

**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

**APPLICANT'S FACTUM
(Returnable May 2nd, 3rd, and 4th, 2017)**

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PART I - OVERVIEW

1. This application arises in response to historical Ontario automobile insurance legislation and recently enacted amendments. The Applicant asserts that portions of this legislation, namely ss. 267.5(1) and 280 of the **Insurance Act**, violate the equality provisions of the unwritten constitutional right to equality as well as s. 15 of the **Canadian Charter of Rights and Freedoms** (“**Charter**”), and that with respect to s. 15, cannot be justified under s. 1 of the **Charter**. The Applicant further asserts that both ss. 267.5(1) and 280 violate s. 7 of the **Charter**. The applicant lastly asserts that s. 280 of the Act further violates s. 96 of the **Constitution Act, 1867**.
2. The outcomes of the frequent motor vehicle accidents in Ontario vary from minor “fender benders” to fatalities. On this continuum, victims suffer serious and permanent injuries, with disabilities, and need for treatment and financial restitution. Insured accident victims have contractual rights from their insurers, and all parties who are not completely at fault for an accident have a right to seek redress in tort in order to be “made whole.”
3. Under the recent **Insurance Act** amendments, the right of motor vehicle accident victims to sue in the Ontario Superior Court of Justice has been removed, with respect to automobile accident insurance benefits. Denying the equal right to access the courts and the equal right to full tort compensation, to individuals who have become disabled in automobile accidents, has been rationalized on the purported objective to lower automobile insurance costs and to provide accident benefits to uninsured individuals. The practical result of this shift is that the majority of automobile drivers have been promised lower rates at the expense of those members of Ontario society who have suffered the gravest injuries and disabilities.
4. Settling tort and contract disputes is an integral and firmly entrenched function of the Superior Courts. The resolution of tort and contract, between private citizens and parties, is part and parcel of the “normative legal order” which in fact far pre-dates our written constitutional structure.
5. The Applicant, Joseph Campisi, questions the constitutional validity of:
 - (a) Section 267.5(1) of the **Insurance Act**, which limits accident victims’ right to recover lost income prior to trial to:
 - (i) 70% of gross income if the accident occurred on or after September 1, 2010, or

- (ii) 80% of net income if the accident occurred before September 1, 2010; and
- (b) Section 280 of the **Insurance Act**, which denies accident victims the right to have the contractual disputes between accident victim and insurer adjudicated in the Superior Court regardless of the magnitude of the injury and/or the monetary amount in dispute.¹ Thus the tort dispute is adjudicated in the Superior Court, while the contractual dispute(s), arising out of the same accident, with respect to the same injuries, is adjudicated in the Licence Appeals Tribunal (LAT).

PART II – FACTS

A/HISTORY & PURPOSE OF ONTARIO’S NO-FAULT LEGISLATION

6. The Supreme Court of Canada in **Peixeiro** commented on Ontario’s no-fault system quoting the Ontario Court of Appeal in **Meyer**. The SCC noted that:
- There is a limitation on the right of the victim to maintain a tort action against the tortfeasor.
 - There is an exchange of rights wherein the accident victim loses the right to sue, for insurance benefits, but receives more generous first party benefits.
 - The legislation is designed to control costs by eliminating some tort claims.
 - The legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses to be paid to the accident victim regardless of fault.²
7. No constitutional issues were at play in **Peixeiro**.
- **Bill 68 (1990) and Its Legislative Purpose**
8. Prior to June 1990, Ontario operated under a tort system.³

¹ *Insurance Act*, R.S.O. 1990, c. I.8, s. 267.5(1) and s. 280 [*Insurance Act*].

² *Peixeiro v. Haberman*, [1997] 3 SCR 549, 151 DLR (4th) 429 [*Peixeiro*] at 559; *Meyer v. Bright* (1993), 15 OR (3d) 129; 110 DLR (4th) 354 [*Meyer*] at 134 (Ont CA).

³ Application Record (hereinafter “AR”), Vol. 7, Tab 32, at pp. 3269, Ontario Automobile Insurance Dispute Resolution System Review Interim Report (Ontario: FSCO, 2013) [*Interim Report*] a page 4.

9. On June 1, 1990, Bill 68, the “Ontario Motorist Protection Plan” came into effect.⁴
10. Bill 68 was the result of the report of Justice Coulter Osborne wherein he was asked to investigate the insurance “crisis.” Justice Osborne found that the crisis was caused by the costs of motor vehicle accident liability awards increasing while the premiums, for the regulated insurance industry, were not being allowed to increase.⁵
11. Bill 68 incorporated restrictions into the **Insurance Act**. Among the changes introduced:
 - (a) the right to sue was limited to those who had suffered permanent serious **physical** impairments, whose status as such could be;
 - (i) determined in a motion by the defence prior to trial, and/or;
 - (ii) raised again as a defence at trial, effectively exposing the plaintiff to an “autre fois” situation (*Bill 68*);
 - (b) those individuals with permissible suits, (i.e. a subset of those disabled) were allowed to claim for all pecuniary and non-pecuniary losses including:⁶
 - (i) income loss, up to 100% of their gross income including salary increases;⁷
 - (ii) income tax was not to be deducted as this was a matter between the victim and the state.⁸

Any claim by eligible individuals with disabilities was to be reduced by any collateral benefits which were received under the SABS, or any other insurance policy.⁹

- 12. Through referenced Regulations, Bill 68 provided all accident victims with accident benefits including:¹⁰
 - (a) An Income Replacement Benefit in the lesser amount of (*SABS90*);
 - (i) 80% of their gross annual income before trial, or

⁴ *Supra* note 3 [*Interim Report*] at page 4; *Insurance Act*, RSO 1980, c I-8 as amended by Insurance Statute Law Amendment Act, 1990, SO 1990 [*Bill 68*].

⁵ *Ibid* note 3 [*Interim Report*] at page 4.

⁶ *Ibid* note 3 [*Interim Report*] at page 4.

⁷ *Baillargeon v. Murray*, [2001] 52 OR (3d) 278; 25 CCLI (3d) 44 [*Baillargeon*] (Ont SCJ).

⁸ *Shanks v McNee*, [1994] 1 SCR 359, 113 DLR (4th) 1 [*Shanks*] (SCC).

⁹ *Supra* note 3 [*Interim Report*] at page 4; *supra* note 4 [*Bill 68*] at ss 231; *supra* note 7 [*Baillargeon*] at para 162; *Ibid* note 8 [*Shanks*] at 416.

¹⁰ *Statutory Accident Benefits Schedule — Accidents Before January 1, 1994*, R.R.O. 1990, Reg. 672 [*SABS90*] at ss 12, 19.

- (ii) \$31,200 (\$54,600 with optional coverage) annually (\$600 weekly plus optional benefits up to \$450 for a total of \$1,050 weekly).

This amount was payable for the first 3 years if the person suffered a substantial inability to perform the essential tasks of their employment and thereafter if they suffered a complete inability;

- (b) entitlement to \$500,000 in Medical Benefits payable as necessary (*SABS90*); and
- (c) entitlement to \$500,000 in Attendant Care Benefits payable as necessary (*SABS90*).¹¹

13. In 1992, the Income Replacement Benefit was above the poverty line for a family of four.¹²
14. Disputes could be resolved through arbitration, with arbitrators designated by the Director of the Financial Services Commission of Ontario ("FSCO"), or through the Superior Court.¹³
15. The purpose of introducing Bill 68 was to provide affordable insurance rates and a social net for all Ontario citizens (*Hansard231089*).¹⁴

• **Bill 164 (1994) and Its Legislative Purpose**

16. In 1994, the legislated compensation framework was reformed by **Bill 164** as follows:
 - (a) eliminating the right to sue for economic loss from those individuals who were disabled;
 - (b) restoring the right to sue for non-pecuniary damages to individuals who had suffered permanent serious mental or psychological injuries;
 - (c) introducing a \$15,000 base deductible on the non-pecuniary award that the qualifying disabled individuals could claim, indexed to inflation.¹⁵
17. Modifications were made to the regulated accident benefits that were payable,¹⁶ including:
 - (a) the Income Replacement Benefit was modified to provide the lesser of:
 - (i) 90% of the insured person's net weekly income, indexed to inflation; or
 - (ii) \$52,000 annually (\$1,000 weekly);

¹¹ *Ibid* at ss 6, 7, 12.

¹² AR, Vol. 1, Tab 10, at pp.294, Statistics Canada, *Low income cut-offs (1992 base) before tax* (Ottawa: Statistics Canada) [*Poverty Line*].

¹³ *Supra* note 4 [Bill 68] at s 242(1)(c).

¹⁴ AR, Vol. 3, Tab 21, at pp.1027 Ontario, Legislative Assembly, Official Report of Debates (Hansard), Session 3:2, dated October 23, 1989 [*Hansard231089*].

¹⁵ *Insurance Act*, RSO 1990, c I-8 as amended by *Insurance Statute Law Amendment Act*, 1993, SO 1993 [Bill 164] at s 267.

¹⁶ *Statutory Accident Benefits Schedule - Accidents After December 31, 1993 and Before November 1, 1996*, O. Reg. 776/93 [*SABS94*].

- (b) The Income Replacement Benefit was only payable:
 - (i) for the first 104 weeks to individuals who had at least a partial inability to carry on a normal life; and
 - (ii) after the first 104 weeks to individuals who had a complete inability to carry on a normal life;
 - (c) The limit on Medical and Rehabilitation benefits was increased to \$1,000,000; and
 - (d) Attendant Care Benefits were limited to \$3,000 per month unless severely disabled (\$6,000 per month) or severely disabled with an additional separate injury (\$10,000 per month).¹⁷
18. In 1994, the Income Replacement Benefit was above the poverty line for a family of seven or more.¹⁸ The **SABS94** also introduced designated assessment centres to evaluate the injuries of victims.¹⁹
19. The changes in **Bill 164**, to the statute, and the additional regulatory changes, were intended to achieve five (5) goals, including providing: affordable insurance, reasonable and fair accident compensation for all, fairer driver classification, greater insurance availability and better customer service (*Hansard051291*).²⁰

- **Bill 59 (1996) and Its Legislative Purpose**

20. In 1996, the statute was again reformed by **Bill 59**:
- (a) allowing all accident victims the right to sue for income loss:
 - (i) the recovery from Income Loss was limited to 80% of net income before trial, and
 - (ii) Income Loss before trial was not indexed to inflation. It was limited to the amount that was earned at the time of the accident;
 - (b) all accident victims remained unable to sue for health care expenses except for those who were catastrophically injured.²¹

¹⁷ *Ibid* at ss 10,46,47.

¹⁸ *Supra* note 12, *Poverty Line*.

¹⁹ *Supra* note 16, *SABS94* at ss 10,46,47

²⁰ AR Vol.3, Tab 21, at 1114, Ontario, Legislative Assembly, Official Report of Debates (Hansard), Session 35:1, dated December 5, 1991 [*Hansard051291*].

²¹ *Insurance Act*, RSO 1990, c I-8 as amended by Automobile Insurance Rate Stability Act, 1996, SO 1996 [Bill 59] at ss 267.5. Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996, O Reg 461/96 [*Court Proceedings*] at s 4.

21. A new Statutory Accident Benefit regulation was implemented²² which reduced Income Replacement Benefits to the lesser of (a) 80% of net income; or (b) \$20,800 annually (\$400 weekly), unless additional coverage was available and could be purchased.
22. In 1996 this was above the poverty line for a single individual (*Poverty Line*).²³
23. On the introduction of the Bill, and with the intended changes to Regulations, the Minister of Transportation noted that it would accomplish three things: reduce insurance fraud, help stabilize the cost of insurance; and reduce the number of uninsured drivers on the road (*Hansard*040696).²⁴
24. There is no evidence that the Ontario Legislative Assembly considered the impact on the disabled. The Hansards show that there was discussion on automobile insurance fraud, with estimates of **the rate of fraud ranging from 12%-15%**. This information on the rate of insurance fraud was given by the Canadian Coalition Against Insurance Fraud, the alter ego of the Insurance Bureau of Canada (*Hansard*130696).²⁵

- **Bill 198 (2003) and Its Legislative Purpose**

25. On October 1, 2003, additional revisions to the **Insurance Act**, in **Bill 198** were enacted specifically allowing accident victims to sue for medical expenses if the accident victim had suffered a permanent serious impairment of an important physical, mental or psychological function (*Bill 198*).²⁶
26. The annual amount of Income Replacement Payable provided for in the Regulations remained above the poverty line for a single individual (*Poverty Line*).²⁷ The Hansards allude to the fact that the legislation was introduced to fight fraud on the part of accident victims, specifically soft

²² *Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996*, O Reg 403/96 [SABS96] at s 6.

²³ *Supra* at footnote 12, *Poverty Line*.

²⁴ AR Vol. 3, Tab 21 at pp1180 Ontario, Legislative Assembly, Official Report of Debates (Hansard), Session 36:1, dated June 4, 1996 [*Hansard*040696].

²⁵ AR Vol. 3, Tab 21, at pp. 1325 Ontario, Legislative Assembly, Official Report of Debates (Hansard), Session 36:1, dated June 13, 1996 [*Hansard*130696].

²⁶ *Insurance Act*, RSO 1990, c I-8 as amended by Keeping the Promise for a Strong Economy Act (Budget Measures), 2002, SO 1996 [Bill 198] at s. 267.5.

²⁷ *Supra* at note 12 *Poverty Line*.

tissue injury victims (*Debate181102*).²⁸ The Hansards further reveal that the government modified Regulations to defeat perceived opportunities to “double dip” with respect to the income replacement benefit with other available benefits. The government was concerned that a disabled person may get paid more after the accident than earned before the accident (*Debate071102*).²⁹

- **SABS Regulation - 2006**

27. In 2006, the government, by modifying Regulations, eliminated the Designated Assessment Centres (“DAC”) and expanded the role of insurer examinations in determining if someone truly was injured (*SABS06*).³⁰
28. In 2006 the base annual amount of Income Replacement payable by regulation was **below** the poverty line for a single individual (Poverty Line).³¹
29. In 2010, the **Insurance Act** underwent further changes (**Bill 16**) which limited the tort damages that could be recovered for income loss to 70% of gross income.³²
30. The SABS Regulations underwent a further reduction in benefits. This version, unless optional coverage was purchased, provided:
 - (a) Income Replacement Benefits, that were the lesser of (a) 70% of gross income; or (b) \$20,800 annually.³³ In 2010 this amount represented **less than half** of the amount required to meet the poverty line for a family of 4 (*Poverty Line*);³⁴
 - (b) Non-catastrophically injured victims, those victims who had not suffered minor injuries, reduced standard benefits including:
 - (i) Medical and Rehabilitation Benefits reduced from \$100,000 to \$50,000,
 - (ii) Attendant Care Benefits reduced from \$72,000 to \$36,000, and

²⁸ AR Vol. 3, Tab 21, at p.1397, Ontario, Legislative Assembly, Official Report of Debates (Hansard), dated November 18, 2002 [*Debate181102*].

²⁹ AR Vol. 3, Tab 21, at p. 1447, Ontario, Legislative Assembly, Official Report of Debates (Hansard), dated November 7, 2002 [*Debate071102*].

³⁰ *Statutory Accident Benefit Schedule*, O. Reg. 403/96 (2006) [*SABS06*]

³¹ AR, Vol. 1, Tab 10, at pp. 296, *Poverty Line*.

³² *Insurance Act*, RSO 1990, c I-8 as amended by *Creating the Foundation for Jobs and Growth Act*, 2010, SO 2010 [*Bill 16*].

³³ *Statutory Accident Benefit Schedule*, O. Reg. 403/96 (2010) (*SABS10*) at s 7.

³⁴ AR, Vol. 1, Tab 10, at pp. 296, *Poverty Line*.

(iii) housekeeping and home maintenance only as optional “add-ons”.³⁵

There was no discussion in the Legislature regarding the changes.

