IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

INTACT INSURANCE COMPANY

Applicant

- and -

THE DOMINION OF CANADA GENERAL INSURANCE and
WAWANESA MUTUAL INSURANCE COMPANY

Respondents

DECISION

Appearances:

Intact Insurance Company (Applicant): Lorie Sprott

Dominion of Canada General Insurance (Respondent): Christopher J. Schnarr

Wawanesa Mutual Insurance Company (Respondent): Paul Omeziri

Introduction:

This matter comes before me pursuant to the *Arbitration Act, 1991* to arbitrate a dispute between the above-noted insurers. This dispute is a priority one pursuant to the *Insurance Act, R.S.O. 1990 1.i.8 as amended* and particularly Section 268 and Regulation 283/95 as amended.

This claim arises out of a motor vehicle accident that occurred on June 1, 2014 and a claim for statutory accident benefits that was advanced by one Tammy Amsinga-Munro. The parties selected me as their arbitrator on consent and this matter proceeded to a hearing with both documentary and oral evidence in London, Ontario on May 24, 2019.

The following documents were made exhibits at the hearing:

Exhibit 1 - Arbitration Agreement dated May 8, 2019;

Exhibit 2 - Agreed Statement of Facts dated May 21, 2019;

Exhibit 3 - Joint Document Brief that contained the following:

1. Notice of Dispute to Dominion;
2. Notice to Submit to Arbitration;
3. Notice of Dispute to Wawanesa;
4. Intact Policy and Documents, 7JA048329;
5. Police Report;
6. Occupational Therapy Report;
7. OCF-1 of Tammy Amsinga;
8. Statement of Tammy Amsinga;
9. Executive Summary re Catastrophic Impairment;
10. Intact Claims Notes;
11. Record of Solemnization of Marriage (Munro);
12. Certificate of Commitment;
13. Affidavit for Divorce, Amsinga;
14. Certificate of Divorce;
15. Record of Solemnization of Marriage (Schram);
16. Amsinga EUO Transcript;
17. Schram EUO Transcript;
18. Munro EUO Transcript.

In addition I heard the evidence of Tammy Amsinga-Munro and William Schram.

Background:

On June 1, 2014 Tammy Amsinga-Munro (hereinafter called "Tammy") was a passenger on a motorcycle. William Schram (hereinafter called "William") was the owner and driver of the motorcycle involved in the accident.

The motorcycle was insured by Intact Insurance Company (hereinafter called "Intact") pursuant to Policy No. 7JA04329. William was the named insured under that policy. Tammy made a claim for statutory accident benefits to Intact and Intact has been paying Tammy's accident benefits.

At the time of the accident Tammy was married to Jason Munro (hereinafter called "Jason"). Jason was the named insured under a policy with Wawanesa Mutual Insurance Company (hereinafter called "Wawanesa") bearing Policy No. 7645820.

Tammy herself was the named insured under a policy with Dominion Insurance Company of Canada (hereinafter called "Dominion") bearing Policy No. 1909335.

Intact takes the position that either Dominion or Wawanesa are the priority insurers in this matter and that if they are equal in ranking that Tammy should be put to an election.

Dominion and Wawanesa take the position that Tammy was not only an occupant of William's motorcycle on the date of the accident but that Tammy and William meet the definition of spouse under the *Insurance Act* and therefore Intact is properly the priority insurer as Tammy was both the occupant of the Intact vehicle and the spouse of the named insured at the time of the accident.

This case therefore revolves around whether Tammy and William were spouses as defined under the *Insurance Act* on June 1, 2014.

Issue:

The issue was set out in the Arbitration Agreement as follows:

> "2A Which insurer is highest in priority to pay statutory accident benefits to the claimant, Tammy Amsinga?"

This question narrows down to whether Tammy and William were spouses on the date of loss. However this had a number of components to it.

The question is:

1. Were Tammy and William spouses on the date of loss as "they are two persons who 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"; and,

2. Are they spouses as they have lived together in a conjugal relationship outside marriage continuously for a period of not less than three years?

Result:

As will be outlined further in this decision I have concluded that Tammy and William were not spouses on the basis that they had entered into a marriage that is void or voidable in good faith. However, I have concluded that they are spouses as defined under Section 224(1) of the *Insurance Act* as on the evidence as a whole I find that Tammy and William had lived together in a conjugal relationship outside marriage continuously for a period of not less than three years on the date of loss.

Onus of Proof:

Before the arbitration began an issue was raised by counsel as to which of the three insurers had the onus of proof. Submissions were made that the onus of proof should either lie with Intact who is the applicant or that none of the parties should bear the onus of proof as had been found in a number of cases by previous arbitrators involving similar situations. In this particular case the parties had filed a joint document brief. The questions of burden of proof

really arose as to who would lead the evidence in chief with respect to the two witnesses and who would have the right to cross-examine.

