

**IN THE MATTER OF THE INSURANCE ACT,  
R.S.O. 1990, C. 1.8, AS AMENDED AND ONT.  
REGULATION 283/95, AS AMENDED**

**AND IN THE MATTER OF THE ARBITRATION ACT,  
S.O. 1991, CHAPTER 17, AS AMENDED**

**AND IN THE MATTER OF AN ARBITRATION**

BETWEEN:

CERTAS DIRECT INSURANCE COMPANY

Applicant

-and-

ALLSTATE INSURANCE COMPANY

Respondent

**AWARD**

Mark Sones, Esq.  
Counsel for the Applicant

Ian Kirby, Esq.  
Counsel for the Respondent

The issue in this Arbitration is to determine which of the parties is the insurer liable to pay Statutory Accident Benefits to R.R., by reason of injuries sustained by R.R. in a motor vehicle accident which occurred on February 1, 2003.

R.R. was operating a snowmobile on February 1, 2003, when he was ejected from the same. He was almost immediately struck by another snowmobile owned and operated by M.F.

The snowmobile which R.R. was operating at the time of the incident was uninsured.

The Applicant Certas Direct Insurance Company had issued an automobile liability policy to M.F. insuring the snowmobile which he was operating at the time of the incident.

R.R. married A.R. on April 30, 1983. They separated in August 1993 and have lived separate and apart since then. They remained legally married since they never divorced.

The Respondent Allstate Insurance Company insured a vehicle owned by A.R. and that policy was in effect on February 1, 2003.

Following the incident, R.R. applied to Certas for benefits under the SABS and has been paid such benefits.

Certas has taken the position that Allstate is the insurer which ought to be paying benefits to R.R..

### **POLICY TERMS AND STATUTORY PROVISIONS TO CONSIDER**

“Insured person” is defined in s. 2(1) of the Bill 59 SABS (Ontario Regulation 403/96).

The definition of “insured person”.... means, (a) the named insured.. .the spouse.. .of the named insured.. .if the named insured,.. .spouse,....

- (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile...

Section 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, in sub-section 2 sets out the rules to apply when determining which insurer is liable to pay Statutory Accident Benefits to an individual.

Under s. 268(2)2.i., R.R. would have recourse against the insurer of an automobile in respect of which he was an insured. Assuming that he is the spouse of A.R., he would have access against Allstate Insurance Company.

Section 268(2)2.ii sets out that if he does not have recovery against an insurer of an automobile in respect of which he is an insured, he has recourse against the insurer of the automobile that struck him. That would give him recourse against Certas Direct Insurance Company.

Section 268(4) would allow R.R. to determine the insurer from which he will claim benefits, if he has recourse against more than one insurer for benefits under the SABS. However, s. 268(5) sets out as follows:

if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or same-sex partner 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.”

Accordingly, in the subject case, if R.R. was the “spouse” of A.R. at the time of the subject accident, his recourse for benefits under the SABS would be against Allstate Insurance Company.

### **WAS R.R. THE “SPOUSE” OF A.R. AT THE TIME OF THE SUBJECT ACCIDENT**

Section 224 of the *Insurance Act* defines “spouse” as follows:

“Spouse” means either of a man and a woman 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) are not married to each other and have cohabited continuously for a period of not less than three years, or have cohabited in a relationship of some permanence if they are the natural or adoptive parents of a child;”

Accordingly, we have R.R. and A.R. married to each other on April 30, 1983.

It is admitted by both parties to this Arbitration that the R.s separated on August 13, 1993 and that they have lived separate and apart since then.

The R.s entered into a Separation Agreement dated October 7, 1993. Pursuant to the terms of the Separation Agreement, the R.s accepted the terms of the Agreement in satisfaction of all claims and causes of action that they each might ever have against each other arising out of the marriage. A term of the Agreement also provided:

“After 30 days from the date of this Agreement, [A.] will cease to pay motor vehicle insurance premiums on the behalf of [R.] and will have him removed from the Allstate policy currently in their names.”

Mr. R. gave evidence at the Arbitration Hearing and he confirmed the terms of the Separation Agreement and that it was intended that the R.s would release each other from any and all claims arising out of the marriage.

It was argued on behalf of Allstate that it was the intention of the R.s to release each other from further claims financial and otherwise. Furthermore, the R.s specifically contemplated the issue of automobile insurance.