• **Bill 15 (2014) – “Fighting Fraud and Reducing Automobile Rates”**

31. In 2014, the most recent amendments to the *Insurance Act* were made under **Bill 15** which was titled “Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014” (*Bill 15*).³⁶
32. The legislation reduced the non-pecuniary interest rate from 5% annually to 1.3% (Bank of Canada Interest Rate) (*Bill 15*).³⁷
33. This legislation changed how disputes were to be settled, requiring all disputes to be settled by the License Appeal Tribunal (“LAT”) (*Bill 15*).³⁸
34. An accident victim could no longer bring an action in the Superior Courts if there was a dispute with the insurer (*Bill 15*), with respect to insurance entitlement.³⁹ The base amount of Income Replacement Benefit Payable under the regulations is more than 10% **below** the poverty line for a single individual as of 2013 (*Poverty Line*).⁴⁰
35. MPP Laura Albanese, who introduced Bill 15, claimed that, according to the Anti-Fraud Task Force, auto insurance fraud cost between \$770 million and \$1.6 billion (*Hansard211014*).⁴¹ This claim by Ms. Albanese **is not true**.
36. The Anti-Fraud Task Force was **unable** to quantify the prevalence of fraud and relied on estimates provided in a KPMG report. KPMG was commissioned by the Insurance Bureau of Canada - the insurance industry trade association (*Interim Report*). The Task Force noted that closed claim studies relied on the subjective judgment of individual insurance adjusters. It was

³⁵ *Statutory Accident Benefit Schedule*, O. Reg. 403/96 (2010) (SABS10) at ss 18, 23.

³⁶ *Insurance Act*, RSO 1990, c I-8 as amended by *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, SO 2010 at ss 267.5(1) and 280 [*Bill 15*].

³⁷ *Ibid* at s 258.3.

³⁸ *Ibid* at s 280.

³⁹ *Ibid* at s 280.

⁴⁰ AR, Vol. 1, Tab 10, at pp. 297, *Poverty Line*.

⁴¹ AR Vol. 3, Tab 21, at pp. 1467, Ontario, Legislative Assembly, Official Report of Debates (Hansard), Session 41:1, dated October 21, 2014 [*Hansard211014*].

inferred that closed claim studies should be avoided due to bias (*Interim Report*). The Task Force indicated that there were new statistical methods for quantifying fraud. It was also inferred that the KPMG study used new statistical techniques that avoided the inherent bias of closed studies (*Interim Report*). The Insurance Bureau of Canada was involved in this analysis.⁴²

37. KPMG used closed claim studies from Ontario and New York State as the basis of their report (*EYFinal*).⁴³
38. For the Ontario data, the KPMG study relied on a **2001** report by the Canadian Coalition Against Insurance Fraud (“CCAIF”) (*EYFinal*). The CCAIF appears to be an alter ego for the Insurance Bureau of Canada. Online contact information for the CCAIF provides the same contact person and the same contact phone number as for the Insurance Bureau of Canada.⁴⁴
39. The percent of fraudulent claims, most of which were attributed to individuals that “pad” their claim, was estimated to be between 9% and 18% of claims, in Ontario, in 2014, based, in part, on this report (*Final Report*).⁴⁵
40. The insurance industry has repurposed a report, produced by the insurance industry, using their historically biased opinion, to again accuse accident victims of committing widespread insurance fraud. The government in power has taken up the Insurance Industry’s position, to the detriment of **all** those injured in automobile accidents.⁴⁶

- **More Recent Changes**

41. While accident benefits have been cut, the deductible from non-pecuniary damages was increased by 21% and indexed to inflation. Additionally, legal costs are only considered after damages are reduced by the deductible thus increasing uncertainty for accident victims.⁴⁷

⁴² AR Vol. 1, Tab 10, at pp. 393, Ontario, Ontario Auto Insurance Anti-Fraud Task Force, *Interim Report*, (Ontario: FSCO, December 2011) [*Interim Report*] at page 52.

⁴³ AR Vol.1, Tab 10, at pp.322-323 Ontario, Ontario Auto Insurance Anti-Fraud Task Force, *Review of Research Related to the Nature and Scope of Automobile Insurance Fraud in Ontario*, (Ontario: FSCO, October 5, 2012) [*EYFinal*] At s 3.4.

⁴⁴ AR Vol.1, Tab 10, at pp. 291-292.

⁴⁵ AR Vol.1, Tab 10, at 421 Ontario, Ontario Auto Insurance Anti-Fraud Task Force, *Final Report*, (Ontario: FSCO December 2011), [*Final Report*] at page 5.

⁴⁶ AR Vol.1, Tab 10(A), at pp. 546- 547, Transcript of the Examination of Keith Finley at Q9-Q15.

⁴⁷ *Insurance Act*, RSO 1990, c I.8 as amended by, *Building Ontario Up Act* (Budget Measures), 2015.

42. Without any Legislative debate, the Regulations were changed. The changes included:

- (a) halving the amount of Medical, Rehabilitation and Attendant Care benefits available to Catastrophically Impaired Individuals;
- (b) limiting the availability of Non-Earner Benefits to the first two years after an accident; and
- (c) halving the duration of benefit availability for a person who has suffered a non-minor/non-catastrophic injury.⁴⁸

• Summary of Legislative Evolution

43. Over the last 25 years there has been an alarming reduction in the right to recover for automobile accident injuries and **the amount accident benefits that are payable**. Disabled tort victims have had their right to recover for economic loss restricted by legislation and reduced from 100% of their lost gross income (Inflation indexed) to 70% of their gross income (Not inflation indexed) prior to trial or settlement.⁴⁹ A legislated deductible has been introduced on the amount that disabled individuals can recover for non-pecuniary losses.⁵⁰ The statutory changes have made it so that accident victims cannot sue to be made whole regardless of the severity of their injuries.⁵¹

44. Regulatory changes have significantly diminished the base contract benefits for accident victims, specifically:

- (a) Income replacement benefits have been reduced from 80% of gross weekly income to 70% of gross weekly income;⁵²
- (b) The maximum annual Income Replacement benefits have been reduced from \$31,200 to \$20,800. This has had the impact, when inflation is considered, of decreasing the payable benefit from an amount sufficient to keep a family of four above the poverty line to a benefit which places a single individual **below** the poverty line.⁵³
- (c) There has been an erosion of all substantive accident benefits as time has progressed without consideration for inflation.⁵⁴

⁴⁸ *Statutory Accident Benefit Schedule*, O. Reg. 34/10 (2010) [SABS10] as of June 1, 2016, ss 18, 12, 20.

⁴⁹ See paragraphs 11 and 29 of the within factum.

⁵⁰ *Insurance Act*, RSO 1990, c I.8 as amended by, Building Ontario Up Act (Budget Measures), 2015, at s.267.5(7)

⁵¹ An accident victim will never be able to entitled to more than 70% pre-trial in lost income.

⁵² See paragraphs 12 and 30 of the within factum.

⁵³ See paragraphs 12 and 30 of the within factum.

⁵⁴ See paragraphs 17 and 30 of the within factum.

- (d) Insured individuals, regardless of disability, or monetary amount at stake, will no longer have the right to sue in the Superior Court, with respect to insurance benefits.⁵⁵
45. The ongoing purposes of the legislative changes have been to reduce the cost of insurance, and to reduce the (erroneously) perceived fraud that is claimed by the Insurance Industry. It is of particular significance that all restrictions on the rights of disabled accident victims have been imbedded in the statute requiring approval of the Legislative Assembly to revoke. Conversely, the right, which more appropriately should be termed an indulgence on the part of the government, to claim insurance compensation is imbedded in Regulation, requiring only the approval of the Governor-in-Counsel to reduce or revoke. The approach taken by the government with respect to the exchange of rights is asymmetric, with respect to two private parties in a tort/contract relationship, allowing for political expediency to adversely affect disabled individuals, and arbitrarily impact on their constitutional rights under ss. 15 and 7 of the **Charter**, as well as s. 96 of the **Constitution Act, 1867**.

B/ENTITLEMENT & PAYMENT OF ACCIDENT BENEFITS

46. Statutory Accident Benefit disputes generally arise in one of two contexts. Disputes may arise with respect to: i) the entitlement **to** benefits, and ii) the payment **for** benefits.
47. In Ontario for motorists to qualify for payment of the most significant benefits- Income Replacement Benefits, Medical Benefits, Rehabilitation Benefits and Attendant Care Benefits insured individuals must show that (*SABS10*):
- (a) They are substantially unable to perform the duties of their employment (Income Replacement);
 - (b) They are completely unable to engage in any employment after 104 weeks of disability (Income Replacement after 104 weeks);
 - (c) The benefits sought are a reasonable and necessary expense that have arisen as a result of the accident in which they suffered an impairment (Medical, Rehabilitation);
 - (d) The Rehabilitation Benefits are for the purpose of reducing or eliminating the effects of any disability resulting from the impairment caused by the accident;

⁵⁵ *Insurance Act*, RSO 1990, c 1.8 as amended by, *Building Ontario Up Act* (Budget Measures), 2015, at s. 280.

- (e) The Rehabilitation Benefits are for the purpose of facilitating the victim's reintegration in her family, the rest of society and the labour market; or
 - (f) The attendant care expenses are reasonable and necessary, based on an application prepared by an occupational therapist or a nurse.⁵⁶
48. Entitlement to benefits, except income replacement, is governed by the severity of the injuries that have been suffered. There are three broad categories: catastrophic impairment, minor injuries, and others (*SABS10*).
49. Catastrophic injuries include: paraplegia or tetraplegia, amputation of an arm or a leg, loss of vision in both eyes, brain impairment, whole body impairment ratings of 55% or more, and permanent marked, or extreme, impairment due to mental or behavioural disorders in three or more areas of function(*SABS10*). Individuals' who have suffered catastrophic injuries are entitled to: \$1,000,000 in combined Attendant Care Benefits, and Medical and Rehabilitation Benefits.⁵⁷
50. Minor injuries means one or more of: a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration, or subluxation and includes any clinically associated sequelae to such an injury. Individuals who suffer from primarily minor injuries are entitled to \$3,500 in Medical and Rehabilitation Benefits and no Attendant Care Benefits.⁵⁸
51. Other injuries include those injuries that are neither catastrophic nor minor in nature. The individuals with these injuries are entitled to only \$65,000 Attendant Care Benefits and Medical and Rehabilitation Benefits. Therefore, if a person has suffered a 55% whole person impairment ("WPI"), he or she is entitled to enhanced catastrophic impairment benefits, while a 54% WPI would only entitle him or her to the above amounts.⁵⁹

⁵⁶ *SABS10*, *supra* footnote 33 at ss 5, 14, 15(1), 16(1), 42(a).

⁵⁷ *SABS10*, *supra* footnote 33 at s. 3.1.

⁵⁸ *SABS10*, *supra* footnote 33 at s. 3.

⁵⁹ *SABS10*, *supra* footnote 33 at ss 3, 18, 19.

- **Stakeholder Influence**

52. “If there are stakeholders that come into the Ministry and say that there’s an issue here that needs to be looked at and considered then it is looked at and considered. It’s analyzed by staff and it’s presented to the deputy and the minister and if there’s a sense that it is a significant and valid issue then the matter goes to potential policy consideration by the minister and the government.”⁶⁰ It is clear that, notwithstanding the purported and disputed incident of “fraud” by 8-18% of accident victims, parliamentary debates clearly show that the interests and rights of the **undisputed bona fide** 82% of disabled accident victims, are not tabulated nor balanced in the legislative changes evolution. Only those of the insurance industry are.

- **Insurance Industry Market Stakeholders**

53. In Canada, private property and casualty insurance companies control assets of approximately \$158 billion which are invested. These companies received \$49 billion in premiums, and, in 2014, paid out \$30 billion in claims, or approximately 60% of the premiums received. From this information, it seems that private property and casualty companies control assets equal to approximately 3 years of premiums and 5 years of claims.⁶¹
54. Automobile insurance in Ontario is a contractual matter between private parties, namely insurance companies and their insured.⁶² The one small unusual item is the Motor Vehicle Accident Claims Fund (MVACF) which deals with drivers who are **not** insured or who are **not** identified. In 2014, the total Revenue of the MVACF was approximately \$30 million, primarily from driver’s license fees, which represents approximately 0.1% of the premiums of the property and casualty industry during the same period.⁶³
55. The MVACF is administered by the Superintendent of Financial Services and it is funded by payments made at the time of the issuance of a driver’s license or the renewal of a license. The MVACF is segregated from the province’s Consolidated Revenue Fund.⁶⁴

⁶⁰ AR Vol. 7, Tab 32(B), at pp. 3370 Transcript of the Examination of Alvaro Del Castillo, page 3, lines 9-16.

⁶¹ AR Vol. 1, Tab 4(B), at pp. 45 Affidavit of Randall Bundus at paras 6,7.

⁶² AR Vol. 7, Tab 32(A), at pp.3362, Transcript of the Examination of Del Castillo page 50 line 3-13.

⁶³ AR Vol. 7, Tab 32, at pp.3257, Affidavit of Del Castillo at para 51; AR Vol.4, Tab 21, at pp.1739, Exhibit N to the Affidavit of Cesar Carranza dated May 10, 2016 at page 47.

⁶⁴ *Motor Vehicle Accident Claims Act*, RSO 1990, c M.41, s. 1.

- **Insurance Bureau of Canada as Stakeholder Lobbyist**

56. Historically, the Insurance Bureau of Canada has had an annual operating budget of approximately \$64 million which it receives from its members (Insurance Companies) and historically the IBC has spent approximately \$32 million, annually, lobbying the government. One of the IBC's primary objectives is promoting and advancing the interests of its members. The Insurance Bureau of Canada's members consist of private property and insurance companies. One of the central objectives of private corporations is the maximizing of shareholder value.⁶⁵ To the credit of the insurance industry, their lobby has succeeded through seven (7) legislative regime changes. This however does nothing to address the rights and interests of the disabled accident victims, including pedestrians who are not in vehicles at the time of the accident.

C/GOALS OF THE INSURANCE INDUSTRY IN THE CONTEXT OF REGULATORY ENVIRONMENT

57. Insurers are regulated with respect to premium rate increases. FSCO allows insurers to increase rates to achieve a "reasonable" rate of return on equity. In 1988, rates were set targeting a 12.5% after-tax return on equity- a period when the bench-mark long-term bond rate stood at 10%. It was next revised in 1996 to 12%. In the 2011 report of the Office of the Auditor General of Ontario it was noted that, despite the long-term bond rate being about 3% for the last couple of years and projected to remain low, there was no decrease of the return on equity for insurers. In 2013, FSCO chose to review the rate of return and decreased the rate of return on equity to 11% (15% before tax) using a 5 to 10 year risk free rate of return. Since 2013 the risk free rate of return has decreased but the allowable return on equity has not decreased. It is asserted that insurers who are entitled to 15% rate of return on equity must be experiencing a gargantuan windfall that has been steadily increasing since 2000 and insurers will likely have an ongoing incentive to invest as much equity as possible in order to capitalize on this incredible rate of return.⁶⁶

58. Insurers, if they are able, can increase total liabilities at any given time by holding on to liabilities for an extended period of time. If an insurance company holds liabilities of \$100 for 1 year then they are entitled to invest \$22 in capital and they are allowed to 15% pre-tax return on equity. If

⁶⁵ AR Vol. 5, Tab 23(A), at pp.2246, Transcript of the Examination of Cesar Carranza, page 21, lines 14-20; AR Vol.1, Tab 4(B), at pp.45, Affidavit of Randall Bundus at para 9.

⁶⁶ AR Vol. 5, Tab 25, at pp.2322, Affidavit of Craig Allen sworn July 11, 2016 at page 24; AR Vol. 3, Tab 21, at p.1526, Exhibit H to the Affidavit of Cesar Carranza sworn May 10, 2016.

an insurance company holds on to \$100 in annual liabilities for 5 years then, on a rolling basis, they will have \$500 of liabilities in a given year and will be able to invest \$110 (\$500 x 22%) in capital annually for which they are allowed to receive a 15% pre-tax return on equity.

59. If the allowable return on equity is excessive, as has been suggested by the Auditor General of Ontario and Craig Allen, then insurers have a general motive to delay settlement- to have an opportunity to invest capital in a regulated market that offers an excess rate of return compared to what should be expected. It is asserted that since the return on equity is limited by FSCO, in order for an insurer to increase profits the insurer increase the amount of liabilities on the insurer's balance sheet. An insurance company is required to hold equity equal to 22% of insurance liabilities. Increasing liabilities allows insurers to invest more equity at a high rate of return increasing shareholder value.⁶⁷

D/REGULATORS – FINANCIAL SERVICES TRIBUNAL AND FINANCIAL SERVICES COMMISSION OF ONTARIO

60. The Chair of the Financial Services Tribunal (FST) is also the Chair of the Financial Service Commission of Ontario (FSCO) and is hereafter referred to as the Chair. The Chair is appointed by the Lieutenant Governor and as such is mandated to abide by the Public Service of Ontario Act, 2006. The Chair has been delegated the responsibility of appointing the Superintendent of the FSCO (Superintendent). The Chair is responsible for designating which arbitrator will hear a matter before the FST unless there is a direct conflict. Insurance companies submit proposals to increase their rates to the Superintendent. If the Superintendent disputes the rate increase the dispute will be heard by a designated FST arbitrator. Unfair and Deceptive Acts and Practices are investigated by FSCO and the Superintendent will issue a report subsequent to which the insurer can request a hearing in front of the FST. From 2007 through 2014 John Solursh was the Chair. While Chair, Mr. Solursh, at the same time, is senior counsel at Blakes, Cassels & Graydon LLP (Blakes) and has historically been the managing partner of Blakes. Blakes has a self-recognized specialty in defending specialized insurance claims in front of administrative tribunals. Blakes represents insurance companies before regulatory bodies. Blakes is the firm on record representing the Insurance Bureau of Canada in this application. It is noted that there are inherent conflicts of interest with respect to the position of the Chair. The appointment of Mr.

