Appeal P15-00059

OFFICE OF THE DIRECTOR OF ARBITRATIONS

AUSTIN BENSON

Appellant

and

BELAIR INSURANCE COMPANY INC.

Respondent

BEFORE:	David Evans
REPRESENTATIVES:	Ian Furlong for Mr. Austin Benson Eric K. Grossman for Belair Insurance Company Inc.
HEARING DATE:	July 12, 2016

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The Arbitrator's order of October 9, 2015, is confirmed and this appeal is dismissed.
2. If the parties cannot agree on the legal expenses of this appeal, a determination of them may be requested within 30 days of this decision.

David Evans
Director's Delegate

February 15, 2017
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mr. Benson appeals Arbitrator Musson's order of October 9, 2015, in which he found that Mr. Benson was not injured in an "accident" when he fell off an ATV in British Columbia because an ATV is not an automobile, so he could not claim statutory accident benefits.

Mr. Benson submits that he was injured while using an automobile both under his automobile policy and under Ontario law.

However, for the reasons set out below, I find neither to be the case.

II. BACKGROUND

On June 23, 2013, Austin Benson, an Ontario resident, fell off the back of an All-Terrain Vehicle (ATV) in Fort Nelson, British Columbia. He sustained a severe traumatic brain injury. The ATV, owned and operated by Lee Askin, a BC resident, was not insured under a BC automobile policy, nor was it required to be, so there was no BC policy Mr. Benson could turn to for benefits.

Mr. Benson therefore claimed statutory accident benefits pursuant to the *2010 SABS*[1] under his Ontario insurance policy with Belair. Although the ATV was neither an automobile in ordinary parlance nor listed as an automobile in his policy, Mr. Benson claimed that it should have been insured according to Ontario law. As such, it fit the extended definition of an automobile for the purposes of Ontario law, so he could claim benefits.

However, the Arbitrator applied *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, and found that the law of the location of the incident – the *lex loci delicti* – was applicable and not the Ontario statute:

[1] *The Statutory Accident Benefits Schedule — Effective September 1, 2010*, O. Reg. 34/10, as amended.

> Specifically, one would need to conclude that although Mr. Askin lived in British Columbia, owned, registered, and operated his vehicle in British Columbia and was compliant with British Columbia insurance laws, that somehow, his ATV should have been insured according to Ontario law. Clearly, Ontario law has no relevance to the insurance coverage regarding this vehicle.

The Arbitrator concluded that the ATV was therefore not an automobile under any extended definition of automobile, so Mr. Benson was not in an automobile accident and could not claim accident benefits.

III. ANALYSIS

The primary ground for Mr. Benson's appeal is that his contract of automobile insurance is governed by the law of the contract, which is Ontario, and not the law of the event. However, ATVs are not automobiles and are nowhere mentioned in his automobile policy. I find this is not a matter of contractual interpretation but rather statutory interpretation: see *Rougoor v. Co-Operators General Insurance Company*, 2010 ONCA 54 (CanLII), discussed below.

In that regard, statutory accident benefits are payable only to those who are in an "accident" as defined in s. 3(1) of the *SABS*, namely "an incident in which the use or operation of an automobile directly causes an impairment…"

The three-part test to be applied to determine whether a motor vehicle is an "automobile" is that set out in *Adams v. Pineland Amusements Ltd.* 2007 ONCA 844 (CanLII). The first two parts – whether the vehicle is an "automobile" in ordinary parlance or defined as such in the wording of the insurance policy – are irrelevant here. That leaves part three: Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?

The relevant section for any enlarged definition of "automobile" in the *Insurance Act* is s. 224(1)(a), which provides that "automobile" includes "a motor vehicle required under any Act to be insured under a motor vehicle liability policy." Mr. Benson submits that "any Act" refers to Ontario law. He relies on *Bray and ING Insurance Company of Canada*, (FSCO A08-002263, December 8, 2010) for that proposition. Thus, he submits, under the *Off-Road Vehicles Act*,

R.S.O. 1990, c.O.4. (*ORVA*), the ATV would have been required to be insured under a motor vehicle liability policy. In that case, the ATV would be an "automobile."

However, even if Mr. Benson is correct that "any Act" refers to Ontario law, that does not assist him, based on *Tolofson*. Mr. Benson submits that *Tolofson* is not germane, as it is a tort case. He points to the quotation from *Tolofson* that the insurer relies on: "at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*."

However, that statement is simply the Court's application in the tort sphere of the more general territoriality principle, which the Court cited at para. 38:

> This [territoriality] principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction.

To the same effect, the territoriality principle provides that Ontario's law on what motor vehicles must be insured has no binding effect in British Columbia.

The Court of Appeal had an opportunity to deal with this specific issue in *Rougoor*, mentioned above, but it declined to do so. The facts in that case paralleled those here: an Ontario resident was injured falling off a non-automobile, a dirt bike, in a jurisdiction where the bike was not insured and not required to be insured. The insured claimed either that the bike was insured under her policy or alternatively that it should have been insured under Ontario law pursuant to the *ORVA*. The lower court found that neither applied. On appeal, the Court only dealt with the first point, in that it found that the appellant had purchased insurance to cover the risk of driving a dirt bike, so the second part of the *Adams* test – the dirt bike was defined as an automobile in the wording of the insurance policy – was met:

> *Adams* directs consideration of the any extended definition of automobile under relevant legislation *only* where the policy definition is not met. In our respectful view, the application judge erred by deciding the case on the basis of the legislation rather than on the plain language of the policy. Accordingly, we find it unnecessary to decide whether he correctly interpreted the legislation.

It is interesting to see what Moore J. said at the trial level, [2009] O.J. No. 6498 (paragraph 38), about the legislation because he essentially reached the same conclusion as the Arbitrator:

> The critical fact in this matter is that Dan [the bike's owner] did not live in Ontario. As such, he is not bound by the provisions [of] Ontario legislation to insure his dirt bike. It necessarily follows therefore that Dan and his bike fell outside of the ambit of the application of the expanded definition of "automobile" set forth in the *Ontario Insurance Act* as a motor vehicle required to be insured under the *ORVA*.

I find this analysis persuasive. Therefore, I find that the territoriality principle set out in *Tolofson* applies here. If "any Act" in s. 224(1)(a) refers strictly to Ontario law, it cannot apply to the ATV's owner in British Columbia, as Mr. Askin and his ATV fall outside of Ontario's jurisdiction. And if "any Act" can include Acts of British Columbia, the ATV was not required to be insured under a motor vehicle liability policy there, so again the any extended definition of automobile under relevant legislation does not apply.

Accordingly, the appeal is denied and the Arbitrator's decision is affirmed.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

David Evans Director's Delegate	February 15, 2017 Date