By reason of the terms of the Separation Agreement primarily, it was argued on behalf of Allstate that the R.s were no longer “spouses” for the purpose of any claim under the *Insurance Act*.

It was argued on behalf of Allstate that the R.s had no further dealings with one another after their separation. The evidence led at the Hearing was that Mr. R. had entered into at least one other common law relationship, giving rise to the birth of a child, since the separation from A.R..

Mr. Kirby argued that it would be a bizarre result if it was determined that R.R. was still a “spouse” of A.R., notwithstanding the Separation Agreement. He pointed out that the R.s had been separated for more than 10 years prior to the subject accident. He submitted that it would be bizarre to then allow Mr. R. to access the Allstate policy as the “spouse” of A.R..

Mr. Kirby, on behalf of Allstate, relied upon the decision of the Ontario Court of Appeal in the case of *Axa Insurance Co. of Canada v. Prince. et al* (Court File No. C26080, 159 D.L.R. (4th-) 41, April 17, 1998).

In the case of *Axa v. Prince*, one, Penny Sherbanuk, was killed in an automobile accident. He had been married and had been separated for about five years and not divorced. His wife presented a claim for a Death Benefit under the SABS. At the time of the accident, he was living with another woman and had lived with her for more than three years. His common law spouse also applied for the Death Benefit.

On the original Motion to determine entitlement to the Death Benefit, the Motions Judge ordered that the money be split between the “spouses” equally.

The Court of Appeal in a 2-1 split determined the entire Death Benefit should go to the common law spouse.

The Court of Appeal accepted that both the wife and the common law spouse were “spouses” as defined in the SABS. The wife qualified as a “spouse” since she was “married” to the deceased. The common law spouse qualified as a “spouse”, as she and the deceased had lived together in a conjugal relationship outside marriage, continuously, for a period of at least one year.

The Court of Appeal interpreted s. 51(7) of the Bill 164 SABS, which section read as follows:

“If at the time of the accident, the insured person had more than one person entitled to claim as his or her spouse, the payment under sub-section (1) shall be divided equally between or among such persons who survived the insured person and who at the time of death were still spouses of the insured person.”

The Court of Appeal considered whether the Separation Agreement is capable of eliminating the wife’s right to be paid one-half of the Death Benefit under s.51(7) of the SABS.

In considering the matter, the Court of Appeal also considered s. 51(1) which provided as follows:

“If an insured person dies as a result of an accident, the insured person is survived by a spouse who was his or her spouse at the time of the accident and,

(a) the insured person met any of the qualifications set out in sub-section 7(1), the insurer shall pay the spouse an amount equal to the insured person’s net weekly income from employment, determined in accordance with section 81 or 82 multiplied by 187.2”.

The Court of Appeal determined that in looking at sub-section 51(7), there had to be a consideration of the spouse’s entitlement to the Death Benefit. The Court then determined

that the wife was not “entitled to claim” within the terms of s.51(7) by reason of the Separation Agreement that she had entered into with the deceased.

The Court of Appeal held that the wife had released all claims that she might have arising out of the marriage and that she was not a person “entitled” to claim as the deceased’s spouse. The entire Death Benefit was awarded to the common law spouse in the Axa v. Prince case.

Yet, the majority in the Court of Appeal noted that if the wife had been the only Applicant for the Death Benefit, she would have received the Death Benefit under the SABS. It was only when one was able to apply s. 51(7), with the word “entitled” in it, that the wife would lose her right to claim the Death Benefit. That would only happen in a situation in which more than one spouse applied for such benefit.

In a dissent in Axa v. Prince, Mr. Justice Morden agreed with the majority that the Separation Agreement would not be a bar to the wife’s claim against the insurance company if she were the sole claimant. That was because she was a “spouse” within the definition in the Insurance Act, since she was still “married” to the deceased.

Mr. Justice Morden pointed out that the Separation Agreement would bind only the deceased’s wife and the deceased and his Estate. Mr. Justice Morden found that the Separation Agreement did not disentitle the wife of the deceased to her claim for a share of the Death Benefit to be paid by an insurer.

Mr. Justice Morden pointed out, in the dissent, that if the makers of the Regulation wished to deprive someone, in the position of the wife, of a claim to a Death Benefit, that would have been set out in the Regulation.

