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

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BET W E E N :

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

STATE FARM INSURANCE and AVIVA

Respondents

DECISION

COUNSEL

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(hereinafter referred to as "Wawanesa")

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ISSUE

In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, C. 1.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant Abdul Rasheed Abdul, with respect to personal injuries sustained in a motor vehicle accident which occurred on September 3, 2014.

The determination of priority requires an analysis of the issues of whether the claimant at the time

of the accident was the "spouse" of Backridan Sooknanan or whether he had "regular use" of a 2011 Ford F250 truck owned by her and insured with Aviva. If a "spouse" of the claimant, she would be "an insured" under the Aviva policy and also "an Insured" under a policy issued by State Farm with respect to a 2012 Jeep Grand Cherokee that she owned.

PROCEEDINGS

The matter proceeded on the basis of a Document brief, Examination Under Oath transcripts, Books of Authority and written submissions.

BACKGROUND

On September 3, 2014, at approximately 7:00 p.m., the claimant Mr. Abdul was a pedestrian who was struck by a vehicle in a parking lot. The vehicle was insured by the Applicant Wawanesa. He was taken to Grand River Hospital by ambulance.

Mr. Abdul did not have a valid driver's license at the time of the accident. His license was suspended in 2008.

Mr. Abdul applied for accident benefits with Wawanesa.

Aviva insures Ms. Sooknanan's 2011 Ford F250 Truck and State Farm insures her 2012 Jeep Grand Cherokee. The Applicant Wawanesa claims that the claimant was "an insured" under both the State farm and Aviva policies as he was the "spouse" of their named insured and had "regular use" of the vehicle owned by her. If so found, State Farm and Aviva would stand in priority to Wawanesa according to the priority scheme set out in s.268 of the *Insurance Act,* R.S.O. 1990, c.I.8.

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules or hierarchy to be applied to determine which insurer is liable to pay statutory accident benefits.

S. 268 of Ontario Regulation 283/95 provides:

> *Liability to pay*
> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 2. In respect of non-occupants,
>
> i. the non-Occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
>
> ii. if recovery is unavailable under Subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant
>
> iii. if recovery is unavailable under Subparagraph i or ii, the non-occupant has recourse against the insurer of any 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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

Wawanesa, as insurer of the striking vehicle, qualifies for priority by reason of s.(2)2(ii). State Farm and Aviva would stand higher in priority if demonstrated that the claimant was the "spouse" of Sooknanan or had "regular use" of the vehicles owned by her. If either, the claimant would be considered "an insured" and would stand higher in priority by reason of s.(2)2(i) of the Disputes Between Insurers Regulation - Ontario Regulation 283/95 as set out above.

"SPOUSAL' ISSUE"

Was Mr. Abdul the spouse of Ms. Sooknanan at the time of the accident in accordance with s. 224 of the *Insurance Act*?

Mr. Abdul was born on January 3, 1957, and is currently 60 years of age. Ms. Sooknanan was born on April 14, 1964 and is currently 52 years old. They are both Guyanese.

The evidence discloses that at the time of the accident, Mr. Abdul was clearly involved in some form of relationship with Ms. Sooknanan. Mr. Abdul and Ms. Sooknanan had been in a relationship some 30 years earlier. They had a brief relationship while she was young and had a child together. They were never married. They are the biological parents of a son named Azad Sooknanan, who was born on February 15, 1984. She was 19 at the time. The relationship actually ended before

the baby was born and Sooknanan raised the child without involvement of the claimant. The two of them carried on with separate lives for 28 or 29 years thereafter.

In the meantime, Mr. Abdul had a Son, Faraz Abdul, with another woman. However, he reported at his Examination Under Oath on December 19, 2014 that he and this woman were no longer together at the time of the subject accident and that she has her "own life". He reported that they separated in approximately 2009 or 2010, i.e. four or five years prior to the subject accident. Mr. Abdul and this woman were never married.

In the meantime, Ms. Sooknanan was married to another man after her brief relationship with the claimant some 30 years ago. She has two children who are the product of this marriage. Ms. Sooknanan separated from her former husband in approximately 2009 shortly before the claimant separated from his other relationship. Ms. Sooknanan is not certain whether their divorce had been finalized. Since their separation, Ms. Sooknanan has not kept in contact with her ex-husband,

Sometime after they left their respective partners, as Sooknanan stated, "we end up meeting back together". She was unable to pinpoint exactly when the rekindled relationship started. She stated:

> "it's like trying to know the person then see where it goes and then say, okay, we will give it a try"

The claimant testified on his Examination Under Oath that they began seeing one another in 2011 without reference to a specific date in that year.

