IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, 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:

CERTAS DIRECT INSURANCE COMPANY

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

AS REPRESENTED BY THE MINISTER OF FINANCE

Respondent

AWARD

Heard: November 29, 2017

Written Submissions: January 29, 2018, February 22, 2018, March 12, 2018

Counsel:

Kevin H. Griffiths for the Applicant

Todd M. Wasserman for the Respondent

SCOTT W. DENSEM: ARBITRATOR

Introduction

This priority dispute arbitration arises out of a bicycle – automobile accident occurring November 6, 2015. To maintain the privacy of a minor who is indirectly involved in the legal issue to be resolved, it has been agreed by the parties and me that in my Award I will refer to the involved persons using only their initials.

The SABS[1] claimant ("JL") was riding a bicycle when he was struck by an automobile which remains unidentified. JL was injured in the accident and submitted a SABS claim to the applicant ("Certas"). At the time of the accident Certas insured LM pursuant to a standard motor vehicle liability policy which provided SABS coverage. The SABS claim was submitted to Certas on behalf of JL asserting that JL was a spouse of LM at the time of the accident.

In accordance with its obligations under Regulation 283/95 of the *Insurance Act* as the first insurer to receive a SABS application, Certas began handling JL's SABS claim, and served a Notice of Dispute between Insurers ("NDBI") on the respondent ("HMQ"). Certas disputes the ultimate responsibility to pay SABS on the grounds that JL was not covered for SABS under the Certas policy issued to LM because he was not a spouse of LM at the time of the accident.

For JL to have SABS coverage under the Certas policy issued to LM he would have to meet the definition of "spouse" set out in section 224 of the *Insurance Act*, which has been incorporated into subsection 3 (1) of the SABS.

[1] Ontario Regulation 34/10, Statutory Accident Benefits Schedule – Effective September 1, 2010.

If JL meets the definition of spouse as indicated, Certas will remain responsible for the payment of SABS to JL. If JL does not meet this definition of spouse, HMQ as the payor of last resort, will be responsible for the payment of SABS to JL.

The Issue

The overarching issue is which of Certas and HMQ has the ultimate responsibility for the payment of SABS to JL pursuant to section 268 *Insurance Act*.

As indicated, the specific question to be resolved is whether JL meets the definition of spouse set out in subsection 3 (1) of the SABS. The definition reads as follows:[2]

> "spouse" means either of two persons who,
>
> (a) …
>
> (b) …
>
> (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;

[2] I have edited the definition to include only those parts which are relevant to the issue to be decided in this arbitration.

Evidence

The evidence for this arbitration included the testimony at the hearing of JL and LM. Three documents were also entered as exhibits, as follows:

Exhibit 1: Arbitration Agreement, signed by counsel for the parties on November 29, 2017.

Exhibit 2: Agreed Statement of Facts, including documents at tabs 1 to 3, signed by counsel for the parties on November 28, and November 29, 2017.

Exhibit 3: Joint Document Brief, including documents at tabs 1 to 4.

Analysis

There are several matters on which the parties agree. The Agreed Statement of Facts confirms that there are no issues concerning the timeliness of the service of the NDBI, or the commencement of the arbitration. The parties agree, and the evidence confirms, that JL and LM were not married nor had they gone through any voidable form of marriage before the accident. It is also agreed, and the evidence confirms, that JL and LM are the natural parents of a daughter, BL, born August 1, 2013.

In asserting its position that JL was not a spouse of LM at the time of the accident, Certas concedes that JL and LM were spouses for SABS purposes from August 1, 2013 (the birth of BL) until the beginning of April, 2014 when JL began a drug rehabilitation program in Windsor, Ontario.

Certas submits however, that in a case such as this where a common-law relationship is under consideration, the case law made it clear a long time ago that the

“once a spouse always a spouse” argument is fallacious. Just as marriage is ended by divorce, a common-law relationship ends when the parties, or one of them intend it to end, and the objective evidence confirms that settled intention.

Certas argues the evidence indicates JL’s spousal status had ended prior to the accident. Certas submits that I should find that JL’s spousal status ended at any one of a series of (alternative) dates before the accident. The first point at which Certas argues the spousal relationship ended is August, 2014 when JL relapsed and moved out of the Windsor apartment where he had been living with LM and BL. In the alternative, Certas submits that the spousal relationship ended in November, 2014, when LM and BL moved into a townhouse in Windsor, without JL, whom, Certas submits, had by then moved into different rented premises, never taking up residence in the townhouse. In the further alternative, Certas submits that the spousal relationship ended approximately 11 weeks before the accident after JL had been released from jail (he had been in jail as a result of an incident involving LM) and he returned to “living on the streets” rather than under the same roof as LM and BL.

Certas urges me to find that the testimony of JL to be unreliable (as opposed to not credible) with respect to dates of certain events, and specifically with respect to his recollection of the time period between August 2014 and the November 6, 2015 accident. Certas argues that LM’s recollection of events and dates is much more reliable and should be preferred to JL’s recollection of the events and dates.

Certas submits that an objective analysis of the evidence is required, and that such an analysis contradicts the opinions of JL and LM whose testimony clearly

indicated that they considered themselves to be spouses at the time of the accident and for quite some time thereafter.

In support of this argument Certas submits that although the accident ironically appears to have resulted in an improvement of JL's resolve to end his drug addiction, which therefore facilitated a "reconciliation" between JL and LM, it is the period of time immediately preceding the accident which must be considered in determining whether JL and LM were spouses at the time of the accident.

Certas submits that an objective examination of the evidence concerning JL's relationship with LM the weeks and months leading up to the accident leads to the conclusion that the spousal relationship had ended and would not have been revived except for the fact that the accident occurred. In any event it would be speculation to suggest that had the accident not occurred, JL and LM would have resumed their spousal relationship.

HMQ, not surprisingly, agrees with Certas that JL and LM were spouses within the meaning of the SABS definition before the accident. HMQ submits however, that this status never changed before the accident – JL and LM remained SABS spouses at the time of the accident.

HMQ emphasizes that despite the difficulties encountered by JL and LM in their relationship because of JL's drug addiction, they nevertheless "lived together in a conjugal relationship" as that concept has been defined in the case law. HMQ emphasizes that authorities up to and including the Supreme Court of Canada confirm

that the indicia of a conjugal relationship must be applied in a flexible way, on a case by case basis.

A relationship does not have to include each and every characteristic which has been enumerated in the case law as being indicative of a conjugal relationship, and indeed some characteristics may be more important than others, depending on the specific relationship being considered.

HMQ argues the courts have recognized that because they are dealing with the multifaceted and varied nature of human interaction in determining whether persons are “spouses” of one another, much deference must be accorded to how those persons themselves perceive their relationship, and, to a lesser extent, how it is perceived by other persons in their family and social circle.

HMQ submits that this latter fact is especially true when one is considering whether a spousal relationship – which in this case had admittedly been established, has come to an end. The intention of the parties is a very important consideration in this regard.

