COURT OF APPEAL FOR ONTARIO

CITATION: Benson v. Belair Insurance Company Inc., 2019 ONCA 840
DATE: 20191025
DOCKET: C65918 and C66726

Feldman, MacPherson and Simmons JJ.A.

BETWEEN

DOCKET: C65918

Austin Benson

Applicant (Appellant)

and

Belair Insurance Company Inc. and
Financial Services Commission of Ontario

Respondents (Respondents)

AND BETWEEN

DOCKET: C66726

Christopher Perneroski, by his Litigation
Guardian, Wendy Perneroski

Plaintiff (Respondent)

and

Echelon General Insurance Company

Defendant (Appellant)

Ian W. Furlong and Robert M. Ben, for the appellant Austin Benson

Eric K. Grossman and Patrick M. Baker, for the respondent Belair Insurance Company Inc.

Deborah McPhail and Martina Aswani, for the respondent Financial Services Commission of Ontario

Daniel Strigberger and Caroline L. Meyer, for the appellant Echelon General Insurance Company

Robert M. Durante and Ben Irantalab, for the respondent Christopher Perneroski

Heard: May 29, 2019

On appeal from the judgment of the Divisional Court (Regional Senior Judge Geoffrey B. Morawetz, and Justices Julie A. Thorburn and E. Ria Tzimas), dated April 9, 2018, with reasons reported at 2018 ONSC 2297, 141 O.R. (3d) 541, refusing an application for judicial review of a decision of the Financial Services Commission of Ontario (Appeal Division), dated February 15, 2017, with reasons reported at 2017 CarswellOnt 3134.

On appeal from the order of Justice Annette Casullo of the Superior Court of Justice, dated February 28, 2019, with reasons reported at 2019 ONSC 1415.

Feldman J.A.:

Introduction

[1] Two accidents. Two recreational off-road vehicles, an ATV and a dirt bike. Two catastrophic injuries. Both accidents occurred outside Ontario, one in British Columbia, one in Georgia, U.S.A. Both injured parties are from Ontario. Both have an Ontario automobile insurance policy for a car or truck they own in Ontario. Both insurers denied statutory accident benefits ("SABs"). Both were challenged in court but via different procedural routes. One sued in the Superior Court, which held that the insurer must pay the SABs. The other sought arbitration at the Financial Services Commission of Ontario. The Arbitrator denied the claim. That denial was

upheld on appeal to the Director's Delegate and on judicial review by the Divisional Court.

[2] Both appeals were heard together by this court as they both concern the interpretation of the same provisions of the *Insurance Act,* R.S.O. 1990, c. I.8, and the *Off-Road Vehicles Act,* R.S.O. 1990, c. O.4, as they apply to out of province accidents.

[3] For the reasons that follow, I would find that both insurers are obliged to pay SABs because both vehicles are automobiles that were involved in an accident within the meaning of the *Statutory Accident Benefits Schedule – Effective September 1, 2010,* O. Reg. 34/10 (the "SABS Regulation 34/10") and the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996,* O. Reg. 403/96 (the "SABS Regulation 403/96"), collectively the "SABS Regulations".

Background Facts

(1) *Benson v. Belair*:

[4] The appellant, Mr. Austin Benson, was a resident of Ontario who was living in British Columbia in June 2013. On June 23, while a passenger on an all-terrain vehicle ("ATV") that was owned and driven by a British Columbia resident driving on a public trail owned by the Northern Rockies Regional Municipality, Mr. Benson fell off and suffered a severe brain injury. He was the named insured under an

Ontario automobile policy issued by the respondent, Belair Insurance Company Inc. That policy did not list an ATV as an insured vehicle.

[5] Mr. Benson filed an application for accident benefits in Ontario. Belair denied coverage, contending that because the accident occurred in British Columbia, the question of whether an ATV constitutes an automobile for Ontario accident benefit purposes was to be determined under the laws of British Columbia which do not require ATVs to be insured as motor vehicles.

[6] The parties were unable to resolve their dispute through mediation and Mr. Benson applied for arbitration at the Financial Services Commission of Ontario. The FSCO Arbitrator upheld Belair's denial of accident benefits. Mr. Benson's statutory appeal to the Director's Delegate and his further application for judicial review to the Divisional Court were both dismissed.