On the evidence overall, it would appear that the rekindled relationship gradually grew from first reconnecting on a dating basis to the situation which existed at the time of the accident. Initially the claimant was living in Kitchener at 92 Ebydale Drive and Sooknanan had an apartment in Toronto. There is also some confusing evidence that Sooknanan had a residence in Kitchener as well. On his July 18, 2016 Examination Under Oath, the claimant indicated that at the time of the accident, Sooknanan was living on Morgan Avenue in Kitchener but spent nights at his residence. He could not estimate how many nights per week she would be at his place. Confusing matters is the fact that Sooknanan, on her Examination Under Oath of September 4, 2015, indicated that at the time of the accident, although still owning an apartment in Toronto, she was a resident of Kitchener and did not have a place in Kitchener besides his residence on Ebydale Drive. She went on to add that she would simply go back and forth between Toronto and Kitchener.

In any event, Sooknanan deposed that sometime after the initial dating period and a couple of years after reconnecting, she began staying on and off with the claimant at his residence in Kitchener. This would have been sometime in 2013 or so prior to the subject accident. I take from the evidence overall that the amount of time spent together at Ebydale Drive increased as time went by. On her 2016 Examination Under Oath, Sooknanan testified that at the time of the accident she would stay the night maybe once or twice each week. Yet on her September 4, 2015 Examination Under Oath, she indicated that she considered her residence at the time of the accident to be in Kitchener. I find that at the time of the accident they were spending considerable nights together at Ebydale Drive in Kitchener. On the evidence overall, I was left with the impression that they were probably spending more nights together than they were prepared to admit.

Throughout Sooknanan described the relationship as "boyfriend/girlfriend, not engaged or with a promise to marry". Similarly, when asked, the claimant described the relationship as "boyfriend/girlfriend" and specifically denied being "spouses". They had separate residences but as indicated she would spend nights with the claimant in Kitchener. She maintained that she only moved in with him after the accident. On Sooknanan's initial Examination Under Oath, she indicated that before the accident when she stayed over, they would sleep in the same bed. On her July 18, 2016 Examination Under Oath, she indicated that she became romantically involved just a couple of years earlier which, if taken literally, would have it in the summer of 2014 or several months before the subject accident. She did state that at the time of the accident they were exclusive to one another and not seeing others. They shared meals together and would engage in cooking tasks as a couple. They would also go dancing, go to the beach, go to the movies, and go to the park, partaking in "basic stuff that any couple will do". When staying in Kitchener, Sooknanan Completed numerous housekeeping tasks at 92 Ebydale Drive, including cleaning the home and doing some laundry. The evidence indicates that when in Kitchener, Sooknanan was running the household - buying groceries, paying the bills "like any husband and wife". They made decisions regarding big purchases, like appliances, together.

Sooknanan admitted that they spent most days together but to understand this statement one must consider the business relationship that developed between them as their rekindled relationship evolved.

In terms of employment, Mr. Abdul is the owner of A1 Landscaping Inc., which was incorporated on December 7, 2006. This business provides landscaping services and snow removal services.

As Mr. Abdul did not have a driver's license at the time of the accident, Ms. Sooknanan would drive him to various work sites with the F250 Ford Truck that is registered in her name. Ms. Sooknanan reported that Mr. Abdul paid for the purchase of this vehicle, and that this vehicle is "his vehicle". The F250 Ford Truck was the only vehicle used for A1 Landscaping.

Mr. Abdul paid for the maintenance of the F250 Ford Truck along with the insurance policy with Aviva. He also paid for Ms. Sooknanan's insurance policy with State Farm, which insures the 2012 Jeep Grand Cherokee, a vehicle that she also owned.

Mr. Abdul reported that at the time of the accident, Ms. Sooknanan would drive him "back and forth" from various Work sites "every day". Ms. Sooknanan confirmed that she was helping Mr. Abdul with his company, assisting with landscaping and driving tasks. For these services, Mr. Abdul paid Ms. Sooknanan approximately $2,500 per month. This would cover gas, maintenance, insurance, plus something extra. This was her only employer and source of income.

The records of Grand River Hospital from the date of loss indicate that Mr. Abdul is "married/common law". Presumably this information was provided by the claimant or Ms. Sooknanan. However, the Application for Accident Benefits says "single".

When Ms. Sooknanan was asked whether she really cared for Mr. Abdul in her heart, she responded: "Of course".

Although Mr. Abdul and Ms. Sooknanan have not gotten married over the years, Ms. Sooknanan reported that marriage is not important to her; rather, it is "love and understanding" that she values.