My initial reaction was that Intact had the burden of proof. However counsel did submit three cases in which arbitrators concluded that in these priority disputes and the arbitrary manner in which an application for benefits is submitted and is obliged to be accepted by the first insurer that it's not fair to force that insurer to have the burden of proof in a priority dispute. The three cases referred to me were:

> *Dominion of Canada General Insurance Company* & *The Motor Vehicle Accident Claim Fund* (decision of Lee Samis dated November 10, 1997);
>
> *Intact Insurance Company* & *Her Majesty The Queen on behalf of the Motor Vehicle Accident Claim Fund* (decision of Arbitrator Scott Densem dated July 10, 2013); and,
>
> *Economical Mutual Insurance Company* & *ACE INA Insurance Company* (decision of Arbitrator Shari Novick dated March 24, 2015)

In each of those cases the arbitrator concluded that the traditional onus of proof analysis placing that burden on the applicant really did not apply to priority disputes. Arbitrator Samis noted that just because the applicant had paid the accident benefits as obliged to under Regulation 283/95 that that should not be taken as evidence of any conclusion about entitlement or should not be considered in determining the onus of proof. Arbitrator Samis pointed out that neither insurer in the case he was looking at which involved dependency was in any better position to lead the evidence than the other. Arbitrator Samis concluded that the onus of proof should not be any different than if this were an action commenced by the named insured against both insurers. In other words, one would treat the case as if there was a putative plaintiff and both insurers were responding to that individual. I do note however that Arbitrator Samis noted that the evidence was sufficiently clear before him but nothing turned on the onus of proof in any event.

In the decision of Arbitrator Densem he relied on Arbitrator Samis' case and agreed with his approach. He therefore looked at the burden of proof as if the insured were the plaintiff in an action against the insurers and he weighed the dependency evidence accordingly. He found that neither of the insurers must prove principal dependency or the lack thereof on a balance of probabilities but rather it was as if the insured had to prove that issue on a balance of probabilities.

Finally, Arbitrator Novick who was looking at a spousal issue as opposed to a dependency issue agreed with both Arbitrators Samis and Densem on the onus of proof. She found that it would be manifestly unfair if the first insurer who received the application who was not in fact the priority insurer must not only adjust the claim but also bear the onus of proving or disproving some fact alleged by a claimant.

Arbitrator Novick concluded that it was incumbent on the applicant as the initiator of the process to lead some evidence to show why the obligation to continue to pay the claim in question should not remain with them. She then found that the arbitrator must apply the balance of probability test to the evidence presented and determine what evidence to accept. She followed that analysis in her case. I therefore found in this case that none of the insurers had the burden of proof. However, as in Arbitrator Novick's case we agreed that Intact had the responsibility to lead out the evidence. Both Dominion and Wawanesa then had the right to cross examine and Intact had the right to conduct any reply examination. The same process was followed with respect to both written and oral submissions.

The Evidence:

I not only had before me the transcripts of the EUOs of Tammy and William but I also had an opportunity to hear their oral evidence over the course of the day in London. At the outset I must say that both William and Tammy were delightful, honest and credible witnesses. I found that their evidence together was consistent with what they had said in their examination under oath previously. I found no reason not to believe what they said about their relationship over the course of the three to five years prior to the motor vehicle accident.

However, I start first with the Agreed Statement of Facts. The key facts that were agreed upon are as follows:

1. At the time of the accident Amsinga was married to Jason Munro;
2. Munro and Amsinga were married on April 10, 2005;
3. Munro and Amsinga separated in June, 2009;
4. Munro and Amsinga divorced effective April 26, 2015;
5. Schram and Amsinga participated in a commitment ceremony on August 17, 2013;
6. Schram and Amsinga were married on May 15, 2015;
7. At the time of the accident Munro had been residing at 1967 Trafalgar Street in London for approximately three years.

With respect to the remaining facts there really was no dispute that I could see during the course of the arbitration and submissions suggesting that there were any significant inconsistencies in any of the facts other than the few I will outline below. Rather the main thrust of counsel's arguments was what one draws from those facts.

As noted above on the date of loss of June 1, 2014 Tammy was still married to Jason. They had been separated for a number of years (since June, 2009). However, they had not entered into

any formal divorce. Tammy's evidence on that issue was that she approached Jason for a divorce but he would only give her one if she undertook to pay for it. Tammy felt the cost of the divorce should be split equally between them. Tammy dug her heels in on this issue and therefore the divorce had not proceeded prior to June of 2014. In fact, the divorce did not take place until nearly a year following the motor vehicle accident. The divorce was formalized on April 26, 2015.

In the meantime, in approximately 2009 William and Tammy entered into a relationship. They described the relationship as initially boyfriend and girlfriend. William says that the longer they were together the more time they spent together and the deeper their relationship became. There seems little doubt that this couple were not legally married despite a commitment ceremony I will discuss further which took place on August 17, 2013. A formal wedding did take place and this couple were legally married on May 15, 2015, again almost a year post-motor vehicle accident.

With respect to their living arrangements Tammy had been residing at 163 John Street in Parkhill, Ontario for approximately four years at the time of the accident. She lived there with her then 15 year old son Colton.

William was residing at 34848 Brimsley Road in Ailsa Craig, Ontario for approximately seven years. He lived there with his adult son, Darren.

After the accident William and Tammy purchased a new home and moved into that home together. William's son, Darren, and his girlfriend continued to reside in the Brimsley Road location. The new home purchased by William after the accident was at 171 West Park Drive in Parkhill and they moved in there together in July of 2014.

There doesn't seem to be any question that at the time of the accident Tammy and William kept separate bank accounts. Their evidence was also that they each managed their own bills at the residences. William was employed and Tammy was not. Tammy had a pre-existing physical disability and was on ODSP and has been on ODSP since 1991. She gave evidence that ODSP was her only source of support. She lived in income housing. Both Tammy and William's evidence was that the cost for her to live in the income housing would increase if someone else lived there. Both William and Tammy also gave evidence that financially it was cheaper for them to maintain separate residences rather than maintain one residence (i.e. William formally move in to live in the same residence in the income housing with Tammy). Their evidence was that their two rents combined were still less than if William moved in with Tammy and the additional fee was charged.