[7] The Arbitrator rejected Mr. Benson's argument that Ontario legislation applied regardless of the jurisdiction in which the accident took place. He stated:

> … Rather, I agree with the Insurer's analysis that the starting point of the analysis begins with the principle of *lex loci delicti*, which is a rule of private international law. The Supreme Court of Canada has stated that Canada's Constitution supports a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout country; *lex loci delicti* principle. Its support of this law is unequivocal because it allows for uniformity of legal effect throughout the country. On the whole, there is little to be gained and much to lose in creating an exception to *lex loci delicti*.

> The Supreme Court of Canada decisions of *Tolofson v. Jensen* and *Lucas v. Gagnon* [[1994] 3 S.C.R. 1022] are particularly relevant when analyzing which provincial laws should be adhered to in the case before me. These cases address the "choice of rule of law", which law should govern auto accidents involving residents of different provinces.
>
> As it relates to the case before me, given that this incident occurred in British Columbia and using the Supreme Court of Canada decision as guidance; the laws of British Columbia and specifically the laws of British Columbia that relate to insurance requirements of an ATV at the time of the accident, should apply in this case….Clearly, Ontario law has no relevance to the insurance coverage regarding this vehicle….I am not convinced that the usage of the term "any relevant law" in the third part of the ordinary parlance test can be used to impose an Ontario insurance requirement on Mr. Askin's ATV in British Columbia.

[8] On appeal, the Director's Delegate upheld the Arbitrator's decision. In his view, this was a matter of statutory interpretation. He concluded:

> …If "any Act" in s. 224(1)(a) [of the *Insurance Act*] 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 policy there, so again the any [sic] extended definition of automobile under relevant legislation does not apply.

[9] On judicial review, the Divisional Court concluded that the application involved a matter of statutory interpretation to which the standard of review of reasonableness applied, and because the decision fell within the range of possible defensible outcomes, deference was warranted.

[10] On the issue of whether Ontario or British Columbia law applied to the question of whether the ATV was required to be insured, the Divisional Court stated at paras. 39-42:

> The Ontario Court of Appeal in *Adams v. Pineland Amusements Ltd.*, 2007 ONCA 844, 88 O.R. (3d) 321 held that when determining a case of liability insurance, "the proper question is whether the vehicle [involved in the accident] required motor vehicle insurance at the time and in the circumstances of the accident."
>
> This ATV ("the vehicle") was not required to be insured under any motor vehicle liability insurance policy because this ATV was operated in British Columbia where ATVs need not be insured. At the time and in the circumstances of this accident, this ATV was not insured.
>
> Moreover, there is no basis to assert that the Applicant had a legitimate expectation that his insurer would cover an accident involving ATVs, as ATVs are not included under this insured's policy.
>
> Finally, although Ontario's *Off-Road Vehicles Act* states that "no person shall drive an off-road vehicle unless it is insured under a motor vehicle liability policy" under the *Insurance Act*, it is reasonable to assume that this provision only requires this of ATVs in Ontario, not ATVs in British Columbia. Accordingly, although an ATV in Ontario is required by Ontario's Off-Road Vehicles Act to be insured under a motor vehicle liability policy, the same cannot be said of the particular ATV in this case because it is an ATV located in British Columbia.

[11] The Divisional Court concluded, at para. 46: "…the Director's Delegate's decision that the relevant legislation to consider is British Columbia legislation and the ATV did not therefore fall within the definition of an automobile for the purpose of the SABs, was reasonable."

(2) *Perneroski v. Echelon*:

[12] The parties presented the court with an agreed statement of facts which formed the basis for the motion judge's analysis. The respondent, Mr. Christopher Perneroski, is a resident of Ontario. The appellant, Echelon General Insurance Company, issued a standard Ontario OAP 1 motor vehicle liability policy to him as the named insured, with his Toyota pick-up truck as the described automobile under the policy. The insurance policy contained the statutory benefits set out in the SABS Regulation 403/96. There is no dispute that if Mr. Perneroski was involved in an "accident," he would be an "insured person" under the policy and entitled to accident benefits.

