasoning of the Supreme Court of Canada in *M v. H, supra*, in order to "expand the definition of "spouse" beyond what it had previously meant" (at para.19). He found that the fact that the question of whether someone is a spouse under the *FLA* arises in a different context than it does under the *Insurance Act*, means that there is "no imperative to deviate from the ordinary understanding of what it means for two persons to live together" for the required three years.

66. As noted by counsel for the Fund, Justice Morgan's ruling does not include any discussion on what criteria should be used to determine whether a relationship is "conjugal". His finding that the three-year cohabitation requirement was not met was sufficient to support the conclusion that he reached. The fact that he did not provide his views on whether the body of *FLA* case law that has been followed by many judges and arbitrators in the priority dispute context in interpreting what constitutes a "conjugal relationship" – the only overlapping factor between that case and this one - means that his ruling has no practical application here.

67. In contrast, Justice Leitch specifically addressed the test for determining conjugality under the definition of "spouse" in the *Insurance Act*, in the *ING Insurance and Co-operators* decision cited above. He stated that a "flexible approach should be employed when gauging a conjugal relationship, as was indicated in *M v. H*". He cited paragraph 59 of that decision in which the Supreme Court of Canada referred to the *Molodowich* case as setting out the generally accepted characteristics of a conjugal relationship, noting that these elements may be present in varying degrees and are not all necessary for a relationship to be found to be conjugal. He confirmed that these criteria "remain the authority on the elements of a conjugal relationship" in priority disputes.

68. Interestingly, Justice Leitch also stated that the adoption of the *Molodowich* factors "makes clear that the fact that one party continues to maintain a separate residence does not preclude a finding that parties are living together in a conjugal relationship". This appears to directly contradict Justice Morgan's findings above, but as stated, is not germane to the analysis required here.

69. I agree with Justice Leitch's findings, as well as those of my arbitral colleagues cited above, that the "*Molodowich* factors" remain the criteria to consider when determining whether two people were involved in a conjugal relationship, under the *Insurance Act* definition of "spouse". I turn now to the evidence tendered in this case, with those factors in mind.

(i) Were Shayne and Jessica living together in a conjugal relationship at the time ?

70. Echelon's submissions focused mainly on whether Shayne and Jessica were involved in a relationship of some permanence, and do not specifically address the criteria to be applied in determining whether the relationship was "conjugal". As noted above, counsel for Echelon cited and relied on Arbitrator Malach's decisions in *Zurich Canada v. Pilot Insurance Company and Royal v. SunAlliance Company of Canada, supra,* and *Pilot Insurance Company v. State Farm Mutual Automobile Insurance Company, supra,* in which he referred to the duration and stability of a relationship, the parties' intentions, their interdependence and shared responsibility for household services and children, the existence of a sexual relationship, their interaction with family and friends and the extent to which their finances are mingled as being relevant factors to consider.

71. Interestingly, Echelon also cited Arbitrator Bialkowski's decision in *Gore Mutual v. AXA Insurance, supra.* Arbitrator Bialkowski stated in that case that the *M v. H, supra,* decision establishes that the leading authority on the generally accepted characteristics of a conjugal relationship is the *Molodowich* case, in which Justice Kurisko outlined seven main categories to be considered, including shelter, sexual and personal behaviour, shared household services, social habits, societal treatment of the couple, economic support and the existence of children.

72. Counsel for the Fund noted that despite Echelon's contention that the cases it cited should be preferred over those relied on by the Fund, the authorities cited by both parties generally refer to the same list of factors to consider. I agree. As has been noted throughout these reasons, the *Molodowich* factors have been accepted by many arbitrators and judges in different contexts, including priority disputes, as well as by the Supreme Court of Canada in *M v. H.* I find that there is no real distinction between those and the list of criteria referred to by Arbitrator Malach in the decisions cited by Echelon.