Tammy's evidence also was that her residence was better suited to some of the disability that flowed from her Cerebral Palsy. She had some mobility issues and she found her residence safer than William's. William had a wooden stove with steep stairs and she found it more difficult to deal with that.

However, both gave evidence that while they kept their finances separate as William had more available funds that he provided both some financial and non-financial support to Tammy who the evidence supports had very limited circumstances. The evidence was that William would help pay for things Tammy could not afford. He provided some monetary assistance with utilities, food and clothing. He also would cut her grass, paid for her car, and would help her if she was financially short. In my view there was some considerable evidence of co-mingling of funds and William played a quite significant role in helping out Tammy in that regard.

With respect to their relationship both gave evidence that their relationship was a sexual one. As time went on from when they first met they spent more and more time together. Overall the evidence suggested that in the three years prior to the accident that they would spend most nights at each other's home both during the week and on the weekend. They held themselves out to family and friends that they were in a committed relationship and in fact decided to have a special commitment ceremony to reflect that.

According to Tammy this commitment ceremony had been planned for almost two years. She and William had hoped it was going to be a wedding but because Tammy would not agree to pay for the entire cost of the divorce and that did not get resolved before the ceremony they decided to proceed with it as a commitment ceremony. As part of the evidence a Certificate of Commitment dated August 17, 2013 was submitted. This certificate indicated that on that day Tammy and William affirmed their commitment to one another. There were two witnesses and a formal officiant, Ms. La Charite, presided over the ceremony. Ms. La Charite ultimately also married William and Tammy on May 15, 2015 as evidenced by the Record of Solemnization of Marriage signed by Ms. La Charite on that day.

Tammy in her evidence said this commitment ceremony was to tell family and friends that we are husband and wife but without a "wedding certification". Both Tammy and William did give evidence that they understood that without a formal divorce from Jason they could not legally get married. Despite that both said that they felt that they were married.

Both William and Tammy said their relationship was exclusive starting in 2009 through to the date of accident.

As to the time that they spent together William's evidence was that it was almost every night. However, he acknowledged that he still had what he described as his "escape route" if it did not work out. However he stated the primary reason that he kept his residence was that if he had moved in with her she would lose ODSP and her rent would "go through the roof". William's evidence was that he wanted to marry Tammy before this accident and the only reason that prevented it was Jason and his refusal to pay for the divorce.

With respect to their children Tammy's evidence was that William played a major role as a mentor to her son, Colton. Her evidence at the hearing was that "he would not be the man he is today if he did not have Willie". Tammy was the primary caregiver to her son otherwise and

was responsible for making his meals, doing his laundry, driving him to school, sporting events and driving him to appointments.

With respect to the chores in the house the evidence is a little less clear. Tammy did cooking and cleaning and laundry for herself. Her son and William and others seem to have helped with the outside yard, grass and snow. However William also gave evidence that he assisted while at Tammy's residence. William's evidence was that they spent more time at her house because his son and girlfriend were living at his. William's house was way out in the country and Tammy's was in town. It was about 20 minutes distance between the two of them. When Tammy was at his house in the country she did assist to the extent that she could with cleaning and cooking.

Each of Tammy and William had keys to each other's residence. They each kept toothbrushes and clothing at each other's residence.

Turning now to the documentary evidence that was submitted and some inconsistencies. The application for accident benefits that was completed by Tammy and signed by her on June 3, 2014 under Part 1 – Applicant Information Marital Status she has checked off the box Single.

In a statement Tammy gave to Intact on June 20, 2014 Tammy said that her marital status was single, that she lived at her residence at 163 John Street with her son and that "no one else lived here". With respect to Mr. Schram Tammy states "He's my friend. He is not my spouse. We have never lived together."

When asked about these two pieces of information during cross-examination by Intact Tammy's evidence was firstly that she didn't remember giving the statement. She did agree it was her handwriting on Part 1 of the OCF-1. It was her view that she was not formally married and therefore she described herself as single. During the course of her evidence Tammy struck me as a sincere, unsophisticated, simple woman. She would not describe herself as married unless there was a formal marriage. She said prior to the accident while she was not married to William she felt as if she were married. I do note as well that in her examination under oath taken on January 23, 2017 that Tammy again confirmed that no one was living with her at the time of the accident. However, when one reads further in her examination it is clear that while Tammy may say that they were not "living together" that the facts suggested otherwise. She describes themselves as being in a full relationship for more than 8 years, that Willie spends a lot of time with her, he paid for all their activities such as camping, fishing, motorcycling, dinners and food. He helped with gas, he did the lawn maintenance and that he was her partner or her boyfriend. She also says in her EUO, which is consistent with her evidence at the hearing, that she would see William every day if not at her house at his house. She notes that William worked for Carters Gravel or Truck so she wouldn't see him during the day while he was working but he would come home from work but she states at page 13 "I'd see him before he went to work and then when he came home from work. He'd either go home and shower, get ready and come over or he'd come over and shower and we'd do stuff."

Position of the Parties and Analysis:

A. Did Tammy and William Enter Into a Marriage That Was Void or Voidable?

Intact's position is that Tammy and William did not enter into a marriage that was void or voidable.

Intact points to Section 4 of the *Marriage Act* that provides as follows:

> "No marriage may be solemnized except under the authority of a Licence issued in accordance with this Act or the publication of Banns."

Intact also points to Section 8(2) of the *Marriage Act* which provides that an issuer cannot issue a marriage licence unless one of the following has been produced:

(a) The final Decree or Judgment dissolving or annulling the previous marriage;

(b) A copy of the final Decree, Judgment or Act dissolving or annulling the previous marriage certified by the proper officer; or,

(c) A Certificate of Divorce issued by the Registrar under the Rules of Civil Procedure.

