

CV-15-520150

Court file no.

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH CAMPISI

Applicant

And

HER MAJESTY IN RIGHT OF ONTARIO

AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO

Respondent

APPLICATION UNDER Rule 14.05(3)(g.1) of the Ontario Rules of Civil Procedure, s. 15(1) of the Canadian Charter of Rights and Freedoms, s.52 of the Constitution Act, 1982, and s.96 of The Constitution Act, 1867.

(Court seal)

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on a date and time to be fixed by the Registrar, at 393 University Avenue, Toronto, Ontario, M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it,

with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date January 20<sup>th</sup> 2015

Issued by *S. Turkel*  
Local registrar

Address of court office .....

SUPERIOR COURT OF JUSTICE..... 393 UNIVERSITY AVE. 10TH FLOOR TORONTO, ONTARIO M5G 1E6	COUR SUPÉRIEURE DE JUSTICE 393 AVE. UNIVERSITY 10E ÉTAGE TORONTO, ONTARIO M5G 1E6
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TO The Attorney General of Ontario  
Constitutional Law Branch  
4th floor  
720 Bay Street  
Toronto, Ontario M5G 2K1  
fax: (416) 326-4015

## APPLICATION

### 1. The applicant makes application for:

#### Right of Disabled Individuals to Access the Superior Court to Settle Insurance Contract Disputes

- a) A finding that individuals who are seeking access to benefits under the *Statutory Accident Benefit Schedule O Reg 34/10*, as a group, are individuals with mental or physical disability;
- b) A declaration that the government approved 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" creates a distinction when accessing the courts in contract disputes based on physical and mental disability;
- c) A declaration that the purpose and/or effect of s.280 perpetuates disadvantage to members of the group on the basis of personal characteristics negatively affecting their access to justice;
- d) A declaration that the purpose and/or effect of s.280 is to perpetuate prejudice to members of the group negatively affecting the perceived worthiness of this group to procedural safeguards and access to justice;
- e) A declaration that s.280., is inconsistent with s.15 of *The Charter Of Rights and Freedoms* and is not justified in a free and democratic society;
- f) A declaration that s. 280 sections (1) to (3) shall 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.

Insurance Contract Disputes Require Federally Appointed Judge

- g) A finding that the Superior Courts have sole inherent jurisdiction to adjudicate with respect to contracts for insurance in instances in which the monetary value exceeded \$100 at the time of Confederation;
- h) A finding that \$100 value from 1867 has a 2014 nominal value of approximately \$50,000;
- i) A declaration that Section 280 of the *Insurance Act* violates Section 96 of the *Constitution*;
- j) A declaration that s. 280, without monetary limits, is *ultra vires* provincial authority and is inoperative; or in the alternate
- k) A declaration that Section 280 shall 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.

#### Right of Disabled Individuals to Full Tort Compensation

- l) A declaration that Section 267.5 (1) of the *Insurance Act* has a significantly stronger negative impact on those disabled, as a group, than those who are not disabled;
- m) A declaration that the purpose and/or effect of Section 267.5 (1) perpetuates disadvantage to members of the group, on the basis of personal characteristics, negatively affecting their ability to be self-sufficient;
- n) A declaration that the purpose and/or effect of Section 267.5 (1) is to perpetuate prejudice to members of the group, negatively affecting the perceived independence of the group;
- o) A declaration that Section 267.5 (1) is inconsistent with Section 15 of *The Charter of Rights and Freedoms* and is not justified in a free and democratic society;

- p) A declaration that section 267.5 (1) is inoperative;

**Other Relief**

- q) No costs are sought as this application is advanced in the public's interest; and
- r) Such further and other relief as counsel may advise and this Honourable Court may permit.

**2. The grounds for the application are:**

The Applicant

- a) Joseph Campisi is a lawyer who practices law in the area of personal injury law, and he is an adjunct professor of insurance law at Osgoode Hall Law School. Many of Mr. Campisi's clients have been injured in automobile accidents and they seek benefits under the *Statutory Accident Benefit Schedule* and they pursue Tort claims. Mr. Campisi has a genuine concern for all individuals that are injured in automobile accidents in Ontario and their ability to access justice. Mr. Campisi owns and operates an automobile that is insured in Ontario. Mr. Campisi is married and he has three children. All members of Mr. Campisi's family routinely are passengers in motor vehicles and pedestrians traversing roadways;

## Access to Superior Courts

### **Charter Challenge- Access to Courts**

- b) Section 15. (1) of the Charter guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based on mental or physical disability;

### Distinction

- c) Section 280 of the *Insurance Act* requires all insured individuals that have disputes with their insurer, regarding automobile accident benefits, to have their claims adjudicated by the Licence Appeal Tribunal. There is no limit to the monetary value that is in dispute. Insured individuals cannot commence claims in the Superior Court. There is no guarantee of procedural safeguards and impartiality as are provided in Superior Courts. Decisions of the Licence Appeal Tribunal can only be appealed based on a question of law;
- d) The magnitude of entitlement to benefits for insured individuals will vary directly with the extent of disability and duration of the disability;
- e) While all individuals, that have disputes with their insurer, are affected by this legislation, the legislation has a disproportionate impact on the physically and mentally disabled, due to the magnitude of entitlement to benefits and the potential magnitude of disputes that arise;

### Perpetuation of Disadvantage

- f) Requiring all claimants to arbitrate their dispute, 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. The legislation has the effect of denying the physically and mentally disabled of 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;

- g) The infringement of Section 15. (1) does not constitute a reasonable limit demonstrably justified in a free and democratic society pursuant to Section 1 of the *Charter*;

#### Affirmative Action

- h) Section 15. (2) of the *Charter* ensures that any law that has as its object the amelioration of conditions of disadvantaged for individuals including those that are disadvantaged because of mental or physical disability is not precluded due to Section 15. (1);
- i) The remedial function of Section 280 of the *Insurance Act* is to streamline the adjudication of automobile accident benefits disputes. In many instances an insured may wish to have their claim decided expeditiously foregoing the procedural protections offered in the Superior Courts. Where an insured is allowed the election as to which forum to choose to have a dispute adjudicated there is an amelioration of a condition of disadvantage;

#### Remedy

- j) A law that is inconsistent with the *Constitution* is of no force or effect;
- k) A disabled individual may only be an insured individual. No insurers are disabled individuals;



- 1) To fulfil the intended remedial function, while not impairing the rights of the physically and mentally disabled, Section 280, Subsections (1) to (3) of the *Insurance Act* should 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

- m) Section 280 of the *Insurance Act* empowers the Licence Appeal Tribunal solely with the power to adjudicate on contractual disputes of entitlement to Accident Benefits between insurers and insured individuals. There is no allowance to appeal based on a question of fact;
- n) Section 96 of *The Constitution Act, 1867* assures that Judges of the Superior Courts will only be appointed by the Federal Government;

### Monetary Jurisdiction

- o) At the time of Confederation in 1867 Inferior Courts had monetary jurisdiction limited to \$100 with respect to contractual disputes;
- p) From an individual perspective, \$100, in 1867, would have approximately the same perceived value as \$50,000 in 2015;
- q) Contractual disputes for amounts greater than \$50,000 were, at the time of *Confederation*, within the sole jurisdiction of the Superior Courts;
- r) Section 280 of the *Insurance Act* does not have any monetary limit;

### Judicial Function

- s) The Licence Appeal Tribunal is faced with adjudicating private disputes between parties, namely the insured and the insurer;
- t) The Licence Appeal Tribunal is called upon to adjudicate through the application of a recognized body of rules namely the *Statutory Accident Benefits Schedule*;

- u) The Licence Appeal Tribunal is expected to adjudicate in a manner consistent with fairness and impartiality;

#### Function Ancillary or Subsidiary to Administrative Function

- v) The Licence Appeal Tribunal has authority to adjudicate on matters in many areas including but not limited to; Bailiff's, Liquor Licences, Consumer Protection, and Film Classification;
- w) The Licence Appeal Tribunal requires no prerequisite specialized knowledge of Accident benefits;
- x) The Licence Appeal Tribunal is not an integral component in the policy formulation for Automobile Insurance;
- y) The License Appeal Tribunal's mandate is simply to adjudicate on matters relating to insurance contract benefits disputes among the other varied adjudication functions. This function is not ancillary to or subsidiary to a broader administrative function;

