

**IN THE MATTER OF SECTION 268 OF THE INSURANCE ACT  
R.S.O. 1990, C. I.8, AND O.REG. 283/95**

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

**AND IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

GUARANTEE COMPANY OF NORTH AMERICA  
and AVIVA CANADA INC.

Respondents

Counsel for Applicant: Douglas Wallace

Counsel for Respondent Guarantee Company: Maura Thompson and Jonathan de Vries

Counsel for Respondent Aviva Canada: Robert Rogers

## AWARD

### Background

This arbitration arose out of a motor vehicle accident that occurred on July 18, 2006. Elaine Crow sustained injuries when struck by an automobile while riding her bicycle. The automobile was insured by the Applicant, ING Insurance Company of Canada.

At the time Elaine Crow was 16 years old. She was a ward of the Crown whose case was handled by the Chatham Kent Children's Services (CKCS) pursuant to the provisions of the *Child and Family Services Act* R.S.O. 1990, c. 11.

The Applicant has been paying Accident Benefits to Ms Crow but claims that she is dependent on CKCS and that, accordingly, responsibility properly lies with the Guarantee Company, insurer of CKCS. The Guarantee Company disputes this on two grounds: (a) its claim that Ms Crow's relationship with the CKCS does not amount to dependency, and (b) in any event, a corporation is not an entity upon which anyone can be dependent for purposes of the Statutory Accident Benefits Schedule (SABS). In the alternative Guarantee argues that, if anyone other than the Applicant ING is responsible for payment of Accident Benefits, it is the Respondent Aviva Canada, insurer the fleet of automobiles owned and operated by the Crown in Right of Ontario.

### Hearing

The hearing was held on December 15, 2008. No witnesses were called as the parties submitted an agreed statement of facts. This dealt almost exclusively with Ms Crow's circumstances during the year or so prior to the accident and, in particular, her relationship with the CKCS.

## Issues

The issues to be decided are:

1. Was Elaine Crow, as a matter of fact, a “dependant” of the CKCS and/or the Crown at the time of the accident?
2. For the purposes of section 2 of the Statutory Accident Benefits Schedule, can a child be a dependant of anyone other than a natural person (such as a corporation like the Children’s Aid Society or the Crown)?
3. If the answer to 2 is yes, should Elaine Crow be treated for the purposes of SABS coverage as a dependant of the CKCS or of the Crown?

## Was Elaine Crow a Dependant?

Without, for the moment, distinguishing between the CKCS and the Crown, I shall first address the question of whether Elaine Crow was, as a factual matter, a “dependant” of the system of child welfare with which they both have involvement.

Section 2(6) of the SABS (O.Reg. 403/96) provides:

A person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person’s spouse.

The first thing to note about this subsection is that dependency may concern *either* financial support *or* care. Therefore if there is principal dependency for one but not the other, the definition is still satisfied.

In *Miller v. Safeco* (1984), 48 O.R. (2d) 451, aff’d (1985), 50 O.R. (2d) 797 (C.A.) the court stated that the criteria for dependency include the amount of dependency, the duration of dependency, the financial and other needs of the alleged dependant, and the ability of the alleged dependent to be self-supporting. As will have been noted, it is also necessary, under section 2(6), that the person be “principally” dependent. (See also *Oxford Mutual Ins. Co. v. The Co-operators* [2006] O.J. No. 4518 (C.A.).

In this case it is clear from the agreed statement of facts that, at least for the year prior to the accident, Ms Crow was receiving most of her financial support from the CKCS. Apart from a brief period of employment at the Luxury Inn in June, 2006, when she earned \$775, and apart from her not having to pay rent when incarcerated or staying with

family or friends, almost all her living expenses were met by the CKCS. For the relevant period, her estimated expenses were between \$830 and \$930 per month. I am satisfied that almost all, certainly well more than half, of these expenses were met by the CKCS. Moreover, given her ongoing troubles with the law and the failed experiment of employment at the Luxury Inn, I am also satisfied that her ability to be financially self-supporting was negligible.

Accordingly I find that Elaine Crow was, at the time of the accident, principally dependent on the child welfare system for financial support. The facts are less clear about whether she was principally dependent for her "care" but, since financial dependency alone is sufficient to satisfy the definition, it is not necessary for me to make a conclusive determination on that ground.

In the result, I find that Elaine Crow was a dependant of the child welfare system at the time of the accident.