Intact acknowledges that William and Tammy participated in a "commitment ceremony" but takes the position that that could not be considered a "void or voidable marriage". There was no Certificate of Divorce that had been issued with respect to the marriage between Jason and Tammy and absent that, irrespective of what ceremony was performed, a Licence could not have been issued under the *Marriage Act* and the commitment ceremony could not be considered to be a void or voidable marriage. Further Intact points to the fact that the definition under the *Insurance Act* provides that if one finds that the parties did enter into a marriage that was void or voidable that that marriage had to be entered into "in good faith on the part of the person asserting a right under this Act". Intact submits that the evidence of Tammy and William were both quite clear. They did not believe they were getting married. They recognized it was a commitment ceremony only. They knew they could not properly marry absent a proper divorce as between Jason and Tammy.

Dominion submits that two individuals may be considered spouses even though they may be non-compliant with the *Marriage Act*. Dominion submits that Section 224(1)(b) of the *Insurance Act* allows for individuals to be spouses in circumstances such as the commitment ceremony as between William and Tammy. Intact submits that Tammy and William wanted to be married and entered into this commitment ceremony as if they were getting married. He suggests they had the intent to comply with the *Marriage Act* in good faith even though the ceremony itself did not conform strictly to the requirements of the legislation.

Wawanesa points to the decision of Arbitrator Bialkowski in *Wawanesa Mutual Insurance Company & State Farm Mutual Insurance Company*, 2017 Carswell Ont., 5775 where he stated:

> "The nature of the spousal definition in the *Insurance Act* contemplates situations where an individual may have more than one spouse. This is made clear in Section 26(4) of the Statutory Accident Benefit Schedule which specifically sets out a solution should an insured person have more than one spouse who is entitled to death benefits."

Dominion also relies on the case of *Aviva Insurance Company of Canada & Security National*, another decision of Arbitrator Bialkowski, 216 Carswell Ont., 515, dated January 1, 2016. In that case the question was whether a religious ceremony that was conducted as between two individuals constituted a marriage both under the *Marriage Act* and the *Insurance Act*, Section 224(1)(b) even though it did not strictly conform to the solemnization requirements of a legal marriage in Ontario.

Arbitrator Bialkowski found that this particular ceremony did not result in the two individuals meeting the definition of spouses. Arbitrator Bialkowski made the following comments at paragraph 43:

> "Furthermore, the saving provisions require that the purported marriage be 'good faith'. The words 'in good faith' according to the juris prudence provided to me and in particular the Court of Appeal's decision in *Debora* mean the good faith intention to comply with the *Marriage Act* even when the marriage ceremony did not strictly conform to the requirements therein. The case law does indicate that persons who have engaged in a marriage ceremony are not expected to know all the requirements of the *Marriage Act*. However, the case law is clear that there must be evidence of a good faith intention to comply with the *Marriage Act* in order to successfully invoke the saving provision.
>
> ... In *Debora* the parties had a religious ceremony outside of Ontario but waited years to perform a provincially recognized civil ceremony. The Court of Appeal found that because the parties knew of some obligation to comply with the Ontario Marriage Legislation but waited for personal reasons to perform the civil marriage, that in the years in between they were not spouses."

Wawanesa did not provide any separate submissions on this issue but relied on the submissions of Dominion.

Result:

I am not satisfied that the commitment ceremony and the facts that surround this would meet the requirements of Section 224(1)(b) of the *Insurance Act* to qualify William and Tammy to be spouses.

The evidence of William and Tammy was that neither considered the commitment ceremony to be a marriage. Both acknowledged that they could not properly or legally marry until Tammy got a divorce from Jason. This was a commitment ceremony to show to their friends and families that they wished to be together and wished to be recognized in a committed relationship. While they entered into this commitment ceremony in good faith they did not enter into this ceremony under the belief that it was a marriage under the *Marriage Act*. They were well aware that it was not.

In my view the act of "entering into a marriage that is void or voidable in good faith" means that the parties believe that they are getting married properly and have complied with the requirements of the *Marriage Act*. I agree with Arbitrator Bialkowski in the *Aviva & Security National* case (supra) that this saving provision only applies where the parties can demonstrate a good faith intention to comply with the *Marriage Act* where the marriage ceremony did not strictly conform to the requirements. There must be good evidence of this good faith intention to comply with the *Marriage Act* in order to successfully invoke this saving provision.

While there was a good faith intention to go through with a commitment ceremony there was no intention on the part of Tammy or William to get married in accordance with the *Marriage Act*. They knew that that could not be done.

I therefore find that under this definition William and Tammy cannot be considered to be spouses.

B. Did William and Tammy Live Together in a Conjugal Relationship Continuously for a Period of Not Less Than 3 Years?

The main thrust of Intact's argument is that Tammy and William did not live together. Intact submits that I have to find that they lived together before I need to move on to any of the other criteria. If I conclude they were living together then I look at whether it was in a "conjugal relationship". The next step is to determine whether or not that existed continuously for a period of not less than three years up to the time when the accident occurred.

