Court File No.: C64008

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

JOSEPH CAMPISI

Applicant
(Appellant)

and

HER MAJESTY IN RIGHT OF ONTARIO
AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO, and the
INSURANCE BUREAU OF CANADA

Respondents
(Respondents in appeal)

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Part I- Overview

1. This is an appeal by Mr. Joseph Campisi, the sole Applicant, from a decision dated May 31, 2017 of the Honourable Mr. Justice Belobaba of the Superior Court of Justice in application # CV-15-520150. The Superior Court dismissed the application, finding that Mr. Campisi lacked standing to bring the proceeding, that neither ss. 267.5(1) nor 280 of the *Insurance Act*[1] breaches ss. 15(1) or 7 of the *Canadian Charter of Rights and Freedoms*[2] ("Charter"), and that the Licence Appeal Tribunal's ("LAT") dispute resolution jurisdiction is not in violation of s. 96 of the *Constitution Act, 1867*.[3]
2. At common law, victims of tort or contract breach were able to recover 100% of their loss in compensation and to be placed in the same position that they were in prior to that tort/breach of contract. 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, or 80% of net income, up to trial; and
    b. 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 Licence Appeal Tribunal ("LAT") and cannot be determined by the Superior Court, which has jurisdiction over the tort claim.

Part II- Nature of the Appeal

3. This appeal raises the extent of a motor vehicle accident victim's disadvantage under the current legislation. Mr. Campisi commenced the application in both his private capacity and in the public interest. The application considered the following circumstances:

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[1] RSO 1990, c I.8, s. 267.5(1).
[2] *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.
[3] *The Constitution Act*, 1867, 30 & 31 Vict, c 3.

a. Insureds are unilaterally forced to pay an excessive taxation rate of 30%[4] to the Ontario Government for lost income until trial. The tax being paid serves as an undue preference to the defendant, thereby encouraging delay in court proceedings by the defendant [captured by s. 267.5(1) of the *Insurance Act*];[5] and

b. The disabled are stripped of their right to access the Superior Courts, as triers of fact for private contractual disputes regarding significant monetary sums, being forced to attend an administrative tribunal (captured by s. 280 of the *Insurance Act*).[6]

4. Mr. Campisi pleaded that ss. 267.5(1) and 280 violated ss. 7 and 15(1) of the *Charter of Rights and Freedoms,* as well as the unwritten constitutional right to equality, and that the removal of access to the Superior Court of Justice for private party disputes violated s. 96 of the *Constitution Act,* 1867.

5. It is submitted that, in the course of his decision, Justice Belobaba made errors of law, mixed fact and law, and palpable errors and misapprehension of facts. The issues to be considered in reviewing these errors are framed as follows:

a. Did Mr. Campisi have private and/or public interest standing?

b. Do ss. 267.5(1) and 280 of the *Insurance Act* violate s. 7 of the *Charter* and, if so, are they saved by s. 1 of the *Charter*?

c. Do ss. 267.5(1) and 280 of the *Insurance Act* violate s. 15(1) of the *Charter* and, if so, are they saved by s. 1 of the *Charter*?

d. Do ss. 267.5(1) and 280 of the *Insurance Act* violate the unwritten, underlying constitutional right to equality of treatment before and under the law?

e. Does s. 280 of the *Insurance Act* violate s. 96 of the *Constitution Act, 1867*?

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[4] Post September 2010. Prior to September 2010 the Ontario tax was equivalent to the Federal and Provincial tax plus an additional 20% of net income. No deductions are allowed from the Ontario Tax).

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

[6] *Insurance Act*, RSO 1990, c I.8, s. 280.

