

# SHILLINGTONS<sup>LLP</sup> | LAWYERS

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## INSURANCE LAW BULLETIN

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### The Licence Appeal Tribunal is Constitutional

*Campisi v Ontario (AG): 2017 ONSC 2884*

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#### Summary

A personal injury lawyer, Joseph Campisi, recently challenged the constitutionality of two automobile accident provisions in the *Insurance Act*. Mr. Campisi challenged both section 257.5(1), which limits the pre-trial recovery of lost income to 70 per cent of gross income, and section 280, which grants sole jurisdiction to the Licence Appeal Tribunal (“LAT”) to resolve *Statutory Accident Benefits Schedule* (“SABS”) disputes.

Justice E.P. Belobaba dismissed the application holding that Mr. Campisi did not have standing to bring the application and that regardless, the application failed on its merits.

#### Arguments

Mr. Campisi presented three arguments supporting the unconstitutionality of ss. 257.5(1) and 280:

- (1) The sections were in breach of s.15(1) of the *Charter* which provides for equal protection and benefit under the law without discrimination;
- (2) The sections were in breach of s. 7 of the *Charter* which protects the right of life, liberty and security of the person; and
- (3) Section 280 was in breach of s. 96 of the *Constitution Act, 1867* which limits the kinds of cases that can be decided by provincial agencies and tribunals.

#### Reasoning

##### Mr. Campisi Lacked Standing

Justice Belobaba held firstly that Mr. Campisi had not established private interest standing to bring this application. Mr. Campisi had not been injured in an automobile

accident, he was not claiming for lost income, and his law practice rarely dealt with SABS complaints. Because he was not directly affected by ss. 267.5(1) or 280 of the *Insurance Act*, he did not have private interest standing to bring the constitutional challenge.

Secondly, Mr. Campisi failed to establish public interest standing. There are three prerequisites for public interest standing:

- 1) There is a serious, justiciable issue raised;
- 2) The applicant has a real stake or a genuine interest in the issue; and
- 3) In all the circumstances, the proposed application is a reasonable and effective way to bring the issue before the courts.<sup>1</sup>

Mr. Campisi failed to establish the second and third criteria. He did not demonstrate a real stake or genuine interest in the constitutional validity of the two provisions. Mr. Campisi did not file his own affidavit; instead, his paralegal was examined. He also did not prove that the application was a reasonable and effective way to bring these constitutional issues before the court. Justice Belobaba opined that there are thousands of people who have been injured in motor vehicle accidents who are in a much better position to bring such an application.

#### Section 15(1) of the Charter

Section 15(1) of the *Charter* provides for equal protection and benefit under the law without discrimination. Justice Belobaba held that there was no breach of s. 15(1) because neither section drew a distinction based on a prohibited ground enumerated in s. 15(1) of the *Charter* or on any analogous ground.

For s. 267.5(1), the type or category of accident victim is not an enumerated or analogous ground, and for s. 280, the distinction between those who are able to enforce legal rights in the court system and those who are part of an administrative scheme is not a distinction based on disability.<sup>2</sup>

#### Section 7 of the Charter

Section 7 of the *Charter* provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

There was no breach of s. 7 of the *Charter* because a deprivation of full compensation was not caused by the relevant sections of the *Insurance Act*. This type of loss arises independently of the provisions at issue and will continue regardless of whether the provisions apply. The provisions did not cause the plaintiff’s physical loss of liberty and

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<sup>1</sup> *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37.

<sup>2</sup> *Hernandez v. Palmer*, [1992] OJ No. 2648 at para 188; *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2002 SCC 54 at para 72.

security; rather, the provisions limited a plaintiff's ability to recover more than a stipulated amount of money from the persons legally responsible for the accident.<sup>3</sup>

Furthermore, tort claims are proprietary in nature and the Court of Appeal has specifically held that the right to sue for damages for personal injury is not protected under s. 7 of the *Charter*.<sup>4</sup> Justice Belobaba confirmed that life, liberty and security of the person does not include economic benefits.<sup>5</sup>

### Section 96 of the *Constitution Act, 1867*

Section 96 of the *Constitution Act, 1867* is a constitutional safeguard that works to limit the kinds of cases that can be decided by provincial agencies and tribunals. There is a three part test for determining when s. 96 allows jurisdiction:

- 1) Does the power or jurisdiction "broadly conform" to a power or jurisdiction exclusively exercised by a superior, district or county court at the time of Confederation?
- 2) If so, is it a judicial power?
- 3) If so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function?<sup>6</sup>

The LAT fulfills the second step given it clearly exercises a judicial power when it decides a *SABS* dispute. However, it fails on both the first and third steps.

When determining the first step, the court must look beyond the remedies in question and instead focus on the subject matter of the dispute. The LAT is resolving disputes about the availability of statutorily prescribed no-fault accident benefits. Justice Belobaba stated that this power or jurisdiction did not exist in 1867 as neither automobiles nor automobile insurance existed at that time. Because this is a new power or jurisdiction, it was not part of the core of jurisdiction protected by s. 96 of the *Constitution Act, 1867*.<sup>7</sup>

The s. 96 challenge also failed the third step. If the powers are necessarily incidental to the achievement of a broader policy goal of the legislature, the grant of judicial power to provincial appointees is valid.<sup>8</sup> Here, Justice Belobaba held that the resolution of *SABS* disputes by the LAT is necessarily incidental to the broad policy goals of providing minimum standards of protection for non-unionized employees, providing a speedy system for dispute resolution, and to the overall system of automobile accident insurance regulation. As such, there was no basis for the s. 96 challenge.

### **Conclusion**

While Mr. Campisi's application was certainly an interesting and novel argument, Justice Belobaba firmly barred any future challenge to the LAT's jurisdictional constitutionality.

<sup>3</sup> *Whitebread v Walley*, [1998] BCJ No. 733 (BCCA) at para 56.

<sup>4</sup> *Filip v. Waterloo*, (1992) 98 DLR (4<sup>th</sup>) 534 (CA); *Rodgers v. Faught*, (2002) 212 DLR (4<sup>th</sup>) 366 (CA).

<sup>5</sup> *Re Eurig Estate*, [1994] OJ No. 2570 (Gen. Div.) at para 48.

<sup>6</sup> *Re Residential Tenancies Act*, [1981] 1 SCR 714.

<sup>7</sup> *Reference re Young Offenders Act (PEI)*, [1991] 1 SCR 252 at paras 42, 75.

<sup>8</sup> *Supra* note 6 at 735-736.