For the reasons which follow I conclude that JL lived together in a conjugal relationship with LM at the time of the accident, and that the circumstances of the relationship satisfy both (c) (i) and (c) (ii) of the SABS section 3 (1) definition of “spouse”.

I will begin with an examination of the law applicable to the issue. In my view the applicable law has been well established and considered in both court and arbitral decisions, so I will try to keep my review of the law as brief as possible.

A list of factors to consider in determining whether a “conjugal relationship” exists was enumerated by Justice Kurisko in *Molodowich v. Penttinen*.[3]

(1) SHELTER:

(a) Did the parties live under the same roof?

(b) What were the sleeping arrangements?

(c) Did anyone else occupy or share the available accommodation?

(2) SEXUAL AND PERSONAL BEHAVIOUR:

(a) Did the parties have sexual relations? If not, why not?

(b) Did they maintain an attitude of fidelity to each other?

(c) What were their feelings toward each other?

(d) Did they communicate on a personal level?

(e) Did they eat their meals together?

(f) What if anything, did they do to assist each other with problems or during illness?

(g) Did they buy gifts for each other on special occasions?

(3) SERVICES:

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

[3] (1980) 17 RFL (2d) 376, at paragraph 16.

(a) Preparation of meals;

(b) Washing and mending clothes;

(c) Shopping;

(d) Household maintenance;

(e) Any other domestic services?

(4) SOCIAL:

(a) Did they participate together or separately in neighborhood and community activities?

(b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

(5) SOCIETAL:

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

(6) SUPPORT (ECONOMIC):

(a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?

(b) What were the arrangements concerning the acquisition and ownership of property?

(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

CHILDREN:

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

In *M v. H*.[4] the Supreme Court of Canada had the task of considering the constitutionality of the provisions of the *Family Law Act*[5] in determining whether a conjugal relationship existed between a same sex couple. The fact that the Court was considering this issue and the number and nature of groups granted intervenor status are indicative of the significant developments in society's consideration of human relationships from the time of Justice Kurisko's decision in *Molodowich* almost 20 years before.

The Supreme Court referred to the factors outlined in *Molodowich* as *"…the generally accepted characteristics of a conjugal relationship*", summarizing these as, *"…shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple."* The Court went on to emphasize however, that there is essentially no longer any such thing as a "one size fits all" conjugal relationship. Each relationship must be examined in its own right.

[4] [1999] 2 S.C.R. 3.
[5] R.S.O. 1990, c. F.3.

General guidelines can be helpful, but must be judiciously applied only if appropriate, and in a way that makes sense for the relationship being considered. The court stated:

> …these (*Molodowich*) elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal…In order to come within the definition, neither opposite sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".
>
> Certainly an opposite sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite sex couple is in a conjugal relationship will vary widely and almost infinitely…Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.[6]

Hazelwood v. Kent[7], a decision of the Ontario Superior Court, was released after *M. v. H*. and does not make specific reference to it. The decision nevertheless takes the same progressive tone to analyzing what constitutes a conjugal relationship. It also speaks to what in my view is a very important factor to consider in determining whether a conjugal relationship exists – the intention of the parties. After reviewing the "*Molodowich* factors", Justice Wildman cites with approval comments from an earlier Ontario Superior Court decision, *McEachern v. Fry Estate*[8]*:*

[6] *Supra*, note 4, at paragraphs 59 and 60.
[7] [2000] O.J. No. 5263 (ONSC).
[8] [1993] O.J. No. 1731 (ONSC).

> Cases of this type must necessarily turn on their own facts…
>
> Whether were not a couple have cohabited continuously is both a subjective and objective test. **What was the intention of the parties as gleaned from the facts and how were they regarded by others? Intention of the parties is important.** In today's world, where often both spouses work, sometimes in different cities and where work can keep them apart for often long periods of time, one must look at the relationship generally and not specifically, item by item, to see if the parties were, in fact, cohabiting, in the legal sense, or merely getting together for the time being for whatever purpose…***It has been said that cohabitation is a state of mind*.**[9]

I also consider it important for this case to emphasize comments made by Justice Wildman later in the *Hazelwood* decision. He states:

> One of the strongest indicia of an intention to be treated as a family is the existence of children born to a couple. When this is combined with an element of financial support by one party to the other, and altering of the roles in the relationship as a result of the birth of the children and some time spent together on a regular basis, this relationship should be considered to be "cohabitation in a relationship of some permanence" within the meaning of the Family Law Act. The amount of residence sharing which is necessary to support a spousal finding where there are children and ongoing financial support is probably less required if either of these important factors were absent although these two criteria are not determinative of the question for all cases, their existence is very persuasive to the court in assessing whether or not a family unit has been established.[10]

[9] *Supra*, note 8, at paragraph 21. Arbitrator's emphasis.
[10] Supra, note 7, at paragraph 38.

The analysis and approach outlined in the foregoing cases has also been adopted by arbitrators dealing with the SABS definition of "spouse".[11] As has been emphasized, the results in these types of cases are fact driven. I do not think it would be helpful to extensively review the facts of those cases here because none of them are similar to the facts of the case before me.

The concept of intention is especially important for the case before me since this is a situation where the spousal relationship between JL and LM before the accident is acknowledged. The question is whether this spousal relationship ended before the accident.

The comments on the issue of intention in *McIntrye (Litigation guardian of) v. West Wawanosh Mutual Insurance Co.*[12], a case cited by Certas in its submissions, are directly relevant to this issue.

CM and GB began living together shortly after the birth of their twin girls January 24, 1989. They did not marry. They lived together in an apartment at GB's grandfather's place. GB worked outside the home, and paid all the bills. GB stayed at a different residence than CM four out of seven days for work reasons, coming home on the weekends. CM stayed home and cared for the children. They had discussed marriage but CM was not ready for that step.

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[11] See, for example, *Wawanesa Mutual Insurance Company v. Kingsway General Insurance Company,* Arbitrator Guy Jones, Award April 2005; and the following Awards of Arbitrator Ken Bialkowski: *Intact Insurance v. Jevco Insurance Company (Bechard)*, October 13, 2011; *Intact Insurance Company of Canada v. Economical Mutual Insurance Company (Mayes-Hanna)*, July 17, 2014; *Gore Mutual Insurance v. AXA Insurance (Barry)*, December 22, 2014; *The Cooperators General Insurance Company v. Pembridge Insurance Company (Zwaryczuk)*, July 21, 2015; *Wawanesa Mutual Insurance Company v. State Farm Insurance and Aviva (Abdul)*, April 11, 2017;

[12] [1994] O.J. 652 (ONSC).

CM and GB separated in April, 1990. Family law proceedings ensued regarding support and custody of the children. GB was killed in a car accident on May 12, 1991, just over a year after the separation.

CM advanced a claim to the insurer for the payment of benefits on the basis that she was GB's spouse at the time of the accident and the children were his dependants.