⁶⁷ *Ibid*, AR Vol. 5, Tab 25, at pp.2322, Affidavit of Craig Allen sworn July 11, 2016 at page 24 of report; AR Vol. 3, Tab 21, at pp.1526, Affidavit of Cesar Carranza sworn May 10, 2016.

Solursh as Chair appears to be a situation similar to the situation addressed by the Conflict of Interest Commissioner where he found that occupying an appointed position could result in an increase in consulting work additionally the affiliation of individual with the organization could create the appearance of preferential treatment for the organization. It appears that statutory requirements regarding conflicts of interest are not rigidly adhered to with respect to public appointments. This represents a demonstrated lack of independence with respect to appointment of adjudicative personnel contrary to the expectation of judicial independence constitutionally present in the Superior Court.⁶⁸

E/PERCEPTION OF ACCIDENT VICTIMS

61. Accident victims have been wrongly vilified by the insurance industry, and to an extent by legislation, in general, and have been broadly portrayed as fraudsters ripping off the system,⁶⁹ this despite the evidence to the contrary.
62. Mr. Del Castillo, former Director of the Financial Institutions Policy Branch of the Financial Services Policy Division, affiant for the Crown, opined that since there are incentives for delays in other areas of litigation that auto insurance would not be immune to it. Mr. Del Castillo claims that Ontario in imposing the reduction in liability is attempting to take away the incentives for delay **from both sides**. This seems at odds with the opinion of Dr. Mintz who indicates that the reduction in liability could be replicated through taxation on the accident victims and providing a tax credit to the insurance company. Thus, the insurance companies do receive an incentive while the accident victims are penalized.⁷⁰
63. Mr. Del Castillo is of the opinion that the incentive for an accident victim to delay settlement is affected or influenced by legal counsel who may perceive that there may be a significant windfall with respect to historically high and spent pre-judgment interest rate.⁷¹ Mr. Del Castillo believes

⁶⁸ *Financial Services Commission of Ontario Act*, 1997, S.O. 1997, c. 28 at ss 4., 7(1); *Public Service of Ontario Act*, 2006, SO 2006, c 35, Sch A at s 2(2); Delegation by Public Service Commission under Subsection 44 (4) of the Act, O Reg 376/07; AR Vol. 4, Tab 21, at pp.2092-2097, 2118-2119, Exhibits T, U, V, X, and Z to the Affidavit of Cesar Carranza sworn May 10, 2016; Office of the Conflict of Interest Commissioner, Case Summary, Consultant (09/10); *Committee for Justice and Liberty et al v. National Energy Board et al.*, [1978] 1 S.C.R. 369.

⁶⁹ AR Vol.1, Tab 6, at pp. 115 Des Roches affidavit dated March 11, 2015 at para 16.

⁷⁰ AR Vol.7, Tab 32(A), at pp.3362-3363 Cross of Del Castillo page 54 Answer 146. AR Vol.2, Tab 19(A), at pp.955 Cross of Mintz page 98 question 291.

⁷¹ AR Vol.7, Tab 32(A), at pp. 3362 Cross Del Castillo page 52 answer 140.

that most lawyers are hired on a contingency basis. Common sense would argue that a lawyer, from a purely financial perspective, would prefer to settle sooner and recover disbursements then later where there is an ongoing uncertainty.⁷²

64. In a poll conducted by the IBC it was found that **83% of respondents** (1,000 Ontarians) believed that insurance fraud occurred frequently or occasionally.⁷³
65. The IBC noted that since 2011 there has been a noticeable increase in stakeholder focus on combating insurance fraud. The IBC and its member companies contributed to the Task Force by providing data and policy submissions.⁷⁴
66. The disadvantage and stereotyping that applies to disabled automobile accident victims has been exacerbated by the IBC releasing biased sterilized results through its alter ego the CCAIF. These reports were subsequently utilized as the foundation for government sponsored analysis which resulted in a stilted and overstated understanding of fraud in the system which has the impact on accident victims of compounding the problem, because they are made to feel like society at large is condemning them. As a result of the lobbying efforts and biased studies society at large assumes that disabled accident victims are in it for secondary gain.⁷⁵
67. Mr. Del Castillo speculated that historically high pre-judgement rates would act as a windfall encouraging accident victims to delay settlement. According to Ms. MacLean between 2000 and 2016 pre-judgement interest has varied between 6% and 0.8%.⁷⁶
68. Ms. MacLean claims accident victims only receive 80% of the pre-judgment interest rate, effectively providing a historical rate that has varied between .6% and 4.8%. Ms. Maclean notes that Pre-judgement interest has followed historical bond yields.⁷⁷ Ms. MacLean has charted, but failed to acknowledge, the decreasing trend in pre-judgement interest which, as noted by Mr.

⁷² AR Vol. 7, Tab 32(A), at pp. 3353, Transcript of the Examination of Alvaro Del Castillo at page 17 Q41.

⁷³ AR Vol. 1, Tab 10, at pp.300, Affidavit of Keith Finley dated June 22, 2015, Exhibit B at page 2 of report.

⁷⁴ AR Vol. 1, Tab 10, at pp.299, Affidavit of Keith Finley dated June 22, 2015, Exhibit B at page 1 of report.

⁷⁵ AR Vol. 1, Tab 10(A), at pp. 546-547, Transcript of the Examination of Keith Finley at Q9.

⁷⁶ AR Vol. 7, Tab 32(A), at p. 3362, Transcript of the Examination of Alvaro Del Castillo at page 52 Q140; AR Vol. 2, Tab 15, at p.752, Exhibit 1 to the Affidavit of Satnam McLean dated June 20, 2016 at page 6.

⁷⁷ AR Vol. 2, Tab 15, at p.753, Exhibit 1 to the Affidavit of Satnam McLean dated June 20, 2016 at page 7.

Craig, decreases from 100% of the expected amount if the claims settles in the first year to 47% if the claim settles after 5 years and to 33% if the claim settles after 9 years.⁷⁸

69. It is lastly to be noted on the issue of fraud, that no matter where the reality lies, even taking the insurance industry's statistics and assertions without rational question, the fact is that, on the basis of alleged fraud, on the part of a **small minority** of disabled accident victims, legislation has been over broadly crafted to paint 100% of accident victims as fraudsters and penalized that 100%.

F/REALITY OF ACCIDENT VICTIMS

70. Disabled accident victims are subject to inhumane insurance examinations which show disregard for the health of the accident victim. Insurers ignore or bury medical findings that conflict with their agenda to deny claims.⁷⁹
71. Disabled accident victims such as Jokelee Vanderkopp quickly run through their savings and end up in dire financial situations. Such individuals being unable to maintain any standard of life become isolated. Such accident victims who do not have beneficial uncles are at risk of losing their homes, cars and mobility. Disabled accident victims become dependent on charity from others to survive.⁸⁰
72. The greater the disability the greater the asymmetry in bargaining positions. This asymmetry in bargaining positions causes Plaintiffs to accept actuarially unfair settlements.⁸¹ Accident victims such as Jokelee Vanderkopp suffer from cognitive deficiencies which are frequently not discovered for years.⁸² Accident victims may have direct knowledge of the extent of their injuries but they may not understand the significance of their injuries.⁸³

⁷⁸ AR Vol. 2, Tab 16(A), at p.818, Transcript of the Examination of Satnam McLean at Q159; AR Vol. 5, Tab 25, at p. 2311, Affidavit of Craig Allen dated July 11, 2016 at page 13.

⁷⁹ AR Vol. 2, Tab 11, at p. 553-555, Affidavit of Jokelee Vanderkopp at para 15-17; 19.

⁸⁰ AR Vol. 2, Tab 11, at p. 560-561 Affidavit of Jokelee Vanderkopp para 32-34.

⁸¹ AR Vol. 1, Tab 7, at p. 215 Affidavit of Eli Katz sworn June 16, 2015.

⁸² AR Vol. 2, Tab 11, at p. 562 at para 37, 565 of Affidavit of Jokelee Vanderkopp.

⁸³ AR Vol. 5, Tab 24, at p. 2272, Affidavit of Craig Allen sworn May 9, 2015 at page 18.

73. Insurance companies will have the benefit of experience in dealing with thousands of claimants that can be used in many cases to arrive at a more favourable outcome for the insurer.⁸⁴ Without a capable lawyer accident victims may settle for pennies on the dollar with respect to claims.⁸⁵
74. Empirical evidence indicates that adjusters will settle with accident victims for less than the adjuster initially believes the claim is worth (86% of initial reserves). In other words, insurers will attempt to take advantage of the disparity in sophistication that exists between an unrepresented disabled accident victim and the insurance company. If a disabled accident victim has a lawyer who presumably will help the accident victim translate their injuries into their true worth then the story reverses and the claim is worth more than the initial reserve (146%). Despite this improvement in knowledge parity, accident victims still forego 41% of their lost income due to settlement pressures.⁸⁶
75. Based on the Ontario Closed Claim Study Data, the less able a person is to return to work, based on the percent of time not worked post accident, the less of their lost income they will recover as a percentage of total lost income.⁸⁷ The longer a person is disabled the less they are willing to settle for. A person not able to work for more than 2 years is willing to settle for approximately 33% of their lost income from all sources.⁸⁸
76. Insurance companies will deny benefits without proper justification. Ms. Vanderkopp was “cut-off” from Income Replacement benefits in January 2015 because her insurance company found out that she had written a book, over several years, which sold 300 copies.⁸⁹

⁸⁴ AR Vol. 5, Tab 24, at p. 2272, Affidavit of Craig Allen sworn May 9, 2015 at page 18.

⁸⁵ AR Vol. 2, Tab 11, at p. 566, Affidavit of Jokelee Venderkopp at para 45.

⁸⁶ AR Vol. 5, Tab 24, at p.2282, Affidavit of Craig Allen sworn May 9, 2015.

⁸⁷ AR Vol. 5, Tab 24, at p.2277-2278, Affidavit of Craig Allen sworn May 9, 2015 at pages 23-24.

⁸⁸ AR Vol. 5, Tab 24, at p. 2279-2280, Affidavit of Craig Allen sworn May 9, 2015 at pages 25-26.

⁸⁹ AR Vol. 2, Tab 11, at p. 573-574, Affidavit of Jokelee Vanderkopp at para 60.

G/SECTION 267.5(1) SPECIFIC FACTS

- **Tax**

77. "Governments often use rough justice in a lot of stuff...if you were trying to do things very precisely you would look at each individual case in terms of the individual".⁹⁰
78. Section 267.5(1) provides for an arbitrary 70% of gross income on the purported basis that the Federal government does **not** impose tax on this payment. This arbitrary provision wrongfully assumes that:
- (a) the Federal government does not have its independent policy rationale for not imposing tax on benefits to the disabled under its independent, concurrent income tax jurisdiction;
 - (b) all injured accident victims are in a position that they would otherwise pay 30% of their gross income in tax which ignores the obvious that:
 - (i) taxation levels depend on taxable (net) income levels;
 - (ii) there are deductions from taxable (net) income which vary with **every** individual; and
 - (iii) many would pay little, or **no** tax, on their gross income, depending on their taxable (net) income.
79. Other groups, such as individuals covered under the **Indian Act**, who live and work on reserves, or UN employees, or foreign diplomats, etc. are not subject to any income tax.⁹¹
80. The Ontario government could create a system to have the same effect as section 267.5(1) through the use of a taxation on the accident victims and a tax credit to the insurance companies.⁹² Utilizing the arbitrary legislation is economically more efficient than setting up a separate taxation and rebate system and an administration system.⁹³
81. In computing a taxpayer's income for a taxation year from employment, there may be deducted amounts paid by the taxpayer in the year as or on account of legal expenses incurred by the taxpayer to collect, or to establish a right to, an amount owed to the taxpayer that, if received by the taxpayer, would be required by this subdivision to be included in computing the taxpayer's

⁹⁰ AR Vol. 2, Tab 19(A), at p. 943-944, Transcript of the Examination of Jack Mintz at Q168.

⁹¹ *Indian Act*, R.S.C., 1985, c. I-5 at s. 83.

⁹² AR Vol. 2, Tab 19(A), at p. 955, Transcript of the Examination of Jack Mintz at Q291.

⁹³ AR Vol. 2, Tab 19(A), at p. 955, Transcript of the Examination of Jack Mintz at Q293.

income.⁹⁴ There may also be non-refundable tax credits which would further reduce tax liability. Dr. Mintz (affiant for the IBC) did not examine the **Income Tax Act** to consider whether legal costs were deductible from income.⁹⁵

82. In order for a represented accident victim with disabilities to be put in the same state economically the compensation payment amount would need to be increased by 17% to compensate for unrecovered legal fees.⁹⁶

- **Tax Effect on Low Earning Individual**

83. A person earning less than \$29,714 (52 weeks x \$400 per week ÷ 70%) who was eligible, would receive 70% of their lost income from the SABS Income Replacement Benefit. Until trial they would not be entitled to recover any amount for lost income in tort. It is submitted that this limit in ability to recover prior to trial results in a skewing of data, towards higher income earners making tort claims. Thus the data showing that the median salary of disabled accident victims making tort claims is \$55,000 per year, is skewed by the fact that lower income disabled accident victims cannot make their tort claims due to uncertainty of damages and cost consequences.

84. A person working 30 hours a week at minimum wage would earn approximately \$15,000 annually. Such an individual would be overburdened by 267.5(1) as they would typically not pay **any** tax.⁹⁷

- **Other Considerations**

85. Dr. Mintz (an IBC affiant) completed an analysis which considered work day losses prior to trial. Dr. Mintz did not consider the effect on the individual.⁹⁸ Dr. Mintz is of the opinion that each of the categories referred to by John Stapleton should fall under a separate heading and be fully compensated.⁹⁹

⁹⁴ *Income Tax Act*, R.S.C. 1985, c. 1, s.8(1)(b).

⁹⁵ AR Vol. 2, Tab 19(A), at p. 944, Transcript of the Examination of Jack Mintz at Q181.

⁹⁶ AR Vol. 5, Tab 26, at p. 2417, Affidavit of John Stapleton dated May 9, 2016 at para 25.

⁹⁷ AR Vol. 2, Tab 19(A), at p. 932, Transcript of the Examination of Jack Mintz at Q16-23.

⁹⁸ AR Vol. 2, Tab 19(A), at p. 943, Transcript of the Examination of Jack Mintz at Q163-164.

⁹⁹ AR Vol. 2, Tab 19(A), at p. 942-943, Transcript of the Examination of Jack Mintz at Q162-165.

86. Dr. Mintz did not consider any compensation for legal fees, disparity in bargaining position, additional costs associated with loss of income, constraints on recovery of lost income as was discussed by Mr. Stapleton.¹⁰⁰ Dr. Mintz does not explain why contingencies such as reductions in work-related costs cannot be considered in a separate category.¹⁰¹

87. Dr. Mintz's evidence further stated that: "taking a holistic view of what you mean by gross income, gross income under the tax system is not a correct calculation of actual comprehensive income of an individual. You would include income from RRSP and pension plan and attribute it to the individual and their income."¹⁰²

88. A 20-year-old investing 18% of their income in RRSPs, utilizing historical stock return rates, would receive 320% of their income at age 72 after accounting for inflation.¹⁰³

- **Encouraging Insurers to Delay Payment**

89. Insurers deny liability despite there being absolutely no basis for denying liability. Insurers deny liability claiming that discovery is required and then delay discovery so as to avoid liability and to compromise the position of accident victims.¹⁰⁴

90. Despite having records supportive of having a permanent, serious impairment of important physical function (a fibula too fractured for it to be reasonable to reestablish fibular length) insurers seek to delay discoveries for more than a year (July 17, 2014, to November 2015).¹⁰⁵

91. The government believes that there are measures in the **Insurance Act** which counterbalance s. 267.5(1) by encouraging insurance companies not to delay tort settlement,¹⁰⁶ which is untrue. The same Crown witness testified that one of the intentions of recent amendments was to try to reduce insurance company delays with respect to accident benefits.

