

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**JOSEPH CAMPISI**

Applicant

And

**HER MAJESTY IN RIGHT OF ONTARIO**

**AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO**

Respondent

**NOTICE OF CONSTITUTIONAL QUESTION**

The applicant intends to question the constitutional validity of amendments in Bill 15, *Fighting Fraud and Reducing Automobile Insurance Rates, 2014*, in Schedule 3 of the *Insurance Act*, specifically Section 280, hereafter known as “s.280” which provides that the Licence Appeal Tribunal has sole jurisdiction to adjudicate contractual disputes between insurers and insured individuals, with respect to entitlement to benefits under the *Statutory Accident Benefit Schedule*. The Applicant seeks declarations that s. 280 is contrary to: 1) section 15 of the *Canadian Charter of Rights and Freedoms*, and 2) section 96 of *The Constitution Act, 1867*. The Applicant seeks a declaration that only disputes in which the insured person agrees to binding arbitration may be adjudicated by the Licence Appeal Tribunal. Furthermore, the Applicant seeks a declaration that the cap on recovery of lost income and earning capacity prior to trial, as contained in section 267.5 of the *Insurance Act*, is contrary to section 15 of the *Canadian Charter of Rights and Freedoms* and is inoperative.

The question is to be argued on a date and time to be fixed by the Registrar, at 393 University Avenue, Toronto, Ontario, M5G 1E6.

The following are the material facts giving rise to the constitutional question:

- 1) Attached is a copy of the Notice of Application which recites the material facts.

The following is the legal basis for the constitutional question:

## Charter Challenge- Access to Courts

- 2) In determining if the said legislation violates Section 15 of the *Charter* a two part approach is used as endorsed by the Supreme Court of Canada in *Quebec v. A*, specifically:
  - 1) Has the government made a distinction based on an enumerated or analogous ground, and
  - 2) Does distinction perpetuate disadvantage?

### Distinction

- 3) The distinction that is claimed is that the current legislation denies the physical and mentally disabled the fundamental procedural protections of the Superior Courts as triers of first instance. While all individuals that have disputes with their insurer are affected by this legislation, the impact is disproportionately felt by the physically and mentally disabled as the magnitude of entitlement to benefits will generally vary directly with the degree and permanency of disability experienced.
- 4) There are various benefits that can be claimed under the *Statutory Accident Benefit Schedule*. However, the benefits that represent the majority of value and costs are contained under the categories of:
  1. Income Replacement, Non-Earner and Caregiver Benefits, (“Weekly Benefits”) and
  2. Medical, Rehabilitation and Attendant Care Benefits

### Weekly Benefits

- 5) An individual is entitled to only one of three weekly benefits under the *Statutory Accident Benefit Schedule*: Income Replacement, Non-Earner Benefit or Caregiver Benefit. There are different requirements to qualify for each, specifically:
  1. Income Replacement Benefit is available to all automobile victims up to \$400 weekly. This weekly amount can be increased with optional coverage up to \$1,000 weekly plus inflation indexation. No benefit is payable during the first week of disability. Income Replacement Benefit is available to an individual:
    - i. during the first 104 weeks of “disability” if that individual is substantially unable to perform the essential tasks of their pre-accident employment. The value of benefits that may be payable during the first 104 week disability period may amount to \$103,000 or more. An individual may return to work anytime within the first 104 weeks of disability without being disqualified from subsequently claiming income replacement benefits if the individual is found to no longer be able to substantially perform the tasks of their employment.
    - ii. after the first 104 weeks of disability, if the individual is completely unable to engage in any employment or self-employment for which the insured is

reasonably suited by way of training, education or experience then the insured may continue to receive this benefit indefinitely so long as complete inability continues. Depending on the age of the individual, the total monetary amount that can be disputed may be in the millions of dollars.

Entitlement to Income Replacement Benefits will vary directly with the degree of disability (substantially unable versus completely unable) and with the permanence of the disability (Continuous versus Discontinuous in nature).