The court held that there had been a spousal relationship between CM and GB. They had children together and their relationship was one of some permanence. The court concluded however that this spousal relationship had ended before the accident. In coming to that conclusion, the court focused on the intention of the parties:

> …a common law spousal arrangement is created by and founded on the parties' intention to cohabit in a relationship of some permanence. It is ended by the parties changing their intention in this regard. (CM) admitted in evidence that she and (GB) had no intention of resuming cohabitation. Thus, the spousal arrangement between (CM) and (GB) ended when they no longer intended to cohabit, likely at separation.

An earlier case from the Ontario Court of Appeal is also especially relevant to the issue before me. In *Re Sanderson and Russell*[13] a previous and different version of the definition of "spouse" in Ontario's *Family Law Act* was under consideration. In this case the parties involved had no children so the issue was duration of continuous cohabitation to determine entitlement to support. Under the version of the *Family Law Act* in effect at that time, the cohabitation had to be continuous for five years to satisfy the definition of spouse.

[13] 1979 CanLII 2048 (ONCA).

The evidence indicated that the parties had lived together "as husband and wife" (although not married) for approximately 5 years and 10 months but that they had been separated for 4 to 5 days just over a year before their final separation giving rise to the *Family Law Act* proceedings. The evidence indicated that the 4 to 5 day separation was caused as a result of an argument between the parties. The male spouse left the home they were living in taking his clothes and a small bed. He made a deposit on a separate apartment. Some 4 to 5 days later he "reconciled" with the female spouse. The lower courts and the Court of Appeal agreed that this 4 to 5 day interruption did not vitiate a five-year period of continuous cohabitation.

What is most important about the case are the comments of the Court of Appeal when addressing the significance of intention. The Court stated:

> **"Cohabit" is defined…as meaning "to live together in a conjugal relationship**, whether within or outside marriage"…Without in any way attempting to be detailed or comprehensive, it could be said that **such a relationship has come to an end when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one**. While the physical separation of parties following "a fight" might, in some cases appear to amount to an ending of cohabitation the test should be realistic and flexible enough to recognize that a brief "cooling-off" period does not bring the relationship to an end. Such conduct does not convincingly demonstrate a settled the state of mind that the relationship is at an end.

The question will often be largely one of fact.[14]

Having reviewed the applicable law, I will now analyze the facts of this case as disclosed in the evidence in the context of the applicable law.

Let me begin by stating that I found both JL and LM to be credible, honest witnesses. My assessment of their demeanor and presentation leads me to conclude that both of them were doing their best to be of assistance to the parties and to me, as arbitrator. Neither of them had any reason to tailor their evidence in any particular way because no matter which party to this arbitration is successful, JL will continue to receive SABS as is appropriate.

Certas has argued in its submissions that JL's evidence is unreliable in some respects. I agree with that proposition to a point. JL readily conceded his uncertainty regarding being able to provide specific dates of events, or being able to recall exactly when they occurred. I will say however, that I found LM to have the same difficulty being readily certain of the when some events occurred. On several occasions in her testimony she would make a statement and shortly thereafter make a comment to the effect of, "*I am trying to think…*", or something similar which indicated to me she too was uncertain as to dates or as to exactly when certain events took place.

I do not find any inconsistencies in the evidence of JL (or LM for that matter) on the issue of dates or timing of events to be of great significance. In my view, their evidence was clear, consistent, and credible as far as the overall picture of, and most importantly – the impact of the events in their lives together is concerned from the

[14] *Supra*, note 13, at page 6. Arbitrator's emphasis.

beginning of their relationship at the start of 2011, up until the date of JL's accident, and its aftermath.

With reference to JL, he was examined under oath about a year and a half before he testified at the arbitration hearing.[15] I have studied the transcript from that examination carefully. His evidence on his examination under oath is remarkably consistent with the evidence he gave at the arbitration hearing about a year and a half later. In fact, with respect to one of the date discrepancies pointed out by Certas in his arbitration hearing testimony relating to JL being incorrect about the date he, LM and BL moved Windsor – JL had the date correct on his examination under oath even though he later got it wrong in his arbitration testimony.

Certas has also submitted that JL's arbitration testimony in particular did not provide an accurate picture of his relationship with LM after his August, 2014 relapse up until the time of his November 6, 2015 accident. Certas did not argue that JL deliberately misrepresented matters, only that he was remembering them more as he would like them to have been, rather than as they actually were. LM's evidence, Certas submits, provides a more realistic view of that time period which reflects, Certas argues, that the spousal relationship had deteriorated and ended during this time.

I agree with Certas to the degree that JL's view of the time period between when the family began living together in Windsor in the summer of 2014, and his relapse in August, 2015 which ended in jail time, reflected his belief that there were more "good times" in his relationship with LM (and BL) than there probably were.[16] LM's recollection

[15] The transcript from JL's examination under oath is Exhibit 3, tab 4.
[16] See, for example, Transcript of Arbitration Evidence, November 29, 2017, Q. 72.

of this time period was more “clinical” and objective. I do not agree however, that it proves either JL or LM unequivocally indicated by words or conduct that either of them considered their spousal relationship at a permanent end.

What was strikingly clear to me from both the evidence of JL and LM was the fact that from the early beginnings in 2011, up until the accident, no matter how bad things became because of JL’s drug habit, neither of them said or did anything to indicate that either of them had given up on the relationship, or which indicated a “settled intention” to end it permanently.

In my view, a determination of whether JL and LM remained in a spousal relationship does not turn on inconsistencies regarding dates, or the differences in perception between JL and LM with respect to their characterization of certain time periods in their relationship as being “better”, or “worse”. It is their overall intention with respect to the relationship which is of paramount importance.

As indicated I found that taken as a whole, both the evidence of JL and LM provided a cogent, and substantially consistent account of the main events in their lives from the beginning of 2011 up until JL’s accident and later. Most importantly, in my opinion their evidence elucidated their state of mind at the relevant time necessary to determine whether they remained in a spousal relationship up to the date of the accident.

I think it is important to consider as well the context in which both JL and LM were giving evidence. Considering everything that JL and LM have been through as a couple from the time they began living together at the end of 2010 or the beginning of

2011, I would not be surprised if most of the time since then seemed to them like the proverbial “blur”.

Their time together was anything but what one would consider the norm for a young couple starting a relationship, having a child, and trying to make their way in life. They both have suffered an extreme amount of hardship, privation, and more than what might be considered a fair share of disappointment and disaster in their life together.

In making these comments I in no way want it interpreted that my conclusion as to whether JL and LM were spouses for SABS purposes has somehow been influenced by sympathy for their situation. That is not the case. I make these observations because, in my opinion, they are relevant to understanding the unique nature of the relationship between JL and LM. In spite of everything I have described – they showed a remarkable willingness to “soldier on”.

As the cases have emphasized, each relationship must be considered in the context of the parameters for the relationship that the parties involved have established for themselves, and not be measured against some type of “normal” or “standard” spousal relationship.