¹⁰⁰ AR Vol. 5, Tab 26, at p. 2426, Affidavit of John Stapleton dated May 9, 2016 at para 46.

¹⁰¹ AR Vol. 5, Tab 27, at p.2650, Affidavit of John Stapleton dated July 4, 2016 at page 7 of the report.

¹⁰² AR Vol.2, Tab 19(A), at p.942, Transcript of the Examination of Jack Mintz at Q152.

¹⁰³ AR Vol. 5, Tab 26, at p. 2421, Affidavit of John Stapleton dated May 9, 2016 at para 34.

¹⁰⁴ AR Vol. 2, Tab 12, at p. 590-591, Affidavit of Randy Gerritsen dated July 13, 2015 at paras 18-23.

¹⁰⁵ AR Vol. 2, Tab 12(C), at p. 659, Response to Undertaking for Randy Gerritsen; AR Vol. 2, Tab 12, at pp. 590, Affidavit of Randy Gerritsen dated July 13, 2015 at para 20.

¹⁰⁶ AR Vol. 7, Tab 32, at p. 3261, Affidavit of Alvaro Del Castillo at para 64.

92. FSCO, despite being provided with a complaint alleging that Intact Insurance Company systematically overwhelms its in-house counsel with file work-load in order to resist the timely settlement of claims, took the position that since there is nothing in the Insurance Act which specifies the time for discovery there was no contravention of the act.¹⁰⁷

H/SECTION 280 SPECIFIC FACTS – THE LICENCE APPEAL TRIBUNAL (LAT)

• Access to Justice

93. The Licence Appeal Tribunal (“LAT”) does not award costs unless a party has acted unreasonably, frivolously, vexatiously and/or in bad faith after an application has been submitted to the Tribunal.¹⁰⁸

94. Basic Attendant Care for the most seriously disabled is paid at minimum wage. There is no consideration of the additional payments necessary such as employer CPP or UI contributions. It is asserted that the Statutory Accident Benefit Scheme, as it has been developed, starts from a position where there is a deficit in payments.¹⁰⁹ It is asserted that the Ministry of Finance has taken so little notice of the needs of accident victims that they are not even aware that such a deficit exists.

95. There has been an increase in legal representation for a number of reasons. SABS has become more complicated according to the Ministry of Finance.¹¹⁰

96. The government has created a tribunal system which denies costs routinely. This accrues to the benefit of one party: the insurance company.

• Independence of Judiciary

97. The LAT rules of practice were drafted in collaboration with lawyers who are staff of the Attorney General’s office.¹¹¹ It was the understanding of the advisory committee that there was a full and complete consultation process attached to Justice Cunningham’s review and it is the government’s goal to work to implement those recommendations.¹¹²

¹⁰⁷ AR Vol.5, Tab 22, at p.2191 at paras 6-7, 2194-2213, Affidavit of Cesar Carranza dated August 30, 2016.

¹⁰⁸ 16-000041 v *Intact Insurance Company*, 2016 CanLII 78333 (ON LAT) at paras 1-4.

¹⁰⁹ AR Vol. 7, Tab32(A) at p. 3352, 32(C) at pp. 3375-3382, Transcript of Examination of Alvaro Del Castillo at Q23.

¹¹⁰ AR Vol. 7, Tab 32A, at p. 3360-3361, Transcript of Examination of Alvaro Del Castillo at Q122.

¹¹¹ AR Vol. 6, Tab 31A, at p.3203, Transcript of the Examination of Chris Popovich at Q328 and Q334.

¹¹² Undertaking of Chris Popovich, Summary of Minutes from LAT Advisory Committee Meetings.

98. Justice Cunningham's review was conducted at the behest of the Minister of Finance. Justice Cunningham recommended that there should be no application fee. Justice Cunningham cited RRO 1990 reg 664 with respect to costs and expenses with approval. RRO 1990 Reg 64, section 12, allowed costs to be awarded **based on success in proceedings**. The only change that Justice Cunningham recommended was that failing to accept a reasonable settlement offer would result in costs sanctions.¹¹³
99. The advisory committee was told during the meeting of December 15, 2015, that the draft rules would be posted on the LAT website without an indication of what dates the draft rules would be posted. The advisory committee was told, on January 27, 2016, that the LAT practice rules had been posted on the LAT website and had been open for comment until January 22, 2016. The majority of the feedback on the proposed rules was from existing users of the LAT and not from the new stakeholder base.¹¹⁴
100. The advisory committee was never given an opportunity to consult on the rules. The advisory committee was not given an opportunity to alert stakeholders of the proposed rules. The advisory committee was not given a copy of the proposed rules or the final rules.¹¹⁵
101. Between the December 15, 2015, advisory committee meeting and the January 27, 2016, meeting there were 3 public information sessions which provided a project update and a high-level process map. There is no indication that these meetings gave notice to stakeholders that draft rules had been posted and that there was an opportunity for comment.¹¹⁶
102. The Memorandum of Understanding signed between the Attorney General and the Executive Chair of SLASTO states that SLASTO is independent with respect to all matters concerning dispute resolution. The SLASTO does not need approval of the attorney general with respect to taking action with respect to any matter concerning its independent legal framework.¹¹⁷

¹¹³ AR Vol. 7, Tab 32, at p. 3325, Exhibit B to the Affidavit of Alvaro Del Castillo at page 12.

¹¹⁴ AR Vol. 8 at p.3414, Summary of minutes from LAT Advisory Committee Meetings.

¹¹⁵ AR Vol. 8 at p.3414, Summary of minutes from LAT Advisory Committee Meetings.

¹¹⁶ AR Vol. 8 at p.3414, Summary of minutes from LAT Advisory Committee Meetings.

¹¹⁷ AR Vol. 6, Tab 31(A), at p. 3196, Transcript of the Examination of Chris Popovich at Q168 and Q170.

103. Mr. Popovich stated that an external Advisory Committee was meeting regularly to provide high-level advice on the design and implementation of the LAT. This committee required the approval of the Ministry of Finance to add members.¹¹⁸
104. The insurance industry spends millions of dollars to lobby the Ontario government in an attempt to influence who will be appointed to the LAT- in a similar manner in which Ms. Vanderkopp's insurer threw thousands of dollars at physicians and other examiners in order to achieve biased assessments. It is obvious from Ms. Vanderkopp's experience that the insurance industry's primary interest is reducing costs without regard for the impact on accident victims.¹¹⁹
105. The LAT lacks the required independence and appearance of independence that is required. It further bifurcates remedial avenues of the disabled accident victim between it and the Superior Court and **de facto** usurps the historical and constitutional function of the Superior Court.

PART III – THE ISSUES

106. Whether s. 267.5(1) of the **Insurance Act** is unconstitutional in that,
- (a) it violates the equality provisions of both:
 - (i) the unwritten constitutional right to equal treatment (equality); and
 - (ii) it violates s. 15 of the **Charter**?
 - (b) it violates s. 7 of the **Charter** in that:
 - (i) it deprives the motor vehicle accident victim of security of the person in arbitrarily reducing income to 70% of gross income while disabled; and
 - (ii) in doing so, s. 267.5(1) suffers from overbreadth (disproportionality); not in accordance with the principles of fundamental justice?
107. Whether s. 280 of the **Insurance Act** is unconstitutional in that:
- (a) it violates the equality provisions of both:
 - (i) the unwritten constitutional right to equal treatment (equality); and
 - (ii) it violates s. 15 of the **Charter**?
 - (b) it violates s. 7 of the **Charter** and the unwritten pillars of the Constitution, in violating the constitutional rights to an independent judiciary?

¹¹⁸ AR Vol. 6, Tab 30, at p. 3077, Affidavit of Chris Popovich at paras 56-59.

¹¹⁹ AR Vol. 2, Tab 11, at p. 576, Affidavit of Jokelee Vanderkopp dated July 8, 2015 at para 65.

- (c) in its creation of the LAT, to adjudicate insurance benefits of motor vehicle accidents, it violates s. 96 of the **Constitution Act, 1867**?

PART IV – ISSUES AND LAW

A/CONSTITUTIONAL OVERVIEW TO TORT & CONTRACT – NORMATIVE LEGAL ORDER

108. In the **Quebec Secession Reference**,¹²⁰ the SCC articulated four, non-exhaustive, constitutional pillars and imperatives. Stemming from the Rule of Law and Constitutionalism, the SCC set out and articulated that our Constitution **provides and demands** a “normative legal order”. Thus, the SCC, in paragraphs 70-71 stated:

[70] **The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure".** As we noted in the *Patriation Reference*, *supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

[71] In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. **We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons.** There is, in short, one law for all. **Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order".** It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference*, *supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance. [emphasis added]

109. Canada's “normative legal order”, in substance, consists of a “public” and “private” component. The public component in turn consists of Criminal (Quasi-Criminal) and Regulatory Law wherein the state governs and interacts with the citizen. The “private” component consists of categories of law which governs the private interactions as between private citizens both biological and corporate: namely tort and contract.

¹²⁰ *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 54; 70-71.

110. Tort and contract law, ironically, pre-date the evolution of our constitutional framework as between state and citizen. Tort and Contract relations have, like public law issues, always been adjudicated by the Courts. In the exercise of this function, the common law has evolved as a separate “state” function, of judicial independence, which constitutes the constitutional lever in adjudication the normative legal order, both as between state and citizen, as well as between private persons (citizens).
111. The Applicant asserts and highlights that Constitutionalism and the Rule of Law requires, as set out in **Quebec Secession Reference**, that “maintenance” of the “order of positive laws” by the Legislature, provides a check and balance, a constitutional constraint, on the legislative process and substance, of the “normative order”.
112. It is trite law that the written Constitution applies to state action, including the courts and the common law. It has thus been held that the courts are under a **duty** to review statutes,¹²¹ executive action,¹²² as well as the common law, both in the criminal context,¹²³ as well as in the civil context¹²⁴ for constitutional conformity.
113. It is recognized and conceded that Parliament may change the common law, always subject to constitutional constraint. It is also conceded and recognized that Parliament can legislate as to contract and tort and **can transform** a purely private tort or contract regime into a purely regulatory one **run and administered by the state**. For example, workers’ compensation legislation or state (province)-run and administered automobile accident compensation scheme, pension schemes, etc. When it does so, it is nonetheless always subject to constitutional constraints.
114. The ability of the state to “take over” a tort or contract regime, “wholesale”, and wholly convert it into a regulatory scheme, does not mean that the right(s) of tort and contract, as between private citizens, is not part of our unwritten constitutional framework, constituting constitutional imperatives with respect to tort and contract, as part of our normative legal order, emanating from the Rule of Law and Constitutionalism.

¹²¹ *R v Morgentaler*, [1988] 1 SCR 30 (SCC).

¹²² *Operation Dismantle v. The Queen*, [1985] 1 SCR 441 (SCC); *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44.

¹²³ *R v Salituro*, [1991] 3 SCR 654, 1991 CanLII 17 (SCC).

¹²⁴ *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 (SCC).

115. The Applicant asserts that, what the state **cannot** do, as it has done in ss. 267.5(1) and 280 of the **Insurance Act**, is to parachute itself between the parties of a private contract and tort regime, to **selectively favour** and leverage the private interests of one party to the contract and relationship, over the other party: namely, the insurance company over the disabled accident victim vis-à-vis the private tort and contract obligations and relationships of the private parties involved. This violates the constitutional imperatives and requirements of the Rule of Law and Constitutionalism and violates the requirement and provision of a normative legal order, in the private tort and contract context, as between private citizens, in violation of the constitutional rights of motor vehicle accident victims who suffer physical and psychological injuries and thus become physically and/or psychologically disabled, whether temporarily or permanently.

116. It is submitted that both ss. 267.5(1) and 280, as set out below, in the constitutional violations articulated, further violate the constitutional imperatives of Constitutionalism, the Rule of Law, as well as Respect for Minorities (the Disabled).

B/SS. 267.5(1) AND 280 VIOLATE THE UNWRITTEN CONSTITUTIONAL IMPERATIVE OF EQUALITY

- **Equality Provisions of the Constitution as an Underlying Structural Imperative**

117. It is submitted that, as an underlying imperative of our constitutional history, and underlying constitutional right, “equality” of treatment has always been a constitutional constraint on legislative and executive action, this emanating from the Rule of Law and Constitutionalism, and Respect for Minorities.

118. Thus, citing Dicey, MacIntosh points out that, even pre-*Charter*:

Professor A. V. Dicey in his book, *Introduction to the Study of the Law of the Constitution*, outlined the basic principles of the rules as:

- (1)
- (2) equality before the law, excluding the idea of any exemptions of officials or others from the duty of obedience to the law which governs other citizens;
- (3) ...¹²⁵

119. Moreover, even *prior* to the *Charter*, the notion of *equality of treatment* was articulated by the Supreme Court of Canada as an underlying principle, imperative, and requirement of our constitutional framework. Thus, in *Winner*, the Supreme Court of Canada ruled, with respect to

¹²⁵ *Fundamentals of the Criminal Justice System*, Donald A. MacIntosh, Carswell, 1989, at p. 7.

a refusal of a bus license to a foreigner (an American corporation), that equality of treatment is a constitutional imperative.¹²⁶

120. It is submitted that, in keeping with the analysis of the Supreme Court of Canada in *Quebec Secession Reference*, it is impossible to envisage a constitutional framework based on, *inter alia*, the Rule of Law, Constitutionalism, Federalism, Democracy, and Respect for Minorities, without equal treatment of all individual before and under the law. The equality imperative, an unwritten right, stems from all four pillars enunciated in *Quebec Secession Reference*.
121. It is submitted that the underlying constitutional duty for Parliament, and the Executive, to treat all individuals equally, does **not** only arise out of an individual's invocation of a right, nor s. 15 of the **Charter** and discrimination analysis thereunder, **but rather from a review of the legislative provision, executive action, and/or process and how that government process or right is dispensed.**
122. It is submitted that, looked at another way, this "equality of treatment" is much akin to the application of "due process", and procedural fairness, in a fashion that is **non-arbitrary**, which non-arbitrariness is the hallmark of a s. 7 **Charter** analysis from the point of view of an individual invoking the right, which has been articulated by the SCC in *Chaoulli*:

133 *While cloaked in the language of manifest unfairness, this reasoning evokes the principle of fundamental justice that laws must not be arbitrary, and was so read in Rodriguez*, at p. 594. Beetz J.'s concurring reasons in *Morgentaler* thus serve as an example of how the rule against arbitrariness may be implicated in the particular context of access to health care. The fact that Dickson C.J., Lamer J. concurring, found that the scheme offended a different principle of fundamental justice, namely that defences to criminal charges must not be illusory, does not detract from the proposition adopted by [page853] Beetz J. that rules that endanger health arbitrarily do not comply with the principles of fundamental justice.¹²⁷

123. This very analysis of equating **non-arbitrary** "due process" of treatment, with equal treatment, was succinctly and clearly articulated by the US Supreme Court, in the "busing" cases wherein, in 1954, the Court ruled:

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a [347 U.S.

¹²⁶ *Winner v S.M.T. (Eastern) Ltd.*, [1951] SCR 887 at p 928.

¹²⁷ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at paras 129-133.

497, 500] proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. 5 We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

For the reasons set out in *Brown v. Board of Education*, this case will be restored to the docket for reargument on Questions 4 and 5 previously propounded by the Court. 345 U.S. 972 .

It is so ordered.¹²⁸

124. It is further submitted that the Supreme Court of Canada, post-**Charter**, alluded to exactly the same analysis, when it pointed to the possible interplay between ss.7 and 15 of the **Charter**, in extradition (*non*-criminal) proceedings versus criminal trial proceedings (criminal), in the bail context, wherein in *Schmidt* the Court stated:

[40] I would not, however, wish to be interpreted as saying that some of the interests involved in s. 11, such as the right to bail (s. 11(e)), are not similarly protected at an extradition hearing under other provisions of the Charter; consider the interplay between s. 7 (the right to liberty) and s. 15 (equality before the law).¹²⁹

125. The Supreme Court of Canada in *Schmidt* was making the point that whether one sat in a jail cell on an extradition warrant (a “civil proceeding”) or on a domestic Canadian criminal charge, their **Charter** rights under ss. 7 and 15 (extradition) and s. 11(e) (criminal charge) must substantively be treated equally with respect to interim judicial release (“bail”). Likewise, in the within Application, whether one is disabled as a result of a motor vehicle accident or a slip-and-fall and/or assault, their loss of income and other “benefits” require substantive equal treatment as a consequence of a joint s. 7/15 **Charter** treatment. This treatment of equality is not restricted to the **Charter**, but also lays as an unwritten Constitutional imperative.