### **Dependency and Non-natural Persons as a Matter of Law**

The legislative and regulatory context relevant to this issue is as follows:

Section 268(2) of the *Insurance Act* provides:

(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...

The Applicant ING is the insurer of the automobile that struck Elaine Crow. If responsibility for payments under the SABS is to be shifted to either of the Respondents, it is necessary to determine whether, for the purposes of the SABS, she was "an insured" under one or both of their policies.

In section 2(1) of the SABS, "insured person" is defined to include:

- (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,
  - (i) is involved in an accident in or outside Ontario...or

- (ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident... that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother sister, dependant or spouse's dependant...

Thus it is necessary to determine whether, at the time of the accident, Ms Crow fit within this definition in relation to either of the Respondents' policies or both. She was not a named insured. Nor was she a specified driver. She was not the spouse of a named insured. The only way she could be included is if she was a dependant of the named insured – the CKCS and/or the Crown.

The Applicant's argument is that, in accordance with section 268(2), subparagraph 2i, of the *Insurance Act*, Guarantee (and, in the alternative, Aviva) is an "insurer of an automobile in respect of which [Elaine Crow] is an insured." She is "an insured" because she is a dependant of the named insured, the CKCS, in accordance with section 2(1) of the SABS. In the alternative she is an insured in respect of the Aviva policy because she is a dependant of its named insured, the Crown.

The Applicant relies heavily on the decision in *Allianz v. Guarantee Company*, an arbitration case decided in 2005. In a case similar to this one the arbitrator held that a ward of the Crown could be a dependant of a Child and Family Services agency for the purposes of section 2(1) of the SABS. To reach that conclusion the arbitrator had to distinguish the decision of the Ontario Court of Appeal in *R.L. v. Harkness* [1998] OJ No. 2461 (CA). That case also posed similar questions to this case, in particular whether a dependency relationship can exist between a natural person and a Children's Aid Society and/or the Crown in order to determine entitlement to accident benefits. But the court was dealing with the different definition of "insured person" contained in the Statutory Accident Benefits Schedule that preceded the one applicable here. The relevant section there referred to "the named insured, his or her spouse and any dependant of either of them..." The court held that this "only contemplates dependency relationships between natural persons and not between natural persons and corporate entities or the Crown." In *Allianz*, the arbitrator distinguished *Harkness* on the basis of the absence, in the later regulation, of the words, "his or her" before "spouse."

The arbitrator agreed that, under the earlier version, it was clear that only dependency between natural persons was contemplated. Since "a corporation cannot have a spouse," a named insured (for the purposes of that section) could not be a corporation and could therefore only be a natural person. It followed that a "dependant" covered by the section had to be dependent on a natural person. However, because the newer SABS regulations (section 2(1)) do not include "his or her" in reference to "spouse", the arbitrator concluded that it was the intention of the drafters to broaden the class of "named insureds" on whom other people could be dependent beyond natural persons. In support of that conclusion he referred to the presumption contained in the *Interpretation Act* (now the *Legislation Act* s.87) that "person" includes a corporation and to the fact that, in other places in the SABS and the *Insurance Act*, "person" clearly includes a corporation.

In contrast, the position of both Respondents is that the definition of “insured person” in section 2(1) of the current SABS, like its predecessor, contemplates only natural persons. They argue that the *Allianz* case was wrongly decided, that the difference in wording between the regulations in play for the *Harkness* case and those applicable to *Allianz* and here is inconsequential in so far as the issues before me are concerned.

With the greatest of respect for my fellow arbitrator, I agree with the Respondents. Section 2(1) of the current SABS, read as a whole, demands a finding that the “named insured,” as that term is used in the section, can only mean a natural person. To be an insured person under that section a named insured, in addition to being named in the policy, must be involved in an accident or suffer psychological or mental injury as a result of a family member being involved in an accident. Since entities such as a corporate body or the Crown cannot be involved in an accident or suffer psychological injury, they cannot, for the purposes of section 2(1) of the SABS, be “named insureds.”

Section 87 of the *Legislation Act* does indeed provide that, when it appears in a statute, the word “person” includes a corporation. However, section 47 of that act states that its provisions do not apply if a contrary intention is apparent from a reading of the statute or regulation being interpreted or if its application would yield a meaning that is inconsistent with the context. In other words, if it appears that the legislative intent is not to include a corporation within the meaning of “person” or if the wider meaning of the word would be inconsistent with the context, section 87 does not apply.