Following the accident, Mr. Abdul reported that he was "bedridden" for several days, and Ms. Sooknanan assisted him with his every day personal care tasks. Ms. Sooknanan also continued to assist Mr. Abdul with his housekeeping tasks, as she did prior to the accident. She also drove him to various medical appointments as needed.

About seven months following the accident, in April of 2015, Ms. Sooknanan gave up her apartment in Toronto.

One of the issues before me is whether the factual backdrop outlined in the preceding paragraphs satisfies the definition of "spouse" as contained in the *Insurance Act.*

Section 224 of the *Insurance Act* defines "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. [emphasis mine]**

It is clear from the evidence that Sooknanan and the claimant were never married, nor did either claim that they had been married, so it is s.224(c) that must be considered.

On the evidence before me, I am of the view that the two of them rekindled their earlier relationship after being apart for 27 or 28 years in 2011, first on a dating basis, then ultimately on the basis that Sooknanan would spend nights at the claimant's residence and sleep in the same bed. I accept the evidence of Sooknanan that it was a couple of years after reconnecting in 2011 that this occurred. I find that this change in the relationship between dating and something more occurred in 2013. I am unable to find on the evidence before me that they "lived together" until sometime in 2013, less than two years prior to the subject accident. As a result and as I have indicated, subsection (c)(i) of the spousal definition is not satisfied. This leaves the issue as to whether the evidence supports a finding that they "had lived together in a conjugal relationship of some permanence and as parents of a child" so as to meet the requirements of s. 224(c)(ii).

The Respondents claim that the subsection is not satisfied as at the time of the relationship being considered, they were not parents of a "child", since their son by that time was an independent adult and long since abandoned by the claimant. No jurisprudence was provided to support their position. I am of the view that there is no requirement that their biological offspring had to be an infant or child at the time of the accident. If that were the case, specific words to that effect would have been added by the legislators to so indicate. I am satisfied that they were "the natural parents of a child".

This leaves me to determine simply whether they were living in a "conjugal relationship of some permanence" at the time of the accident. In my view, this is the crucial issue in determining whether they were "spouses" as defined in s.224 of the *Insurance Act*.

The Supreme Court of Canada decision *M v. H* [1992] 2 SCR 3, held that the "leading authority" on accepted characteristics of a conjugal relationship is *Molodowich v. Penttinen* [1980] OJ No. 1904.

Molodowich enumerated numerous facts and circumstances that should be considered when determining whether a relationship is "conjugal". These factors are applied as follows, given the evidence at the Examinations Under Oath of Mr. Abdul and Ms. Sooknanan:

a. SHELTER:

i. Did the parties live under the same roof?

- On the evidence before me, find that Ms. Sooknanan spent several nights each week with Mr. Abdul at 92 Ebydale Drive in Kitchener at the time of the accident. On the remaining days, she spent her nights at her Toronto residence or perhaps other accommodation in Kitchener on Morgan Avenue. The evidence confirms that they only moved in with one another full-time after the accident.

ii. What were the Sleep arrangements?

- I am satisfied that Mr. Abdul and Ms. Sooknanan shared the same bed and slept together on the nights she spent at his residence. The relationship probably only reached this level of intimacy in 2013.

iii. Did anyone else occupy or share the available accommodation?

- At the time of the accident, Mr. Abdul's son, Faraz Abdul, who is approximately 30 years old, also lived at 92 Ebydale Drive.

b. SEXUAL AND PERSONAL BEHAVIOUR:

i. Did the parties have sexual relations? If not, why not?

- I am satisfied Mr. Abdul and Ms. Sooknanan did have sexual relations at some point in time after reconnecting in 2011. I am satisfied that this occurred no later than when she started spending nights at his place

some two years after reconnecting and probably earlier during the dating phase of the rekindled relationship. At one point in her evidence, she stated that they became romantically involved in the summer of 2014 but attempted to backtrack when questioned further. I find the evidence on her first Examination Under Oath that they were sleeping together when she started spending nights together in 2013 and her statement on her second examination that they were romantically involved in July of 2014 satisfies me that they were romantically involved at the time of the accident and probably as soon as they started spending nights together in 2013.

ii. Did they maintain an attitude of fidelity to each other?

- I am satisfied that once they began having sexual relations, they remained faithful to one another and were exclusive to one another as deposed.

iii. What were their feelings toward each other?

- When Ms. Sooknanan was asked whether she really cared for Mr. Abdul in her heart, she responded: "Of course". It would appear from the question though that it was with respect to her feelings at the time she was being questioned in September 2015. Nevertheless find it clear from the evidence overall that they cared for one another.

iv. Did they communicate on a personal level?