Part III- Relevant Facts to Issues in Dispute

A. Right of Standing Facts

6. Mr. Campisi, a personal injury lawyer, is a practicing partner at Campisi LLP. Campisi LLP accepts 100 to 150 new clients annually for statutory accident benefit ("SABS") disputes. Most new clients retain the firm for two separate claims: tort and accident benefits. It is "rare, very rare" for the firm to be retained only for an accident benefits claim.[7] The lawyers of Campisi LLP, including Mr. Campisi, represent clients for SABS arbitrations.[8]
7. Mr. Campisi has advocated at the Ontario Court of Appeal assuring his client's entitlement to the catastrophic level of accident benefits.[9] Mr. Campisi is the lawyer on record for Mr. Gerritsen's tort claim - an affiant.[10] Mr. Campisi has made submissions to the Financial Services Commission of Ontario ("FSCO") in the capacity of a doctoral researcher regarding:
   a. findings from empirical studies indicating that insurers will defend tort claims strenuously, resulting in long delays when large monetary sums are involved;
   b. findings from surveys indicating that accident benefits are too complex and require the involvement of a lawyer; and
   c. concerns regarding access to justice.
8. Mr. Campisi has taught insurance law at Osgoode Hall since 2009.

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[7] Appeal Book: Volume 4, p2306-2310, questions 44, 67, 68, 70, 36.
[8] Appeal Book: Volume 4, p2308 at question 36.
[9] *Pastore v Aviva Canada Inc.*, 2012 ONCA 642 (CanLII).
[10] Appeal Book: Volume 1, pp643-654.

B. Section 267.5(1) Facts

9. Historically, tort claims require an average of 5 years to settle and can require 9 years.[11]

10. The Ministry of Finance witness, Alvaro J. Del Castillo, stated that: [12]

    a. s. 267.5(1) was introduced in order to encourage plaintiffs to settle;

    b. the objective of the legislation was to make sure that plaintiffs were not placed in a better position than what they would have been in given their net incomes;

    c. defendants may have reasons to delay tort actions;

    d. there is no legislation that prevents defendants from delaying tort claims;

    e. it is "not a good thing" if it is legally too expensive for individuals to pursue their rightful claims;

        i. accident victims have to pay, out-of-pocket, a portion of attendant care expenses as insurers have no obligation to pay to the minimum wage level;

        ii. Income replacement benefits paid are below the Poverty line.

11. The IBC's tax expert, Jack Mintz, stated that:

    a. s. 267.5(1) overburdens those who earn minimum wage and work 30 hours weekly;

    b. s. 267.5(1) effectively imposes a tax on the plaintiff and provides a tax rebate to the defendant;[13]

12. Dr. Katz opined that section 267.5(1) imposed a Disability tax that was higher than the income tax imposed, by Ontario, on workers earning $30,000, or $300,000 annually.[14]

13. Evidence of the real-life effect of s. 267.5(1) was provided by Mr. Gerritsen and Ms. Vanderkopp. Mr. Gerritsen, a client of Mr. Campisi, has a grade 8 education. Prior to the accident, he earned approximately $100,000 as a crane operator. Mr. Gerritsen was struck

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[11] Appeal Book: Volume 2, pp725-726 s2.5.4, p733.
[12] Appeal Book: Volume 5, p3345 at para 62, p3451 at question 149, pp3450-3451 at question 145, p3462 at question 1, p3449 at question 127, pp3476-3441 at questions 23-29, p3476.
[13] Appeal Book: Volume 2, p962 at questions 16-23, p985 at questions 290-293, p951 at question 945.
[14] Appeal Book: Volume 1, pp291-292. (Based on whether accident occurred before or after September 2010).

by a driver, who was convicted with failing to stop at a stop sign. His left fibula was too badly splintered to re-establish its original length. This information was provided to the defendant on July 17, 2014. His tort claim is simple; including a lost income claim.[15]

14. The defendant originally wanted to conduct examinations for discovery on March 15, 2015. The defendant subsequently refused to schedule examinations for discovery before November 2015, representing a delay of 8 months. Mr. Campisi's firm was able to reduce this delay following protracted correspondence and negotiations with opposing counsel.[16]
15. Section 267.5(1) results in Mr. Gerritsen's damages being reduced by approximately $30,000 annually until trial. In addition to his physical disability, Mr. Gerritsen was diagnosed with post-traumatic stress disorder and adjustment disorder. Mr. Gerritsen feels hopeless because he is disadvantaged and unable to control his destiny. Mr. Gerritsen believes that he must settle now, for less than he is owed for his loss of income claim, or face further procedural delays. The continuous reduction in the amount that can be recovered, as a direct result of section 267.5(1), is having an adverse psychological effect on Mr. Gerritsen. Mr. Gerritsen feels stripped of his pride and self worth.[17]
16. Ms. Vanderkop is a former teacher. In 2009, 7 years after her income replacement benefits were terminated, she was found to be entitled to payment of same. She was awarded $191,455 in interest as a result of her insurer's unreasonable delay. As a result of this delay, her insurer was also able to reduce its tort liability by $385,590. Her insurer saved about $194,135 by delaying her lawsuit. She spent tens of thousand of dollars in legal fees which she cannot deduct from the s. 267.5(1) tax.[18]
17. As a result of the delays, Ms. Vanderkop depleted her life savings. She had to be careful with spending money to the extent that she could no longer participate socially. Going for