JL’s problems which later placed enormous strain on the JL’s and LM’s relationship were well-established before JL and LM entered into their relationship, and were well known to LM at the end of 2010 or the beginning of 2011. It is clear from her evidence that LM knew JL from childhood and that, as she put it, they had been “friends” since childhood. She entered into a spousal relationship with JL in spite of JL’s struggles with drugs for many years. He was “clean” at the time and was working, but

she knew he had experienced “ups and downs” so there was no guarantee things would stay this way.[17]

Some may say that LM’s tolerance for JL’s weaknesses and inability to “stay clean” was folly on her part and that she should have ended their relationship quickly, when JL suffered his first relapse – or perhaps not even have taken the chance of entering into the relationship in the first place.

Others might praise LM as an unselfish, sensitive human being. She demonstrated her exceptional character through her willingness to “hang in” with JL, sticking by him through his many relapses which probably outnumbered the periods of “normalcy”, and during which it was almost impossible for him to carry on a relationship with anyone, let alone a spousal one with LM.

The evidence in this case makes it clear that JL was, throughout his relationship with LM, a drug addict. Although JL must assume responsibility for his choices, the degree of blame which should be attributed to him for getting himself into the situation he is in, and for not being able to get out of it, is a different question. It is not a determination which I, as arbitrator, must make to decide the issue in this case. I will leave it to doctors, mental health experts, social scientists, and others much more qualified than me to determine how much free will control over his “demons” JL could truly exercise.

Fortunately, I also do not have to explain why LM entered into her spousal relationship with JL, or, perhaps more significantly, why she stayed in it as long as she

[17] See pp. 23 and 24, *infra*, for LM’s evidence on this point.

did. My task, easier but not easy, is to determine whether both the objective and subjective evidence available indicates that the spousal relationship which had been established between JL and LM in the beginning of 2011, existed on November 6, 2015.

What was abundantly clear to me in listening to both JL and LM testify, is that throughout the period which is of concern to me (2011 to November 6, 2015) JL and LM loved each other, cared about each other's welfare, wanted to be together as a family with BL, would do whatever was necessary in their lives to protect the best interests of BL, and in spite of all that had happened, neither of them wanted to "call it quits" once and for all, and end their relationship.

I will now examine the evidence with specific reference to the SABS spouse definition subsections 3 (1) (c) (i) and (ii).

Certas acknowledges that JL and LM were living together in a conjugal relationship sufficient to satisfy the SABS definition of spouse before the accident. Certas concedes that JL and LM were in a spousal relationship between August 1, 2013, (the birth of BL) and April, 2014, when JL began his drug rehabilitation program in Windsor.

Certas does not admit that the spousal relationship existed between January, 2011, and August 1, 2013, or from April, 2014, until August, 2014, the latter date being the first of the alternative series of dates by which Certas argues that the relationship had ended.

On Certas' analysis, if there was a spousal relationship in existence between August 1, 2013, and April, 2014 it would have had to have been on the basis of

subsection 3 (1) (c) (ii) – that JL and LM were in a relationship of some permanence and the natural parents of BL.

I concur that JL and LM satisfied the 3 (1) (c) (ii) SABS definition of spouse based on the fact that they were in a relationship of some permanence and that they were the natural parents of BL. My conclusion in that regard however, is not limited to the approximate 8 month period conceded by Certas. In my opinion, JL and LM have lived together a relationship of some permanence since January, 2011, and they remained so up until, and for several months after the November 6, 2015 accident. I do not read the SABS section 3 (1) (c) (ii) definition as stipulating that the "relationship of some permanence" cannot begin until after a child is born to the putative spouses. The definition requires only that the parties have lived in a conjugal relationship of some permanence, and that makes them spouses if they have had a child together. There is nothing in the wording which requires that the child come first, then the "relationship of some permanence". In my opinion, the definition is satisfied if the couple have – at any time, lived together in a conjugal relationship of some permanence, provided they have had a child together.

In any event, this is somewhat of an academic point because even if the time to consider whether JL and LM were living together in a conjugal relationship of some permanence cannot start until after the birth of BL on August 1, 2013, in my opinion that relationship of some permanence was still in effect at the time of JL's accident.

I am also of the view that JL's and LM's relationship satisfied the SABS definition of spouse in subsection 3 (1) (c) (i) – that they lived together in a conjugal relationship

continuously for a period of not less than three years, at least up to the date of the accident.

First let me address the temporal requirement. The evidence as to when JL and LM began their relationship confirms that it started either at the end of 2010, or at the beginning of 2011.

On his examination under oath JL was asked, "*…how long have you been… common-law with (LM)?".* JL answered, *"We moved in with each other five years ago*".[18] The examination under oath took place March 7, 2016.

At the arbitration hearing JL was asked, "*I would like you to think back to the very first time that you and (LM) lived together. Can you tell me when the two of you started to live together?*" JL answered, "*I want to say it was right in the beginning of 2011. Maybe 2010. No, it would have been 2011*".[19]

At the Arbitration Hearing LM testified as follows as to the beginning of their relationship:

> Q. I understand that you first started living with JL around 2011; is that correct?
>
> A. Yes.
>
> Q. …And then you agree with me that before you started living with JL, JL was on the streets for many years?
>
> A. Yeah. We have known each other since we were about 10 years old, and I know that throughout his life he has had, you

[18] Exhibit 3, Tab 4, Q. 12, 13.
[19] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 1.

> know, ups and downs, problems with drug abuse and whatnot. We have remained friends since we were kids.
>
> At the time that we had met up again in the end of 2010 he had been clean for a little while and was working in Toronto. He, you know, had a place to live and was trying to make some changes with his life.[20]

Both JL and LM were consistent in their evidence as to their relationship and living arrangements from January, 2011 until April, 2014. They lived in Toronto together in an apartment for approximately 5 months in 2011. They moved to Burlington to an apartment on Maple Street.[21] They resided together in the Burlington apartment until approximately November, 2013. In the interim, their daughter, BL, was conceived and born August 1, 2013. In November, 2013, they moved in with JL's grandfather. The purpose of this move was so that they could both provide care for JL's grandfather as he was in ailing health. When JL left for Windsor to attend the drug rehabilitation program at Brentwood, LM and BL remained living with JL's grandfather.

It is not necessary, for a couple of reasons, for me to conduct an item by item review of whether JL and LM's relationship between 2011, and April, 2014 would fit neatly into each category of the "*Molodowich* factors". Firstly, it is conceded by Certas, and in my view appropriately so, that JL and LM were in a spousal relationship from August 1, 2013 at least up until April, 2014. Secondly, as the case law indicates, a spousal relationship may well exist even if it is not reflective of each and every *Molodowich* factor. The courts, including the Supreme Court of Canada, have clearly stated that this list of factors is to be considered a general guideline for the inquiry as to

[20] *Ibid.* Q. 235 – 237.
[21] As an aside I will note here that JL recalled the actual street address of the apartment – "510".

whether a spousal relationship exists, and not an itemization of mandatory requirements for a spousal relationship.

To the extent it is useful to consider these guidelines, in my opinion the evidence leaves no doubt that JL's and LM's relationship between 2011 and April 2014 sufficiently resembled the characteristics of what "living together in a conjugal relationship" has been interpreted to mean in the authorities. It meets the test under either 3 (1) (c) (i) or (ii) of the SABS.