- I find that they did communicate with one another on a personal level. They discussed matters of importance to their lives, including their children, finances, and health concerns. Given their business relationship she was with him every working day and communication would be expected.

v. Did they eat meals together?

- Mr. Abdul and Ms. Sooknanan shared meals together and would engage in cooking tasks as a couple when she was staying at his

house.

vi. What, if anything, did they do to assist each other with problems or during illness?

- Prior to the accident, Ms. Sooknanan would drive Mr. Abdul to Work sites every day on account of his suspended license.

- Following the accident, Mr. Abdul reported that he was "bedridden" for several days, and Ms. Sooknanan assisted him with his every day personal care tasks. Ms. Sooknanan also continued to assist Mr. Abdul with his housekeeping tasks, as she did prior to the accident. She also drove him to various medical appointments as needed.

vii. Did they buy gifts for each other on special occasions?

- The evidence with respect to gift exchange was ambiguous. Ms. Sooknanan indicated on her second examination that they did not buy gifts on birthdays but would go out for dinner. On her first examination, she deposed that she likes to buy the claimant gifts but he did not typically buy her gifts.

c. SERVICES:

What was the Conduct and habit of the parties in relation to:

i. Preparation of meals,

- Mr. Abdul and Ms. Sooknanan would engage in cooking tasks as a couple on the nights she was staying with him.

ii. Washing and mending clothes, shopping, household maintenance.

- Ms. Sooknanan Completed numerous housekeeping tasks at 92 Ebydale Drive, including cleaning the home, grocery shopping, doing laundry and paying the bills "like any husband and wife" on the days she would spend at his residence.

d. SOCIAL

i. Did they participate together or separately in neighborhood and community activities?

- At the time of the accident, Mr. Abdul and Ms. Sooknanan Would go dancing, go to the beach, go to the movies, and go to the park, partaking in "basic stuff that any couple will do". On the evidence overall, I find they did not do a lot of socializing with mutual friends. She was a loner and he did things with his own friends.

ii. What was the relationship and conduct of each of them towards members of their respective families and how did such families behave toward the parties?

- Ms. Sooknanan was residing at the same residence as Mr. Abul's son, Faraz, at the time of the accident, but no specific evidence as to they how interacted with one another. In addition, Ms. Sooknanan reported that she and Mr. Abdul celebrate holidays together, including Christmas and birthdays, but there was no evidence as to whether this was shared with other family members.

e. SOCIETAL:

i. What was the attitude and conduct of the community towards each of them as a couple?

- Ms. Sooknanan reported that she is somewhat of a loner and does not have a lot of friends. However, Mr. Abdul's friends visit the house and they all sit down and chat. Ms. Sooknanan would make his friends supper.
- On the evidence before me, I am satisfied that Mr. Abdul's friends and society at large would view Mr. Abdul and Ms. Sooknanan as a couple.

f. SUPPORT (ECONOMIC).

i. What were the financial arrangements between the parties regarding the

provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?

- I am satisfied that the claimant provided all of the necessaries life for Sooknanan from a point in time where she started spending nights with him.

- In addition, Mr. Abdul had a business at the time of the accident. She drove him on a daily basis to and from jobsites as his licence had been suspended. In exchange, he provided her with a personal vehicle and a vehicle to be used in the business. He would pay her about $2,500 a month to cover expenses and something extra.

ii. What were the arrangements concerning the acquisition and ownership of property?

- Ms. Sooknanan referred to 92 Ebydale Drive as being their "shared address" at the time of the accident. She had her own residence in Toronto where she would spend part of the week.

- The evidence indicates that Mr. Abdul and Ms. Sooknanan made decisions regarding big purchases together as a couple.

- Mr. Abdul paid for the purchase of the F250 Ford Truck that is registered in Ms. Sooknanan's name. Mr. Abdul also paid for the maintenance of the F250 Ford Truck, along with the insurance policies of Ms. Sooknanan's vehicles, the F250 Ford Truck and the 2012 Jeep Grand Cherokee.

- Mr. Abdul paid for the cost of the mortgage at 92 Ebydale Drive, as well as the utilities, cable, and groceries for both Ms. Sooknanan and himself.

ii. Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

- Ms. Sooknanan reported that even if the business does not succeed, she and Mr. Abdul would "work things out". She reported: "I would not just throw the boat at him and let him sink, you know, we will try to figure it out. It's like any relationship, you have understanding, it's not all about the money".

g. CHILDREN:

i. What was the attitude and conduct of the parties concerning children?

- As aforementioned, Ms. Sooknanan was residing at the same residence as Mr. Abul's son, Faraz, at the time of the accident. There was no evidence as to any interaction between them and the other's children.