In reviewing the submissions of Intact I do not see any strenuous position taken that Tammy and William were not in a conjugal relationship. The key point of Intact is that they were not "living together". Intact submits that I must look at the literal sense of whether parties are living together. Intact submits that if they were living in separate residences, were each responsible for their own bills and daily needs and not only had separate residences but owned, maintained and lived in separate residences that they cannot be considered to be "living together". Intact does acknowledge that William and Tammy had a long-lasting relationship and cared for each other. Intact also recognizes that William and Tammy would spend nights together at each other's homes. However, they submit that this does not mean they were "living together". Intact submits throughout their relationship until after the accident occurred Tammy and William kept separate residences.

Intact relies heavily on the decision of Justice Morgan in the decision *Royal & SunAlliance Insurance Company of Canada* & *Desjardins Insurance Company/Certas*, 2018 ONSC 4284. This case was an appeal from the decision of Arbitrator Shari Novick from February of 2017. The issue as in this case was whether or not two individuals met the definition of spouse pursuant to Section 224 of the *Insurance Act*. The two individuals in that case were not married but it alleged that they were living together in a conjugal relationship continuously for a period of three years prior to the motor vehicle accident.

Ms. Halliday and Mr. Zirony had been involved in a romantic relationship but maintained separate residences. The evidence suggested they had been dating since 2008. Arbitrator Novick found that from 2011 to approximately February or March of 2013 that they saw each other on weekends and usually slept over at one or other's home on the weekends mostly at Mr. Zirony's home. They did not co-mingle their assets, have joint back accounts or financially support each other in any consistent way during that period.

Then in February or March of 2013 Mr. Zirony took a job as a long distance truck driver and at that point they actually moved in together. Mr. Zirony was asked about why they delayed moving in together and he said that Ms. Halliday had been living with her mother in order to provide care for her and but for that they probably would have moved in together earlier. Therefore, at the time the accident occurred they had moved in to share one residence for only one year.

The arbitrator in determining that Mr. Zirony and Ms. Halliday were spouses as defined under the *Insurance Act* relied upon decisions and case law from the *Family Law Reform Act 1978*. According to Justice Morgan the key case law that the Arbitrator relied on all came from the Family Law context. It was submitted that her analysis did not meet the standard of review which was reasonableness.

Justice Morgan concluded that the Arbitrator had failed to articulate reasons why *Family Law Act* cases should apply to the *Insurance Act*. He felt that that was a fatal flaw to her decision. He felt that in relying on cases that analyzed the *Family Law Act* with a different mandate and policy considerations that the Arbitrator had failed to consider the appropriate interpretation, mandate and policy decisions of the *Insurance Act*. Intact relies heavily upon the following quote from Justice Morgan's decision at paragraph 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 is meant 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 independent lives – but maintain separate physical residences. In most non-Family Law context, 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."

Justice Morgan found that the circumstances of Mr. Zirony and Ms. Halliday as described above meant that they had only lived together for one year prior to the accident. Intact urges me to find that this means under the *Insurance Act* individuals cannot be spouses under Section 224(1)(c) unless they actually lived together in one residence. Intact submits that clearly William and Tammy did not do that and therefore they do not meet the first part of the test.

Intact submits that only if I conclude that William and Tammy were living together can I move onto the next consideration as to whether they were in a conjugal relationship. On that point Intact's submission with respect to the relevant law relating to that seems consistent with both Wawanesa and Dominion. Both parties agree that in looking at a conjugal relationship one should follow the criteria set out in M. v. H. (SCC) [1999] 2 S.C.R. 3 (generally referred to as Molodowich). The factors that are relevant to the conjugal relationship as set out in this decision include shelter, sexual and personal behaviour, shared household services, social habits, societal treatment of the couple in the community, economic support and whether they have children.

On the issue of conjugal relationship Intact asked me to find that they did not have a conjugal relationship suggesting that some of the factors set out in Molodowich do not apply to them: They had separate financial arrangements, they had their own family obligations with their own children in their separate residences, they were each responsible for their daily needs and generally they were each responsible for their housekeeping chores.

Finally, Intact submits that if I find that Tammy and William were living together in a conjugal relationship at the time of the accident that they still do not meet the criteria as that status was not continuous for a period of not less than three years prior to the accident. In regard to that Intact submits that the evidence of the parties suggests that they did not spend every night at each other's home. Tammy in her EUO estimated that in the spring or summer before the accident William would stay over on a weekly basis whenever he was available to: Up to four nights a week. William's evidence from his EUO is that in 2011 they did not spend that much time together but the longer they were together the more time they spent together. As I understand Intact's submissions it is that staying overnight at one or other's home more than 50% of the time or no more than four nights a week would not result in there being a finding that they were living together "continuously".

Intact submits that I am bound by Justice Morgan's decision and must follow it.

Turning now to the position of Wawanesa and Dominion.

On the issue of the "living together" Dominion submits that there is case law to support that a couple can be found to be spouses pursuant to Section 224 of the *Insurance Act* where they

maintain separate residences but spend time at each other's residences. Dominion acknowledges that Justice Morgan in the *Royal & SunAlliance* decision (supra) found that spouses should only be considered to be living together when they were under the same roof in the normal sense of the words. However, Dominion submits that Justice Morgan departed from previous decisions considering the *Insurance Act* and the definition of spouse that had found to the contrary. Dominion submits that there is a line of case law that supports that two individuals can maintain separate residences yet be found to live together in a conjugal relationship. It is a fact driven decision and it is not dependent on whether they are actually living under the same roof: the literal interpretation from Justice Morgan. Dominion also submits that Justice Morgan was wrong in finding that *Family Law Act* cases should not be considered in *Insurance Act* matters.

Dominion submits that the situation of Tammy and William are distinguishable on the facts from *Royal & SunAlliance*. Further they submit that Justice Morgan narrowly interpreted the phrase "live together in a conjugal relationship" and that when looking at the spousal nature of the relationship in the context of insurance law that it requires a broader more purposeful approach.