126. It is trite law that certain Constitutional rights are duplicated, both as unwritten Constitutional imperatives, as well as mirrored as individual **Charter** rights. For example, the Constitutional right to a fair and independent judiciary. What differs is the analysis, effect, consequence, and available remedies.

¹²⁸ *Bolling v Sharpe*, 347 US 497 (1954) (USSC) [emphasis added].

¹²⁹ *USA v. Schmidt* [1987] 1 SCR 50 at para 40; see also *R. v. Turpin*, [1989] 1 S.C.R. 1296.

127. It is thus submitted that, as a matter of an underlying constitutional imperative of equal treatment, without any views to s. 15 of the **Charter**, ss. 267.5(1) and 280 are arbitrary, discriminatory provisions.¹³⁰

128. It is lastly submitted that the proposition that equality of treatment is an unwritten constitutional imperative, apart from s. 15 of the **Charter**, has further been supported by academic writing.¹³¹

C/SS. 267.5(1) AND 280 VIOLATE S.15 OF CHARTER

(i) Overview – Statutory Provisions Under Challenge

129. At common law, victims of tort or contract breach were able to recover 100% of their loss in compensation to be placed in the same position prior to that tort/breach of contract.

130. The **Insurance Act** now provides that:

- (a) under s. 267.5(1), a disabled tort-victim (in an automobile accident) can only recover 70% of gross income;
- (b) under s. 280, a victim of a motor vehicle accident who himself is the tortfeasor can only recover 70% of lost gross income under the contract of insurance up to a maximum of \$400 weekly;
- (c) under s. 280, disputes with respect to both income loss insurance benefits, as well as the other insurance benefits, are to be determined by the LAT and cannot be determined by the Superior Court, which determines the tort claim.

131. Throughout this discussion, for ease and clarity, reference will be made to the rights of the motor vehicle accident victim, vis-à-vis the tort action, as the “**disabled tort victim**” and the rights of the motor vehicle accident victim, under the contract of insurance, as the “**disabled contract victim**”.

¹³⁰ *Fundamentals of the Criminal Justice System*, Donald A. MacIntosh, Carswell, 1989; *Winner v. S.M.T. (Eastern) Ltd.* [1951] SCR 887; *Bolling v Sharpe*, 347 U.S. 497 (1954); *USA v Schmidt* [1987] 1 S.C.R. 500 at para 40.

¹³¹ Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (Fall 1999) 22 Dalhousie L.J. 5.

(ii) The Section 15 Violations

132. Every individual has the right, under the *Charter*, to equal protection and benefit of the law, without discrimination based on an enumerated or analogous ground (*Charter*), with a two-part test.¹³² Thus, in *Withler v Canada (Attorney General)*, the SCC confirmed and articulated the test for **substantive** equality as follows:

The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction that is based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The claimant must establish that he or she has been denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1). It is not necessary to pinpoint a mirror comparator group. Provided that the claimant establishes a distinction based on one or more of the enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. At the second step, the question is whether, having regard to all relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping it.¹³³

133. The enumerated ground in this application is disability, both permanent and temporary, both physical and psychological. The sub-group unifying the different categories that may arise, in different permeations, is disability as a result of a motor vehicle accident, that is the motor-vehicle disabled, as it impacts the tort remedy and contract remedy. Disabilities may arise from different sources and different circumstances. For example: genetic disabilities, disabilities from metabolic and other illnesses; work-place accidents; criminal assaults; slip and fall accidents; etc. In Ontario, the motor-vehicle disabled are largely and primarily dealt through tort and contract, as modified and regulated by the terms of the **Insurance Act**. There are two different sub-groups that are in turn considered in this Application with respect to the motor-vehicle disabled:

- (a) The first group consists of motor vehicle accident disabled who are: i) insured, and ii) would, but for the legislation, have a right, in tort, to recover up to 100% of their lost gross income [hereafter referred to as the “**disabled tort victim**”]. The distinction is that this group is not able to recover up to 100% of their lost gross income, as was their right at common law. This is the s. 267.5(1) violation of s. 15 of the **Charter**.

¹³² *The Constitution Act, 1982*, being Schedule B to the Canadian Act 1982 (UK), 1982, c 11 [*Charter*] at s 15. (1).

¹³³ *Withler v Canada (Attorney General)*, 2011 SCC 12; [2011] 1 SCR 396 at headnote [emphasis added].

- (b) The second group consists of those: (i) accident victims who have suffered non-minor injuries, (ii) are seeking a declaration of entitlement to, or the specific performance of, contractual rights from the insurer, and (iii) would have, but for the legislation, been able to access the Superior Courts to settle the dispute [hereafter known as the “**disabled contract victim**”]. The distinction is that this group is not able to access the Superior Court to settle their dispute, a dispute in which there is also a tort component which is adjudicated by the Superior Court. This is the s. 280 violation of s. 15 of the **Charter**.

134. The basis of discrimination in the within Application are based on two bases as follows:

- (a) the discriminatory effect, in the statutory scheme tampering with the common-law right(s) in tort and contract to access Superior Court to recover 100% of loss, based on disability, contrary to s. 15 of the **Charter**; and
- (b) as between disabled tort and contract victims, based on differently caused disabilities, the discrimination by the **Insurance Act** in prohibiting 100% recovery and access to the Superior Court in pursuit of tort recovery to victims of motor vehicle accidents and not to victims of other torts.

135. In order to determine whether such discrimination has been perpetuated, a trier of fact must first determine whether a claimant group qualifies as disabled for purposes of s. 15 (*Granovsky*).¹³⁴

136. Justice Binnie speaking for the Supreme Court of Canada, noted that disabilities are not immutable and may grow more or less severe as time progresses. He noted that disabilities vary in type, intensity and duration across the full range of personal physical and mental characteristics. Thus, disabilities can be both permanent or temporary. The Supreme Court of Canada has identified three elements of disability that must be considered: i) the nature and extent of the physical or mental disability, ii) the functional limitations and iii) the socially constructed handicap (*Granovsky*).¹³⁵

¹³⁴ *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 186 DLR (4th) 1 [*Granovsky*] at paras 31 to 40.

¹³⁵ *Ibid* at para 27.

- **First Two Elements**

137. The Supreme Court of Canada has indicated that the first element, nature and extent of the physical or mental impairment, and the second element, functional limitations, are to be considered internal to the person and are to be examined separately from the third element, the social construct (*Granovsky*).¹³⁶

- **First Two Elements for Disabled Tort Victims**

138. Disabled tort victims vary significantly in the nature and extent of the physical and/or mental impairment from which they suffer. The element of primary importance is the level of functional limitation.

139. The Ontario Court of Appeal has stated that disabled tort victims are entitled to compensation to be put in a similar position to the position they would have been if the accident had not occurred (*Talon*).¹³⁷

140. The Ontario Court of Appeal has noted that a tort victim has a duty to mitigate - a duty to seek alternative work so as to minimize their losses (*Talon*). If a disabled tort victim chooses not to mitigate he or she will not be compensated above the level that would put them in the same position as if the accident had not occurred.¹³⁸

141. For disabled tort victims the relevant functional impairment relates to their inability to return to work, and their inability to mitigate their losses by seeking alternative employment. From this perspective the greater the limitation a **disabled tort victim** faces, with respect to the ability to work in any capacity, the greater the functional disability the **disabled tort victim** has suffered. The legislation has not considered the magnitude of functional impairment suffered by **disabled tort victims**. In fact the legislation has removed a historical delineation that was made for individuals who had suffered permanent serious physical injury. In 1990 such individuals were allowed to recover 100% of their gross income.¹³⁹

¹³⁶ *Ibid* at para 34.

¹³⁷ *Talon v Whalley*, [1988] 63 OR (2d) 723; 48 DLR (4th) 744 at 7-8 (Ont CA) [*Talon*].

¹³⁸ *Ibid* at 7.

¹³⁹ *Baillargeon supra* 10 at 162.

142. The Supreme Court of Canada has recognized that not all limitations qualify as a disability (*Granovsky*).¹⁴⁰
143. The Supreme Court of Canada has also recognized that a heterogeneous group, in which not all are disadvantaged, is not barred from forwarding a discrimination claim for the group as a whole (*Quebec*). In *Quebec*, individuals, who were seeking equalization payments from common-law partners, were allowed to advance a s.15 claim even though some of the individuals were not viewed as disadvantaged (*Quebec*).¹⁴¹
144. Section 267.5(1) of the **Insurance Act** represents targeted exploitation of vulnerable disabled accident victims. Vulnerable and cognitively impaired accident victims without rehabilitation resources are punished by a system that no longer functions. Section 267.5(1) further impoverishes these accident victims.¹⁴²
145. It is asserted by the Applicant, that **disabled tort victims**, as a group, are disabled and worthy of protection based on the pre-requisite requirements that; i) a claimant must suffer from a functional impairment, the inability to work, in order to claim lost income, and ii) a claimant in order to claim lost income must be unable to mitigate income losses due to a functional impairment.
146. The heterogeneity of the **disabled tort victim** group is due, in no small measure, to the devolution of the statute. In 1990 the statute recognized that those who had suffered a permanent serious physical impairment should be able to achieve full recovery of lost income. In 2015 no one can fully recover their lost income no matter how serious, permanent, or functionally debilitating their injuries.

- **First Two Elements for Disabled Contract Victims**

147. The amount in dispute between an insurance company and an accident victim may vary significantly. For example:
- (a) a person seeking payment for a chiropractic adjustment may be disputing a denial of a few hundred dollars;

¹⁴⁰ *Granovsky*, *supra* para 59 at para 36.

¹⁴¹ *Quebec (A.G.) v. A.*, [2013] 1 SCR 61, 354 DLR (4th) 191 at para 345-347.

¹⁴² AR Vol. 1, Tab 6, at pp. 114-115, Affidavit of Rhona DesRoches at paras 12 and 15.

- (b) a person seeking \$6,000 in attendant care for months, who would have to pay 30% of amounts recovered to their legal counsel;
- (c) a disabled contract victim, who should be entitled to a catastrophic designation, may need to dispute the insurer's denial of a catastrophic designation, which would deny access to more than a million dollars in accident benefits; or

In cases where the monetary amount is not viable to pursue, this does not change the impact to the disabled person, and aggravates their disability.

148. The impact of the adjudicative decision by LAT in the aforementioned examples will vary radically. The dispute in (a), above, may represent an inconvenient out of pocket expense for a non-disabled insured. If improperly adjudicated, the latter disputes in (b) and (c), above, fundamentally affect the liberty and security of the disabled contract victim.

149. The Supreme Court has noted that to rise to a **Charter** challenge the characteristic needs to be “unchangeable for its duration, and entirely outside of the control of the individual thus burdened.”¹⁴³

150. A majority of the Supreme Court has recognized that protection under section 15 is based on characteristics “that can be changed, if at all, only at great personal cost.”¹⁴⁴

151. Disabled Contract Victims are a heterogeneous group suffering from a range of physical, mental and functional impairments which are outside of their control and can only be changed at great personal cost. That this disability, in some cases, is a “temporary” one, rather than a “permanent” one, changes nothing with respect to s. 15, because s. 15 of the **Charter** does not restrict protection to permanent disabilities but includes both.

• Third Element Common to Both Disabled Tort and Contract Victims

152. While there is sufficient grounds based on the first two elements to find both **disabled tort victims** and **disabled contract victims** are disabled the third element will be considered. The third element is the socially-constructed handicap relating to the impairment (*Granovsky*).¹⁴⁵

¹⁴³ *Granovsky*, *supra* para 59 at para 53.

¹⁴⁴ *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429, 221 DLR (4th) 257, [*Gosselin*] at para 105.

¹⁴⁵ *Granovsky*, *supra* para 17 at para 34.

153. In this instance the third element is consistent among both groups. There is a predisposition from the public, and the government, exacerbated by the efforts by the insurance industry, to identify accident victims as frauds. That is, individuals who are **disabled tort victims**, or **disabled contract victims**, are associated with fraud and are painted with the same brush as actual perpetrators of fraud. There is a socially-constructed handicap in which accident victims are portrayed as embellishing or outright fabricating their symptoms in order to defraud the insurance companies.

154. In the present Application it is noted that the victims advocacy group FAIR believes that the Insurance Industry has portrayed accident victims as fraudsters (*DesRoches*).¹⁴⁶

155. The Provincial Government commissioned a study related specifically to fraud in the automobile insurance industry (*Final Report*).¹⁴⁷

156. The government has not requested studies on the underlying causes of the increasing costs of automobile insurance but has, by default, designated fraud as the cause of the increase in expenses (*AuditorGeneral*). The government has approached the matter with a closed mind and has used biased and dated studies that have been provided by the insurance industry to reaffirm this paradigm. These studies, provided by the insurance industry have the result of portraying **disabled tort and contract victims** as undeserving of compensation and protection.¹⁴⁸

157. In the 2011 Auditor General's annual report it was noted that the insurance industry was receiving 12% return on equity, even though the long-term bond rate, upon which the original return on equity had been benchmarked, had declined by 7% (*AuditorGeneral*). It is asserted that this continued high yield, despite the decrease in bond yields, would explain in part why an "insurance crisis" came into being in 2010. It is further asserted that to continue receiving this rich return the insurers would have a strong interest in pointing the finger elsewhere, namely at accident victims.¹⁴⁹

¹⁴⁶ AR Vol. 1, Tab 6, at p.115, Affidavit of Rhona DesRoches dated March 11, 2015 at para 16 [*DesRoches*].

¹⁴⁷ AR Vol.1, Tab 10, at p.418 *Final Report*, *supra* para 12.

¹⁴⁸ AR Vol. 3, Tab 21, at p.1526 Ontario, Legislative Assembly, Office of the Auditor General of Ontario, "2011 Annual Report of the Office of the Auditor General of Ontario", (December 5, 2011) [*Auditor General*] at page 47.

¹⁴⁹ *Ibid*, AR Vol. 3, Tab 21, at pp. 1526, *Auditor General* at 47.

158. In 2012, the Insurance Bureau of Canada issued a report in which they stated that, based on a poll they had conducted, 83% of Ontarians believe that fraud occurs frequently, or occasionally, in the automobile insurance industry (*Status Update*). It is asserted that the Insurance Bureau of Canada strategy has been hugely successful in deflecting financial accountability onto those least able to defend themselves.¹⁵⁰
159. In determining if legislation is discriminatory it is not necessary for the purpose of the legislation to be discriminatory. “It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law.” (*Eldridge*)¹⁵¹
160. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled.¹⁵² In the case of disabled persons, it is often the failure to take into account the adverse effects of generally applicable laws that result in discrimination.¹⁵³ Adverse effects discrimination is especially relevant in the case of disability.¹⁵⁴ The impugned provisions perpetuate the systemic discrimination against disabled persons, denying them the equal concern, respect and consideration demanded by s. 15 (*Eldridge*).¹⁵⁵ If legislation excludes a vulnerable population from protections which are considered so fundamental that the protection is presumptive, discrimination will be found (*Kapp*).¹⁵⁶
161. At common law there is a presumptive right to sue for compensation in contract and tort.¹⁵⁷

• Adverse Effect Discrimination Against Disabled Tort Victims

162. A disabled tort victim is presumptively entitled to recover 100% of lost gross income.¹⁵⁸ The tortfeasor is not allowed to deduct taxes from the compensation owed to the plaintiff at common law.¹⁵⁹ The Supreme Court has held that considering income taxes in personal injury awards

¹⁵⁰ AR Vol. 1, Tab 10, at pp. 300 *Anti-Fraud Task Force Status Update Report—August 2012*, Insurance Bureau of Canada [*Status Update*] at 2-3.

¹⁵¹ *Eldridge v British Columbia*, [1997] SCR 624, 151 DLR (4th) 577 at para 62 (SCC).

¹⁵² *Ibid* at para 64.

¹⁵³ *Ibid* at para 65.

¹⁵⁴ *Ibid* at para 61.

¹⁵⁵ *Ibid* at para 56.

¹⁵⁶ *R v Kapp*, 2008 SCC 41, 2 SCR 483 at para 25.

¹⁵⁷ *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12, 99 DLR (4th) 577 [Checo].

¹⁵⁸ *Shanks supra* at paras 126 - 127.

¹⁵⁹ *Shanks supra* at paras 126 - 127.

gives an undue preference for the Defendant or the Insurance Company.¹⁶⁰ The Supreme Court has noted that such deductions on tort damages are a matter of tax policy (*Shanks*).¹⁶¹

163. The Federal Government has chosen to forego charging income tax on personal injury awards and settlements (*ITR365*).¹⁶²

164. Section 267.5(1) overrides the common law, denying the presumptive right of full tort compensation to the disabled by reducing the maximum amount that an accident victim can recover, prior to trial.