Clearly corporations and the Crown can own automobiles. As owners they are named in insurance policies covering those vehicles. Accordingly, there are some contexts in which such an entity is a “named insured.” But it does not follow that they are so designated every time that term is used in the legislation or the SABS. Respondents pointed to several other instances in the SABS (for example, sections 2, 47, 57, 59, 61, 62, 63 and 64) where the terms “person” or “insured person” could only refer to natural persons.

Specific recognition of entities other than natural persons is contained in section 66 of the SABS. That section deems “an individual” to be a named insured in certain circumstances where an automobile is being made available to him or her by an entity such as a corporation. In my respectful view, this in no way undermines the claim that section 2(1) refers only to natural persons. Section 2 is concerned with identifying those who are entitled to receive benefits as a result of suffering injury arising out of automobile accidents. Since only a natural person can suffer the kinds of injury for which benefits are available, it follows that section 2(1) refers only to natural persons. Neither corporations, such as the CKCS, nor the Crown suffer personal injury or receive accident benefits. It is individual, natural persons who do. The fact that section 66 clarifies the entitlement of a particular class of natural persons – regular users of vehicles owned by corporations, partnerships and the like – does not detract from this. Rather, it underscores the point that it is only natural persons to whom benefits are payable and,

since section 2(1) is, in my view, clearly about defining eligibility for benefits, reinforces the conclusion that the list of “insured persons” in section 2(1), including “the named insured” are exclusively natural persons.

Respondents argued that policy considerations militate against a holding that insurers of bodies such as Children’s Aid Societies and the Crown be responsible for accident benefits in cases such as this. They say that the result would be increased exposure on a scale not presently contemplated by insurers or legislators and that this would apply not only to children’s aid societies but to myriad other government agencies. The result would be significantly increased financial responsibility for taxpayers. While reference was made to three cases – involving facts and coverage different from this case where such concerns were expressed (*Fraczak v. Pascual* [2003] OJ No. 1402 (CA); *Oxford Mutual Co. v. Co-operators General Insurance Co.* [2006] OJ No. 4518 (CA) and *Co-operators v. Economical* a 2004 arbitration decision), no actuarial or other evidence was presented to support this claim. In any event, while I do not necessarily deny the validity of this argument, it is not a crucial factor in my decision.

There was also some debate among counsel as to whether section 268 of the *Insurance Act* and section 2 of the SABS should be considered “remedial” legislation justifying a “fair, large and liberal interpretation as best ensures the attainment of its objects” in accordance with section 64 of the *Legislation Act*. I accept that the scheme provided by the SABS is “remedial” in that it was intended to improve the automobile accident compensation regime by augmenting the tort-based remedy with relatively certain and more readily available compensation obtainable without proof of fault, with the added advantage of stabilizing premiums. But I do not accept that any of this is undermined by an interpretation of section 2(1) of the SABS restricting the meaning of “named insured” to a natural person. It does not make it more difficult for people like Elaine Crow to receive accident benefits. It merely determines which insurer pays those benefits.

## **Conclusion**

For the reasons given I conclude that Elaine Crow does not have (in the language of section 268(2)2i of the *Insurance Act*) “recourse” against either Guarantee or Aviva because she was not an “insured” under either policy. She was not an insured because, pursuant to section 2(1) of the SABS, which defines an “insured person” for the purposes of the SABS, she was not a named insured, nor a spouse of a named insured nor a dependant of a named insured. It is irrelevant whether or not she was factually dependent on either the CKCS or the Crown because, since neither is a natural person capable of sustaining injury, neither could be a “named insured” within the meaning of section 2(1).

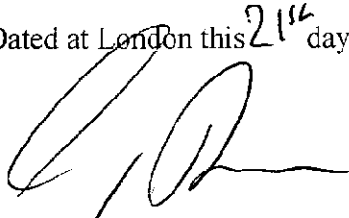
Accordingly her next recourse, pursuant to section 268(2)2ii, is against ING, the insurer of the automobile that struck her.

Given the conclusion I have reached with respect to this issue, it is unnecessary to consider the third issue – which of the Respondents has responsibility for payment.

**Result**

The relief requested by the applicant is denied. In accordance with paragraphs 10 and 11 of the Arbitration Agreement, the Applicant shall pay the costs of this arbitration. I remain seized of the case should there be any dispute about the amount of costs.

Dated at London this 21<sup>st</sup> day of January, 2009

A handwritten signature in black ink, appearing to be 'Craig Brown', written over the date line.

Craig Brown  
Arbitrator