The evidence indicates that JL was working both when he and LM first got together in 2011, and continued to do so almost until 2014 when he suffered his relapse and went to Windsor. JL gave evidence that during periods when he was not relapsed, JL, LM and BL conducted themselves in virtually all respects – personal, economic, social and recreational, like a "typical" family. LM gave similar evidence, which although not quite as specific as JL's evidence on the issue, it was nonetheless supportive of a conclusion that JL and LM satisfied many of the *Molodowich* factors in their relationship. Absent evidence to the contrary I think it reasonable to conclude that JL, LM (and BL after August 1, 2013) were functioning as a family unit between January, 2011, and April, 2014.

The depth of JL's and LM's relationship in the first three years is also demonstrated by the fact that they moved in with JL's grandfather to provide assistance to him. How a couple treat family, and how they are treated by family is another indicia of whether a spousal relationship exists. The evidence in this case is quite clear that JL and LM were a couple for over three years, and that even after their final breakup after

the accident which did not occur until July, 2016, LM's evidence was that some of JL's family still considered them to be a couple.

To the extent that it is necessary to evidence a spousal relationship – and there are many cases suggesting it is of marginal importance provided other, more essential features of a relationship such as children are present, JL and LM resided under the same roof for a period of more than three years. They obviously were intimate with each other and became parents August 1, 2013. It should be emphasized that throughout the entire period of their relationship, the evidence indicates that JL and LM displayed exclusivity, fidelity, a dedication to each other, and especially to their daughter, BL. This remained true no matter how difficult the situation became when JL descended into drug relapses.[22]

Significantly, JL and LM had made plans to marry. The wedding was to take place in April, 2014. It was a "destination wedding" in Cuba. They had confirmed the arrangements and paid for the trip. The wedding did not take place because of JL's relapse into drugs. LM went to Cuba without JL because the wedding trip coincided with the beginning of JL's treatment at the Brentwood clinic in Windsor.

The fact that JL and LM had planned to marry demonstrates the depth of their commitment to each other. My impression of the evidence is that LM, who made the ultimate decision to cancel the wedding, did not do so because her feelings for JL had changed, or his for her. It was done because JL's descent into drug problems again made the appropriate timing of their plans uncertain.

[22] In saying this I am aware that JL testified that he prostituted himself while in the throes of serious drug relapses, but neither he nor LM indicated in their evidence that on an emotional level they were anything less than completely faithful to each other.

Although LM described this as, "*…things were just going downhill…*", she did not express, or demonstrate any intention to end her relationship with JL. To employ some terms from the world with which the parties and myself are familiar, it was my impression that the cancellation of the April 2014 wedding was in the nature of an "adjournment, *sine die*", and not a "dismissal".

Based on the position taken by Certas, the crucial period of time to be examined is April, 2014, up to the date of the accident on November 6, 2015.

Although JL's and LM's spousal relationship was severely tested during this period, in my opinion the evidence does not prove that there was a termination, or even an interruption, of the spousal relationship between JL and LM.

When JL went to Windsor to undertake a drug rehabilitation program at the Brentwood clinic in April, 2014, the evidence suggests that LM was supportive of JL, as she had been with respect to previous relapses he had experienced after their relationship had started.

In my opinion, her evidence as to how she dealt with JL's periodic relapses into drug addiction is significant in both an objective and subjective way for the determination as to whether her spousal relationship with JL had ended before the accident.

LM testified that while they were living in Toronto JL suffered a "one night" drug relapse in about July, 2011. It did not have any impact on their relationship, other than one of the reasons they moved to Burlington around that time was to help JL escape the temptation of the Toronto "drug scene".

JL had a series of more minor relapses from the time they moved to Burlington up until BL was born, preceding the more significant relapse about three months after BL was born which led to his attendance at the drug rehabilitation program in Windsor. LM's description of these episodes is, in my opinion, reflective of the kind of support an understanding spouse would provide, and of the strength of her commitment to continue to try to help JL get permanently sober so that they could move on with a normal life. Her evidence is not indicative of someone who had decided there was no hope for the relationship and intended to end it. The following excerpts from her testimony illustrate this point.

> Q. So from the time you moved into Burlington until the time that BL was born, did JL have any relapses?
>
> A. There was (*sic)* a few relapses…I don't think there was anything major. I cannot remember which year it was. It was prior to BL being born. I do not know if he had gotten into some trouble or if he had like a breach of his probation or something like that, and he was held I think for a night or two…on Thanksgiving weekend, so I guess that would have been in 2012.
>
> Q…
>
> A. When I was three months pregnant so it was in 2013 at the beginning of the year, I had come home early from work and found him unresponsive on the floor, and he was brought to the hospital, and upon being released from that, he went on a methadone program, and he stayed clean for the next nine months so until BL was three months old.
>
> Q. And what happened when BL was three months old?
>
> A. He was really struggling with I guess maybe just all the new things that came along with being a dad again. He had a

> daughter when he was 16 who passed away when she was just almost 5 months old, so he was having a lot of fears that, you know the same thing would happen with BL…he was working at that time, and his job was, you know, stressful, and taking care of his grandfather and the baby as well as at the same time was a lot for both of us I think.
>
> Q. How long did this relapse last?
>
> A. Quite some time. He was -- it was kind of like he would use and not use. It was back and forth for the next few months, and then he went to Brentwood in Windsor.[23]

Children's Aid became involved in the lives of JL and LM for the first time it would appear between November, 2013, and April, 2014. JL's evidence on the involvement of Children's Aid in their lives is significant. He very clearly articulated the contrast between the approach taken to his drug problem by Children's Aid in Burlington as compared to the involvement of Children's Aid in Windsor later on when he had his problems there. I will return to this point in more detail later.

LM's evidence indicated that Children's Aid in Burlington met with JL and LM once every week or two weeks, especially to ensure that JL was attending counseling. LM's evidence was consistent with JL's evidence in this respect. JL indicated that Children's Aid in Burlington did not require him to absent himself from the residence where he lived with LM and BL because of his drug problem. JL testified that as long as he was attending counseling and trying to straighten himself out Children's Aid Burlington allowed him to remain at home. This was not the case with Children's Aid Windsor as will be seen.

[23] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 247 – 254.

LM's evidence indicates that their spousal relationship remained stable after JL began the drug rehabilitation program in Windsor. She continued to support him and to look forward to trying to normalize their family life:

> Q. …
>
> A. He entered into rehab I think it was April 6 or something like that of -- I am just trying to think. Sorry. It would have been 2014, and I still went on vacation with my daughter and when we got back, a week later we had made plans to go out to Windsor to have a visit, and we continued to visit him every week to every other week through the program, and he was in there for 90 days…Then we had talks about, you know, maybe it would be a good idea that we all moved to Windsor…and BL and I moved out there July 9, 2014…JL moved out of the dry house that he was living in, and we were all living together.[24]

LM was asked whether their decision to move to Windsor from Burlington was motivated by the need to get JL away from the "drug element" in Burlington. Her response is instructive as to how she viewed their relationship:

> Not so much to get away from the drugs and stuff like that because Windsor has a really high rate for that. It was just more to be close to Brentwood so that he could continue going there on a weekly basis and to go to the groups and adjust so that we would have the support we needed as a family.[25]

This evidence makes it clear, in my opinion, that JL's move to Windsor so that he could attend the Brentwood rehabilitation program did not interrupt the "continuous" nature of JL and LM living together in a conjugal relationship. The authorities confirm

[24] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 264.
[25] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 265.

that living under the same roof is not a *sine qua non* characteristic of a spousal relationship. There are many cases involving persons not living under the same roof nevertheless being found to be “spouses”. Many of the cases deal with work reasons for such a separation, but others address more extreme situations where the parties have carried on a spousal relationship under one roof at the same time as a “spousal” relationship of the kind under consideration in this case under a different roof.