165. Under the current version of the *Act*, the tortfeasor is only required to compensate the victim for 70% of gross income if the accident occurred on or after September 1, 2010.¹⁶³ Under the current version of the *Act*, the tortfeasor is only required to compensate the victim for 80% of net income if the accident occurred before September 1, 2010 (*Insurance Act*).¹⁶⁴

166. Many seriously disabled accident victims are not in a position to make a sustainable, viable, living (*Vanderkop*), (*DesRoches*).¹⁶⁵ In the present application, serious disability engenders both obvious and hidden costs for the disabled individual (*Vanderkop*).¹⁶⁶ Even full compensation for pre-trial income loss may not be sufficient to offset the costs of disability (*Vanderkop*).¹⁶⁷

167. Section 267.5(1) of the **Insurance Act** makes accident victims more dependent on public resources and perpetuates the poverty these individuals endure (*DesRoches*).¹⁶⁸

168. In pith and substance, the Ontario government has imposed an Ontario Disability Tax on accident victims and used this tax to subsidize automobile insurance (*Katz*).¹⁶⁹

169. The implied Ontario Disability Tax results in an Ontario taxation rate for disabled accident victims (*Katz*) that is:

¹⁶⁰ *Shanks supra* para 10 at paras 126 - 127.

¹⁶¹ *Shanks supra* para 10 at para 417.

¹⁶² Canada Revenue Agency, Interpretation Bulletin, IT-365R2, "Damages, Settlements and Similar Receipts", (May 8 1987) [*ITR365*] at para 2.

¹⁶³ *Insurance Act*, RSO 1990, c I-8 at s 267.5 (1) [*Insurance Act*].

¹⁶⁴ *Insurance Act ibid* at s 267.5 (1).

¹⁶⁵ AR Vol. 2, Tab 11, at p. 554, Affidavit of Jokelee Vanderkop dated March 26, 2015 at para 17; AR Vol. 1, Tab 6, at pp. 115, Affidavit of Rhona DesRoches at para 13.

¹⁶⁶ AR Vol. 2, Tab 11, at p. 578-579, Affidavit of Jokelee Vanderkop at para 73.

¹⁶⁷ AR Vol. 2, Tab 11, at p. 578-579, Affidavit of Jokelee Vanderkop at para 73.

¹⁶⁸ AR Vol. 1, Tab 6, at p. 114-115, Affidavit of Rhona DesRoches at paras 12-13.

¹⁶⁹ AR Vol. 1, Tab 7, at p. 215, Affidavit of Eli Katz dated May 15, 2015 at para 6.

- (a) In instances where recovery is limited to 80% of net income;
 - (i) Excessive by 592.68% for a disabled accident victim, compared to an able-bodied individual, who had a gross income of \$30,000;
 - (ii) Excessive by 229.08% for a disabled accident victim, compared to an able-bodied individual, who had a gross income of \$300,000;
- (b) In instances where recovery is limited to 70% of gross income;
 - (i) Excessive by 578.40% for a disabled accident victim, compared to an able-bodied individual, who had a gross income of \$30,000;
 - (ii) Excessive by 87.46% for a disabled accident victim, compared to an able-bodied individual, who had a gross income of \$300,000.¹⁷⁰

The effective implied Ontario Disability Tax rate increases as the level of disability increases (*Katz*).¹⁷¹

170. The implied Ontario Disability Tax, and the resulting subsidy, create an additional motive for insurance companies not to settle disputes (*Katz*). Based on available closed claim data, including all claims for accidents occurring in Ontario, it has been shown, by the IBC's own witness, that insurance companies can obtain an ongoing 15% return on equity for 5 years. Based on the data relevant to the most vulnerable sub-population it appears that the insurance company realizes a return on equity of 15% plus an additional \$180,000 (\$444,762-\$265,111) modelled for a person earning \$50,000 prior to the accident.¹⁷²

171. The implied Ontario Disability Tax causes disabled individuals to accept unfair settlements (*Katz*). This economic model is validated by Ontario closed claim data which shows that the greater the disability in terms of days or work missed the lower the percent of lost income that is recovered in terms of days missed from work.¹⁷³

¹⁷⁰ AR Vol. 1, Tab 7, at p. 221-222, Affidavit of Dr. Eli Katz at report tables 2-3 [*Katz*].

¹⁷¹ AR Vol. 1, Tab 7, at p. 215; *Katz* at para 6.

¹⁷² AR Vol. 1, Tab 7, at p. 215; *Katz* at para 7; AR Vol. 2, Tab 16, at pp. 793, Affidavit of Satnam dated August 30, 2016, table 4.1; AR Vol. 5, Tab 25, at p. 2321 Affidavit of Craig Allen dated July 1, 2016, page 23, table 7e.

¹⁷³ AR Vol. 1, Tab 7, at p. 215, *Katz* at para 8; AR Vol. 5, Tab 24, at p. 2278-2280, Affidavit of Craig Allen, May 9, 2016, pages 24-26 of the report, Tables 7 and 8 of the report.

172. The implied Ontario Disability Tax has the effect of increasing the asymmetry in bargaining positions between the insurance company defendant and the plaintiff (*Katz*).¹⁷⁴ The implied Ontario Disability Tax increases the concessions that will be made by a Plaintiff to the defendant insurer who has suffered serious disability (*Katz*).¹⁷⁵ The longer the period between the accident and trial or settlement, the greater the detriment suffered by the plaintiff, through the ongoing tax imposed on lost income (*Katz*).¹⁷⁶
173. Section 267.5(1) of the **Insurance Act** disproportionately affects more seriously disabled accident victims (*Katz*). More severe injuries would seem only to increase the claimant's degree of risk-adversion relative to the insurer.¹⁷⁷
174. The more seriously an individual is injured, the lower the percentage of full compensation for injuries the individual is likely to accept (*Katz*).¹⁷⁸ The longer the time period between the accident and resolution of the claim, the lower the percentage of full compensation the individual is likely to accept (*Katz*). This is supported by empirical data which shows that the longer a person is unable to work, in terms of days, the less the person is able to recover in terms of lost income from all sources.¹⁷⁹
175. The Supreme Court of Canada has observed that "statistics indicate that persons with disabilities, in comparison to non-disabled persons ... are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed."¹⁸⁰
176. Section 267.5(1) has the adverse effect of denying **disabled tort victims** access to manage their affairs in any manner that they wish with respect to taxation and arbitrarily imposes a specified indirect tax not allowing for deductions such as the legal costs which could otherwise be deducted during the recovery of lost income.

¹⁷⁴ AR Vol. 1, Tab 7, at p. 215; *Katz* at para 9.

¹⁷⁵ AR Vol. 1, Tab 7, at p. 215; *Katz* at para 9.

¹⁷⁶ AR Vol. 1, Tab 7, at p. 223; *Katz* at report at table 4.

¹⁷⁷ AR Vol. 1, Tab 7, at p. 223 *Katz* at report table 4.

¹⁷⁸ AR Vol. 1, Tab 7, at p. 223, 227-229, *Katz* at report table 4.

¹⁷⁹ AR Vol. 1, Tab 7, at p. 223, *Katz* at report table 4; AR Vol 5, Tab 24, at pp. 2280-2281, Affidavit of Craig Allen sworn May 9, 2016, Table 8.

¹⁸⁰ *Eldridge supra* at para 43.

177. It is respectfully submitted that s 267.5(1) of the **Insurance Act** has an adverse effect that is disproportionately felt by **disabled tort victims** who are unable to return to their pre-accident employment, or mitigate the losses.

- **Adverse Effect Discrimination Against Disabled Contract Victims - Origination of Changes – Section 280**

178. On August 23, 2013, Justice Cunningham was appointed by the Ontario Minister of Finance to conduct a review of Ontario's Dispute Resolution System. He was tasked with providing a final report in which among other things recommendations on changes to the current dispute resolution system were to be provided (Cunningham, *Interim Report*).¹⁸¹

179. The stated goals of the proposed reforms, which were enacted under the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014, include: improving efficiency, providing timely and cost effective dispute resolution, and improving access to justice (Cunningham, *Final*).¹⁸²

180. In his review of Ontario's dispute resolution system Justice Cunningham stated: "I do not accept the argument that denying access to the courts would deny individual's access to justice. The proposed model outlined in the interim report would provide dispute resolution services that will be more timely and cost effective than the courts..."(*CunninghamFinal*)¹⁸³

- **Adverse Effect Discrimination Against Disabled Contract Victims - Legislative Purpose and Changes**

181. The **Statutory Accident Benefit Schedule**, or **SABS** sets out the minimum rights and minimum obligations of the two parties to the private contract of automobile insurance, insured and insured (*Babakar*).¹⁸⁴ The **SABS** aims to provide a comprehensive mechanism for resolving disputes arising out of the insurance contract (*Mihichuk*).¹⁸⁵

¹⁸¹ AR Vol. 3, Tab 21, at p. 1565, Financial Services Commission of Ontario, Ontario Automobile Insurance Dispute Resolution System Review, Interim Report, by Justice Cunningham, (Toronto: Ministry of Finance, 2013) [*CunninghamInterim*] at page 1.

¹⁸² AR Vol. 4, Tab 21, at pp. 1617-1618, Financial Services Commission of Ontario, Ontario Automobile Insurance Dispute Resolution System Review, 2014, by Justice Cunningham, (Toronto: Ministry of Finance, 2014) [*CunninghamFinal*] at page 2, 3.

¹⁸³ AR Vol. 4, Tab 21, at p.1628, *CunninghamFinal* at page 13.

¹⁸⁴ *Babakar v Brown* (2009), 95 OR (3d) 206; 71 CCC (4th) 258 [*Babakar*] at para 5; rev'd *Babakar v Brown*, 2010 ONSC 255; [2010] OJ No 414 on the issue of discoverability of experts' opinions.

¹⁸⁵ *Mihichuk v Allstate Insurance Co of Canada* (1998), 38 OR (3d) 762, 1998 CanLII 14674 (Ont Gen Div) [*Mihichuk*] at 10.

182. The **SABS** has been and continues to be recognized as consumer protection legislation (*Baughan*).¹⁸⁶
183. Until the enactment of the **Fighting Fraud Act**, **disabled contract victims** have had the right to pursue a claim against their accident benefits insurer for breach of contract either through arbitration at FSCO or by **commencing an action in Superior Court of Justice (Bill 15)**.¹⁸⁷
184. The **Fighting Fraud Act** has introduced drastic changes to this dispute resolution mechanism that are harmful to severely or catastrophically **disabled contract victims**.
185. Disputes between insurer and **disabled contract victims** will only be adjudicated by the LAT (**Bill 15**).¹⁸⁸ The LAT is not a specialized tribunal designed to adjudicate insurance disputes with specialized knowledge gained in a larger administrative context (*LAT*).¹⁸⁹
186. Administrative tribunals are not required to have constitutionally entrenched independence from government in order to adjudicate disputes (*OceanPort*).¹⁹⁰ In fact, *OceanPort*, makes it clear that they are part of the executive in adjudicating and implementing legislative policy. Conduct of the Licence Appeal Tribunal will be regulated by the Lieutenant Governor in Council, and will be subject to the various pressures placed upon that body.¹⁹¹ The members of the Licence Appeal Tribunal are appointed by the Lieutenant Governor in Council (*LAT*).¹⁹² The term of appointment of LAT members is determined by the Lieutenant Governor in Council (*LAT*).¹⁹³ The party in power will also be responsible for the regulations governing the actions of the tribunal in insurance disputes.
187. Severely and catastrophically **disabled contract victims** will no longer have access to the Superior Court of Justice as trier of fact. The Divisional Court of the Superior Court of Justice will only be accessible for judicial review of LAT decisions and appeals based on a question of law (*LAT*).¹⁹⁴

¹⁸⁶ *TD General Insurance Company v. Baughan*, 2013 ONSC 333 (CanLII) [Baughan] at paras 31-35.

¹⁸⁷ *Bill 15 supra* at s 280.

¹⁸⁸ *Bill 15 supra* at s 280. (3).

¹⁸⁹ *Licence Appeal Tribunal Act*, 1999, SO 1999, c12 [*LAT Act*].

¹⁹⁰ *Ocean Port Hotel Ltd v British Columbia*, [2001] 2 SCR 781, 204 DLR (4th) 33 [*Ocean Port*] at paras 23-24.

¹⁹¹ *Bill 15 supra* at ss. 121, 126.

¹⁹² *LAT Act supra* at s 2(3).

¹⁹³ *LAT Act supra* at s 2(3).

¹⁹⁴ *LAT Act supra* at para 11(6).

188. It is respectfully submitted that the LAT does not have the requisite independence from the ruling party of the day to guarantee a fair and impartial hearing of the disputes concerning disabled motor vehicle accident victims.

- **Role of the Superior Courts**

189. It is fundamental to the rule of law, and to Canadian societal values, that aggrieved individuals have the right to pursue justice in the Superior Court (*Trial Lawyers*).¹⁹⁵ The Supreme Court of Canada has given notice that the population at large has a right to access the superior courts based on non-**Charter** grounds.¹⁹⁶ It is submitted that the legislation will result in vulnerable and **disabled contract victims**, being prevented from accessing the Superior Courts.

190. It is asserted that without access to the Superior Courts the positive law aspects of the **Insurance Act** and the **Statutory Accident Benefit Schedule** may be subverted by the government. Access to the courts allows **disabled contract victims** to have confidence that their disputes will be adjudicated on a fair and impartial basis. Access to the courts creates binding precedents to be followed in similar disputes reducing uncertainty for **disabled contract victims**. Access to the courts provides **disabled contract victims** with additional remedies unavailable through the LAT including the joinder of suits and the awarding of punitive damages.

191. Access to the same Court adjudicating the tort claim, from the same accident and disability, is further fairer to the disabled accident victim and avoid inconsistent findings as between the Superior Court adjudicating the tort claim, and the LAT adjudicating the contractual insurance benefits.

- **Adverse Effect on Disabled Contract Victims - Access to Services**

192. Historically, disabled individuals have been excluded and marginalized.¹⁹⁷ The courts can be accessed as a right by the general public.¹⁹⁸ **Disabled contract victims**, a group protected under s. 15 of the **Charter** do not have a similar level of access to government service.

¹⁹⁵ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, [2014] 3 SCR 31, 375 DLR (4th) 599, [*Trial Lawyers*], at para 39.

¹⁹⁶ *Trial Lawyers* Ibid at paras 35-36.

¹⁹⁷ *Eldridge* supra at para 56.

¹⁹⁸ *Trial Lawyers* supra at para 36.

193. It is respectfully submitted that Justice Cunningham, in his report, has conflated the concepts of timely and cost effective resolution and access to justice. Many routine disputes (for example, over a denied treatment plan) can be dealt with justly by an administrative tribunal of no particular expertise. However, in complex and high value accident benefits disputes (including determinations of catastrophic impairment and entitlement to Income Replacement Benefits) the procedural and substantive safeguards, the full range of remedies available to a judge, and the guarantee of independence and impartiality of the Superior Court of Justice have been denied to severely and catastrophically disabled accident victims. This denial has had an adverse impact on these individuals, and has perpetuated and extended the historical denial of equal access to government services to them, in violation of s. 15 to the **Charter**.

- **Adverse Effect on Disabled Contract Victims - Perpetuation of Stereotype**

194. The public perception is that fraud occurs frequently, or occasionally, in the automobile insurance industry. Accident victims are vilified, being portrayed as fraudsters ripping off the system.¹⁹⁹ This perception has been perpetuated by the Insurance industry. This perception has also been perpetuated by the Ontario government. **Disabled contract Victims** need adjudicators who are independent and who will not be influenced by the lobbying efforts of the Insurance Industry.²⁰⁰

195. It is respectfully submitted that, given the environment of suspicion and hostility facing seriously disabled **Disabled Contract Victims**, an environment fostered in part by the insurance industry and Ontario's government, continued access to the courts is essential in order to provide these disabled individuals with fair, impartial, and moreover, equal treatment.

(iii) Section 1 of the Charter

196. The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (*Charter*).²⁰¹

¹⁹⁹ AR Vol. 1, Tab 6, at pp. 115, Affidavit of Rhona DesRoches at para 16.

²⁰⁰ AR Vol. 2, Tab 11, at pp. 576-577, Affidavit of Jokelee Vanderkopp at paras 65, 69-70.

²⁰¹ *Charter supra* para 16 at s. 1.