Mr. Kirby argues on behalf of Allstate that if one applies Axa v. Prince, then the R.s would not be spouses and Mr. R. should not have coverage under the Allstate policy as the “spouse” of A.R..

However, on a very careful reading of Axa v. Prince, it is clear that that Decision is a specific interpretation of s. 51(7). The Court of Appeal in the majority and in the minority agreed that the wife of the deceased would have received the Death Benefit, had there not been a competing “spouse”, leading to the application of s. 51(7).

Accordingly, I find that the case of Axa v. Prince is of no application in the subject Arbitration.

I find that A.R. and R.R. were “spouses” at the time of the subject accident as they were “married to each other”. They were never divorced. The marriage continued based on the definition in s. 224 of the *Insurance Act*, notwithstanding that they had been separated for more than 10 years as at the date of loss and notwithstanding the terms of the Separation Agreement.

I agree that that is a bit of a bizarre result. One would have thought that the definition of “spouse” in the *Insurance Act* should be amended to deal with situations in which spouses have entered into Separation Agreements, such as the one in question.

Accordingly, I find that Allstate Insurance Company is the company responsible to pay benefits under the SABS to R.R..

Allstate Insurance Company is responsible to indemnify Certas Direct Insurance Company for benefits paid to R.R.. If the parties are unable to sort out the amounts to be paid, the parties may approach me to determine the quantum to be paid.

## DISPUTE AS TO EXPENSES

Certas Direct and Allstate have agreed as to various expenses which Allstate would be obliged to pay to Certas Direct. Those expenses total \$5,700.90. There is an issue as to two items of expense.

Certas Direct was required to pay the sum of \$500.00 to FSCO when R.R. applied for Mediation. Certas Direct was obliged to pay the sum of \$3,000.00 to FSCO when R.R. applied for Arbitration at FSCO.

There is an issue between the parties as to whether Allstate is obliged to indemnify Certas Direct for those two expenses.

I have reviewed Ontario Regulation 283/95 –Disputes Between Insurers.

Ontario Regulation 283/95 specifically sets out that all disputes between insurers “as to which insurer is required to pay benefits under section 268 of the *Act* shall be settled in accordance with this Regulation.”

Accordingly, in an Arbitration pursuant to Regulation 283/95, an Arbitrator determines which insurer is to pay **benefits**. That would lead to one insurer reimbursing the other for “benefits” paid out under the SABS.

The Regulation also deals with an award of costs of the Arbitration as between the insurers.

The Regulation is silent as to whether one insurer is obliged to reimburse the other for expenses incurred in the course of the handling of the claim for benefits under the SABS.

An insurer handling the claim for benefits under the SABS will incur expenses for Insurer Examinations, assessments imposed by FSCO, surveillance, salaries of staff handling claims and perhaps, adjusting expenses.

The question is whether the insurer handling the claim for benefits under the SABS may recover such expenses when another insurer is found to be the insurer responsible to pay benefits on an Arbitration pursuant to s. 283/95.

If the insurer ultimately responsible to pay benefits under the SABS must reimburse the insurer handling the claim for expenses incurred in the handling and processing of the claim, that could ultimately mean that the Arbitrator hearing the dispute between the two insurers under Regulation 283/95 would have to hear evidence as to the cost of claims personnel, disbursements, postage, investigations, surveillance, insurer examinations, adjusting expenses and other expenses. The Hearing to determine such costs re expenses could take longer and be more complicated than the real issue as to which insurer had to pay the benefits.

The Regulation is silent as to the recovery of such expenses. An Arbitrator has no authority to award such expenses based on Regulation 283/95.

I am of the view that those drawing the Regulation determined that each insurer would bear its own expenses of handling a claim even if ultimately another insurer was found to be responsible to pay benefits to the claimant.

Accordingly, I order that Allstate reimburse Certas for benefits paid out to R.R.. Certas may not recover the costs of handling the claim from Allstate.

**COSTS**

At the conclusion of the Arbitration Hearing, counsel for both parties agreed that if costs of this Arbitration were to be awarded, that the quantum of the costs be fixed at the sum of \$2,500.00 plus disbursements.

Accordingly, I order that Allstate pay to Certas Direct, the costs of this Arbitration, fixed at the sum of \$2,500.00, plus assessable disbursements, and I also order that Allstate pay the fees and disbursements of the Arbitrator.

DATED this 10th day of November, 2004.

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Stephen M. Malach, Q.C.  
Arbitrator