Many arbitrators, including myself, as I did in *Intact Insurance v. Jevco Insurance Company* (arbitrator Bialkowski - October 13, 2011), have also considered the additional criteria set out in *Wawanesa Mutual Insurance Company v. Kingsway General Insurance Company* (Arbitrator Jones - April 2005). The additional criteria of the "expectation of the parties and the intention of the parties" is an important component of the analysis herein. Both described their relationship as "boyfriend/girlfriend". They consistently stated that they were not "spouses" and had no intention of becoming "spouses". In fact, marriage had never been discussed. I am satisfied that I cannot take their subjective view of the relationship as determinative of the spousal issue, but their expectations and intentions must be considered in the overall assessment of whether they were "spouses" on the application of all of the facts to the various criteria set out above. As per the appeal decision of Madam Justice Wilson in *Macmillan-Dekker v. Dekker*, 2000 CanLil 22428 (ONSC), subjective intent is not sufficient to overcome the objective factors as set out in *Molodowich v. Penttinen* (1980) O. J. No. 1904. In *Macmillan-Dekker* it was held that the subjective intention in itself is not determinative and only a factor to consider. I accept this proposition.

I accept the fact that the subjective approach has been acknowledged to be a valid indicator of whether a spousal relationship exists in some circumstances. In Decision No. 2621/07, 2009 ONWSIAT 2098, the WSIAT strongly considered indicia that showed that a deceased worker wished to avoid the recognition of a common-law or spousal relationship between himself and his co-habiting girlfriend during his lifetime. The girlfriend was found to have acquiesced to this desire,

both by maintaining a separate address and by filing tax returns as divorced and not as a common-law spouse. The facts before me are quite different. The claimant and Ms. Sooknanan spent several nights together at a "shared residence" as described by Sooknanan. Someone told the hospital staff that they were married or living common-law. Ms. Sookmanan ran the household buying groceries, paying bills and helping with housework and meals "like any husband and wife". This is far different than the facts in the WSIAT decision. I find the WSIAT decision factually distinguishable.

Admittedly few cases exist in which *both* individuals are adamant that they did not have a spousal relationship. Abdul and Sookmanan are completely consistent in their denial of any intention to form a spousal relationship with one another. In the decision of *Allstate v. Belair re Shaw*, OIC A95-000557, Arbitrator Blackman (as he was then) was faced with a similar factual situation in which two insurers were disputing priority over spousal status while the individuals involved were adamant that no spousal relationship existed between them.

Arbitrator Blackman found that neither individual considered themselves to be living in a conjugal relationship on the date of loss, which was found to be in accordance with the documentary record in that case. He also found that the individuals involved had no financial interest in the outcome of the dispute, which Allstate, the initiating insurer, had an obvious financial interest in attempting to shift priority onto Belair. As a result, Arbitrator Blackman was inclined to accept the evidence of the individuals that they were not spouses. Again, the facts in *Allstate* were far different than the case before me and I find as a result, that the case is factually distinguishable. Unlike here, there was no evidence that the two had a sexual relationship. In fact, they slept in separate rooms. There was no evidence of any financial interdependence between them. They separately bought their own groceries. In *Allstate*, not only did the two not consider themselves spouses but the objective evidence as to their relationship supported such a finding. In the case before me, the objective evidence suggests otherwise and points to a conjugal relationship. I am satisfied that on application of the criteria set out in *Molodowich*, the relationship between Mr. Abdul and Ms. Sooknanan was "conjugal”.

I am of the view that the fact that Ms. Sooknanan appeared to still be legally married to her ex-husband at the time of the accident has no bearing on the status of her spousal relationship with Mr. Abdul. 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 Benefits Schedule*, which specifically sets out a solution should an insured person have

more than one spouse who is entitled to death benefits.

Determining whether Mr. Abdul and Ms. Sooknanan lived together in a relationship of "some permanence" is fact-specific and includes considerations of accommodation arrangements, sexual and personal relations, responsibility for household service, and financial arrangements.

In *Allstate Insurance v. State Farm Mutual Automobile Insurance Company* (FSCO Director's Delegate Draper April 23, 1997), the claimant, Ms. Alfred, was involved in a motor vehicle accident on December 30, 1993. The issue was whether she was able to claim accident benefits as the spouse of Mr. Vyramuthu, on account of them co-habitating in a relationship of some permanence.

The facts of that case are as follows: Ms. Alfred had a child with Mr. Wyramuthu in 1990. Ms. Alfred and Mr. Wyramuthu each immigrated to Canada separately in 1990 and 1991. At some point in 1993 - i.e. just prior to the motor vehicle accident - they re-established a relationship, though lived in separate addresses at all material times. Mr. Vyramuthu began paying $50 per month in child support for his daughter in the summer or autumn of 1993. They got married post-accident, on August 8, 1994.