[13] He purchased a dirt bike on February 27, 2006, which he registered with the Ontario Ministry of Transportation. Just 12 days later, on March 11, 2006, Mr. Perneroski was tragically injured while riding the dirt bike on a closed track at a sports resort in Union Point, Georgia, U.S.A. He sustained a severe traumatic brain injury. He has spent the ensuing years in a wheelchair, requiring round-the-clock care and supervision. Mr. Perneroski submitted a claim for accident benefits under the insurance policy. Echelon denied the claim on the basis that the dirt bike was not an automobile, and therefore the incident was not an "accident" as defined in the SABS Regulation 403/96.

[14] The motion judge referred to the definition of automobile in s. 224(1) in Part VI of the *Insurance Act*. Under that definition, "automobile" includes (a) a motor

vehicle required under any Act to be insured under a motor vehicle policy." A dirt bike is an off-road vehicle. The *Off-Road Vehicles Act* provides in s. 15(1) that: "[n]o person shall drive an off-road vehicle unless it is insured under a motor vehicle policy in accordance with the *Insurance Act*."[1] Subsection (9) provides an exception from the insurance requirement where the off-road vehicle is being driven on land occupied by the owner of the dirt bike. Similarly, s. 2(1) 5. of a regulation to the *Off-Road Vehicles Act, General,* R.R.O. 1990, Reg. 863, (the "ORVA Regulation") also provides an insurance exemption when the bike is being driven in a sponsored closed course competition or rally. Because the plaintiff was not in a rally or on his own property, the motion judge accepted that had the accident occurred in Ontario, he would have been entitled to receive accident benefits.

[15] The issue became whether the same result applied when the accident occurred outside Ontario. The motion judge approached the question in the same way as it was approached in the *Benson* case, by asking what law applied, Ontario law or Georgia law. The motion judge found that she would exercise her discretion to apply the *lex fori*, the law of Ontario, rather than the *lex loci delicti*, the law of Georgia. However, in the alternative, recognizing that this was not a tort case but

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[1] The *Off-Road Vehicles Act* does not have any application to an off-road vehicle being driven on a highway (s. 2). In that circumstance, other statutes govern. Insurance is required for off-road vehicles driven on a highway (and therefore it is an automobile under the extended definition in s. 224(1) of the *Insurance Act*), see s. 2(1) of the *Compulsory Automobile Insurance Act,* R.S.O. 1990, c. C.25 and s. 1(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

a contractual dispute, she applied the law of the jurisdiction where the contract was formed, again, Ontario law, and found that Mr. Perneroski was entitled to receive SABs.

Issue

[16] These appeals were heard together because they both raise the same issue: Do the SABS Regulations and the definition of automobile in Part VI of the *Insurance Act*, apply differently if the accident occurs in Ontario or outside Ontario?

Analysis

[17] Part VI of the *Insurance Act* of Ontario governs automobile insurance in this province. The provision of SABs in every motor vehicle liability policy is mandated by s. 268(1) which provides:

> Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.

[18] Both Mr. Benson and Mr. Perneroski, residents of Ontario, held motor vehicle liability policies with Belair and Echelon respectively.

[19] The SABS Regulation 34/10, the version currently in force and the version that was in force at the time of the Benson accident, and the SABS Regulation

403/96, the version in force at the time of the Perneroski accident, define an "accident" as follows:

> "accident" means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device[.]

[20] And "insured person" is defined in the SABS Regulation 34/10 in part as follows:

> "insured person" means, in respect of a particular motor vehicle liability policy,
>
> (a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,
>
> > (i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or
> >
> > (ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant[.][2]

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[2] A substantively similar definition was provided in the previous SABS Regulation 403/96, which read in part:

"insured person" in respect of a particular motor vehicle liability policy, means,

[21] I note here that an insured person is within the definition whether the accident occurs in or outside Ontario.

[22] Other provisions make it clear that SABs are payable where an automobile is used or operated whether in Canada, the United States or any other jurisdiction designated in the SABS Regulations. Section 243(2) of the *Insurance Act* provides:

> Statutory accident benefits provided under section 268 apply to the use or operation of any automobile in Canada, the United States of America and any other jurisdiction designated in the *Statutory Accident Benefits Schedule*, and on a vessel plying between ports of Canada, the United States of America or a designated jurisdiction.

[23] At the time of the accidents, s. 2(3) of the SABS Regulation 34/10 and s. 3(2) of the SABS Regulation 403/96 also provided:

> The benefits set out in this Regulation shall be provided in respect of accidents that occur in Canada or the United States of America, or on a vessel plying between ports of Canada or the United States of America.