[15] Appeal Book: Volume 1, pp653, 650, 631 at para 11, p632 at para 13, p530 at para 4, p702.
[16] Appeal Book: Volume 1, pp669, 670, 670-696.
[17] Appeal Book: Volume 1, p634 at para 24, p635 at para 26, pp634-635 at para 24, pp635-636 at para 27.
[18] Appeal Book: Volume 1, p590 at para 6, p613 at para 56, p607 at para 45, p614 at para 59, p619 at para 71.

a coffee had become a hardship. Due to the combination of her physical injuries, financial burdens, and her isolation, Ms. Vanderkop struggled with severe depression.[19]

18. The delay in the tort settlement also endangered Ms. Vanderkop's life. After being diagnosed with cancer and undergoing several chemotherapy treatments, she was presented with a new treatment option that was not covered by OHIP that would cost $40,000. She could not afford to pay for this treatment. She instead sought homeopathic treatments, and could only afford half doses as a result of the delay of her tort claim, resulting in the return of her cancer.[20]
19. Ms. Vanderkop is worried about surviving on an annual pension of $4,800 at 65.[21]
20. Insurance companies profit from delaying tort claims in which there is significant loss of income claims, where the Defendant is 100% at fault, and where the insurer believes that the plaintiff has suffered a permanent serious impairment of an important physical, psychological or mental function.[22]
21. There is a degree of correlation between disability and dollar loss.[23]

C. Section 280 Facts

22. In 1867, no province allowed inferior courts to hear contract disputes exceeding $100.[24] The present day value of this $100 limit is approximately $60,000 (2016).[25]
23. Private contract disputes involving less than $25,000 can be adjudicated in Small Claims Court by a deputy judge, appointed by the Ontario Government, who has a fixed-term

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[19] Appeal Book: Volume 1, p601 at para 33, p619 at para 72.
[20] Appeal Book: Volume 1, p609 at para 48.
[21] Appeal Book: Volume 1, p619 at para 73, pp610-611 at para 50.
[22] Appeal Book: Volume 4, p2388, p2371.
[23] Appeal Book: Volume 1, p319, question 163.
[24] *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 SCR 238, pp267-270.
[25] Appeal Book: Volume 1, p 317, question 146.

appointment of 3 years.[26] Private contract disputes over $25,000 can only be determined by a judge of the Superior Court of Justice.

24. Individuals who have sustained catastrophic impairment may have disputes with a monetary value exceeding $2,000,000.[27] Individuals who have suffered serious impairments and who are unable to work for 3 years or more may have disputes for amounts in excess of $60,000.[28]

25. Requiring all SABS disputes to proceed through the LAT will result in a multiplicity of proceedings where there is a concurrent bad faith or aggravated damages claim.

26. Government tribunals are intrinsically part of the executive and thus lack independence.[29]

27. Ms. Vanderkopp's income replacement benefits were terminated when her insurer learned that she appeared on a radio show in January 2015. Ms. Vanderkopp has suffered from depression and she continues to suffer from chronic pain and cognitive impairments which prevent her from working. On September 16, 2016, after the LAT was implemented, she gave testimony at her cross-examination on her affidavit that she was not receiving income replacement benefits and that she was not working.[30]

28. Ms. Vanderkopp has had to cope with ignorant attitudes and comments from people who have begrudged her not being able to work and think that she is happy not working. She attended a party where the host asked her if she was still "ripping off the system". The evidence established that this is a widely-held belief with respect to accident victims. She indicated that being required to attend the LAT would cause her to suffer additional psychological and physical stress. She believes that the insurance industry has spent millions of dollars lobbying the Ontario Government to influence who will be appointed

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[26] *Courts of Justice Act*, RSO 1990, c C.43, ss.23, 32, Small Claims Court Jurisdiction, O Reg 626/00, s.1

[27] *Statutory Accident Benefits Schedule*, O Reg 34/10, s.18. Reduced to $1,000,000 after June 1, 2016.