73. When the facts in this case are considered against these factors, I have no trouble concluding that Shayne and Jessica were living together in a conjugal relationship at the

time of the accident. To begin with, they were physically living together in the house in Bowmanville that Shayne had found, and Jessica had signed the lease for, at the time of the accident. Their two children were living with them. They operated as a couple, and had a monogamous sexual relationship at the time. They socialised together with friends and members of both of their families on a regular basis. While Jessica suggested that she performed most of the child care and household tasks, Shayne was working full-time hours over those summer months, while she was not employed.

74. The evidence suggests that the couple lived in Bowmanville for much of June, all of July and all of August, before the accident occurred on August 31, 2014. They had also lived together for approximately three months in Sherbrooke between August and October or November 2013, and a further three months between April and June 2014. By my count, they cohabited for approximately nine of the twelve months that preceded the accident.

75. Counsel for Echelon emphasized that Shayne and Jessica kept their finances separate, and that Shayne did not financially support either Jessica or the children at any time. This factor is undoubtedly relevant to the analysis. In the circumstances, however, I do not find it to be important enough to negate the other indicia of a conjugal relationship. Neither Shayne nor Jessica were financially well off, and Shayne had just begun working full-time. Jessica testified that she was receiving EI maternity benefits as of June 2014 when she gave birth to her daughter, which was enough to support her and both children. The fact that two people who lived together, neither of whom earned much money, did not comingle their finances does not, in my view, lead to the conclusion that their relationship was not conjugal, when many of the other factors are present.

Were the parties involved in a "relationship of some permanence" ?

76. The phrase "some permanence" is difficult to define. It is clear from the existence of the three-year requirement in part c(i) of the definition that the legislators deliberately chose not to impose a temporal requirement on common law couples who are parents of children, opting instead for a more 'qualitative" requirement. In my view, this phrase leaves room for some doubt about the future viability of a relationship. It suggests that the

two people involved must show a determined commitment, but that the length of the commitment may be variable.

77. I find that Shayne and Jessica's relationship fits that description at the time in question. They had just moved in together to a new place of their own, in a town that was new to each of them but close to their extended families. Shayne had secured full-time work, the first time he had done so in a long time. Jessica testified that she planned to continue her schooling at the Humber College campus nearby, the following September. They had a new baby. In my view, the above factors signal a new and more mature stage of their relationship and qualifies as a "relationship of some permanence".

78. I acknowledge Jessica's statement at the hearing that she had kept her apartment in Sherbrooke and was just "visiting" Shayne for the summer with the children. Her evidence on this point was somewhat inconsistent – suggesting that while she hoped that their relationship would work out and their time in Bowmanville together would lead to a renewed long-term commitment, she did not feel secure enough about it to move all of her belongings out of the Sherbrooke apartment. While it is awkward to look back in hindsight on a relationship – especially one that subsequently ends, as this one did – I find that the evidence as a whole suggests that there were many objective factors to support the view that Shayne and Jessica were involved in a fairly stable relationship at the time of the accident, that could accurately be described as a "relationship of some permanence". In Jessica's words, their relationship in the months before the accident was "nowhere near perfect, but better than it had ever been".

79. I also acknowledge that Jessica testified that she declined Shayne's marriage proposals over the years, because she found him, and their relationship, to be too unstable. She also stated that she did not consider Shayne to be her common law spouse. That said, the evidence clearly shows a strong bond between these two individuals, over the course of many years. Jessica made the point at the hearing that she and Shayne had "been together for eleven years" and that even though their relationship was "on and off" they always felt that they "belonged to each other". She slept in his hospital room for a few weeks after he

was injured and was in a coma, and was very involved in his post-accident care. In the end I find these sentiments from her to be more germane to the analysis required than her evidence that she received no financial support from Shayne, which would be more important to the determination of her entitlement to spousal support from him under the FLA.

80. Given my findings above, I conclude that Shayne and Jessica were living together in a conjugal relationship of some permanence at the time of the accident, and that he therefore meets the definition of "spouse" in the *Insurance Act*.