Dominion makes reference to the following cases in support of their proposition that there are other decisions that have concluded this more broader definition under the *Insurance Act* relating to the requirements of living together:

> *Wawanesa Mutual Insurance Company* & *State Farm Insurance Company*, 2017 Carswell Ont. 5775 (Arbitrator Bialkowski);
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> *Dominion of Canada General Insurance Company* v. *TD General Insurance Company*, April 7, 2017 (Arbitrator Samworth);
>
> *Alfred* v. *Allstate Insurance Company of Canada* (OICA - 009267), November 30, 1995 confirmed on appeal (OICP - 96-00015), April 23, 1997; and,
>
> *ING Insurance Company of Canada* v. *Co-operators Insurance Company*, 2013 ONSC 4885

It is important to review the decisions that Dominion put forward by way of contrast to Justice Morgan's decision.

In the case of *Wawanesa* & *State Farm* one of the issues before Arbitrator Bialkowski was whether the two individuals would be considered spouses pursuant to Section 224 of the *Insurance Act*. The evidence showed that they had been involved in a relationship. In fact, they'd had a brief relationship when they were young and had a child together but never married. However, that had been about some 30 years prior to the motor vehicle accident. The evidence suggested that a few years before the motor vehicle accident they began to rekindle their relationship. They started to date. At that time the claimant was living in

Kitchener and Ms. Sooknanan had an apartment in Toronto. After the initial dating period Ms. Sooknanan reported that she began staying on and off with the claimant at his residence in Kitchener. As time went along the amount of nights that they spent together increased. Arbitrator Bialkowski concluded that they were spending a considerable number of nights together around the time the accident had occurred. However, this had not been taking place for a period of not less than three years prior to the motor vehicle accident. At best it was less than two years. However, Arbitrator Bialkwoski was prepared to conclude that had they met the temporal requirement that the fact that they maintained separate residences was not prohibitive to their meeting the spousal definition.

In *Dominion & TD* I concluded that a couple did not meet the definition of spouse under the *Insurance Act* as while they may have had a conjugal relationship and they were the natural parents of a son they were not in my view "living together". In that case the parties clearly had not actually moved in together. Ms. Rowe kept as her prime residence her mother's apartment. She would sleep over from time to time at Mr. Simmon's apartment.

I was satisfied at that time on a review of the case law that I did not have to find that Rowe and Simmons lived together in the traditional sense of the word: physically lived together all of the time in the same residence in order to be spouses. I found that one could be a spouse as defined under Section 224 of the *Insurance Act* and still maintain separate residences. I noted the case of *Alfred v. Allstate Insurance Company of Canada* which had been confirmed on appeal where the Director's Delegate found that two individuals who kept separate residences were spouses. In that case the parties, as in this case, had separate residences, separate financial arrangements. One did not contribute to the household management in any manner. The couple's religious and cultural background prohibited them from living together before marriage. The Director's Delegate did point out that whether a couple share the same home is an important factor in determining whether they are spouses but that in some instances couples who maintain separate residences can be spouses when viewing their living arrangements in the broader context of their relationship. The Director's Delegate noted the importance of focussing on the overall relationship rather than the one simple question of residency. This was to be a factual determination.

Lastly is the decision of Justice Leitch in *ING & Co-operators* (supra). This was an appeal from the award of Arbitrator Bruce Robinson who had concluded that Ms. Gordon and Mr. Orr were spouses pursuant to the definition under the *Insurance Act.* In that case the two individuals were in their 20s and at no time were actually living together under the same roof. One of them lived with his family while the other lived with a family friend and her own family. They did spend some nights together. Justice Leitch in considering the issue of "living together" in separate residences made the following statement at paragraph 51:

> "While I note that Molodowich makes clear that the fact that one party continues to maintain a separate residence does not preclude a finding that the parties are living together in a conjugal relationship, it is difficult to accept that

> Jason and Amy 'lived together' for the purpose of the spousal definition under the *Act* for the three year period leading up to the accident."

While Arbitrator Leitch went on to find that these individuals did not meet the definition of spouse he clearly acknowledged that where two individuals maintain a separate residence does not automatically preclude them from being found to be spouses. Again, it is a fact driven determination.

Dominion also submits that contrary to Justice Morgan's assertion in the *Royal & SunAlliance* case that family law cases are applicable to the insurance context as both statutory regimes share common goals. Dominion points to the Supreme Court of Canada decision in *Miron v. Trudell* [1995] 2 S.C.R. 418 in which the Supreme Court noted that the purpose of the standard automobile policy pursuant to the *Ontario Insurance Act* is inextricably linked to the support provisions of common law spouses in the *Family Law Act*.

Of note is that the issue in that appeal was the eligibility of John Miron, the common-law spouse of Ms. Valier for insurance against injury pursuant to her automobile insurance policy. The court notes "the effected interest is the protection of family units from potentially disastrous financial consequences due to the injury of one of their members" (paragraph 105).

Further, Dominion relies upon the statement of the Court, paragraph 112 as set out below:

> "When characterizing the objective of the standard automobile policy for the purposes of Section 1 analysis, it is important to adopt a functional and pragmatic approach which frames the purpose neither too broadly nor too narrowly. The objective of the standard automobile policy, which I accept as pressing and substantial, is to protect stable family units by ensuring against the economic consequences that may follow from the injury of one of the members of the family."