197. Once a piece of legislation is found to violate s. 15 of the **Charter** the onus falls to the Crown to prove that the violation is justified under s. 1 (*Big M*).²⁰² Section 1 analysis involves a two-step test.²⁰³ The first step requires the crown to prove that the legislative objective is related to concerns which are pressing and substantial in a free and democratic society.²⁰⁴
198. The second step requires the Crown to prove: 1) that the measures have been carefully designed to achieve the objective in question; 2) that the measures are rationally connected to the objective, and that they impair as little as possible the right or freedom in question; and 3) that there is a proportionality between the effects of the measures and the objective which has been identified as of sufficient importance.²⁰⁵
199. Courts will look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints or administrative convenience.²⁰⁶

- **Legislative Objective**

200. The introduction of the **Fighting Fraud Act** has been justified in part by the claim that continued access to the Courts will add to the already heavy workload of the Courts.²⁰⁷ One of the rationales for the ongoing legislative changes to the **Insurance Act** is to reduce or maintain the cost of automobile insurance.
201. It is respectfully submitted that these objectives are in the nature of budgetary and administrative constraints, and are not sufficiently pressing to justify infringement of the rights of **disabled tort victims** to seek full income recovery and **disabled contract victims** to access Superior Court.
202. It is similarly submitted that attempting to improve the cost-effectiveness of first party insurance contract dispute resolution is not sufficiently pressing to justify infringement of the right of disabled individuals to sue their insurers in Superior Court.

²⁰² *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M*] (SCC).

²⁰³ *Big M* *ibid* at 334.

²⁰⁴ *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*] at 138-139.

²⁰⁵ *Oakes* *supra* para 57 at 138-139.

²⁰⁶ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, 283 DLR (4th) 40 [*Health Services*] at para 147 (SCC); *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

²⁰⁷ *Cunningham* *supra* para 114 at 13.

203. The stated overarching objective of improving access to justice may be a pressing and substantial objective, however the complete elimination of access to the Superior Courts as triers of fact demonstrates that the legislation has not been well designed, is not rationally connected to the objective and has a disproportionate impact on the disabled group.
204. Each taxpayer's circumstances are different and the only way to avoid complexity and distortions is to apply the tax system.²⁰⁸
205. The less insurance an insured driver has the more the benefit of the reduction in lost income is conveyed to the insured driver. This section of the legislation encourages carrying less insurance which is not rationally connected to the objective.²⁰⁹ Pedestrian, non-drivers are disabled victims ignored in the mix.
206. If there was no reduction in the amount payable before settlement, or trial, insurers would be more reasonable in handling claims.²¹⁰
207. It is submitted that instituting an across the board reduction in lost income before trial is not rationally connected to: i) encouraging insurance coverage, ii) assuring an accident victim is not unfairly overcompensated, and iii) encouraging prompt settlement.
208. It is respectfully submitted that the desire to reduce insurance rates is not a pressing and substantial societal concern sufficient to override the **Charter**. The impugned legislation has not been well designed, is not rationally connected to the objective and has had a disproportionate adverse impact on the disabled.

D/SS. 267.5(1) AND 280 VIOLATE S.7 OF THE CHARTER

209. For the purposes of this s. 7 discussion, the Applicant relies on the facts and evidence set out previously in this factum, under the s. 15 analysis, so as to avoid repetition.

²⁰⁸ AR Vol. 2, Tab 19(A), at p. 955, Transcript of the Examination of Jack Mintz at Q295.

²⁰⁹ AR Vol. 2, Tab 19(A), at p. 955, Transcript of the Examination of Jack Mintz at Q295.

²¹⁰ AR Vol. 2, Tab 11, at p. 579, Affidavit of Jokelee Vanderkopp at para 73.

• **Scope of s. 7 of the Charter**

210. It is submitted, and trite law, that the scope of s. 7 is both procedural and substantive.²¹¹

211. The Supreme Court of Canada has made it clear, in *Rodriguez* that there is a two-part analysis under s.7, that is, first to determine whether there is a s. 7 right, *or interest*, engaged and denied, and if so, whether that right or interest is being denied in accordance with the tenets of fundamental justice.²¹²

212. Section 7 covers both physical and psychological integrity rights and interests, as set out by the Supreme Court of Canada in *Singh*:

[46] I cannot, however, accept the submission of counsel for the Minister that the denial of the rights possessed by a Convention refugee under the Act does not constitute a deprivation of his security of the person. *Like "liberty", the phrase "security of the person" is capable of a broad range of meaning.* The phrase "security of the person" is found in s. 1(a) of the Canadian Bill of Rights and its interpretation in that context might have assisted us in its proper interpretation under the Charter. Unfortunately no clear meaning of the words emerges from the case law, although the phrase has received some mention in cases such as *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at pp. 628-34 (per Laskin C.J. dissenting); *Curr v. The Queen*, [1972] S.C.R. 889; and *R. v. Berrie* (1975), 24 C.C.C. (2d) 66, at p. 70. The Law Reform Commission, in its Working Paper No. 26, [page207] Medical Treatment and Criminal Law (1980), suggested at p. 6 that:

*The right to security of the person means not only protection of one's physical integrity, but the provision of necessities for its support.*²¹³

and further continued in *Morgentaler*.²¹⁴ This was subsequently approved by the Supreme Court of Canada in *Rodriguez*:

[136] In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra, Lamer J. also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing

²¹¹ *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 (SCC); *R v Pearson* [1992] SCJ No 99 (SCC); *R v Morgentaler*, [1988] 1 SCR 30, at para 36 (SCC).

²¹² *Rodriguez v British Columbia (A.G.)*, [1993] 3 SCR 519, at paras 127-128 (SCC).

²¹³ *Singh et al. MEI* [1985] 1 SCR 177 at paras 43-49 (SCC).

²¹⁴ *R v Morgentaler*, [1988] 1 SCR 30, at paras 17-20.

from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.²¹⁵

And further in *R. v. O'Connor*:

[112] Equally relevant, for our purposes, is Lamer J.'s recognition in *Mills*, supra, at p. 920, *that the right to security of the person encompasses the right to be protected against psychological trauma...*²¹⁶

And further in *Chaoulli*:

[116] In addition to threatening the life and the physical security of the person, waiting for critical care may have significant adverse psychological effects. Serious psychological effects may engage s. 7 protection for security of the person. These "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 60.

...
[119] In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s. 7 protection of security of the person just as they did in *Morgentaler...*²¹⁷.

213. While it is recognized that s. 7 does not guarantee the *reading in* of rights, as absolute, *per se*, such as health care, the Supreme Court of Canada has made the point that once a statutory regime is put into place, granting and/or curtailing a right to certain services or "benefits", then such legislative scheme and its enforcement must be **Charter** compliant, wherein, in *Chaoulli*, the Supreme Court of Canada stated:

[104] The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.²¹⁸

214. The Supreme Court of Canada further ruled that the hallmark of s.7 **Charter** breaches or denials is arbitrariness, where in the Court in *Rodriguez* stated:

²¹⁵ *Rodriguez v. British Columbia (A.G.)*, [1993] 3 SCR 519, at para 136.

²¹⁶ *R v O'Connor*, [1995] 4 SCR 411, at paragraph 112.

²¹⁷ *Chaoulli v Quebec (A.G.)* [2005] 1 SCR 791, at paras 116-119.

²¹⁸ *Ibid* at para 104.

[203] This brings us to the next question: what are the principles of fundamental justice? They are, we are told, **the basic tenets of our legal system whose function is to ensure that state intrusions on life, liberty and security of the person are effected in a manner which comports with our historic, and evolving, notions of fairness and justice**: *Re B.C. Motor Vehicle Act*, supra. Without defining the entire content of the phrase "principles of fundamental justice", **it is sufficient for the purposes of this case to note that a legislative scheme which limits the right of a person to deal with her body as she chooses may violate the principles of fundamental justice under s. 7 of the Charter if the limit is arbitrary. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation.** This was the foundation of the decision of the majority of this Court in *Morgentaler*, supra.²¹⁹

and which *Chaoulli* endorsed and elaborated.²²⁰

215. It is submitted that the recent *Bedford*²²¹ and *Carter*²²² cases endorse, confirm, clarify, and apply the above-noted jurisprudence, particularly with respect to overbreadth and disproportionality.

216. It is submitted that both ss. 267.5(1) and 280 deprive motor vehicle and disabled accident victims as follows:

(a) With respect to s. 267.5(1) by:

- (i) arbitrarily reducing compensation for physical and psychological disability, otherwise compensable at 100% at common law (in tort);
- (ii) arbitrarily providing a benefit to one party to a private tort and/or contract dispute over the other party, who suffers a disability as a result of the tort;
- (iii) arbitrarily, in an overbroad and disproportionate fashion, reducing benefits for a 100% of the motor vehicle disabled population largely on the objective to combat perpetrated fraud on the part of a maximum of 8-18% of the 100% of those disabled;

(b) With respect to s. 280 by:

- (i) the LAT exercising the general jurisdiction area over various statutes, and in particular with respect to insurance benefits flowing from tort claims, creating a tribunal exercising the functions of a s. 96 Court;

²¹⁹ *Rodriguez v British Columbia (A.G.)*, [1993] 3 SCR 519, at para 203.

²²⁰ *Chaoulli v Quebec (A.G.)* [2005] 1 SCR 791, at paragraphs 126-133.

²²¹ *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101.

²²² *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

- (ii) motor vehicle accident victims are further denied, with respect to insurance benefits flowing from a tort action, access to the same Superior Court, which violates their rights to an independent judiciary contrary to s. 96, the unwritten principles of the Constitution, as well as s. 7 of the **Charter**, and further risks inconsistent findings, and effect, as between the LAT and the Superior Court in that it is for example, impossible to reconcile an early LAT finding of “minor” injury, with a later Superior Court finding of a “serious and permanent” impairment, with respect to the same person, accident, and disability.

217. It is further submitted that, with respect to s. 267.5(1), apart from the lack of valid objective, and arbitrary decision to limit benefits to 70% of gross income, and thus not in accordance with the tenets of fundamental justice, the provision further suffers from “overbreadth” or “disproportionality”, a recognized violation not in accordance with the tenets of fundamental justice, for the following reasons:

- (a) arbitrarily reducing compensation for physical and psychological disability, otherwise compensable at 100% at common law (in tort);
- (b) arbitrarily providing a benefit to one party to a private tort and/or contract dispute over the other party, who suffers a disability as a result of the tort;
- (c) arbitrarily, in an overbroad and disproportionate fashion, reducing benefits for a 100% of the motor vehicle disabled population largely on the objective to combat perpetrated fraud on the part of a maximum of 8-18% of the 100% of those disabled.

• s. 7 of the Charter Overbreadth

218. It is submitted that the overbreadth doctrine, under s.7 of the **Charter**, simply put, is as articulated by the Supreme Court of Canada in *Heywood* when it ruled that:

- (a) “In the case of overbreadth the means are too sweeping in relation to the objective”;
- (b) “The effect of overbreadth is that in some applications the law is arbitrary or disproportionate”; and
- (c) “Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual”.²²³

²²³ *R v Heywood*, [1994] 3 S.C.R. 761 at paras. 48-50.

219. It is submitted that s. 267.5(1) and s. 280 of the **Insurance Act** do not meet the test for overbreadth and disproportionality recently reviewed, consolidated, by the Supreme Court of Canada in *Carter*, wherein the SCC summarized:

[85] The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object: *Bedford*, at paras. 101 and 112-13. Like the other principles of fundamental justice under s. 7, overbreadth is not concerned with competing social interests or ancillary benefits to the general population. **A law that is drawn broadly to target conduct that bears no relation to its purpose “in order to make enforcement more practical” may therefore be overbroad (see *Bedford*, at para. 113).** The question is not whether Parliament has chosen the least restrictive means, but **whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled.**²²⁴

And furthermore in *Bedford*, wherein the SCC stated:

[123] **All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law’s effectiveness.** That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. **The question under s. 7 is whether anyone’s life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.**²²⁵

220. It is thus submitted that this breach of s. 7, contrary to the tenet of fundamental justice of overbreadth, cannot be justified in this case, under s. 1 of the **Charter**, for the reasons set out in, *inter alia*, *Ruzic* by the SCC:

[92] Moreover, it is well established that violations of s. 7 are not easily saved by s. 1: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 99. **Indeed, the Court has indicated that exceptional circumstances, such as the outbreak of war or a national emergency, are necessary before such an infringement may be justified:**

²²⁴ *Carter*, supra at para 92 [emphasis added]

²²⁵ *Bedford*, supra at para 123 [emphasis added].

R. v. Heywood, [1994] 3 S.C.R. 761, at p. 802; *Re B.C. Motor Vehicle Act*, *supra*. No such extraordinary conditions exist in this case...²²⁶

E/ s. 280 OF THE INSURANCE ACT VIOLATES S.96 OF THE CONSTITUTION ACT, 1867

221. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.²²⁷ This federal power has been interpreted broadly in order to prevent Legislative and Provincial encroachment.²²⁸ The intended effect of s. 96 would be destroyed if a Legislature could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts.²²⁹

• Grant of Historical Section 96 Power

222. Historically, there was an absolute ban on the transfer of Superior Court powers onto administrative tribunals (*MacMillan*).²³⁰ In response to increasingly complexity of Canadian society, a contextual approach has been taken (*MacMillan*).²³¹ The contextual approach considers not only the power, but also the administrative framework under which it was granted.²³²

223. The test was stated by Chief Justice Dickson (*Residential Tenancies*) as follows: "An administrative tribunal may be clothed with power formerly exercised by s. 96 courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting 'like a court', then the conferral of the power is ultra vires."²³³

²²⁶ *R v Ruzic* [2001] 1 SCR 687, at paras 91-92.

²²⁷ *The Constitution Act, 1867*, 30 & 31 Vict, c 3 [*Constitution*] at s 96.

²²⁸ *Re Residential Tenancies Act*, [1981] 1 SCR 714, 123 DLR (3d) 554 [*Residential*] at 728.

²²⁹ *Residential* *ibid* at 728.

²³⁰ *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, 130 DLR (4th) 385 [*MacMillan*] at para 56.

²³¹ *MacMillan* *ibid* at para 59.

²³² *MacMillan* *supra* 164 at para 59.

²³³ *Residential* *supra* para 162 at pp 733-734.

- **Test to be Clothed with Power**

224. The contextual approach utilizes a three-step test after defining the power under scrutiny. The power under scrutiny is the legislated enablement of the Licence Appeal Tribunal (LAT) to be the adjudicator in private party insurance contract disputes in which the amount in dispute has no prescribed monetary limit. Secondly, the LAT also makes the same disguised declaratory findings with respect to the degree of injury suffered, as well as the meaning of the insurance contract, with respect to the same events and contracts, that the Superior Court will later make on the tort action.

225. The LAT is an adjudicative tribunal. Unlike other administrative tribunals the LAT deals with a variety of matters that does not have anything to do with each other. It is an adjudicative tribunal of general jurisdiction, adjudicating **over thirty (30)** different pieces of legislation.²³⁴ The LAT has all the powers that are necessary or expedient for carrying out its duties.²³⁵

- **Step 1 Sole Jurisdiction at the Time of Confederation**

226. The first step is to consider if the dispute is one which could be exercised solely by Superior Courts at the time of Confederation.²³⁶

227. In the present Application, the primary consideration is the monetary limits to decide contractual disputes at the time of confederation. The monetary limit of inferior courts at the time of Confederation was \$100 (*Sobey*).²³⁷ At the time of Confederation, \$100 has a present day perceived value of approximately \$60,000-\$65,000.²³⁸ Declaratory findings as to the interpretation of contracts were also Superior Court jurisdiction. General jurisdiction over various unrelated statutory schemes is the hallmark of Superior Court as a court of general jurisdiction.

228. It is respectfully submitted that Superior courts have the sole inherent jurisdiction to decide contractual disputes between private parties on monetary amounts that exceed \$60,000. Consequently, step 2 must be considered.

²³⁴ AR Vol. 6, Tab 31C, Transcript of the Examination of Chris Popovich at p. 3191, Q78; p. 3192 at Q92-93; p. 3194 at Q143.

²³⁵ *Licence Appeal Tribunal Act*, 1999, SO 1999, c 12, Sch G, s 3(2).

²³⁶ *MacMillan supra* para 164 at para 63.

²³⁷ *Sobeys stores ltd. v. Yeomans and Labour Standards Tribunal* (N.S.), [1989] 1 SCR 238, 57 DLR (4th) 1 [*Sobey*] at 270.

²³⁸ AR Vol. 1, Tab 9(A), at p.283, Transcript of the Examination of Dr. Eli Katz at q146-147.