SHOULD CASES DECIDED UNDER THE *FLA* BE CONSIDERED ?

81. While the above findings determine this matter, I will add some final comments regarding the applicability of the authorities referred to by the parties in their extensive submissions filed in the aftermath of Justice Morgan's decision in *Desjardins v. RSA, supra.*

82. While I have determined that Justice Morgan's decision in the above case addresses a different branch of the "spouse" definition and is not applicable to this analysis, I do share the Fund's view that his statements that *FLA* cases should not be considered when analysing whether someone is a spouse under the *Insurance Act* for the purposes of a priority dispute is not consistent with the case law that has developed in the aftermath of the Supreme Court of Canada's decision in *Miron v Trudel, supra.*

83. I agree that the reason for determining whether someone qualifies as a "spouse" under the *FLA* for support purposes differs from the consideration of spousal status under the *Insurance Act*. In many of the cases cited, an applicant was seeking a death benefit payable under an insurance policy to a spouse, and the policy definition mirrors that in the Act. In others, as is the case here, two insurers are involved in a priority dispute, and the determination of spousal status dictates which insurer is in priority to pay the accident benefits claims submitted. This is an important distinction.

84. As noted above, many judges and arbitrators have applied the cases decided under the FLA to insurance cases. The basis for doing so is found in the excerpts above from *Miron v. Trudel* and the *Rodrigue* decision, in which the policy and goals underlying the *FLA* and *Insurance Act* have been found to be similar. Justice Morgan's finding that the *FLA* cases should not be considered in cases calling for a determination of spousal status under the *Insurance Act* is contrary to these expressed views.

85. I note that Justice Morgan referred to the comments made by Assoc. Chief Justice Morden in the *Lot*t case, and based his finding on the idea that the policy contexts were different. It is important to note that these comments were made in the context of a consideration of whether a death benefit should be payable to a former spouse under a policy. The motions judge appears to have found that once someone is found to be a common law spouse of someone else, that status remains with them, even if the couple cease to live together. Justice Morden clearly disagreed with this finding and expressed the view that the case cited, the focus of which was whether the FLA provisions could be applied retrospectively, did not support that view. His comments were made in that context.

86. Accordingly and with respect, it is clear that the comment by Justice Morden is not one of general application, and should not in my view be taken as the Court of Appeal having made clear that FLA decisions should not be considered in insurance cases requiring a determination of spousal status. The issue in the *Lott* decision was whether a temporal connection is required between the person's status of spouse and the triggering event, being the insured's death giving rise to the application for death benefit. Any statements made regarding the different policy considerations must accordingly be taken with that narrow focus in mind.

87. Further, the fact that the above comments were made in the context of a death benefits claim also suggests that they are of questionable relevance to priority disputes. While I am content to leave that discussion to another day, the policy context of whether

someone qualifies for a death benefit, and whether one insurer or another is in priority to pay an accident benefits claim is entirely different.

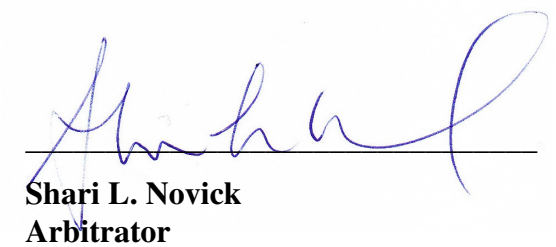
ORDER:

As determined above, Mr. Haynes was the "spouse" of the Echelon insured at the time of the accident, and Echelon is therefore the insurer with highest priority to pay his claims, in accordance with section 268(2)1(i) of the Act. Their application against the Fund is accordingly dismissed.

COSTS:

The Fund is the successful party and is therefore entitled to its legal costs related to this process, on a partial indemnity basis. If counsel are unable to agree on the quantum owing, I invite them to contact me and a process will be arranged to have that issue determined.

DATED at TORONTO, ONTARIO this ___5th____DAY OF APRIL, 2019



Shari L. Novick
Arbitrator