**IN THE MATTER OF THE *INSURANCE ACT*,**
**R.S.O. 1990, c. I. 8, Section 268 AND**
**REGULATION 283/95 THEREUNDER**

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

**AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N :

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

UNIFUND ASSURANCE COMPANY

Respondent

# DECISION WITH RESPECT TO PRELIMINARY ISSUE

## COUNSEL

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## ISSUE

In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, the preliminary issue to be determined is whether or not the incident of October 5, 2012, involving the claimant while operating an ATV on private property occupied by the owner of the vehicle, was an "accident" as defined by the *Statutory Accident Benefits Schedule – Accidents on or after September 1, 2010* ("*SABS*").

The SABS definition of "accident" requires the involvement of an "automobile". Was the subject ATV an "automobile" in the circumstances of this incident?

## FACTS

This priority dispute arises from an incident that took place on October 5, 2012. On that date, the Claimant, Catherine Larmer (hereinafter referred to as “Larmer”), was a named insured under a valid Automobile Policy with Unifund Assurance Company, policy # PR8AH761.

The Claimant was injured while operating an All-Terrain Vehicle (ATV), which was owned by her boyfriend, Piotr Sidorowicz. This ATV was insured under a Standard Ontario Automobile Policy with Security National Insurance Company, policy #73132371, and was listed on the Certificate of Automobile Insurance for that policy. This policy was valid and in operation continuously from November 15, 2011 through November 15, 2012. This policy included a standard O.E.F. 32 Recreational Vehicle Endorsement.

On October 5, 2012, the Claimant was operating the ATV on private property in the backyard of Mr. Sidorowicz' home at 1819 Rideau Road, in Gloucester, Ontario. She lost control of the ATV, causing it to overturn, and sustained injuries.

Larmer has claimed accident benefits from the insurer of the ATV (Security National) which company now claims that Unifund stands in priority by reason of the priority scheme set out in s. 268(2) of the *Insurance Act.*

## APPLICABLE LEGISLATION

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefit claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

As Larmer was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

> *(i) The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
>
> *(ii) If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*

The SABS entitles an individual to claim statutory accident benefits if he or she sustains an impairment as a result of an “accident”.

The SABS defines an “accident” in Section 2(1):

> "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. (emphasis mine)

## ANALYSIS AND FINDINGS

The preliminary issue in dispute is whether or not the incident of October 5, 2012 involving the claimant was an "accident" as defined by the *Statutory Accident Benefits Schedule – Accidents on or after September 1, 2010* ("*SABS*").

The SABS defines an "accident" in Section 2(1):

> "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. (emphasis mine)

Unifund takes the position that if the incident was not an "accident" under the Unifund policy, there is no basis for Security National to pursue any priority dispute against Unifund as there is no coverage for accident benefits under the Unifund policy in the circumstances of this case.

Both parties agreed that the *Statutory Accident Benefits Schedule* itself does not contain a definition of the term "automobile", but that a number of decisions of the Ontario Courts and the Financial Services Commission of Ontario (FSCO) have confirmed that in order to determine whether a specific vehicle is an "automobile", a 3-part analysis must be used, as follows:

i) Whether the vehicle in question is "in ordinary parlance" an automobile?;

ii) If not, whether the vehicle in question is defined as an "automobile" in the wording of the insurance policy?; and

iii) If not, whether the vehicle falls within any enlarged statutory definition of "automobile" in any relevant statute?

This 3-part test was specifically adopted by the Ontario Court of Appeal in *Adams v. Pineland Amusements Ltd.* (2007), 88 O.R. (3d) 321 (OCA). The Court indicated at paragraph 8 that an affirmative answer to any of these questions leads to a conclusion that the vehicle is insured by the standard Ontario automobile insurance contract.

I will now examine each of the 3 parts of the 3 part test in relation to the facts before me.

## 3 PART TEST TO DETERMINE WHETHER A VEHICLE IS AN "AUTOMOBILE"

### *1) Is the vehicle an "automobile" in ordinary parlance?*

The first portion of the test considers whether the vehicle is an "automobile" in ordinary parlance.

Case law, and in particular *Bray v. ING Insurance Co. of Canada,* [2010] O.F.S.C.D. No. 136, has established that an ATV is not considered an "automobile" in ordinary parlance.

Furthermore, Security National appears to concede this point. Therefore, this branch of the test fails.

***2) Is the vehicle defined as an "automobile" in the wording of <u>the</u> insurance policy?***

Unifund takes the position that this branch of the test involves considering the specific insurance policy through which the claimant is seeking accident benefits and determining whether the vehicle in question is defined as an "automobile" in the policy. Unifund has submitted that we must look at the two insurance policies in question separately to determine whether this branch of the test passes or fails.

It is clear that the subject ATV was defined as an "automobile" in the Security National policy so as to meet the second branch of the 3 part test so far as the Security National policy is concerned. The subject ATV in this case was insured under a standard Ontario Automobile Policy [OAP] issued to the claimant's boyfriend. That policy provided coverage for liability, property damage, protection from unidentified and uninsured motorists, and coverage for Accident Benefits. The ATV was the only vehicle listed on the policy, and it was specifically identified on the Certificate of Automobile Insurance.