[24] Importantly, both Mr. Perneroski's insurance policy and Mr. Benson's insurance policy specifically state under the heading "Where You Are Covered":

> This policy covers you and other insured persons for incidents occurring in Canada, the United States of

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(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 dependent,
   (i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or
   (ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

> America and any other jurisdiction designated in the Statutory Accident Benefits Schedule, and on a vessel travelling between ports of those countries.

[25] As benefits are provided for an accident, and an accident only arises out of the use or operation of an automobile, one must look for the relevant definition of automobile. Because the SABS Regulations do not include that definition, this court in *Adams v. Pineland Amusements Ltd.*, 2007 ONCA 844, 88 O.R. (3d) 321, endorsed a three-part test for determining whether the vehicle that caused the particular damage or injury was an automobile for the purpose of the provisions: 1) Is the vehicle an automobile in ordinary parlance? 2) If not, is it defined as an automobile in the wording of the insurance policy? 3) If not, does the vehicle fall within any enlarged definition of automobile in a relevant statute?

[26] It was accepted in both decisions under appeal that neither a dirt bike nor an ATV is considered to be an automobile in ordinary parlance. That proposition is not in dispute on the appeals.

[27] Nor was it argued that either is defined as an automobile in the wording of the two respective policies.[3]

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[3] Mr. Perneroski took the position that his dirt bike was defined in the insurance policy as an automobile in the court below but the motion judge concluded, at para. 52, that as the dirt bike was an automobile under the third branch of the *Adams* test, it was not necessary to deal with the second branch. Mr. Perneroski did not take the position that the dirt bike was defined as an automobile in the insurance policy in this appeal.

[28] Therefore, the issue in each case is whether the dirt bike and the ATV fall within "any enlarged definition of automobile in a relevant statute." Section 224(1) of the *Insurance Act*, in Part VI, defines "automobile" for the purpose of Part VI in part as:

> "automobile" includes,
>
> (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy[.]

[29] Section 1 of the *Off-Road Vehicles Act* defines an off-road vehicle as follows:

> "off-road vehicle" means a vehicle propelled or driven otherwise than by muscular power or wind and designed to travel,
>
> (a) on not more than three wheels, or
>
> (b) on more than three wheels and being of a prescribed class of vehicle[.]

[30] It is agreed that both the dirt bike and the ATV are off-road vehicles governed by the *Off-Road Vehicles Act*. Subsections 15(1)-(3) and (9) of the *Off-Road Vehicles Act* provide that an off-road vehicle cannot be driven without insurance, with the one exception that insurance is not required where the vehicle is driven on land occupied by the owner of the vehicle. Subsections 15(1) and (9) state:

> (1) No person shall drive an off-road vehicle unless it is insured under a motor vehicle liability policy in accordance with the *Insurance Act*.
>
> (9) Subsections (1), (2), and (3) do not apply where the vehicle is driven on land occupied by the owner of the vehicle.

[31] As mentioned earlier, s. 2(1) 5. of the OVRA Regulation also provides an insurance exemption when an off-road vehicle is driven in a sponsored closed course competition or rally:

> 2. (1) The following are designated as classes of vehicles that are exempt from the provisions of the Act and this Regulation:
>
> […]
>
> 5. Off-road vehicles driven or exhibited at a closed course competition or rally sponsored by a motorcycle association.

[32] In neither incident was the off-road vehicle being driven on land that was occupied by the owner of the vehicle or in a sponsored rally. Mr. Benson was a passenger on an ATV owned and driven by Mr. Lee Askin in British Columbia on a trail that was owned and operated by the Northern Rockies Regional Municipality. Mr. Perneroski was driving his own dirt bike on a closed track at a sports resort in Georgia.

[33] All agree that had the two incidents happened in Ontario, the two injured parties would have been entitled to receive SABs under their respective policies. Why? The two off-road vehicles would be automobiles within the extended definition in s. 224(1) of the *Insurance Act*, because under s. 15(1) of the *Off-Road Vehicles Act*, they would have required insurance in order to be driven in the locations they were being operated at the time of the accidents.

[34] However, the same insurance requirement did not apply in either Georgia or British Columbia for dirt bikes and ATVs. In both cases under appeal, the courts

and tribunals set out to determine whether the law of Ontario or the law of the jurisdiction where the incidents occurred governed the SABs entitlement issue, applying the legal constructs of *lex loci delicti* and *lex fori*. In my view, they erred in so doing.