[28] *Statutory Accident Benefits Schedule*, O Reg 34/10, s.18., s.7.

[29] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781.

[30] Appeal Book: Volume 1, p614 at para 60, p603 at para 38, p616 at para 62, p626 at questions 19-20.

as an adjudicator at the LAT. It is calculated that Ms. Vanderkopp is entitled to a weekly income replacement benefit of $653.90 based on her pre-accident income, amounting to $34,002 annually. This sum is greater than the amount over which the Small Claims Court has jurisdiction. [31]

29. The IBC has historically spent $32M annually on lobbying.[32]

Part IV- Law and Argument

A. Mr. Campisi has private standing to bring the application

30. Justice Belobaba held that Mr. Campisi did not have private standing to challenge ss. 267.5(1) or 280 of the *Insurance Act* as he is not directly affected by either provision, ruling that: "He has not been injured in an automobile accident. He is not claiming for lost income. Nor is he disputing a SABS benefit before LAT."[33]

31. As held in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* ("*Downtown Eastside*"),[34] to achieve private interest standing, it must be shown that the applicant would likely gain some advantage or demonstrate suffering some disadvantage as a result of the legislation.[35]

32. It is respectfully submitted that the learned Judge has erroneously inferred that only those individuals who lose income as a result of s. 267.5(1) would gain a benefit by invalidating this subsection. Most clients of Mr. Campisi's firm have tort disputes. Section 267.5(1) disadvantages Mr. Campisi, who has to adapt to delays caused by defendants, for matters such as examinations for discovery. Moreover, section 267.5(1)

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[31] Appeal Book: Volume 1, p615 at para 61, p618 at para 69, p591 at para7.
[32] Appeal Book: Volume 3, pp2005-2006, questions 472-474.
[33] Appeal Book: Volume 1, p16 at para 7.
[34] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence*, [2012] 2 SCR 524, 2012 SCC 45.
[35] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 (CanLII), at para 29.

complicates and negatively affects Mr. Campisi's ability to estimate total damages for clients, like Mr. Gerritsen, as recoverable damages relating to lost income constantly decrease over time. Additionally, Mr. Campisi's ability to settle claims for their reasonable value is compromised as the reasonable value is continuously reduced for clients, such as Mr. Gerritsen, who are disabled and unable to work.

33. If it is found that section 267.5(1) of the *Insurance Act* is of no force or effect under s. 52 of the *Constitution Act, 1982*, Mr. Campisi will gain the following advantages:

    a. he will be able to offer more certainty to his clients with respect to the economic value of their cases;

    b. he will no longer have a barrier to the prompt settlement of tort claims involving income loss as there will no longer be an incentive to delay; and

    c. he will be able to maximize his clients' damages awards as his clients' negotiation position is no longer compromised.

34. In short, Mr. Campisi has a private interest in the application in that he and his firm restrict their practice of law to personal injury litigation.

35. It is respectfully submitted that the learned Judge also made an overriding and palpable error in misapprehending and misapplying the facts to the issue of private interest standing with respect to s. 280. The learned Judge found that Mr. Campisi "rarely, very rarely" deals with people who have SABS complaints.[36] This finding of fact is not supported by the evidence, which indicates that more than half of his firm's cases involve SABS disputes. In any event, it is respectfully submitted that the learned Judge misapprehended the test for private standing by considering the volume of SABS disputes that Mr. Campisi manages. If the test is the frequency with which one encounters the impugned legislation, then no accident victim, on his or her own, would achieve standing.

[36] Appeal Book: Volume 1, p16, para 7.

Rather, it need only be shown that the applicant would likely gain some advantage or demonstrate suffering some disadvantage as a result of the legislation.