At first instance, Arbitrator Naylor held that co-habitation need only be "brief and sporadic" if there are other elements that suggest a relationship of some permanence, such as the economic side of the partnership, and an assumed obligation to support and provide for the other. Arbitrator Naylor found that Ms. Alfred and Mr. Vyramuthu "were co-habitating with each other on and off throughout, at least, November and December 1993", and that this was sufficient to qualify as a relationship of some permanence at the time of the accident. This decision was upheld by the Director's Delegate. In the case before me, the co-habitation was more than brief and sporadic. They started the rekindled relationship in 2011, some three years before the subject accident. By 2013, they had settled into a relationship that on balance, met the criteria of a "conjugal relationship" on the criteria established in *Molodowich*, despite their own subjective views as to the nature of the relationship.

By way of summary, I have found that the claimant and Sooknanan started their rekindled relationship in 2011. Sooknanan started spending nights with the claimant in 2013 some 12-18 months prior to the subject accident. During that period she slept in the same bed with the claimant, had sexual relations and assisted with housekeeping and cooking. I am satisfied on the evidence overall that during this period she ran the household essentially buying groceries, paying bills, preparing meals, doing housekeeping, etc. "just like any husband and wife", as she so

deposed. It is clear that she viewed his residence as their "shared residence" during this period. As well, she was involved in major purchase decisions such as appliances. They engaged in activities that would be typical of any couple - go dancing, go to the beach, go to movies, go to restaurants, go to the park. I am satisfied that an outsider looking at the relationship would consider them a couple. Importantly, I accept the fact that they were sexually exclusive to one another. There is no evidence whatsoever that this relationship was not going to continue for the foreseeable future. This is supported by the fact that Sooknanan deposed that even if the claimant's business failed, they would work things out. In the circumstances I have no difficulty in finding that they "had lived together in a conjugal relationship of some permanence and as parents of a child" so as to meet the definition of "spouse" as set out in s. 224(c)(ii) of the Insurance Act, as opposed to a "friends with benefits" relationship as suggested by the Respondents.

"REGULAR USE' ISSUE'

Did the claimant Mr. Abdul have "regular use' of the F250 Ford Truck at the time of the accident, in accordance with section 3(7) of the *Statutory Accident Benefits Schedule?*

> Section 3(7) of the *Statutory Accident Benefits Schedule* states:
>
> (f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at that time of the accident, if at the time of the accident,
>
> > (i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity...

The evidence before me indicates that Ms. Sooknanan was the registered owner of the F250 Ford truck. The claimant, Mr. Abdul, was at the time of the accident the Owner of A1 Landscaping Inc., which was incorporated on December 7, 2006. This business provides landscaping services and snow removal services. As Mr. Abdul did not have a driver's license at the time of the accident, Ms. Sooknanan would drive him to various work sites with the F250 Ford Truck that is registered in her name. Ms. Sooknanan reported that Mr. Abdul paid for the purchase of this vehicle, and that this vehicle was "his vehicle". The F250 Ford Truck was the only vehicle used for A1 Landscaping.

Mr. Abdul paid for the maintenance of the F250 Ford Truck, along with the insurance policy with Aviva. He also paid for Ms. Sooknanan's insurance policy with State Farm, which insures the 2012 Jeep Grand Cherokee, a vehicle that she also owns.

Mr. Abdul reported that at the time of the accident, Ms. Sooknanan would drive him "back and forth" from various work sites "every day". Ms. Sooknanan confirmed that she was helping Mr. Abdul with his company, assisting with landscaping and driving tasks. For these services, there was evidence that Mr. Abdul paid Ms. Sooknanan approximately $2,500 per month. This would cover gas, maintenance, insurance plus something extra. This was her only employer and source of income.

I am satisfied on the evidence that the claimant Mr. Abdul had "regular use" of the F250 insured by Aviva. He was a passenger in the vehicle on a daily basis. The jurisprudence confirms that "regular use" does not require that the person for whom the vehicle is being made available, be driving or operating the vehicle. Furthermore, it is clear that he had dominion and control over the vehicle and would direct how the vehicle was to be used in his business. It was therefore "available" whenever he wanted. The more difficult question is whether the vehicle was provided to him for his regular use "by a corporation, unincorporated association, partnership, sole proprietorship or other entity".

The Respondent Aviva takes the position that the subject vehicle was provided by "an individual", as opposed to having been provided to Mr. Abdul “by a corporation, unincorporated association, partnership, sole proprietorship or other entity" and as a result, the deeming provision would not apply.