#### Remedy

- z) Binding arbitration, by and of itself, is not *ultra vires* provincial authority, when it is based on an agreement between private parties to such arbitration;
- aa) Section 280 of the *Insurance Act* should be read in such a way as to not offend the division of powers as drafted in the *Constitution Act*, but to allow for private contracting of disputes, and should 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 15 Charter Challenge- Right of Disabled Individuals to Full Tort Compensation

### Distinction based on Enumerated Grounds

- bb) Section 267.5 (1) of the *Insurance Act* limits the amount of compensation that an individual can seek in tort for loss of income before the trial of the action. Individuals are limited to; 1) 80 percent of net income loss, if the accident occurred before September 1, 2010 and 2) 70 percent of gross income loss, if the accident occurred on or after September 1, 2010. There are similar legislated limitations on claims made for loss of earning capacity;
- cc) The change from 80 percent of net earnings to 70 percent of gross earnings was intended to simplify accounting procedures, while providing approximately the same judgment amount;
- dd) 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 true for earning capacity. The direct effect of Section 267.5 (1) is that most individuals who are injured in an automobile accident, and are required to take time off work, and who sue in tort, will experience a loss of take home income;
- ee) In addition to the direct impact of the legislation, noted above, the legislation has the indirect effect of freezing earnings until an action has been completed. An action may take several years to complete. Until the action is completed there is no consideration given for inflation or wage increases. There is an imposed cap on the amount of income loss that can be recovered based on the historical amount that was earned at the time of the accident;
- ff) There may a period of up to 7 years between the time when an accident occurs and when a trial commences.

gg) The combined effect of both of these aspects is that individuals who 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;

hh) One's ability to mitigate losses of income and earning capacity are directly related to the severity of disability that has been suffered. The more debilitating, and permanent, the disability is, that prevents an individual from returning to work, the greater the impact the legislation limiting recovery in tort will have on the individual;

ii) The legislation places an uneven burden on permanently disabled individuals, requiring such individuals to bear greater income loss, than is imposed on individuals that have only transitory or mild impairment;

#### Perpetuation of Disadvantage

jj) Historically, individuals that are physically or mentally disabled have been perceived as less self-sufficient and autonomous;

kk) Historically, individuals that are physically or mentally disable have been less able to secure gainful and well-paying employment in order to be self-sufficient;

ll) Section 267.5 (1) of the *Insurance Act* has the effect of perpetuating this disadvantage;

mm) The constraint on the right to compensation in tort was introduced to reduce costs of automobile insurance;

nn) The infringement of Section 15. (1) to reduce insurance rates does not constitute a reasonable limit demonstrably justified in a free and democratic society pursuant to Section 1 of the *Charter*;

#### Remedy

oo) Section 267.5 (1) of the *Insurance Act* is inconsistent with The Constitution of Canada and as such is of no force or effect.

Other grounds for application

pp) Sections 1 and 15 of the *Canadian Charter of Rights and Freedoms*;

qq) Section 52 of the *Constitution Act, 1982*;

rr) Section 96 of *The Constitution Act, 1867*;

ss) Rule 14 of the *Rules of Civil Procedure*; and

tt) Such further and other grounds as counsel may advise and this honourable court may permit.

3. The following documentary evidence will be used at the hearing of the application:

a. Affidavits and materials as counsel may advise and this Honourable Court may permit.

Date:

Jan 20/15

**CAMPISI LLP**  
Barristers and Solicitors  
7050 Weston Road  
Suite 101  
Vaughan, ON L4L 8G7

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Lawyers for the Plaintiff

**JOSEPH CAMPISI**  
Applicant  
(Short title of Proceeding)

- and -

HER MAJESTY IN RIGHT OF ONTARIO AS REPRESENTED BY THE  
ATTORNEY GENERAL OF ONTARIO  
Respondent  
Court File No.

*CV-15-52015C*

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
Proceeding commenced at

TORONTO

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**NOTICE OF APPLICATION**

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