What is important, in my view, is not whether JL and LM were living in the same premises at any particular time, but the reason why they were not living in the same premises. From April, 2014, until the end of July or August 2014, the reason that JL, LM, and BL were not living under the same roof was not because either of them wished to end their relationship. To the contrary, the evidence of both LM and JL confirms that the decision for JL to live apart from LM and BL either at the Brentwood clinic, or in “dry houses” for the 90 day program was a “family” decision intended to maximize the chance for JL’s recovery, and ultimately to improve their prospects of living a normal life together.

I found that both JL’s and LM’s evidence with respect to events and dates subsequent to JL’s involvement at the Brentwood program in Windsor commencing in April, 2014, up to the accident, was somewhat less detailed and uncertain. The overall picture was clear enough however, for me to form a reliable impression of what their relationship was like during this time.

It seems as if there was a period of relative stability for a few months towards the end of JL’s involvement in the Brentwood program up until sometime in the summer of

2014. LM's evidence was that she, JL, and BL lived together in the Windsor apartment for approximately 3 months. It seems as well that JL may have been working at various points between having entered the Brentwood program in April 2014, and the date of the accident.

It was JL's evidence that the Brentwood program accommodated him working and was extended for that reason. From what I can gather from the evidence, it would appear that JL worked during the day and some nights he returned to either the clinic or a "dry house" to spend the night. At the same time however, it would appear that the program permitted him to spend some nights with LM and BL at the Windsor apartment.

The evidence is unclear about exactly what employment JL had during this time. In a part of his testimony he spoke of having worked "under the table" doing construction type work involving windows and storefronts. Although this work took place when the family was in Windsor, it is not clear when he did it. He also testified about having a job at a company called Belfor. The nature of his work was not described. In a statement given to Certas[26] he indicated that he was earning $14 per hour at Belfor, that he had worked there starting June 23, 2015, and was laid off September 2015.[27]

LM also testified about JL working when he was in Windsor. Her testimony was not precise as to when JL worked, but she described him as having, *"…a few jobs out in Windsor"*.[28]

[26] Exhibit 3, tab 3.
[27] The handwritten version of this statement (Exhibit 3, tab 2) has recorded "2016" as the dates for this employment. The typewritten version refers to the commencement date as "2016" and the layoff date as "2015", which is obviously not correct. The arbitration testimony of both JL and LM suggests to me that this employment more than likely occurred in 2015.
[28] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 298.

Although imprecise, JL's evidence and LM's evidence indicate that at some point in the summer of 2014 JL relapsed either towards the end of, or about a month and half after completing the Brentwood clinic program. LM describes this relapse as continuing for "a couple of months". Both JL and LM note that Children's Aid became involved again with their lives when this occurred. This time however, the involvement of Children's Aid Windsor was different than what had occurred with Children's Aid Burlington.

JL and LM are consistent on the point that JL was not permitted to live at the apartment with LM and BL in his relapsed state. JL's evidence was as follows:

> Q. Had that (the summer, 2014 relapse) caught the attention of children's aid in Windsor?
>
> A. Yeah. Children's Aid in Windsor…was a lot more strict than in Burlington… Children's Aid in Burlington was allowing me to stay in the home as long as I was in counseling where in Windsor they did not give a crap.
>
> Q. What had they told you?
>
> A. That I was not allowed to be there…[29]

LM testified as follows:

> Q. How bad was that relapse (summer 2014)?
>
> A. I think that one continued on for a long time, so he was – I'm just trying to think…I think it was a couple of months…and all this while Children's Aid was involved…
>
> Q. You do not know when he is coming and going?

[29] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 69 – 70.

> A. He would not to come to the apartment. It got to the point where the CAS being involved they had said that he was not allowed to be there.[30]

Certas argues that JL and LM's spousal relationship ended at this point, or by November, 2014 when LM and BL moved into a townhouse in Windsor but JL did not move in with them. In my opinion the evidence does not support that contention. What occurred after this relapse does not either objectively or subjectively indicate that either JL or LM intended to terminate their spousal relationship.

With respect to JL's "moving out" from the family apartment, or not "moving in" to the townhouse, the evidence of certainly JL, and, in my view LM, indicates that this arrangement was not their idea. It was mandated by Children's Aid Windsor.

Although this relapse certainly appears to have led to occasions when JL may have been "on the streets", the evidence also discloses that he once again engaged in what appears to have been an almost endless series of attempts to get help by attending programs, or living in "dry houses".

LM's evidence confirms that again she maintained her support for JL and tried to maintain a family situation as much is possible. She clearly spoke in terms which suggested that although this was another in a series of setbacks for the family, she had not given up on the relationship. She described the situation to the end of 2014 as follows:

> He was in the attempts of trying to stay sober, he was doing what he needed to do, and he -- I am just trying to think. I

[30] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q.274, Q. 280.

> am wondering if that was the year -- he went to live with a man named Chuck who had a dry house, and he was renting an apartment from him. Sorry. He did not come home for Christmas that year. We went and had Christmas at Chuck's place because CAS had met with Chuck and they kind of -- they needed someone like a third-party I guess to be around JL and myself and BL when there was visits going on. So there was a few people who were approved for that. Chuck was one of them. JL's mom was another and a friend of mine. So whenever we wanted to get together as a family and do something, there had to be a third-party supervising basically, so we had Christmas there.[31]

In 2015 JL, LM, and BL spent very little time "living under the same roof". As I have emphasized, this was not a choice made by them, but a situation imposed on them by Children's Aid Windsor because it would not allow JL to live with LM and BL while he was using drugs. It was not sufficient that he be undergoing counseling or in rehabilitation – he had to be "clean".

The majority of JL's belongings remained however, at the townhouse where LM and BL were living. Although the evidence from JL and LM is not clear on this, it does appear that he spent at least a couple of nights the townhouse before the end of 2014, undoubtedly in violation of the Children's Aid Windsor restrictions. When he did so, and he was sober, he interacted as a spouse with LM and as a father to BL.

It appears that JL left Chuck's "dry house" sometime in early 2015. Where he resided after that is again unclear. He may have spent much of his time "on the streets", especially by the summertime when the weather was more accommodating. Throughout this period however, it is also clear that he maintained a relationship with LM and BL.

[31] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 285.