I am satisfied on the established jurisprudence that section 3(7)(f) of the Schedule does not apply in circumstances where the insured vehicle was made available to the claimant by an individual, rather than by some sort of business entity. In *Unifund Assurance Company v Intact Insurance Company* (Arbitrator Bialkowski - April 17, 2015) it was noted:

> *"I find that the present fact situation is quite different and it is simply one individual having regular use of another individual's vehicle. I am of the view that the term "other entity" should not be applied to someone who is clearly, an "individual" in this context."*

Support for this conclusion was found in the earlier decision of *State Farm Mutual Automobile Insurance Company v Kingsway General Insurance Company (Arbitrator Samis - October 20, 1999),* in which Arbitrator Samis explains:

> *"I note that throughout the regulation that people are referred to as "individual" and in other places, as "person". I find it difficult to conclude that subsection 66(1) was intended to embrace individuals or persons without using either term and used instead, the term "other entity" […] as a matter of Ordinary parlance, it would be very unusual to refer to an individual as an "entity", notwithstanding broad dictionary definitions that might sanction this use."*

Arbitrator Samis went on to explain that the *ejusdem generis rule*, or limited class rule, is an appropriate interpretative aide in these circumstances. That rule provides that when one provides a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow, enumerated terms that proceeded. Therefore "other entity" would be limited to those entities similar to those outlined in the Section and not individuals. Arbitrator Samis writes:

> "In my view the list contained in clause 60(1)(a) described businesses and organizations that might own automobiles. The list embraces entities which might have business purposes or other objects. But it clearly describes entities that have some goals and structure, other than private individuals. When the list is followed by the words "or other entity" one is driven to the conclusion that the section refers to other varieties of organizations similar to those specified. Applying this interpretation of the scope of "other entity", I do not conclude that Hannelore Scheffler is an "other entity" as contemplated by the regulation."

The Applicant Wawanesa takes the position that there was a business relationship between the claimant and the registered owner of the truck and therefore Ms. Sooknanan ought to be considered an "other entity" in the circumstances. I am not satisfied that this is the case. Ms. Sooknanan was not a shareholder, officer or director of the limited company operating the landscaping business. She did not share in the profits, nor was she responsible for any losses. In my view, the relationship between the claimant and Ms. Sooknanan was more as "good friends who helped each other out" and not some sort of business entity so that the deemed named insured provision of s.3(7)(f) of the *Statutory Accident Benefits Schedule* would apply. The facts before me are more similar to those in *Liberty Mutual Insurance Company v. Markel Insurance Company of Canada* (Arbitrator Jones - July 2006). In that case, the claimant was a pedestrian struck by a truck insured by Markel. At the time of the accident, the claimant was married to a man who had "regular use" of a vehicle owned by his brother-in-law and insured by Liberty Mutual. A claim for accident benefits was made to Liberty Mutual. Liberty Mutual began paying benefits and took the position that Markel stood in priority. Liberty Mutual took the position that the vehicle had not been provided to the claimant's spouse "by a corporation, unincorporated association, partnership, sole proprietorship or other entity", but rather by an "individual", namely his brother-in-law. The spouse of the claimant had complete use of the vehicle owned by his brother-in-law.

The spouse of the claimant paid for the upkeep and insurance on the vehicle. Arbitrator Jones concluded that the brother-in-law was not an "other entity" contemplated by the legislation so that the spouse of the claimant was not a "deemed named insured". Arbitrator Jones wrote:

> "Section 66(1)(a) [the identically worded predecessor section to S. 3(7)(f) of the Schedule] was designed, in my view, to capture the risk when a business organization is a named insured. In order for an individual to be a "other entity", for the purposes of s.66(1)(a) the individual must be operating, in essence as a business. Based on my finding of facts in this case, the relationship between Mr. Senthilnathan and Mr. Kumaravel was not a commercial or business relationship. It was simply two close friends helping each other out. The facts of this case do not fall within the requirements of section 66(1)(a) of the Statutory Accident Benefits Schedule."

As in *Liberty Mutual*, I find that the relationship between Mr. Abdul and Ms. Sooknanan was not a commercial or business relationship, but as two people in a conjugal relationship trying to help one another out, so that the provisions of the now s.3(7)(f) of the Schedule do not apply.

In reaching my decision, I have considered the decision in *Kingsway General Insurance Company v. Gore Mutual Insurance Company* (Arbitrator Bialkowski - October 15, 2009), but find the case factually distinguishable. In *Kingsway*, the claimant was the owner and operator of a Freightliner tractor that was involved in an accident. The claimant also owned a private automobile insured by Gore which was not involved in the accident. The claimant contracted his services as an owner-operator to Towbridge Transport Ltd. The Freightliner tractor was insured as a scheduled vehicle under a Kingsway Insurance fleet policy with Towbridge. The claimant was not a named insured. The arbitrator found that the claimant had the tractor "made available" to him either by the claimant's sole proprietorship or an "other entity" (the joint venture pursuant to the owner/operator agreement with Towbridge). This was despite the fact that the vehicle was owned by the claimant, and arguably was made available by the claimant himself. Factually, it was found that the vehicle was provided by the executed joint business venture agreement between Towbridge and the claimant, So that the deeming provision would apply. It also made equitable sense that the commercial insurer of the vehicle in which the claimant was an occupant would be responsible, rather than the insurer of the claimant's personal automobile which was not involved in the collision. The arbitrator found that the legislative intent of the deeming provision was to allow "insurers of private automobiles to establish premiums based on known risks, rather than unknown risks of operating heavy commercial vehicles for distances often greater than those one could expect of a personal automobile. It transfers commercial risk to the insurer of the commercial operation." On the evidence before me, I am satisfied that there was no contractual

arrangement or business arrangement between the claimant and Ms. Sooknanan.

Section 3(7)(f) of the Schedule has an "identically worded predecessor section" in section 66(1). Unlike section 3(7)(f) however, section 66(1) was clearly titled "company automobiles", suggesting that the provisions therein had been intended to apply with respect to vehicles owned by employers or other business operations, rather than vehicles of individuals. In my view, this suggests an understanding that section 3(7)(f) and the preceding section 66(1) are intended to apply where a vehicle has been made available to the injured claimant by an employer, other business or contractually created business relationship. None so existed in the case before me.

I have also considered the submissions advanced by State Farm that Ms. Sooknanan owned the subject vehicle in trust on behalf of the claimant and that such trust was an "other entity" that provided regular use to the claimant. The definition of "entity" in the *Insurance Act* includes a "trust". State Farm relies on the decision in *Nishi v. Rascal Trucking* [2013] 2 S.C.R., a case involving monies advanced for the purchase of real property where the entity providing the funding did not take legal title. It did not involve beneficial interest in the ownership of a motor vehicle. It involved parties unrelated to one another. Here the parties were related to one another. They were involved in conjugal relationship. I do not believe the principles of resulting trust would apply. There was absolutely no evidence adduced that there was any intention in creating a trust when one member of the family provides the funds for the purchase of a motor vehicle for the benefit of another family member who takes title to the vehicle which is so often the case. The more likely situation is that the claimant bought Sooknanan a vehicle so she could drive him around from jobsite to jobsite, as he did not have a license.

In the final analysis, I find that the F250 Ford Truck had been provided by an "individual" for the regular use of the claimant and <u>not</u> by an "other entity" as contemplated by s. 3(7)(f) of the Schedule. Accordingly, the claimant was not a deemed named insured under the Aviva policy.

<u>FINDINGS</u>

| find that although the claimant was not an insured under the Aviva policy by reason of the deeming provisions of s.3(7)(f) of the Schedule, the claimant was an insured under both the Aviva and State Farm policies as being the "spouse" of their named insured Ms. Sooknanan. As an "insured" under both policies, thereby meeting the requirements of s.268(2)(i) of the priority scheme, the two insurers would stand in priority to Wawanesa which meets the requirements of

S.268(2)(ii), a lower level of priority.

Section 268 of the *Insurance Act* provides for a tie breaking mechanism in these circumstances:

> *Choice of insurer*
>
> (4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. I.8, s. 268 (4): 1993, c. 10, s. 1.
>
> *Same*
>
> (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. 1993, c. 10, s. 26 (2): 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).
>
> *Same*
>
> (5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c 10, s. 26 (2).
>
> *Same*
>
> (5.2) if there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2): 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).

Here the claimant Mr. Abdul is the spouse of the named insured under both the Aviva and State Farm policies and not an occupant of either insured vehicle so that s.268(5.1) would apply. In these circumstances the claimant would have to elect as to which insurer he wishes to pay benefits.

ORDER

On the basis of my findings aforesaid, I Order:

1. That the insurer elected by the claimant to pay benefits indemnify Wawanesa with respect to benefits paid to or on behalf of the claimant Mr. Abdul, together with interest calculated in accordance with the *Courts of Justice Act* and assume carriage of the accident benefits claim.

2. That Aviva and State Farm pay on an equal basis the costs of Wawanesa with respect to this arbitration on a partial indemnity basis.

3. That Aviva and State Farm pay the arbitrator's costs on an equal basis.

DATED at TORONTO this 11th)

day of April, 2017)

Arbitrator Kenneth J. Biakolwski