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:

AVIVA CANADA INC.

Applicant

- and -

TD INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Nathalie V. Rosenthall and Nathan Fabiano for the Applicant

Stuart Norris for the Respondent

BACKGROUND:

1. Mr. B[1] was seriously injured when he was involved in an accident while driving his father's vehicle on November 8, 2016. He sustained a brain injury and other serious injuries and has been declared to be catastrophically impaired under the *SABS*. The vehicle he was driving was insured with Aviva. Mr. B submitted an Application for Accident Benefits to Aviva and they have paid benefits to him and on his behalf.

2. Mr. B testified at an Examination Under Oath in the course of this proceeding that Ms. N was his common law spouse. Ms. N was a named insured on a policy issued by TD Insurance at the time of the accident. Ms. N and Mr. B are the natural parents of a child born approximately six years prior to the accident.

3. Aviva contends that Ms. N was Mr. B's spouse at the relevant time, and that TD would therefore be in higher priority to pay his claims pursuant to section 268(2)1(i) of the *Insurance Act.* The parties agree that as parents of a child who were not legally married, Mr. B and Ms. N would meet the definition of "spouses" in the *Act* if they have lived together in a conjugal relationship outside of marriage "in a relationship of some permanence".

4. Mr. B and Ms. N resided separately at the time of the accident. He lived with his parents and extended family in a house in the west end of Toronto, and she lived in a rent-subsidised apartment downtown with their daughter, J. Ms. N and J moved into Mr. B's family home after the accident so that she could provide care to him.

ISSUE:

1. At the time of the accident, were Mr. B and Ms. N "spouses" pursuant to the definition in section 224(1)c of the *Insurance Act*?

[1] The parties involved are identified by initials rather than names in order to protect their privacy.

RESULT:

1. Yes, Mr. B and Ms. N met the definition of "spouses" in the *Act* at the relevant time.

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. N, TD would be the priority insurer pursuant to subsection 268(2)1(i) of the *Act*. If not, Aviva, as the insurer of the vehicle that he was in at the time of the accident would remain 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 conducted Examinations Under Oath of Mr. B and Ms. N in the course of this proceeding. Transcripts of these examinations as well as other documents were filed in a Joint Document Brief. Mr. B's father was also examined under oath in the context of his own accident benefits claim, and the relevant part of his transcript was also filed. Counsel attended an oral hearing before me and made extensive submissions. No *viva voce* evidence was called at the hearing.

6. The EUO transcripts reveal close questioning of Mr. B and Ms. N about all aspects of their relationship prior to the accident. While certain facts were clear, their evidence was not consistent on all points. Mr. B referred to Ms. N as his "common law spouse". He could not recall exactly when they began dating, estimating that it was about ten or fifteen years before the examination (conducted in 2017). Ms. N also could not recall exactly when she first met Mr. B, but stated that it was "over ten years ago for sure". They both

stated that they initially were friends, and then became romantically involved about four or five years after meeting.

7. While the evidence suggests that Mr. B was the one to pursue a more committed relationship, and may have had stronger feelings for Ms. N at times than she had for him, it was clear that their relationship was exclusive and that neither of them dated anyone else after becoming romantically involved. Their daughter J was born in November 2010, six years prior to the accident.

8. As noted above, the couple lived separately until the time of the accident. Mr. B lived with his extended family in a house in the west end of Toronto. Ms. N lived in a rent-subsidised one-bedroom apartment with their daughter in downtown Toronto. Mr. B recalled that he saw Ms. N between one and three times each week during that period, and that he occasionally slept over at her apartment. He stated that it took 15 to 20 minutes to drive from his house to her apartment, and about 40 minutes if he took the TTC.

9. When questioned about the time he spent with Ms. N in the year prior to the accident, Mr. B explained that they sometimes ate meals together, and that he helped out with household duties like laundry and cleaning the apartment when he was there. They also occasionally shopped for groceries together. He acknowledged that they sometimes argued over small issues, but stated that "he loved her somewhat" and that she felt the same way. He testified that they had a sexual relationship in the year prior to the accident, but that the frequency of their physical intimacy had diminished over time. He recalled that they went out to restaurants and watched movies together. He stated that they also went to the beach and occasionally took their daughter to an amusement park.

10. Ms. N initially described their relationship in the year before the accident as "on and off", stating that they "were trying to make it work". She explained that when things were going well, "we would try to understand each other, go out more, do stuff together more and take care of each other". She stated that they went out a lot together and described going out for dinners, and to movies and clubs.