Dominion submits that in accordance with *Smith v. Co-operators General Insurance Company*, 2002 S.C.C. 30 at paragraph 11 that consumer protection is one of the main objectives of automobile insurance law. Jurisprudence has long held that this Act is remedial legislation that requires a broad and literal interpretation. Dominion submits that a literal interpretation of "living together" as suggested by Justice Morgan is contrary to the purpose and intent of the insurance law regime.

Wawanesa made separate submissions on this issue of how to determine the meaning of "living together". Wawanesa takes the same position as Dominion that on the facts of this case the fact that William and Tammy maintain separate residences is not conclusive in finding that they were not spouses pursuant to Section 224 of the *Insurance Act*. Wawanesa points to the evidence that Tammy and William said that they would see each other every day, if not at one person's house then at the others. They note that they spent most of their nights together, more than 50% of the time. Therefore in addition to spending many nights together they

would see each other every day. Wawanesa also relies on the decision in Osburne v. York Fire & Casualty Insurance Company [1995] O.I.C.D. #21, Arbitrator Macintosh. That case was decided in 1995 and the definition of spouse was not the same as it is presently. However, Arbitrator Macintosh did make the following comments:

> "I agree with counsel for York Fire that the sharing of a principal residence is a significant indicator of the intention to cohabit. However, it is not the only indicator and is not, in and of itself determinative of the issue."

Turning now to the question of the conjugal relationship. As noted earlier all parties seem to agree that the Molowich decision and it's criteria would apply to the analysis of whether or not William and Tammy have entered into a conjugal relationship. Dominion and Wawanesa submit that the evidence is clear that they were in a conjugal relationship. All parties also seem to agree that the list of factors set out in Molowich and that have been followed consistently when looking at the question of spouses under the *Insurance Act* that it is not necessary for two individuals to meet all of the criteria that are outlined to be in a conjugal relationship. Rather, one must determine looking at all the various categories and the evidence in each category whether on the balance of probabilities a conjugal relationship exists.

With respect to the issue of shelter Dominion submits that the couple spent the majority of their time together. While they maintained separate residences that was due to factors beyond their control (the significant financial implications of William moving in with Tammy). Dominion points out that these two were together nearly every day in the five years preceding the accident as well as staying overnight at each other's home. The delay in obtaining joint accommodation was due to their poor financial situation and the claimant's medical needs.

I don't believe that there is disagreement between the various parties that William and Tammy had an exclusive sexual romantic and uninterrupted relationship for a period of more than three years. This is evident by the fact they wanted to legally marry but were unable to do so because of Jason's position on the cost of the divorce. They had a commitment ceremony. That ceremony affirmed their lifelong commitment to each other before family and friends and they hired an officiant to prepare the ceremony for them.

With respect to household services the two of them shared some of these responsibilities in each other's home but were also responsible for maintaining their own residences. Dominion points to Tammy's evidence that she would wash the dishes, clean and do laundry while at William's house. William would help with some outdoor chores and heavier tasks and household repairs at Tammy's house.

From the social perspective Dominion points out that they acted like spouses. There is evidence from their EUOs that they would each visit each other's family during holidays and special occasions. They also did activities together sometimes including Tammy's son, Colton.

Dominion claims that the evidence would suggest that William and Tammy presented themselves as a couple to their friends and their family certainly as indicated by the commitment ceremony.

With respect to economic support Dominion points to the evidence of William that he did provide Tammy with financial support because she had limited circumstances. She was on ODSP while he was employed. He would pay for anything she could not afford, gave monetary assistance with utilities and food.

On the issue of children while they had no children together Tammy's evidence was that her son would not be the man he is today were it not for the mentoring and involvement of William.

Wawanesa supports the submissions above.

Finally on the issue of whether the three year test is met it is Wawanesa and Dominion's position that if I find that William and Tammy had been living together based on the evidence presented that what flows from that would be that the time frame would be one that was continuous and for more than three years. The fact that the time spent overnight may vary from week to week or year to year is not relevant when one looks at the overall picture of the relationship.

Result:

I agree with Dominion and Wawanesa that Tammy and William were living together at the time of this accident irrespective of the fact that they maintained separate residences and that they were in a conjugal relationship and that they had been doing this for more than three years continuously prior to the motor vehicle accident.

On the issue of "living together" I find that I am not bound by the decision of Justice Morgan. There are other decisions of other Superior Court Judges and as well from the Court of Appeal that in my view suggests that a different path can be followed in interpreting "living together" rather than the literal interpretation and further that the facts of this case are in any event distinguishable.

I find that Tammy and William spent most of their time together in three years prior to the motor vehicle accident. These two individuals were as honest witnesses as I have ever seen. Their oral evidence was quite clear that both their oral evidence at the hearing and their evidence at the EUO was quite consistent that they spent nearly every day together for at least three or more years prior to the motor vehicle accident. Tammy describes them doing everything together and being companions. At her EUO when asked if they slept at each other's houses more than 50% of the time the answer was yes from both Tammy and William. However, when asked how many nights they may spend together the evidence was often anywhere between 4 to 7 nights a week. I find they certainly spent every weekend together

and I also find that during the week they would spend at least another three nights together if not more. The only reason they did not live together under the same roof was the financial problems that would result if they chose to do so. According to William, Tammy would lose her ODSP and there would be a significant increase in the controlled rent at her home. I accept their evidence that it was cheaper to maintain separate residences than it was at that time to move in together.