2. In order to qualify for the Non-Earner benefit an individual must sustain impairment as a result of the accident. The individual must also suffer a complete inability to carry on a normal life as a result of the accident. The insured is:
  - i. not entitled to any payment for the first 26 weeks of disability,
  - ii. entitled to \$185 weekly for the next 78 weeks of disability,
  - iii. after 104 weeks of disability an individual who was a qualifying student or a recent graduate before the accident is entitled to \$320 weekly, while all other entitled individuals continue to receive \$185 weekly.

Entitlement will vary directly with the degree of disability (complete inability to carry on a normal life) and the permanence of disability (First 26 weeks, next 78 weeks, after 104 weeks).

3. Caregiver benefits are only payable if an individual has purchased optional benefits or has suffered a catastrophic impairment caused by the accident. Catastrophic impairment is defined as:
  - a. Paraplegia or quadriplegia,
  - b. Amputation of an arm or a leg,
  - c. Total loss of vision in both eyes,
  - d. A brain impairment,
  - e. 55 percent or more impairment of the whole body, or
  - f. A marked or extreme impairment due to mental or behaviour disorder.

Entitlement will vary directly with the degree of disability and the permanence of the disability.

Under each of the three weekly benefits it is plain and obvious that, in most instances, insured individuals that will be involved in disputes will have either a physical or mental disability.

## Medical, Rehabilitation and Attendant Care Benefits

6) An insured that is injured in an automobile accident is entitled to claim Medical, Rehabilitation and Attendant Care Benefits if the insured meets the qualifying criteria, specifically:

1. An individual is entitled to claim Medical and Rehabilitation Benefits up to:

- a. \$3,500 if the impairment is predominantly a minor injury,
- b. \$50,000 if the injury is neither minor nor is it catastrophic, and
- c. \$1,000,000 if the accident is catastrophic as described above.

It is plain and obvious that the entitlement amount will vary directly with the degree of disability and permanence of the disability.

2. Attendant Care Benefits are payable up to:

- a. \$3000 monthly, payable only during the first 104 weeks after the accident, and \$36,000 is payable in total if an individual is not catastrophically injured;
- b. \$6000 monthly, up to \$1,000,000 if an individual is catastrophically injured as previously mentioned.

It is plain and obvious that the entitlement amount will vary directly with the degree of disability and the permanence of the disability.

7) Under each of the criteria it is plain and obvious that in most instances insured individuals that will be involved in significant monetary disputes will have either a physical or mental disability. The focus of the dispute will be on the extent of the disability or the need for benefits to provide accommodations from or alleviation of the disability.

## Perpetuation of Disadvantage

8) The legislation procedurally treats all complainants similarly. All complainants are allowed to bring claims to the License Appeal board. However, as the effect of disabilities that have been caused by automobile accidents increase, generally, the amount of benefits claimed increases. Requiring all claimants to attend arbitration, and not have access to the Superior Courts, is equivocal to requiring all contractual disputes be settled in Small Claims Court regardless of the amount at stake.

9) The legislation has the effect of denying the physically and mentally disabled the procedural safeguards that are available in the Superior Courts. Historically, the physically and mentally disabled have been denied access to government services available to the general population. This legislation has the effect of continuing and broadening this disadvantage. As mentioned by Abella J. in *Quebec (Attorney General) v. A.*:

“The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.”

## Remedy

10) The purpose of the legislation is to ensure that there is expedient adjudication of disputes. In some instances the insured may prefer this simplified process. In such instances the legislation may be considered remedial legislation intended to ameliorate the conditions of disadvantaged individuals as conceived under Section 15 (b) of the *Canadian Charter of Rights and Freedoms*. To fulfil this remedial function while not impairing the rights of the physically and mentally disabled it is proposed that Section 280 of the *Insurance Act* be read as:

280. (1) This section applies with respect to the resolution of disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled.

### Application to Tribunal

(2) The insured person, or the insurer **with agreement from the insured person**, may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1).

### Limit on court proceedings

(3) No person may bring a proceeding in any court with respect to a dispute described in subsection (1), **and that has been commenced as per subsection (2)**, other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review.