11. Ms. N explained that she and Mr. B argued regularly, but that they were "always a couple, it's just our relationship wasn't stable". She acknowledged that Mr. B "loves her a lot" and always wants to be with her. When asked whether she was in love with him prior to the accident, she initially stated that she was not, but then explained that they had expressed love for each other during that period.

12. Ms. N also testified that her relationship with Mr. B improved after their daughter J. was born in 2010. She recalled that they spent more time together after that, and that she saw him almost every day. She described Mr. B as a very involved father, stating that the three of them went on outings together to the park or swimming pool. Ms. N testified that while she saw Mr. B almost every day, he only slept over at her place on average twice per month, and that on these occasions she would sleep in the bed with J while he would sleep on the couch in the living room.

13. The evidence indicated that while Mr. B and Ms. N both contributed financially to J's needs, they generally kept their finances separate. Mr. B worked as a bricklayer, and earned approximately $36,000 in 2016 before the accident occurred in early November. Ms. N's 2016 tax return indicates that she was self-employed, and had a net income of approximately $8,000. Mr. B stated that Ms. N sometimes needed assistance paying bills, and that he would help her out. She agreed that he would provide financial assistance when she needed it, but refused to elaborate on the details of that when asked.

14. Both Mr. B and Ms. N spent time with each other's families, mostly at holiday times. They agreed that both of their families considered them to be a couple. They apparently did not have any mutual friends, but Mr. B explained that they did not really socialise with anyone. Mr. B did not work during the winter months, and was therefore more available to assist with J's care. They both testified that he would sometimes take J to school, and would often look after her when Ms. N was working.

15. As noted above, Ms. N moved in with Mr. B at his family's home after the accident, so that she could provide care for him. The couple subsequently moved out of that home and into an apartment of their own with their daughter. When asked if they had ever discussed getting married, they both stated that they had not. Ms. N testified that they had discussed having another child together prior to the accident, when J was five or six years old.

16. The evidence indicated that Ms. N's apartment was part of Toronto Community Housing stock and that she received a subsidy, based on her income. She moved in to the building in 2002, and at the time of the accident was living in a one-bedroom apartment, with her daughter. Documents filed by Aviva from the City of Toronto Rent Geared to Income subsidy website advise that the rent of a subsidised unit is set at 30 percent of a household's total monthly income, and that a tenant must inform the housing provider of any changes that might affect the subsidy such as a change in who lives in the household. It also states that if a household stops meeting the program requirements, the subsidy will be lost.

PARTIES ARGUMENTS:

Aviva's submissions

17. Counsel for Aviva submitted that the above evidence supports the conclusion that Mr. B and Ms. N were involved in a conjugal relationship prior to the accident. She contended that despite the fact that they maintained separate residences, they meet the test for a couple living together in a "relationship of some permanence" as that phrase has been interpreted by courts and arbitrators.

18. Counsel noted that the Supreme Court of Canada accepted in *M v. H* [1992] 2 S.C.R. 3 that the leading authority on the factors to consider when assessing whether two people have a conjugal relationship is the decision in *Molodowich v. Penttinen* [1980] 17 R.F.L.(2d) 376. She noted that arbitrators considering whether two people were "spouses" in the context of a priority dispute have also applied the criteria cited in that case (see *Gore*

Mutual v. AXA Insurance (2014) Bialkowksi, *Wawanesa Mutual Insurance v. State Farm Insurance and Aviva Canada (April 11, 2017),* Bialkowski*)*. These include arrangements for shelter or housing, sexual and personal behaviour, shared services and household chores, social habits, societal attitudes toward the couple, economic support and their conduct regarding children. Counsel submitted that when the evidence in this case is considered in light of these factors, it is clear that Mr. B and Ms. N had a conjugal relationship at the relevant time.

19. Ms. Rosenthall contended that the requirement in the *Act* that a couple in a conjugal relationship "live together" should be considered together with the requirement that their relationship be one of "some permanence", rather than analysed as two separate parts. She noted that arbitrators have found that two people in these circumstances who maintain separate residences, or cohabit for short periods, have been found to be spouses, and submitted that the focus should be on the qualitative aspects of the relationship, rather than quantitative ones.

20. Counsel submitted that many objective factors in this case support the view that the parties were involved in a relationship of some permanence before the accident. She noted that their relationship began approximately ten years before the accident and had always been exclusive. They had a child together six years prior to the accident, and had discussed having more children. They saw each other almost every day after their daughter was born, and shared some household chores. They went out frequently and were regarded as a couple by their families. Mr. B was very involved in parenting their daughter, and also assisted Ms. N financially when required.

21. Ms. Rosenthall also contended that the couple relied on each other emotionally, noting that Ms. N became actively involved in Mr. B's care after his injuries, and that she and their daughter moved in with him. She submitted that all of the above demonstrate that the couple were seriously committed to each other. She noted my finding in *Echelon Insurance v MVACF* (April 5, 2019) that the couple in that case had developed a "strong

bond" over the course of many years, and argued that the same finding should be made here.

22. Finally, Ms. Rosenthall contended that the reason that Mr. B and Ms. N maintained separate residences prior to the accident was because Ms. N lived in a one-bedroom subsidised housing unit, and would have either lost the unit or been required to pay a much higher rent, if Mr. B had moved into her apartment. She acknowledged that there was no solid evidence on this point, but noted that the guidelines for subsidised housing require that anyone living in a unit must report their income, and that there is a ceiling above which a subsidy is no longer provided. She suggested that Mr. B's earnings from his employment as a bricklayer would disqualify Ms. N from continuing to receive a subsidy, and would likely require her to leave the apartment that she shared with their daughter. She also advised that Ms. N's counsel made it clear prior to his client's EUO that he would object to any questions posed on this issue.

TD's submissions

23. Counsel for TD agreed that the *Molodowich* factors are the relevant factors to be considered in the assessment of whether a relationship is "conjugal" in this context. He contended, however, that when the evidence in this case is compared to the list of those factors, it does not support a finding that Mr. B and Ms. N lived together in a conjugal relationship before the accident.

24. Counsel noted Mr. B's evidence that he recalled seeing Ms. N only once or twice each week prior to the accident. He allowed that an unmarried couple that otherwise satisfied the relevant criteria for being spouses but decided to live in separate cities for a period of time in order for one of them to pursue a career opportunity, would still be considered spouses. The same would be true in a relationship that was otherwise "spousal" if one person was sent to prison for a period of time. He submitted, however, that the evidence must indicate a good reason for the couple living apart, and that the other indicators of a spousal relationship must be strong.

25. Mr. Norris argued that the evidence in this case did not rise to this level. He contended that the focus of Mr. B and Ms. N's relationship was on raising their child, and that the time they spent together was in this pursuit. He submitted that they did not otherwise display behaviour suggesting they were spouses. He claimed that they did not live together because they did not want to, rather than for any medical, financial or religious reason as has been found in other cases.

26. Counsel cited and relied on Arbitrator Samworth's decision in *Dominion of Canada v TD General Insurance* (April 7, 2017), in which she determined that two people who were parents of a child and maintained separate residences were not living together despite spending a few nights each week at each others' homes. Arbitrator Samworth found that the image that couple presented to the world "was not that of a married couple or family unit but that of a boyfriend and girlfriend who happened to share parenting of a child", and counsel urged me to make the same finding.

27. Counsel for TD did not dispute that Mr. B and Ms. N's relationship could be described as one of "some permanence". He argued, however, that the evidence did not establish that it was "conjugal". He submitted that while they shared a commitment to raise their child, the evidence suggested that they did not have a very strong sexual relationship. He also noted that they only ate meals together sometimes and that their financial lives were separate. He also referred to Ms. N's statement that she was not in love with Mr. B prior to the accident, and contended that the evidence as a whole lacked some crucial aspects of a conjugal relationship, such as a strong emotional connection and intimacy.

ANALYSIS & REASONS:

28. I must consider the above evidence carefully in order to determine whether Mr. B and Ms. N had lived together in a conjugal relationship outside marriage, in a relationship of "some permanence", at the time of the accident in November 2016. Aviva contends that they had, and that they therefore met the definition of "spouses" under the *Act.* TD does not dispute that the relationship between Mr. B and Ms. N was one of "some permanence".

It argues, however, that they were not living together in a conjugal relationship at the relevant time.

29. It is clear that Mr. B and Ms. N maintained separate residences prior to the accident. The question of whether two people can be said to have been living together for the purpose of this definition while maintaining separate residences has been raised in several cases to date. It is important to note that the requirement in the section 224 definition that a couple "have lived together in a conjugal relationship" applies to both couples who do not have children together, as well as to those that do. There is, however, an important distinction. If a couple does not have children, they must satisfy the requirement of having lived together continuously for at least three years. This time frame is not applied to a couple with a child or children, who must only have a relationship of "some permanence" to meet the definition of "spouses".