[35] As the motion judge in the *Perneroski* case recognized in her reasons, the issue before the court was not a tort claim arising out of an accident in another jurisdiction involving an Ontario resident and a local resident, where the choice of law rules from *Tolofson v. Jensen,* [1994] 3 S.C.R. 1022, must be considered and applied: see *Kingsway General Insurance Co. v. Canada Life Assurance Co.* (2001), 149 O.A.C. 303 (C.A.), at para. 12.

[36] The issue in the two cases under appeal is the proper interpretation and application of the respective insurance contract provisions and the Ontario statutes that govern SABs entitlement.

[37] When all the relevant provisions are examined, it is clear, in my view, that Ontario law governs and that the provisions that dictate the result for Ontario incidents dictate the same result for incidents that take place outside Ontario that are covered under the automobile insurance policy.

[38] The interpretive stumbling block that has challenged the courts and tribunals is the wording of s. 15(1) of the *Off-Road Vehicles Act*. That is the section that makes an off-road vehicle an automobile within the expanded definition in s. 224(1) of the *Insurance Act* because it requires insurance when such vehicles are driven.

However, that requirement is not enforceable outside Ontario. As with any Ontario Act, it can only be enforced in Ontario. That led the Divisional Court to conclude that an off-road vehicle is only an automobile when it is being driven in Ontario.

[39] With respect, that interpretation fails to read the section in the context and for the purpose of s. 224(1) of the *Insurance Act*.

[40] As a stand-alone statute, the *Off-Road Vehicles Act* governs the use and operation of off-road vehicles when they are not being driven on a highway. It includes a number of enforcement provisions which apply only in Ontario. However, s. 224(1) of the *Insurance Act* contains a direction for the purpose of applying s. 3(1) of the SABS Regulation 34/10 (formerly s. 2(1) of the SABS Regulation 403/96), to examine other Ontario statutes in order to determine whether a particular motor vehicle comes within the expanded definition of "automobile" by requiring that motor vehicle to be insured.

[41] I say Ontario statutes because s. 224(1) refers to "any Act", and s. 87 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, states that the words "Act" and "statute", when used in an Act or regulation, mean an Act of the Legislature of Ontario. Therefore, it is an error to look to a statute of another jurisdiction or to see if there is a statute in that jurisdiction that requires insurance. The expanded definition must be found in an Ontario Act.

[42] On a plain reading of ss. 15(1) and (9) of the *Off-Road Vehicles Act*, and s. 2(1) 5. of the ORVA Regulation, insurance is required to drive an off-road vehicle

except on the owner's own property or where the off-road vehicle is designated by regulation as an exempt class of vehicles. Those sections therefore have the effect of defining an off-road vehicle as an "automobile" for the purpose of s. 224(1) and s. 3(1) of the SABS Regulation 34/10 (formerly s. 2(1) of the SABS Regulation 403/96), except when it is driven on the owner's own property or in a sponsored closed course competition or rally. There is no language that limits that definition to off-road vehicles driven in Ontario.

[43] This result is consistent with the provisions of the *Insurance Act*, the SABS Regulations, and the contract language, which all state that the SABs will be provided whether the incident occurs anywhere in Canada, the U.S.A. or the other designated jurisdictions. The effect of the Divisional Court's interpretation would be to read out the expanded definition of automobile for incidents that occur outside Ontario and limit SABs payments accordingly. Even if the local laws where the incident occurred required insurance for the off-road vehicle, as I explained above, such laws do not inform the definition of automobile.

[44] The result is also consistent with the statutory scheme for insurers' liability for payment of SABs set out in ss. 268(2)-(5.2) of the *Insurance Act*. Those sections mandate which insurer pays the SABs, depending on the factors listed in the sections including whether the claimant is an occupant of an automobile or a non-occupant. Again, there is no differentiation based on where the incident that caused the loss or injury occurred. By applying the same definition of automobile

no matter where the incident occurs, the same insurer will be called on to pay the benefits. There is no unfairness among insurers arising from this result.

[45] I also respectfully disagree with the statement by the Divisional Court that Mr. Benson could have no legitimate expectation that his insurer would cover an accident involving an ATV because ATVs were not included in his policy. To the contrary, the SABS Regulations make it clear that if you are a defined insured person you are covered for incidents in the insured automobile *or another automobile*. A person can expect coverage if the accident occurs in an automobile within the extended definition.