LM's evidence confirms that she still wanted to maintain her relationship with JL as a spouse, and as a father to BL. She continued to try to support JL in 2015, and maintain the family relationship as best she could, even though they were not living under the same roof. She described the situation this way:

> I do not know when he moved out of Chuck's. Sometime early 2015.
>
> He had been, you know, back to Brentwood. He was in and out of Brentwood a few times without completing the program. He would just leave. I think that just carried on like in and out of detox, in and out of treatment, on the streets for the most part of 2015.
>
> There were, you know, times here and there where we would, you know, get together and he would be able to see BL either set up through CAS or whatnot. Probably for the most of the summer he was definitely not at home because it seems that with addicts come the warmer weather there is nothing forcing them really to get off the streets…
>
> …he would come by the houses (*sic)* periodically just show up, knock on the door, you know, come by that he would want to take a shower, grab something to eat. If he looked sober enough -- and I mean I was pretty good at reading him by this point. If he was under the influence or not, I would let him spend a little bit of time with BL, and if BL was home and he was clearly under the influence, I would basically close the door. Like, I would not let him in.[32]

In response to questioning by HMQ's counsel, LM was asked whether in between relapses, did she, JL, and BL function as a normal family?

[32] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 288, Q. 294.

She answered that "*any time that he was living at home and working, yes*". She confirmed that JL would help around the house, they would have meals together, they would be intimate, they would do activities that regular families would do, and generally function as a "normal" family unit.

In a significant exchange, LM described how she viewed the situation during JL's relapses.

> Q. Even when he was in a relapse (*sic*) state, you would be a supportive companion to him?
>
> A. Yes.[33]

When asked whether she considered herself a "single mother" during this time, it is significant to me that LM restricted her answer to commenting that she was not receiving financial support from JL at this point. She certainly did not respond that she no longer had any emotional or physical connection with JL, or that she did not intend to try to maintain the connection she had with him.

LM continued her efforts with JL to maintain their spousal relationship and their family relationship with BL. In the summer of 2015, they went on a camping trip sponsored by Narcotics Anonymous. LM also described other activities she and JL undertook with BL as a family. They would go shopping, to the park, or to indoor playgrounds. These were all activities willingly undertaken by LM. She was under no obligation to do them. She was trying her best to restore some "normalcy" to their family unit. In my opinion, she would not have continued in this way if she had she not cared deeply for JL in the manner of a "spouse".

[33] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 345.

LM was not simply acting in the role of the caregiver or an intermediary facilitating JL's wish to have "dad time" with BL. It was evident to me from her testimony that although she considered their relationship to be in a perilous state by then, she did not consider it broken beyond repair, at least not for many months following the November 6, 2015 accident. She still cared very much for JL.

The following excerpts from LM's testimony illustrate this point:

> …he might not have been living at home, but if he was not using, then yes, we would still do stuff like with BL as a family, but if he was in a relapse or using or whatnot, then there would be basically nothing going on…
>
> It was kind of like a roller coaster…There would be periods of time where I would not -- he would always phone me and check in almost every day and then there would be like a two-day period that would go by where I did not get a phone call, and that is when I would start like reaching out to friends and family and ask have you heard from him. You know, he usually checks in every day, he has not checked in, and that is when I would get worried that something had happened.[34]

Even JL's last, significant drug relapse before the November 6, 2015 accident did not, in my opinion, end the spousal relationship between JL and LM. An incident occurred around August, 2015. JL attended at the townhouse where LM and BL had moved at the end of October, 2014. He was under the influence of drugs. An argument between JL and LM became physical. JL left the premises but was later arrested. As a result of the incident JL was given jail time. The evidence indicates that JL was released very shortly after LM's birthday on October 1, 2015.

[34] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 353, Q. 354.

Certas submits that this is another possible point at which it can be found that the spousal relationship between JL and LM ended. Once again, the emphasis of the argument is that rather than resuming residence under the same roof as LM and BL, JL returned to "the streets".

In my opinion, the evidence does not support such a conclusion. The events which occurred after JL's sojourn in jail following the August, 2015 incident, and LM's response to the incident, indicate to me that she dealt with this setback in much the same manner as she had dealt with all of the others.

It is important to note that Children's Aid in Windsor was again involved, to an even greater extent than it appeared to have been in the past. LM testified on this point as follows:

> Q. Did the JL's arrest have any implications with Children's Aid office?
>
> A. Yes. So he was at that point not allowed to be at the house. He was not to be in a caregiving role of BL, so he was not allowed to be alone with her, and I think at that point CAS wanted to hear from him. They wanted to have a meeting with him before anything was going to be decided about visits and when he could see his daughter…it would have to be done elsewhere like either at the Children's Aid Society or they have another program…[35]

I found that JL's recollection of this incident and the aftermath was very consistent with LM's recollection of it. JL also recalled that just prior to the incident he had been working at Belfor. One night he relapsed, obtained some drugs, and the incident occurred shortly thereafter. JL's recall of the involvement of Children's Aid is

[35] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 309.

virtually identical to LM's recollection of it. He was visited by Children's Aid while he was still in jail. As he put it, "*They just said not to go home*."[36] When asked what his understanding was of what would happen if he did not follow instructions of Children's Aid, he replied, "*My wife could lose my daughter, and I do not ever want that to happen*".[37] That is why he took to the streets rather than going home.

This episode did not stop JL and LM from willingly seeing each other, or LM from caring for him. The additional restriction imposed by Children's Aid Windsor forbidding JL to be alone with BL or act in a caregiving role to her does appear to have been taken seriously however, by LM. When asked whether she saw JL after he was released from jail up until the time of the accident she responded as follows:

> ...He would still come by the house every now and then…he would call me ahead of him (*sic, time?)* And I would tell him 'BL is outside playing. I do not want you coming by. I do not want her seeing you.'
>
> And sometimes he would kind of show up and peak around the side of the house, and I would just tell him, 'You know you have to go. You cannot stay here. I do not want her seeing you.'
>
> Q. and when you saw JL in passing or made arrangements to see him during that time period, you would help him out by buying him a meal?
>
> A. Sometimes, yeah. There were even times where BL and I would be at home, and he would just say that he was hungry…I would leave him some food. I would say, 'There's something outside.' Sometimes he would want to shower, and I would say,

[36] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 118.
[37] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 119.

> 'No, you can't come in.' But I would always offer him food if he was hungry.
>
> Q. You still cared for him, but your number one priority was BL?
>
> A. Absolutely.[38]

On the question of seeing LM after being released from jail following the August, 2015 incident, JL testified as follows:

> Q. And before the accident while you were on the streets, did you still see LM and BL?
>
> A. Yeah. Yeah. We used to sneak. She would sneak me in the house sometimes even. We loved each other a lot, and she I guess hated seeing what I was going through.[39]

The relationship between JL and LM was at this point undoubtedly in a damaged condition; in my opinion however, it had not yet been irretrievably lost. My overall impression from listening to the testimony of JL and LM was that although they were still spouses, by this time LM was not prepared to live under the same roof with JL with BL there, as long as JL was on drugs. The restrictions put in place by Children's Aid Windsor certainly had something to do with that.