I accept the submissions of Dominion with respect to the state of the law regarding the interpretation of "living together". There are cases such as the decision of Justice Leitch in *ING v. Co-operators* where he clearly finds that maintaining separate residences does not preclude a finding that the parties are living together in a conjugal relationship (supra). I take some comfort in the fact that Arbitrator Novick, after Justice Morgan's decision in *Royal & SunAlliance* was rendered, reached a similar conclusion. In the case of *Echelon Insurance v. Motor Vehicle Accident Claims Fund* 2009, Carswell Ont. 5557 (April 5, 2019) Arbitrator Novick chose to follow Justice Leitch in the *ING & Co-operators* decision. I do note that the issue before Arbitrator Novick, while it was a spousal issue was not on all fours with this particular case. However, Arbitrator Novick did note that Justice Leitch's decision was in contrast to Justice Morgan's decision. Justice Leitch suggested a flexible approach should be employed and specifically stated 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 Novick notes that this appears to directly contradict Justice Morgan's findings but was not germane to her analysis there.

Although this was stated in *Obiter* in Arbitrator's Novick's decision she does comment on whether cases that have been decided under the *Family Law Act* should be considered in the context of *Insurance Act* spousal issues.

Arbitrator Novick notes at paragraph 82 the following:

> "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 not share the Fund's view that his statements that FLA cases should not be considered when analyzing 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*."

Counsel in the case before Arbitrator Novick had argued that Justice Morgan's decision is inconsistent with a long line of cases including the decision of the Supreme Court of Canada in *Miron v. Trudel*. This is consistent with the argument before me by Dominion and Wawanesa. In the case before Arbitrator Novick the Fund submitted that the view set forward by the Supreme Court of Canada in *Miron v. Trudel* directly contradicts Justice Morgan's statement that the policy context of the *Family Law Act* and the *Insurance Act* are distinct. I agree with

Arbitrator Novick's commetns on this issue and with the submissions of Dominion and Wawanesa in that regard.

I agree with Arbitrator Novick's comments at paragraph 84 of her decision where she states the following:

> "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 *Rodrique* decision, in which the policy and goals underline the FLA and *Insurance Act* have been found to be similar. Justice Morgan's findings that 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."

I am satisfied that the Supreme Court of Canada in *Miron* v. *Trudel* allows me to consider a broader interpretation of the words "live together" and that in looking at that interpretation I should approach it on the basis of a broad and liberal approach taking into consideration the policy considerations of the *Insurance Act* as outlined by Dominion in their argument.

Therefore as I concluded in the *Dominion* & *TD* (supra) it is my view that two individuals do not have to actually be living under the same roof in order to be "living together" to meet the definition of Section 224 of the *Insurance Act*. I agree it is an important consideration but in the circumstances of this case I find that these two individuals were living together in the broadest sense. They shared the same bed most nights, they saw each other every day, they were economically interconnected, they shared a loving relationship, they ate together and they shared some household chores. While I am aware of the evidence that was given by Tammy through her EUO statement and OCF-1 that she and William were not "living together" I find that Tammy and William's understanding of living together is not necessarily what the definition under the *Insurance Act* intends.

Lastly, with respect to Justice Morgan's decision I also find the facts of this case are distinguishable from the *Royal & SunAlliance*. In this case in the three years leading up to the accident these parties spent more time together during the day and at night than the two individuals that Justice Morgan was considering in the *Royal & SunAlliance* case. As far as I can see except when William was working and on a few nights these two spent nearly all of their time together.

On the issue of the conjugal relationship again I accept the submissions of Dominion and Wawanesa. I have looked carefully at all of the Molowich criteria and I conclude that there is no doubt in my mind that Tammy and William were involved in a conjugal relationship for more than three years prior to the motor vehicle accident. As pointed out by Dominion, their relationship was permanent and exclusive, they had a commitment ceremony, they spent most of their time together, William had a strong relationship with Tammy's son, they presented themselves to the community as a couple and there was some sharing of household services.

Finally on the question of whether these individuals lived together "continuously" in the three years prior to the accident I conclude that they did. I find that it is not necessary for two individuals who maintain separate residences to spend every night with each other in the three years prior to the accident in order to be found living together continuously. In this case they certainly spent more than 50% of their time together at night if not 75%. In this case I find that the amount of time that these two individuals spent together both at night, during the day and on weekends was sufficient to find that they "continuously lived together".

I therefore find that Tammy Amsinga-Munro and William Schram were spouses as defined under Section 224(1)(c)(i) of the *Insurance Act, R.S.O. 1990.* I do note that counsel for Intact suggested that in order to reach this conclusion I would have to do some judicial gymnastics. I hasten to point out that I was very much assisted in my judicial gymnastics with the most excellent submissions and thoughtful comments of all counsel in this case for which I thank them.

Award:

In response to the questions that I had been asked as arbitrator I find the following:

1. Intact Insurance Company is the insurer who is highest in priority to pay statutory accident benefits to the claimant, Tammy Amsinga, on the basis that Ms. Amsinga was a spouse of Intact's named insured, William Schram, and she was an occupant of his vehicle at the time of the accident. This finding is pursuant to the priority provisions of Section 268(2) 1(i) and Section 268(5.2).

Costs:

According to the Arbitration Agreement the cost of the arbitration, including arbitrator's fees, expenses and disbursements and the cost of any examination under oath shall be borne by the unsuccessful party or parties in an amount to be fixed by the Arbitrator.

As Dominion and Wawanesa were wholly successful in this matter I find that Intact is responsible for the costs as noted above. If the parties cannot agree on the costs then they can contact me to schedule a further pre-hearing to schedule arrangements for cost submissions.

DATED THIS 4th day of September, 2019 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP