



**Citation: Novick v. RSA, 2023 ON LAT 21-008181/AABS**

**Licence Appeal Tribunal File Number: 21-008181/AABS**

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

**Jeffrey Novick**

**Applicant**

and

**RSA Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR: Julia Fogarty**

**APPEARANCES:**

For the Applicant: Jeffrey Novick, Applicant  
Jessica Fullerton, Counsel

For the Respondent: Lee Lalla, Representative  
Geoffrey Keating, Counsel

Court Reporter: Breanna Clancy

**HEARD: by Videoconference: January 26, 2023, February 2, 2023 and February 6,  
in Writing: 2023**

## OVERVIEW

- [1] Jeffrey Novick, the applicant, was involved in an accident on December 17, 2018 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by the respondent, RSA Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [2] On December 17, 2018, a backhoe operator had been driving home on the highway from a jobsite when he pulled off onto the shoulder to allow traffic to pass him. Within a minute of pulling onto the shoulder the backhoe operator ran over the applicant who was walking on the shoulder of the road to get home with his groceries.
- [3] On July 5, 2019, the respondent discontinued the applicant’s benefits. The position of the insurer was reaffirmed again on September 24, 2019, with a further clarification on their denial of benefits due to the vehicle involved in the accident being classified by the insurer as a road building machine which in their opinion would exempt the respondent from the payment of benefits under the *Schedule*.
- [4] At the hearing the parties were able to narrow the subject of the hearing to only the issue of whether or not the backhoe would qualify as an automobile for the purposes of the *Schedule*. If the backhoe is found to be an automobile, it is agreed between the parties that the applicant would qualify for the payment of benefits under the *Schedule*.

## ISSUE

- [5] The issue in dispute is:
  - i. Does the backhoe that struck the applicant qualify as an automobile for which benefits are payable under the *Schedule* at the time of the accident?

## RESULT

- [6] The backhoe, at the time of the accident, meets the legal test under an enlarged definition for “automobile”. As such, at the time of the accident, the backhoe was an automobile for which benefits are payable under the *Schedule*.

## ANALYSIS

### **What is the legal test to be considered as an automobile under the Schedule?**

- [7] “Automobile” is not defined in the *Schedule*.<sup>1</sup> To provide further clarity to our definition of automobile the common-law test found in *Adams v. Pineland Amusement Ltd et al*, 2007 ONCA 844 (“*Adams*”) is used.
- [8] In *Adams* the Ontario Court of Appeal applied a three-part test in their analysis to determine if a motor vehicle is considered an automobile. A yes to any of the three questions leads to the conclusion that the vehicle qualifies as an “automobile”. The parties have conceded that parts one and two do not apply, as such I will only consider part 3, which reads:
- i. Does the vehicle fall within any enlarged definition of “automobile” in any relevant statute?
- [9] This legal test takes me to the definition set out for a “vehicle” at the time of the accident found in section 1(1) of the *Highway Traffic Act*, RSO 1990, c. H.8 (“HTA”). The relevant portion states that a ‘motor vehicle’ includes an automobile and any other vehicle propelled or driven other than by muscular power except for road building machines.
- [10] At first glance, a backhoe, if not found to be a road building machine, would be a vehicle propelled or driven other than by muscular power since it is a machine driven by an operator using a combustion engine as a means of transportation. In that circumstance, it would be a vehicle under the *HTA* and as such, under the test set out in *Adams* an automobile for the purposes of the *Schedule*.
- [11] When you review the definitions for “motor vehicle” and “vehicle” you see that a motor vehicle includes an automobile but excludes a road building machine whereas a vehicle includes a motor vehicle, a road building machine, traction engine and any vehicle drawn, propelled, or driven by any kind of power. I now proceed on to assess if the backhoe is a road building machine.

### **What is a road building machine?**

#### ***Road Building Machines before and after 2017***

- [12] In 2012, Decision No. 2407/11, 2012 ONWSIAT 2364 (CanLII) the Tribunal found that a backhoe owned by a cartage and excavation company that struck a worker

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<sup>1</sup> *Benson v. Belair Insurance Company Inc.*, 2019 ONCA 840 (CanLII)

was not a motor vehicle based specifically on the definition of the Highway Traffic Act that “exclude road-building machines from the definition of motor vehicle and include backhoes in the definition of road-building machines.”

- [13] The prior version of the *Highway Traffic Act* defined a “road-building machine” as a self-propelled vehicle of a design commonly used in the construction and maintenance of highways, including but not limited to... back-hoes.<sup>2</sup>
- [14] This definition was repealed and substituted with the following wording, which was in place at the time of the accident on December 17, 2018:

*“road-building machine” means a self-propelled vehicle of a design commonly used in the construction or maintenance of highways that,*

*(a) belongs to a class of vehicle prescribed in the regulations,*

*(b) has the features or equipment prescribed in the regulations, or*

*(c) is being used as prescribed in the regulations;*

- [15] In 2017 the legislature redefined the road building machine with the introduction of a companion document – Ontario Regulation 398/16, Road-Building Machines (“*RBM*”) under the HTA. This new regulation, like the updated definition included in the *HTA*, did not specifically include backhoe despite previously being specifically included by name in the older versions of the *HTA*.
- [16] This ambiguous definition leaves room for interpreting if a backhoe would fall under one of three of its categories based on how it is used. The usage of the backhoe should be considered based on the definition set out in the amended *HTA*.

### ***The Backhoe is not a road-building machine***

- [17] The parties argue whether the backhoe is a tractor, an excavator, an off-road excavator or not a road building machine at all.
- [18] These categories of vehicles are defined in O.Reg. 398/16 as follows:

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<sup>2</sup> *Highway Traffic Act*, R.S.O. 1990, CHAPTER H.8, as amended 2016, c.5, Sched. 12.

TYPE:	TRACTOR	EXCAVATOR	OFF-ROAD EXCAVATOR	MOBILE EQUIPMENT VEHICLE
ROAD BUILDING MACHINE?	YES	YES	YES	NO
DEFINED:	Tracked and wheeled tractors, while equipped with an of the following equipment: i. Mowers ii. Augers or drills iii. Compactors iv. Spraying equipment v. Snow blowers or snow plows vi. Buckets or shovels	A vehicle whose primary function is to excavate material.	An excavator that: (a) Is not capable of travelling at a speed greater than 60 kilometres per hour, and (b) Is not operated on a highway other than, (i) for the purposes of crossing the highway, or (ii) in the immediate vicinity of the construction site at which the excavator is being used.	1. Mobile crane that is not built on a truck chassis, but not an off-road mobile crane. 2. An excavator that is not built on a truck chassis, but not an off-road excavator. 3. A street sweeper that is not built on a truck chassis, but not a low-speed street sweeper.

- [19] The primary function of the vehicle is described in the applicant's submissions by two means. The testimony of the backhoe operator indicates on the day of the accident he was engaged in using the backhoe to "dig trenches and put in conduits for lights" and this backhoe is owned by the Malyon Excavation Ltd.
- [20] The parties did not lead any evidence that the backhoe, while able to be used for other purposes, is or was actually used for any other primary purpose than excavation.
- [21] The backhoe was used to excavate material on the day of the accident and the company for which it was used has the primary purpose of excavation. I find that the backhoe meets the definition of an excavator, a vehicle whose primary function is to excavate material.
- [22] While it was not a finding material to my ultimate decision, based on the website the parties cited in their submissions for Malyon Excavation Ltd, the company advertises the resale of their equipment as "quality excavation equipment".
- [23] When applied to the definition above, a vehicle whose primary function to excavate, as I have found here, is either an excavator, an off-road excavator or a mobile equipment vehicle. If it is an excavator then it is a road building machine, if it is an off-road excavator, it is also a road building machine, but if it is a mobile equipment vehicle then it is not a road building machine. To determine which

category the backhoe resides we look at the other descriptors set out in O. Reg. 398/16.

- [24] To be an off-road excavator the backhoe must not be able to travel greater than 60km per hour. A review of the joint document brief reveals that this backhoe cannot travel greater than 40 km per hour.
- [25] To be an off-road excavator, and to qualify as a road building machine it must not be operated in a manner prohibited by the definition set out in the *RBM*. The *RBM* prohibits off-road excavators from being operated on a highway other than for two reasons:
- i. Crossing the highway; or
  - ii. In the immediate vicinity of the construction site where the backhoe is being used to excavate materials.
- [26] On the day in question, the backhoe operator drove approximately 6 km to work (St. Andrews West to 17885 South Branch Road in Cornwall, Ontario); from there he drove another approximately 9 km to a Farm Boy (814 Sydney Street in Cornwall, Ontario) where he would be digging trenches and putting in conduits for lights; and then later back home to his residence in St. Andrews West which would have been another approximately 7 km had the accident not taken place. In total, he used the backhoe to commute in or around 22 km outside of the prescribed use of the backhoe that day.
- [27] It was the evidence of the backhoe operator that  $\frac{3}{4}$  of the drive home on Highway 138 was on the road and  $\frac{1}{4}$  was on the shoulder and that the shift from road to shoulder did not slow him down – he would only stop when letting other cars pass if the shoulder was undriveable. The accident took place within minutes of his moving onto the shoulder to let traffic pass.
- [28] This was not uncommon for the backhoe operator who provided in his evidence that he had similarly driven the backhoe on other occasions to Hawkesbury (approximately 85 km drive), Brockville (approximately 96 km drive), Plantagenet (approximately 67 km drive), and “everywhere in between”. For commutes he would attempt to stay on the road but would sometimes drive on the shoulder of the road like he did during the accident if there was a lineup of traffic behind him.
- [29] To be excluded from the definition of a mobile equipment vehicle the backhoe must have been built on a truck-chassis. There is no evidence to support that this backhoe was built on a truck-chassis.

- [30] The scope of the driving undertaken by the backhoe operator far exceeds crossing a highway or driving in the immediate vicinity of the job site. Since the excavator was being operated outside the prescribed regulation for an off-road excavator it is a mobile equipment vehicle. Mobile equipment vehicles are not road building machines for the purposes of the *RBM*.
- [31] As such, the backhoe does not, in this case, fall into the exclusion for road building machines under the *HTA*. A mobile equipment vehicle is an automobile under the *HTA* and therefor meets the third branch of the *Adams* test set out above.

***The backhoe meets the legal test for being deemed an automobile***

- [32] Since the backhoe is not excluded as a road building machine, under the test set out in *Adams v. Pineland Amusement Ltd et al*, 2007 ONCA 844, by the Ontario Court of Appeal the backhoe is deemed to fall within the enlarged definition of “automobile” in the *Highway Traffic Act* since it is a vehicle propelled by an engine and not subject to any exclusion.
- [33] The applicant asked the Tribunal to determine if:
- i. The backhoe that struck the applicant qualify as an automobile for which benefits are payable under the *Schedule* at the time of the accident?
  - ii. I find that the backhoe does qualify as an automobile for which benefits are payable under the *Schedule*.

**ORDER**

- [34] The Tribunal finds that the backhoe at issue in this matter was at the time of the accident an automobile for the purposes of the *Statutory Accident Benefits Schedule*.

**Released:** June 22, 2023

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**Julia Fogarty**  
Adjudicator