## Section 96 Challenge- Sole Jurisdiction of Superior Courts

11) In determining if Section 280 is constitutionally invalid, the three step test, delineated in the *Re Residential Tenancies Act, 1979*, needs to be undertaken, specifically:

- 1) Did jurisdiction, at the time of Confederation, rest solely with the Superior, District or County courts?
- 2) Is the function judicial in nature in contrast to policy making?
- 3) Is the judicial function more than merely ancillary or subsidiary to the general administrative function?

If the answer to these three questions is “yes” then the legislation is invalid. If the answer to any one of these questions is “no” then the next question that needs to be asked, as per *MacMillan Bloedel Ltd v Simpson*, is whether the core jurisdiction of the Superior Court can be ousted?

### Monetary Jurisdiction

12) In *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, the Supreme Court of Canada considered the monetary jurisdiction of inferior courts. It was found that at the time of Confederation inferior courts had jurisdiction for monetary amounts varying from \$25 (Quebec) to \$100 (Ontario) with respect to contract disputes. An exact translation into present value was not carried out and the amount was simply considered “a significant amount”. In considering the present day value of \$100 in 1867 currency two “inflaters” were used; inflation which equates into the purchasing power of money and gross domestic product per capita in real dollars which equates into the perceived value of money.

13) According to the Bank of Canada the best available information source of inflation going back to 1870 is the GDP deflator. So \$1 from 1870 would purchase the equivalent of \$26.70 in 2005 dollars. According to the Bank of Canada’s Inflation Calculator \$26.70 in 2005 would purchase the equivalent of \$31.09 in 2014. Thus the inflation multiplier of a dollar from the time of Confederation until 2014 is 31.09. Based solely on inflation, Superior Courts would have sole jurisdiction for contract disputes in excess of \$3,109. However, as mentioned in *Sobey’s*, the search is for an analogous not precisely the same jurisdiction. In reviewing monetary limits it is purported that one must consider the general population’s perception of the value attached to money based on the prosperity of the population.

14) One of the key measures of prosperity is determined by the Gross Domestic Product per Capita. That is how much value is produced per individual. The Madison Project Database as reference by Statistics Canada shows a growth in the real GDP per Capita (Inflation adjusted using international \$) from \$1,695 in 1870 to \$24,941 in 2010, representing a real growth multiplier of 14.71.

15) When inflation, and real growth of GDP per Capita, are considered together the multiplier amounts to approximately 45.7. In other words \$100 in 1867 would have a perceived value

of approximately \$50,000 in 2014. It appears that contractual disputes that have a current value greater than \$50,000 would have been in the sole jurisdiction of the Superior courts at the time of Confederation.

- 16) Since historically contractual disputes for amounts greater than \$50,000 were in the sole domain of the Superior Courts the answer to the first step of the test is answered in the affirmative.

#### Judicial Function

- 17) In determining whether the function is judicial in nature the words of Dickson J. in *Residential Tenancies* are particularly pertinent, specifically:

The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'.

In this instance the dispute is between private parties (insurer and insured), the rules are detailed in the *Insurance Act* and *Statutory Accident Benefit Schedule*, and there is an expectation that the application of the rules will be done with fairness and impartiality. This denotes that step two of the test is answered in the affirmative.

#### Function Ancillary or Subsidiary to Administrative Function

- 18) The scope of the Licence Appeal Tribunal's authority is limited to adjudicate matters between the insured and the insurer. Historically, adjudication was carried out by Financial Services Tribunal empowered under the *Financial Services Commission of Ontario Act, 1997* and appears to have been an integral tribunal dealing with all insurance related matters. Under the new legislation the License Appeal Tribunal's mandate is simply to adjudicate on matters relating to insurance contract benefits disputes. This function is not ancillary to or subsidiary to a broader administrative function.

- 19) Therefore, step three also must be answered in the affirmative.

- 20) Since all three steps result in affirmative answers the result must be that, at a minimum, Section 280. (3) is *ultra vires* provincial authority or simply Section 280 is *ultra vires* provincial authority.

#### Superior Court Jurisdiction Ousted

- 21) Historically, Superior Courts had the sole jurisdiction to hear private party disputes in excess of \$50,000. Superior Courts were the only triers of facts in private contractual disputes involving this amount of money. Section 11(6) of the *Licence Appeal Tribunal Act, 1999*, SO 1999, c12, states that an appeal from the decision of the Licence Appeal Tribunal may only

be made to the court on a question of law. There is no appeal allowed based on a question of fact.