LM had not yet reached the point however, of demonstrating an intention to terminate the relationship permanently. Her optimism for a successful outcome was certainly diminished, but like many times in the past when she was forced to deal with JL's relapses into drugs, LM's still harboured hope that JL would be able to straighten himself out so that they could live a normal life together as a family.

[38] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 317 – Q. 320.
[39] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 136.

This came through in LM's answers to some questions about how JL and LM's relationship was objectively perceived from 2011, up until the time of the accident.

> Q. …to the outside world through the period from 2011 until at least the time of the accident…would consider you to be spouses?...
>
> …A. Up until the accident, yes, everybody...just hoped that he would…that things would eventually get better and be normal again.[40]

That LM's failing optimism for a favourable outcome regarding JL's drug problem had not extinguished her feelings and concern for JL is evidenced by the following exchange:

> Q. …so the time (JL is) out of jail before the accident, what were your thoughts as to whether JL could go back to living with you at the townhouse?
>
> A. Up until the time of the accident?
>
> Q. Yes.
>
> A. At that point in time, I did not think it was going to happen. I did not even know if he would make it through the night most nights, you know. I thought for sure that point he was going to die.[41]

If LM had considered her relationship with JL ended by that point, I would have expected her answer to be that she was finished with JL, and had no desire to live with him again at the townhouse, or anywhere else. Instead, she voiced what sounded to me

[40] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 346, Q. 347.
[41] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 314, Q. 315.

like despair that the relationship might end, against either of their wishes, because of JL's inability to stop his self-destructive behaviour.

Certas has submitted that I must look at the circumstances which existed at the time of the November 6, 2015 accident to determine whether a spousal relationship existed between JL and LM, and not speculate as to whether their spousal relationship could have been revived even had the accident not occurred. I believe this submission derives from the fact that ironically, the accident appears to have improved JL's and LM's relationship, at least until July, 2016.

I agree with this submission to the degree that the accident is only relevant as a point in time. JL and LM were either SABS "spouses" when accident occurred, or they were not. If the relationship was already over before the accident, it does not matter whether it could have been revived if the accident had not occurred, or even whether the accident revived it.

The argument is premised however, on the assumption that that the spousal relationship between JL and LM had already ended or had lapsed by the time of the accident. I have found that the spousal relationship between JL and LM, although damaged, was not broken before the November 6, 2015 accident.

Therefore, in my view it is relevant to consider how JL and LM reacted to the accident – not to speculate about whether they could have revived an expired relationship absent the accident, but as part of the totality of the evidence bearing on whether they still had spousal relationship when the accident occurred.

The events subsequent to the accident demonstrate, in my opinion, not a resumption of an expired spousal relationship, but a continuation of, and an improvement in (albeit temporary), the spousal relationship.

LM's evidence about her actions immediately upon hearing of JL's accident, and later in the months following the accident are not indicative of someone who has had a change of heart about having ended the relationship, and decided to resume it. In my opinion, they demonstrate that LM hopefully viewed JL's accident as an opportunity – maybe even a "last chance", to keep their relationship alive, and their family unit intact.

The fact that LM immediately responded, without hesitation, to the call from the hospital the day of the accident to go to JL, and that she contacted JL's family to go with her is indicative of the fact that she still considered herself to be JL's spouse. She could have simply passed along the contact from the hospital to JL's family and kept out of being involved herself if she considered her relationship with JL to be over.[42]

LM's evidence also makes it clear that she willingly engaged in discussions with Children's Aid Windsor about allowing JL to begin living with her and BL at the townhouse after the accident. She seems to have encouraged Children's Aid Windsor to allow JL to begin living with her and BL again, in spite of JL's propensity for drug relapses by convincing Children's Aid Windsor that she would be able to keep an eye on things, and by suggesting that given JL's condition, it was hardly likely he would be able to get up and leave to resume his old habits.[43]

[42] See Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 295.
[43] See Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 329.

In my view, these are not the actions of a person who considered her relationship with a former spouse to be at an end. They demonstrate a spousal level of caring, compassion, and concern. LM's response to JL's accident is evidence that LM saw the accident as creating an unexpected opportunity to repair her damaged relationship with JL, and that it could possibly be normalized with some more effort on the both their parts.

To conclude my analysis, I will return to the law with respect to whether a spousal relationship created by "living together in a conjugal relationship outside marriage" once established, has been ended. As the cases indicate, it is the intention of the parties that is the paramount consideration in determining whether such a relationship has been ended.

I am satisfied that both the objective and subjective evidence supports the conclusion that there was a spousal relationship created between JL and LM that meets the SABS definition of spouse 3 (1) (c) (i) or (ii), and that the relationship still existed at the time of the November 6, 2015 accident.

It is undoubtedly clear from JL's evidence that throughout the relevant period of time he considered himself to be LM's spouse, and never wanted a change in that status. LM's evidence indicates that although she may have had increasing doubts as to whether their relationship could survive JL's inability to get off drugs, she had not given up on the relationship before the accident, and still intended to make an effort to preserve it. Her responses to JL's many relapses into drugs from the start of their

relationship in 2011, up to and after the November 6, 2015 accident, in my opinion, objectively demonstrate this point.

LM appears to have maintained the hope that the next time JL "got sober" it might be the last time he would have to do so. Whether that was a realistic hope is not the question. The important consideration for my decision is: what was LM's state of mind and her intentions with respect to her relationship with JL until the date of the accident?

The Court of Appeal has stated that to end the kind of spousal relationship which JL and LM were in prior to the accident, either party must have regarded the relationship as being at an end, and *"…by his or her conduct…demonstrated in a convincing manner that this particular state of mind is a settled one*."[44]

In my opinion, the evidence in this case does not support the conclusion that either JL or LM regarded their relationship as at and before the accident, nor did their conduct demonstrate in a convincing manner a settled state of mind that their spousal relationship was at an end before the November 6, 2015 accident.

Given the importance to this issue of the parties' intentions, the following testimony given by LM at the arbitration hearing is very significant:

> Q. …at any point from when you and JL got together in 2011… To the latest separation…in 2016 July or August, did you, at any point in between those two dates… Ever consider JL not to be your spouse?

[44] *Re Sanderson and Russell, supra,* note 13.

A. No.[45]

Conclusion

For the foregoing reasons, I conclude that JL was a spouse of LM within the meaning of the SABS definition 3 (1) (c) (i) and (ii) at the time of the November 6, 2015 accident. Consequently, Certas is the priority insurer and remains responsible for the handling of JL's SABS claim.

I invite the parties to contact me to discuss whether further arbitration proceedings will be necessary with respect to quantum, and if so, the timing for such proceedings.

As the successful party, HMQ is entitled to its costs of the arbitration to date. I would hope that the parties could agree on costs, but should they require my involvement in dealing with any costs issues, please contact my Coordinator to arrange a telephone conference to discuss them.

Dated at Toronto, April 17, 2018

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Scott W. Densem, Arbitrator

[45] Transcript of Arbitration Hearing Evidence, November 17, 2017, Q. 334.