This policy included a standard O.E.F. 32 endorsement, a sample copy of which is attached to these submissions for ease of reference. This endorsement provides for certain protections when a recreational vehicle is driven by an unlicensed operator anywhere other than a public highway. The endorsement reads, in part, as follows:

> "recreational vehicle" includes an automobile of the type referred to as snowmobile, trail bike, midget automobile, motor scooter, minicycle, snow plane, motorized toboggan, moped, motor assisted vehicle, <u>all terrain vehicle</u>, dune buggy <u>or similar automobile</u>." (emphasis mine)

This endorsement not only confirms that the ATV is a type of automobile as defined under the policy to which it applies, it also shows that the policy specifically contemplated the use of the ATV off of public highways, presumably including land occupied by the owner. The endorsement also contemplated that coverage would persist in those situations. The policy and endorsement do not contain any exclusion or other clause to suggest that the ATV would no longer be considered an automobile in these circumstances, or that coverage under the policy would be denied if an accident occurred on land occupied by the owner of the ATV.

No such endorsement existed on the Unifund policy. The Unifund policy did not insure an ATV. Unifund submitted that the ATV was not defined in the Unifund policy as an "automobile" and therefore the incident in question from the perspective of the Unifund policy did not arise from an "accident" as defined in the SABS and as such not subject to a priority claim against it. I have no difficulty in finding that that the ATV was not defined in the Unifund policy as an "automobile" but do not accept that Unifund would not be subject to the priority scheme as set out in s. 268 of the *Insurance Act*.

***3) Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?***

This branch of the test involves turning to the *Insurance Act*, the *Off-Road Vehicles Act (ORVA)*, and the *Compulsory Automobile Insurance Act (CAIA)* to determine whether the ATV qualifies as an "automobile."

The Director's Delegate recently heard three appeals concerning whether off-road vehicles were considered "automobiles" as per the *SABS*: *Motor Vehicle Accident Claims Fund v. Therrien* , [2012] Appeal P11-000010.; *Motor Vehicle Accident Claims Fund v. Buckle* [2012] Appeal P11-00009.*;* and *Motors Insurance Corporation v. Bouchard* 2012] Appeal P11-00003*.* In each case the Director's Delegate viewed the circumstances from the point of view of the 3rd branch of the 3 part test in *Adams*. All three cases involved the entitlement of an individual to accident benefits in incidents involving vehicles which in ordinary parlance would not be considered standard automobiles. They involved a dirt bike, a pocket bike and a golf cart. In these cases, the Director's Delegate found that the applicable definition of "automobile" is that set forth in section 224(1) of the *Insurance Act* which provides:

a. a motor vehicle required under any Act to be insured under a motor vehicle liability policy; and

b. a vehicle prescribed by regulation to be an automobile.

Based on section 224(1) of the *Insurance Act*, the Director's Delegate in *Therrien* at pages 2 – 3 found that ***all of these cases "turned on whether the vehicles involved had to be insured under a motor vehicle liability policy.***" The Director's Delegate stated:

> Due to the provisions of the *Off-Road Vehicles Act*, R.S.O. 1990, c. O.4 (the *ORVA*) and the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25 (the *CAIA*), *the need for insurance depends on where the vehicles were operated: off-road motor vehicles require insurance under the ORVA when operated off-road and not on their owners' property*; motor vehicles require insurance under the CAIA when operated on a highway.

The Director's Delegate referred to section 15 of the *ORVA* which provides:

> (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*.
>
> (2) No owner of an off-road vehicle shall permit it to be driven unless it is insured under a motor vehicle liability policy in accordance with the *Insurance Act*.
>
> (3) Every driver of an off-road vehicle who is not owner thereof shall, upon the request of a peace officer, surrender for inspection evidence that the vehicle 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.

The Director's Delegate referred to section 2(1) of the *CAIA* which provides:

> (1) Subject to the regulations, no owner or lessee of a motor vehicle shall,
>
> (a) operate the motor vehicle; or
>
> (b) cause or permit the motor vehicle to be operated,
>
> on a highway unless the motor vehicle is insured under a contract of automobile insurance.

Therefore, a vehicle driven on land occupied by the owner of the vehicle does not require insurance as per the *ORVA* and the *CAIA*, and therefore is not an "automobile" as per the *Insurance Act*.

In *Therrien*, the claimant was catastrophically injured while operating an uninsured dirt bike on private property that was not occupied by the bike's owner. The claimant applied to the Motor Vehicle Accident Claims Fund ("the Fund") for statutory accident benefits. Although the claimant's bike was not required to be insured as per the *CAIA*, it was required to be insured as per the *ORVA* (as the claimant was not operating his bike on property that was owned by the bike's owner). Therefore, the Director's Delegate found that the bike was an "automobile" as per section 224(1)(a) of the *Insurance Act*, and held that the claimant was involved in an "accident" as per the *SABS*. The Fund was thus held liable to pay accident benefits to the claimant.

In *Bouchard*, the claimant was operating a pocket bike off-road on land occupied by the bike's owner. The claimant claimed statutory accident benefits through her father's automobile insurance policy. The Director's Delegate held that as per *Copley v. Kerr Farms Ltd.* 2002 CanLII 44900 (ON CA), the correct test is whether the vehicle in question "required motor vehicle insurance at the time and in the circumstances of the accident." The pocket bike was being operated on the property of the owner at the time of the accident, and therefore did not require insurance as per the *ORVA*. Therefore, this vehicle did not constitute an "automobile" as per the *SABS*, and the claimant was not entitled to statutory accident benefits from her father's automobile policy. This decision was recently upheld by the Superior Court.

In *Buckle*, the claimant was injured in a golf cart that was being operated on a highway. She applied to the Fund for statutory accident benefits. While golf-carts are off-road vehicles, the *ORVA* exempts them from its provisions when not driven on a highway as per section 2(1). However, because the golf cart was being driven on a highway at the time and in the circumstances of the accident, it required automobile insurance as per the *ORVA*. Accordingly, the Director's Delegate held that it was an "automobile" and that the claimant was involved in an "accident" as per the *SABS*. She was thus entitled to statutory accident benefits from the Fund.

Applying the reasoning in the above-noted Director's Delegate decisions, any argument that the ATV fell within any enlarged definition of "automobile" under any relevant statute fails. There was no requirement under the *Insurance Act*, the *Off-Road Vehicles Act (ORVA)*, or the *Compulsory Automobile Insurance Act (CAIA)* for the subject ATV to be insured while being operated on the owner's own property. However, it must be kept in mind that in the case before me the subject ATV was insured by a standard automobile policy issued by Unifund.

**IMPACT OF 3 PART TEST FINDINGS**

In light of my findings following analysis of the 3 part test as adapted by the Ontario Court of Appeal in *Adams*, I must now consider the impact of these findings on Security National's claim for indemnity by way of priority dispute.

I have found above that the accident benefits claim of Larmer arose from an "accident" (having met the second component of the 3 part test) and that she was entitled to claim benefits from Security National as the subject ATV was defined as an "automobile" in that policy. The real issue is whether Security National can now seek indemnity from Unifund by way of the priority provisions of s. 268 of the *Insurance Act*.

As Larmer was an occupant (actually the operator of the ATV) of a vehicle at the time of the accident, the following rules with respect to priority of payment apply as set out in s. 268(2) of the *Insurance Act*:

> Liability to pay –
>
> > *(i) The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
> >
> > *(ii) If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*

I am of the view that application of the priority scheme is an independent step to be taken once it is determined that the claimant has a valid accident benefits claim against an automobile insurer arising out of an "accident". Section 268 merely distributes obligations of automobile insurers according to a legislated priority scheme. There exists no modifying words in subsection (i) of s. 268(2) such as:

> *(i) The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured* provided the policy would also makes accident benefits available to the insured in the circumstances*;*

I am of the view based on the clear and unrestrictive wording of s. 268(2) that so long as the first party insurer is legally obligated to pay accident benefits then the priority scheme comes into play without restriction.

Unifund has argued that it did not insure the risk of operating an ATV but in my view this is no different than one of their insureds getting into a Lamborghini or an 18 wheeler where

arguably the risk would be higher than the vehicle Larmer insured. There are obviously situations where an insured would place himself and herself in situations where risk would be higher than simply operating the insured vehicle.

As I have indicated, the analysis to be undertaken is a simple one. First, it must be determined that the claimant was involved in an "accident" so as to be entitled to accident benefits and second, the insurer paying those benefits then looks to s.268 of the *Insurance Act* to see if another insurer stands higher in priority. Here, as I have found, the claimant was involved in an "accident" and entitled to accident benefits from Security National. I do not believe that the fact that the claimant may not have been in a position to make a valid claim directly as against Unifund defeats the application of priority scheme set out in s.268 of the *Insurance Act*. I am satisfied that the priority scheme is available to any automobile insurer paying a valid accident benefits claim. As I have indicated, section 268(2) contains no restrictive wording. It merely provides that one automobile insurer paying a valid accident benefit claim can look to another standing in higher priority for indemnity.

The parties have provided me with considerable jurisprudence dealing with whether various vehicles would be considered "automobiles". These cases deal with an individual's entitlement to accident benefits, an obligation to defend pursuant to an automobile policy or the applicability of s. 267 of the *Insurance Act*. None of these cases deal with a priority dispute. None of these cases deal with a situation where the vehicle involved in the collision was actually insured by a standard automobile policy. The present case is therefore distinguishable from all of those cases.

In the final analysis, I find the claimant Larmer was involved in an "accident" entitling her to make an accident benefits claim pursuant to the SABS and that the automobile insurer paying her valid claim would have access to the priority provisions of s.268 of the *Insurance Act*.

**ORDER**

I hereby order that Unifund pay the costs of Security National with respect to the determination of this preliminary issue as well as the costs of the Arbitrator with respect to same.

I understand that there are other issues in this priority dispute to be dealt with and will arrange for a further pre-arbitration conference to deal with those issues.

DATED at TORONTO this 9th )

day of December, 2015. )

KENNETH J. BIALKOWSKI
Arbitrator