- 22) As noted in *MacMillan Bloedel* and affirmed in *Trial Lawyers Association of British Columbia v British Columbia*, “powers which are ‘hallmarks of superior courts’ cannot be removed from those courts”. Here the legislation at issue bars access to the Superior Courts to settle private law disputes through enactment of Section 11(6) of the *Licence Appeal Tribunal Act* and Section 280.(3) of the *Insurance Act*.

## Remedy

- 23) Binding arbitration, by and of itself, is not *ultra vires* provincial authority when it is based on the agreement between private parties. It is proposed that Section 280 of the *Insurance Act* have the requirement read in that, the insured person must agree to arbitration, in order for a dispute to be adjudicated the License Review Tribunal, more precisely:

280. (1) This section applies with respect to the resolution of disputes in respect of an insured person’s entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled.

### Application to Tribunal

(2) The insured person, or the insurer **with agreement from the insured person**, may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1).

### Limit on court proceedings

(3) No person may bring a proceeding in any court with respect to a dispute described in subsection (1), **and that has been commenced as per subsection (2)**, other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review.



## Section 15 Charter Challenge- Right of Disabled Individuals to Full Tort Compensation

### Legislation

- 24) Section 267.5 (1) of the *Insurance Act* places limits on the amount of income loss and loss of earning capacity an individual can claim prior to the trial of an action. A claim against a tortfeasor is limited to:
- 1) 80 per cent of the net income loss during that period, as determined in accordance with the regulations, if the incident occurred before September 1, 2010, or
  - 2) 70 per cent of the amount of gross income that is lost during that period, as determined in accordance with the regulations, in any other case.
  - 3) 80 per cent of the net loss of earning capacity during that period, as determined in accordance with the regulations, if the incident occurred before September 1, 2010, or
  - 4) 70 per cent of the loss of earning capacity during that period, as determined in accordance with the regulations, in any other case.

### Distinction based on Enumerated Grounds

- 25) For all individuals, 80 per cent of net income is less than the net income that was earned prior to the accident. Similarly, for most individuals, 70 per cent of gross income is less than the net income that was earned prior to the accident. The same is generally true for earning capacity. The direct effect of Section 267.5 (1) of the *Insurance Act* is that most individuals who are injured in an automobile accident, and who are required to take time off from work, and sue in tort, will experience a loss of take home income.
- 26) In addition to the direct impact of the legislation noted above, the related regulations have the indirect effect of freezing earnings until an action has been completed. This freezing of earnings results in a cap being placed on the income loss based on the historical amount that was earned just prior to the time of the accident. An action may take several years to complete. Until the action is completed there is no consideration given for inflation or wage increases.
- 27) The combined effect of both of these aspects is that individuals that are unable to return to work and who are unable to mitigate their loss by seeking other employment suffer to a greater extent than those who can return to work quickly. One's ability to mitigate losses in income and earning capacity are directly related to the extent of disability that has been suffered. The greater and more permanent the disability preventing one from working the more impact the legislation limiting recovery will have in tort.
- 28) The legislation places an uneven burden on permanently disabled individuals requiring such individuals to bear a greater loss in respect to monetary compensation than has been suffered by individuals that have only transitory symptoms or those who have suffered only property damage.

Perpetuation of Disadvantage

29) The loss of ability to receive replacement income has the effect that those who are physically and mentally disabled are less able to be financially independent. Historically, the physically and mentally disabled have been unable to be financially independent due to various factors such as inability to access high paying employment. This legislation has the effect of continuing and broadening this disadvantage by inadequately compensating disabled individuals. This legislation also has the effect of perpetuating prejudice that disabled individuals are somehow less worthy of full compensation for their worth than are able bodied individuals.

Remedy

30) The purpose of this section is to reduce the costs of automobile insurance for consumers. The uneven burden that is placed on disabled individuals cannot be justified in a free and democratic society. It is proposed that Section 267.5 (1) of the *Insurance Act* be declared inoperative.

Date:

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