- **Step 2 Judicial Function**

229. The second step is to consider the function within its institutional setting to determine whether the function was still “judicial”.²³⁹ In the present Application the Licence Appeal 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” (*Residential Tenancies*).²⁴⁰

230. It is respectfully submitted that the Licence Appeal Tribunal is performing a judicial function. Further it is submitted that this represents an encroachment on the authority of the Superior Courts (*MacMillan*). Consequently the third step must be considered.²⁴¹

- **Step 3 Tribunal Function**

231. The third step is to review the tribunal’s function as a whole in order to appraise the impugned function in its entire institutional context. A scheme will be valid if the impugned judicial powers are merely subsidiary or ancillary to general administrative functions or necessarily incidental to the achievement of a broader policy goal (*Residential Tenancies*). In other words, a provincial scheme will be invalid where the adjudicative function is a sole or central function of the tribunal.²⁴²

232. In the present Application, the Licence Appeal Tribunal undertakes **only one function**, with respect to private insurance contract disputes - **the adjudication of disputes**. Moreover, it exercises this same function with respect to **over thirty (30) different, unrelated statutes**. Thus, it is submitted that what has been created is an “administrative tribunal of general jurisdiction” akin to a Superior Court, violating s. 96.

- **Test to Oust Authority from the Superior Courts**

233. If the legislation has been found to have validly clothed the LAT with powers of the Superior Court, which the Applicant asserts is not the present case, the next step would have been to determine if the Superior Court could be ousted of this power.

²³⁹ *Residential supra* para 162 at 734-735.

²⁴⁰ *Residential supra* para 162 at 735.

²⁴¹ *Macmillan supra* para 164 at para 63.

²⁴² *Residential supra* para 162 at 736.

234. Once a tribunal is found to have usurped the function of s.96 court, a second two-part test is utilized to determine whether the legislature sought to provide the tribunal with sole jurisdiction over the delegated power.
235. The first part is to determine the nature of the power that the Legislature delegated solely to a tribunal.
236. In the present Application, the Licence Appeal Tribunal has been delegated the sole power to adjudicate SABS contractual disputes between insurers and insured victims. Access by these individuals to the **Superior Court of Justice** as triers of fact is **prohibited**.
237. The second part is to determine whether the power was historically, broadly conformable exclusively to a section 96 Court power.
238. If the legislation attempted to oust the jurisdiction of the s. 96 court, of a power that was historically within its sole purview, then the legislation will be found *ultra vires* legislative authority.
239. In the present Application, the jurisdiction that the legislature has attempted to oust from the Superior courts appears to be part of the (core) jurisdiction of the Superior courts.
240. It is respectfully submitted that this power cannot be handed over to the Licence Appeal Tribunal by the Ontario legislature. Further it is submitted that the jurisdiction of the Superior Court as forum of first instance in contract and tort disputes between these private parties cannot be ousted by legislation.
241. It is further submitted that, from the perspective of the disabled accident victim and redress to an inseparable event and consequences of disability, to “split” the adjudication of the dispute between the Superior Court (tort action) and the LAT (contract insurance benefits) further highlights the violation in that both have to make sibling determinations such as:
- (a) Degree and duration of injury;
 - (b) Liability of tortfeasor and/or insurer;
- While at the same time the LAT pirates, under the guides of administrative determinations, traditional and core functions of the Superior Court such as:

- (c) Declaratory relief with respect to the interpretation and enforcement of the terms of the contract (see for example Rule 14.05(e) applications).

With the added and further effect that, with respect to the same accident injury and contract, inconsistent findings may arise as between the Superior Court and the LAT.

242. It is thus submitted that the disabled tort/contract victim of a motor vehicle accident has the constitutional right to have both the tort and contract rights and benefits adjudicated in a consolidated forum, namely the Superior Court. While the Applicant acknowledges that in certain circumstances, the SCC has recognized the possibility of **concurrent jurisdiction, as between two Superior Courts**, the s. 96 and s. 101 Courts (Federal Court), and the deferral of jurisdiction in the s. 96 Court to the s. 101 (Federal Superior Court),²⁴³ it is submitted that this is not possible as between a s. 96 Court and provincial quasi-judicial tribunal body for the reasons set out by the SCC in *Ocean Port*,²⁴⁴ where the SCC ruled that such tribunals are **part of the Executive**.

PART V – RELIEF SOUGHT

243. The Supreme Court of Canada has consistently held, post-**Charter**, citing pre-**Charter** jurisprudence, the ancient maximum that there is “no right without a remedy,” in *Mills*²⁴⁵ and further endorsed in *Nelles v. Ontario*²⁴⁶ and in *Doucet-Boudreau v. NS*.²⁴⁷

244. The Applicant seeks the following relief

- (a) with respect to s. 267.5(1), for violations under s. 7 of the **Charter**, s. 15 of the **Charter**, as well as the underlying constitutional imperatives of equality and treatment before and under the law:
 - (i) a finding or declaration, pursuant to s. 52 of the **Constitution Act, 1982**, that s. 267.5(1) is of no force and effect;

²⁴³ *Reza v Canada*, [1994] 2 SCR 934 (SCC).

²⁴⁴ *Ocean Port Hotel Ltd v British Columbia*, [2001] 2 SCR 781, 204 DLR (4th) 33 [*Ocean Port*] at paras 23-24.

²⁴⁵ *R v Mills* [1986] 1 SCR 863, at p. 971-972.

²⁴⁶ *Nelles v Ontario* [1989] 2 S.C.R. 170 (per Lamer, C.J.).

²⁴⁷ *Doucet-Boudreau v NS (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 55.

- (ii) a finding or declaration that s. 267.5(1) constitutes a **de facto ultra vires** tax on the (motor vehicle) disabled, infringing ss. 7 and 15 of the **Charter**, as well as the unwritten Constitutional imperatives to equality;
- (b) with respect to s. 280, for violations under s. 7 of the **Charter**, s. 15 of the **Charter**, as well as the underlying constitutional imperatives of equality and treatment before and under the law:
 - (i) that s. 280 be struck in its entirety; or
 - (ii) in the alternative, a declaration “reading down” s. 280 by inserting the bolded portions:

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.

(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).

(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 from a decision of the Licence Appeal Tribunal or an application for judicial review.

- (c) In the alternative to (b), above, with respect to s. 280 a violation of s. 96 of the **Constitution Act, 1867**, that the entirety of s. 280 be found and declared to be of no force and effect.
- (d) With respect to costs, the Applicant only seeks costs, on a substantial indemnity basis, based on public interest litigation, against the Crown, in the sole event that the Crown seeks costs. It has been agreed, as between the Applicant and the Intervener, that neither side seeks costs. Should the Crown decide **not** to seek costs, then the Applicant does **not** seek costs.
- (e) such further and other relief as counsel may advise and this Honourable Court may grant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Toronto this 16th day of January, 2017



Peter Murray
Counsel for the Applicant



Rocco Galati
of Counsel for the Applicant

PART VI – SCHEDULE OF AUTHORITIES

SCHEDULE “A” – AUTHORITIES

1) <i>Peixeiro v Haberman</i> , [1997] 3 SCR 549, 151 DLR (4th) 429 (SCC)
2) <i>Meyer v Bright</i> (1993), 15 OR (3d) 129; 110 DLR (4th) 354 (Ont CA)
3) <i>Baillargeon v Murray</i> , [2001] 52 OR (3d) 278; 25 CCLI (3d) 44 (Ont SCJ)
4) <i>Shanks v McNee</i> , [1994] 1 SCR 359, 113 DLR (4th) 1 (SCC)
5) <i>16-000041 v Intact Insurance Company</i> , 2016 CanLII 78333 (ON LAT)
6) <i>Reference re Secession of Quebec</i> , [1998] 2 SCR 217 (SCC)
7) <i>R v Morgantaler</i> , [1988] 1 SCR 30 (SCC)
8) <i>Operation Dismantle v The Queen</i> , [1985] 1 SCR 441 (SCC)
9) <i>Canada (Prime Minister) v. Khadr</i> , 2010 SCC 3, [2010] 1 SCR 44
10) <i>R v Salituro</i> , [1991] 3 SCR 654 (SCC)
11) <i>RWDSU v Dolphin Delivery Ltd.</i> , [1986] 2 SCR 573 (SCC)
12) <i>R v Kapp</i> , 2008 SCC 41, 2 SCR 483
13) <i>Withler v Canada (Attorney General)</i> , 2011 SCC 12, [2011] 1 SCR 396
14) <i>Granovsky v Canada (Minister of Employment and Immigration)</i> , [2000] 1 SCR 703, 186 DLR (4th) 1 (SCC)
15) <i>Talon v Whalley</i> , [1988] 63 OR (2d) 723; 48 DLR (4th) 744 (Ont CA)
16) <i>Quebec (A.G.) v A</i> , [2013] 1 SCR 61, 354 DLR (4th) 191 (SCC)
17) <i>Newfoundland (Treasury Board) v N.A.P.E.</i> , 2004 SCC 66, [2004] 3 SCR 381
18) <i>Gosselin v Québec (Attorney General)</i> , [2002] 4 SCR 429, 221 DLR (4th) 257 (SCC)
19) <i>Eldridge v British Columbia</i> , [1997] SCR 624, 151 DLR (4th) 577 (SCC)
20) <i>BG Checo International Ltd. v British Columbia Hydro and Power Authority</i> , [1993] 1 SCR 12, 99 DLR (4th) 577 (SCC)
21) <i>Babakar v Brown</i> (2009), 95 OR (3d) 206; 71 CCLI (4th) 258 (Ont SCJ)
22) <i>Babakar v Brown</i> , 2010 ONSC 255; [2010] OJ No 414 (Ont SCJ)
23) <i>Mihichuk v Allstate Insurance Co of Canada</i> (1998), 38 OR (3d) 762, 1998 CanLII 14674 (Ont Gen. Div.)
24) <i>TD General Insurance Company v Baughan</i> , 2013 ONSC 333
25) <i>Ocean Port Hotel Ltd v British Columbia</i> , [2001] 2 SCR 781, 204 DLR (4th) 33 (SCC)
26) <i>Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)</i> , [2014] 3 SCR 31, 375 DLR (4th) 599 (SCC)
27) <i>R v Big M Drug Mart Ltd.</i> , [1985] 1 SCR 295, 18 DLR (4th) 321 (SCC)
28) <i>R v Oakes</i> , [1986] 1 SCR 103, 53 OR (2d) 719 (SCC)
29) <i>Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia</i> , [2007] 2 SCR 391, 283 DLR (4th) 40 (SCC)
30) <i>Winner v S.M.T. (Eastern) Ltd.</i> , [1951] SCR 887 (SCC)
31) <i>Chaoulli v Quebec (Attorney General)</i> , 2005 SCC 35, [2005] 1 SCR 791
32) <i>Bolling v Sharpe</i> , 347 US 497 (1954) (USSC)
33) <i>R v Turpin</i> , [1989] 1 SCR 1296.
34) Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (Fall 1999) 22 Dalhousie L.J. 5
35) <i>USA v Schmidt</i> , [1987] 1 SCR 50 (SCC)

36) <i>Re B.C. Motor Vehicle Act</i> , [1985] 2 SCR 486 (SCC)
37) <i>R v Pearson</i> , [1992] SCJ No 99 (SCC)
38) <i>Rodriguez v British Columbia (A.G.)</i> , [1993] 3 SCR 519 (SCC)
39) <i>Singh et al.. MEI</i> , [1985] 1 SCR 177 (SCC)
40) <i>R v O'Connor</i> , [1995] 4 SCR 411
41) <i>Canada (Attorney General) v Bedford</i> , 2013 SCC 72, [2013] 3 SCR 1101
42) <i>Carter v Canada (Attorney General)</i> , 2015 SCC 5, [2015] 1 SCR 331
43) <i>R v Heywood</i> , [1994] 3 SCR 761 (SCC)
44) <i>R v Ruzic</i> [2001] 1 SCR 687 (SCC)
45) <i>Re Residential Tenancies Act</i> , [1981] 1 SCR 714, 123 DLR (3d) 554 (SCC)
46) <i>MacMillan Bloedel Ltd v Simpson</i> , [1995] 4 SCR 725, 130 DLR (4th) 385 (SCC)
47) <i>Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)</i> , [1989] 1 SCR 238, 57 DLR (4th) 1 (SCC)
48) <i>Reza v Canada</i> , [1994] 2 SCR 934 (SCC)
49) <i>Chaudary v Canada (Minister of Citizenship and Immigration)</i> , [1995] FCJ No 741 (FCTD)
50) <i>R v Mills</i> [1986] 1 SCR 863 (SCC)
51) <i>Nelles v Ontario</i> , [1989] 2 SCR 170 (SCC)
52) <i>Doucet-Boudreau v NS (Minister of Education)</i> , 2003 SCC 62, [2003] 3 SCR 3

SCHEDULE “B” – STATUTES AND REGULATIONS

1) <i>Insurance Act</i> , RSO 1980, c I-8
2) <i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11
3) <i>The Constitution Act, 1867</i> , 30 & 31 Vict, c 3
4) <i>Insurance Statute Law Amendment Act</i> , 1990, SO 1990 [Bill 68]
5) <i>Automobile Insurance Rate Stability Act</i> , 1996, SO 1996 [Bill 59]
6) <i>Statutory Accident Benefits Schedule — Accidents Before January 1, 1994</i> , R.R.O. 1990, Reg. 672
7) <i>Statutory Accident Benefits Schedule - Accidents After December 31, 1993 and Before November 1, 1996</i> , O. Reg. 776/93
8) <i>Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996</i> , O Reg 403/96
9) <i>Creating the Foundation for Jobs and Growth Act</i> , 2010, SO 2010
10) <i>Statutory Accident Benefit Schedule</i> , OReg 403/96 (2006)
11) <i>Indian Act</i> , (R.S.C., 1985, c. I-5) at s. 83
12) <i>Public Service of Ontario Act</i> , 2006, SO 2006, c 35, Sch A
13) <i>Fighting Fraud and Reducing Automobile Insurance Rates Act</i> , 2014, SO 2010 at ss 267.5(1) and 280 [Bill 15]
14) <i>Financial Services Commission of Ontario Act</i> , 1997, SO 1997, c. 28
15) <i>Public Service of Ontario Act</i> , 2006, SO 2006, c 35, Sch A
16) <i>Motor Vehicle Accident Claims Act</i> , RSO 1990, c M.41, s. 1
17) <i>Licence Appeal Tribunal Act</i> , 1999, SO 1999, c12

SCHEDULE “C” – LEGISLATIVE PROVISIONS

Insurance Act, R.S.O. 1990, c I-8.

267.5 (1) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for the following damages for income loss and loss of earning capacity from bodily injury or death arising directly or indirectly from the use or operation of the automobile:

1. Damages for income loss suffered in the seven days after the incident.
2. Damages for income loss suffered more than seven days after the incident and before the trial of the action in excess of,
 - i. 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
 - ii. 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. Damages for loss of earning capacity suffered after the incident and before the trial of the action in excess of,
 - i. 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
 - ii. 70 per cent of the loss of earning capacity during that period, as determined in accordance with the regulations, in any other case. 1996, c. 21, s. 29; 2010, c. 1, Sched. 11, s. 1 (1); 2011, c. 9, Sched. 21, s. 3 (1).

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. 2014, c. 9, Sched. 3, s. 14.

(2) The insured person or the insurer may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1). 2014, c. 9, Sched. 3, s. 14.

(3) No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review. 2014, c. 9, Sched. 3, s. 14.

(4) The dispute shall be resolved in accordance with the *Statutory Accident Benefits Schedule*. 2014, c. 9, Sched. 3, s. 14.

(5) The regulations may provide for and govern the orders and interim orders that the Licence Appeal Tribunal may make and may provide for and govern the powers and duties that the Licence Appeal Tribunal shall have for the purposes of conducting the proceeding. 2014, c. 9, Sched. 3, s. 14.

(6) Without limiting what else the regulations may provide for and govern, the regulations may provide for and govern the following:

1. Orders, including interim orders, to pay costs, including orders requiring a person representing a party to pay costs personally.

2. Orders, including interim orders, to pay amounts even if those amounts are not costs or amounts to which a party is entitled under the *Statutory Accident Benefits Schedule*. 2014, c. 9, Sched. 3, s. 14.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone 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.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

- (a) the Canada Act, 1982, including this Act;
- (b) the Acts and orders referred to in the Schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

The Constitution Act, 1867, 30 & 31 Vict, c 3

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Joseph Campisi v Her Majesty in Right of Ontario as
Represented by the Attorney General of Ontario

Court File No.: CV-15-520150

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT TORONTO

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