30. There are competing lines of authority regarding whether the "living together" part of the phrase should be interpreted literally under the first branch of the definition, requiring a couple to have lived together in a conjugal relationship for a period of not less than three years. Justice Morgan determined in *Royal and SunAlliance Insurance v. Desjardins Insurance Group* [2018] O.J. No. 3665 that there is "no imperative to deviate from the ordinary understanding of what it means for two persons to live together" for three years, taking the literal view. However, Justice Leitch stated in *ING Insurance Company of Canada v. Co-operators Insurance Company* (2013) ONSC 4885 that the *Molodowich* decision "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". Arbitrator Samworth agreed with this view in *Intact Insurance v. Dominion of Canada & Wawanesa Mutual Insurance* (September 4, 2019).

31. More germane to this case, arbitrators who have decided cases under the second branch of the test applicable to parents of children have generally found that the fact that a couple has maintained separate residences does not disqualify them from meeting the definition of spouse, if the evidence otherwise satisfies the requirement that the

relationship was conjugal and could be described as a relationship of "some permanence". (see *Wawanesa Mutual v. State Farm & Aviva, supra,* (Bialkowski)).

32. In *Dominion of Canada v. TD General Insurance, supra,* Arbitrator Samworth stated that she was satisfied by a review of the case law that in order to find that the couple in her case "lived together" and were spouses she did not have to find that they physically lived together all of the time under the same roof, and that "you can be spouses and still maintain separate residences" (at p. 11). Counsel for TD relied on this decision, noting that Arbitrator Samworth found that the individuals in question did not meet the definition of spouses, and suggested that the facts in that case were similar to the evidence here.

33. A close reading of that case reveals that the woman in question slept at her mother's apartment, which was across the street from the claimant's place, on most nights. And, while the parties had apparently decided to get an apartment together approximately two years before the accident, the woman backed out and the claimant ended up moving into it himself. Both of them testified that they had each decided that they were not comfortable with the idea of moving in together. The couple ultimately separated about six months after the accident, a year or so after their son was born. Arbitrator Samworth found that there was no evidence of the two presenting themselves to others as spouses, or that they intended their relationship to be more than that of boyfriend and girlfriend. She ultimately determined that they were two individuals who had a child together, tried for a very brief period of time to live together but never got beyond that stage. I find that these facts are not "on all fours" with those here, as suggested.

34. In my view, the above authorities establish that the phrase "have lived together in a conjugal relationship" should be interpreted as a whole, rather than broken down into constituent parts. When analysing a relationship between parents of a child in order to determine whether it satisfies the requirement for conjugality and the vague measure of having "some permanence", I find that a more holistic approach is called for. My view is that the finder of fact must examine the couples' actions and routines against the accepted

indicia of a close relationship, and determine whether the level of commitment displayed rises to that of spouses.

35. Counsel for TD agreed with this general approach in his oral submissions at the hearing. He contended, however, that the relationship between Mr. B and Ms. N was mostly focused on co-parenting their child, and was missing many of the factors usually present in a committed spousal relationship such as emotional support, shared activities and physical intimacy. I do not agree with this assertion. While the evidence may not suggest dramatic scenes of romance and smouldering physical intimacy, we must take care not to project artificial or stereotyped expectations gleaned from media portrayals or popular culture regarding what spousal relationships are like or should be. It is trite to say that the emotional makeup of each human being and the way we express love and intimacy is unique, but the same is also true regarding interactions between each two people involved in a relationship.

36. As set out above, the case law on this issue does establish some parameters. It directs me to assess whether the parties' relationship meets the "living together in a conjugal relationship" test by considering factors such as the duration and stability of the relationship, the parties' intentions, their shelter arrangements, sexual and personal behaviour, shared responsibility for household services and children, social habits, societal treatment of the couple and their interaction with family and friends, and the extent to which their finances are intermingled. As Justice Leitch stated in *ING Insurance v. Co-operators, supra,* these elements may be present in varying degrees, and are not all necessary for a relationship to be found to be "conjugal".