[46] The Divisional Court also referred to a statement in this court's decision in the *Adams* case at paras. 16 and 17 where the court said: "[t]he proper question was whether [the vehicle] required motor vehicle insurance at the time and in the circumstances of the accident." The Divisional Court interpreted that statement to mean that if the vehicle is being driven outside Ontario in a jurisdiction that does not require insurance, that is a circumstance that precludes the vehicle from being an automobile within the extended definition.

[47] I would not extend the intended effect of that statement to treat the fact that an incident occurred outside Ontario as a relevant circumstance for the purpose of determining whether the vehicle is an "automobile" for SABs purposes. That statement was made in the context of an Ontario action where the issue was whether a go-kart was an automobile for the purposes of receiving SABs. The

argument had been made that the go-kart was an automobile because it conceptually might require insurance if it were illegally driven on a highway. The court looked at the actual timing and circumstances of the accident in rejecting that proposition. Because the go-kart was operated on a private go-kart track at the time of the accident, it did not require insurance.

[48] A similar analysis applies when reviewing other Court of Appeal decisions that have considered the labyrinth of provisions under the relevant Ontario statutes including the *Insurance Act*, the Statutory Accident Benefits Schedule, the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25, the *Highway Traffic Act*, R.S.O. 1990, c. H.8, the *Off-Road Vehicles Act*, and the *Motorized Snow Vehicle Act*, R.S.O. 1990, c. M.44, for the purpose of determining whether such vehicles as a tomato wagon, a back-hoe, or a farm tractor were automobiles for the purposes of the *Insurance Act*. These cases include *Copley v. Kerr Farms Ltd.* (2002), 59 O.R. (3d) 346 (C.A.), *Morton v. Rabito* (1998), 42 O.R. (3d) 161 (C.A.), leave to appeal refused, [1999] S.C.C.A. No. 51, and *Regele v. Slusarczyk* (1997), 33 O.R. (3d) 556 (C.A.). In each of these cases, the relevant time and circumstance were where the particular vehicle was at the time of the incident, and whether an Ontario statute required it to be insured at that time. I have not been referred to any case that involved incidents that occurred outside Ontario.

[49] To conclude, I am satisfied that when considering the extended definition of automobile, the circumstances to be considered are those mandated by the

relevant statutory provisions that state when a vehicle is required to be insured under a motor vehicle liability policy. As a definitional mechanism, the provisions are applicable to any incident for which SABs may be payable in the same manner, regardless of where the incident occurred within the geographical coverage area of the relevant Ontario insurance policy.

Standard of Review

[50] The *Benson* appeal is from a judgment denying an application for judicial review by the Divisional Court of a decision of the Director's Delegate on appeal from a Financial Services Commission of Ontario arbitrator, with leave granted by this court. The Divisional Court held that the reasonableness standard of review applies. I agree.

[51] In my view, the decision of the Director's Delegate was unreasonable and must be set aside. This is the type of case recognized by the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 38, where "the range of reasonable outcomes will necessarily be limited to a single reasonable interpretation".

[52] There can be only one reasonable interpretation of the statutory language regarding the extended definition of "automobile." The language is not unclear or ambiguous. With respect, the Arbitrator and the Director's Delegate proceeded on a legal misapprehension that the *lex loci delicti* should be applied to a contract and statutory interpretation issue involving an Ontario contract and Ontario legislation

where that legislation specifically directs that Ontario law is to apply: *Insurance Act* at s. 123. An interpretation of the statutory language cannot be within a range of reasonable outcomes where it is erroneously based on inapplicable legal principles. Further, the provisions of the statutes in question and the standard form motor vehicle insurance policy must have the same meaning for all claimants. The factual circumstances of the claimants will differ and require adjudication, but the application of the legislative provisions must be uniform.

Conclusion

[53] I would dismiss the *Perneroski* appeal with costs fixed in the agreed amount of $10,000 inclusive. I would allow the *Benson* appeal with costs fixed in the agreed amount of $5,000 inclusive for the appeal and $4,000 inclusive for the motion.

Released: “K.F.” October 25, 2019

“K. Feldman J.A.”
“J.C. MacPherson J.A.”
“Janet Simmons J.A.”