37. The evidence is clear that Mr. B and Ms. N had a longstanding relationship before the accident. They had known each other for at least ten years at that point, and had been romantically involved for six or seven of those years. Their daughter was born six years before the accident, and according to Ms. N, whose evidence I prefer on this point given the brain injury sustained by Mr. B in the accident and his admitted struggle to recall details, they saw each other every day (or almost) since she was born. They were loyal to

each other and had an exclusive relationship. Their families treated them as a committed couple, and they went out together often for dinners, and to movies and clubs. They also went out with their daughter to the park, the beach and swimming pool.

38. Mr. B was clearly very involved in J's life. he took her to school when he was not at work, and spent time alone with her when Ms. N was working. According to Ms. N, who the evidence suggests was the more reluctant one in the relationship, they had discussed having another child together prior to the accident.

39. On the other hand, the evidence suggests that the couple may not have expressed strong loving feelings for each other prior to the accident, and did not have frequent sexual relations. They also did not mix their finances to any degree. They did not have mutual friends, although Mr. B explained that neither of them had friends and did not really socialise with others.

40. While this mix of factors takes this case close to the "line" of whether the couple passes the 'conjugality test', I find that they do satisfy the accepted criteria and meet the definition of "spouses". As stated above, the fact that they may not have been very demonstrative or physically affectionate with each other, or did not express undying love to one another does not take away from the fact that they spent much time together, engaged both in parenting activities and other things that couples do, and were clearly supportive of each other. As I found in the *Echelon v. MVACF, supra,* decision, the evidence shows a strong bond between these parties over the course of many years. While this bond may have centred around their child, I am satisfied from the evidence that it extended well beyond that.

41. I find that the evidence as a whole shows that Mr. B and Ms. N were very committed to each other before the accident. They relied emotionally on one another, and knew that they could count on each other for care and support. This was borne out by Ms. N's decision to move into Mr. B's family's home to care for him after the accident, and to later move out with him into their own apartment with their daughter.

42. I admit that I have grappled with the reason for the couple maintaining separate residences before the accident. While there is no specific evidence before me that they had explicitly agreed to do so because Ms. N would have either lost her apartment or subsidy if Mr. B had moved in and declared his income, as was the case in *Intact v. Dominion & Wawanesa, supra,* I am prepared to accept Aviva's contention that this was an important factor in the couple not moving in together.

43. The documents filed regarding entitlement to subsidised housing and the "Rent Geared to Income" (RGI) system makes it clear that any change to who lives in the apartment must be reported, and that if a household reports income over a certain level, it will lose its subsidy. Counsel for TD did not dispute Ms. Rosenthall's statement that Ms. N's counsel advised at the EUO of his client that he would not permit her to answer any questions on this topic. I also note that when asked about the financial support provided by Mr. B at the examination, Ms. N was very reluctant to elaborate. I can only take from this that Ms. N was worried about potentially being pursued by the authorities for violating the RGI system, and her evidence should be considered with this in mind.

44. Given the above, I am prepared to accept that there were strong practical and financial reasons underlying Mr. B and Ms. N's decision to maintain separate residences at that time.

45. For all of the above reasons, I find that Mr. B and Ms. N lived together in a conjugal relationship in a relationship of some permanence, as parents of a child, prior to the accident in November 2016. They therefore met the definition of "spouses" in the *Insurance Act* and *Schedule.* TD Insurance is accordingly in higher priority to pay the claims by virtue of section 268(2)1(i) of the *Act.*

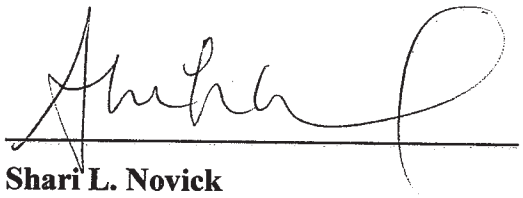
ORDER:

TD Insurance is the priority insurer under section 268(2) of the *Insurance Act* and is responsible to pay claims made by Mr. B under the *Schedule*. Aviva is entitled to seek reimbursement from TD for any reasonable payments made to date, and TD shall take over the adjusting and payment of all claims to which Mr. B is entitled in the future.

COSTS:

As noted in paragraph 10 of the parties' Arbitration Agreement, Aviva, as the successful party, is entitled to be paid its costs and reimbursed for any reasonable disbursements from TD on a partial indemnity basis. If the parties are unable to agree on the quantum of costs payable, they should contact me and a process will be arranged for the determination of this issue.

DATED at TORONTO, ONTARIO this 19th **DAY OF MARCH, 2020**



Shari L. Novick
Arbitrator