36. In addition, as part of the provincial government's administrative body, the LAT cannot offer assurances of its independence, which is intrinsic to the Superior Courts. This lack of independence represents a disadvantage with respect to the certainty of the decision-making process and impacts Mr. Campisi's ability to provide legal counsel.

B. Mr. Campisi has public standing to bring the application

37. Justice Belobaba held that Mr. Campisi did not have public interest standing to challenge ss. 267.5(1) or 280 based on his failure to satisfy the second and third prerequisites raised in *Downtown Eastside.*[37] These prerequisites are:

    a. the application has a real stake or a genuine interest in the issue; and

    b. in all the circumstances, the proposed application is a reasonable and effective way to bring the issue before the courts.[38]

38. The learned Judge held that no Court has ever granted public standing to an applicant who did not file their own affidavit.[39] This is an error in law. In *Downtown Eastside*, the Downtown Eastside Sex Workers Association did not swear its own affidavit despite having the powers of a natural person.[40] Such actions are carried out through directors, officers, employees, or other agents. Being a lawyer on record for the application and the lawyer on record for Mr. Gerritsen's court proceedings, Mr. Campisi is constrained by his professional obligations and cannot give evidence when acting as an advocate.[41]

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[37] Appeal Book: Volume 1, p17, paras 10-11.

[38] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, para 37.

[39] Appeal Book: Volume 1, p17, para 10.

[40] *Downtown* at para 5 also see Societies Act, SBC 2015, c. 18, section 5.

[41] See Rule 5.2-1 of the Law Society of Upper Canada's Rules of Professional Conduct. As noted by the Court of Appeal in *Pluri Vox Media Corp. v. Canada*, 2012 FCA 18 (CanLII), swearing an affidavit on uncontroversial matters of minimal importance may be carried out by the lawyer. However, as noted in paragraph 13, it would have been

39. Dr. Campisi has made scholarly submissions regarding the *Insurance Act* and its regulations to FSCO. Included in his 196 page submission were concerns regarding access to justice and incentives for insurers to delay and the sufficiency of compensation. It is patently clear that Mr. Campisi has a genuine interest in ss. 267.5(1) and 280.

40. The learned Judge suggested that two of the witnesses marshalled by Mr. Campisi – Mr. Gerritsen and Ms. Vanderkopp – could bring a challenge to the constitutionality of the impugned legislation, and that "there are literally thousands of claimants" who can do the same.[42] The learned Judge was required to consider the practical realities of the situation and has erred in law by failing to do so.[43] As it is, both of the affiants have raised concerns about their financial viability going forward.[44] Their financial concerns do not take into account cost sanctions of an unsuccessful application. It is submitted that such individuals commonly do not have sufficient financial resources to hire a lawyer to bring these issues before the courts or to bear the potential costs consequences. As well, both of the affiants have noted limitations in their education or cognitive abilities that would prevent them from bringing these issues before the courts as unrepresented parties. They also both suffer from psychological conditions that would be exacerbated by a lengthy, costly, and protracted constitutional challenge.

41. Mr. Campisi, in bringing the application, efficiently, and comprehensively, raised issues that may have otherwise required seven separate applications: three separate applications for s. 280 (relative to ss. 7 and 15 of the *Charter* and s. 96 of the *Constitution Act, 1867*), and four separate applications for s. 267.5(1) (relative to ss. 7 and 15 for those pre and post 2010).

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preferable on even minor matters if a law partner, associate lawyer or student-at-law swore the affidavit. While Mr. Campisi did not appear as counsel at the hearing he was the only lawyer of record when the application was originally filed and has remained available as an advocate if and when needed.

[42] Appeal Book: Volume 1, p17, para 12.

[43] *Downtown* at para 50.

[44] See paragraphs 13-19, and 27 above.

42. The learned Judge found that the underpinning for the constitutional claims being advanced were "grossly inadequate".[45] It is respectfully submitted that the learned Judge misapprehended the facts by failing to delineate adjudicative facts and legislative facts.[46] Many of the facts in dispute are of a legislative nature and can be determined through expert evidence or through relevant jurisprudence. Furthermore, the foundation of some claims being advanced is so obvious as to not require supporting evidence. For instance, it is transparent that imposing a state religion is a violation of the *Charter*; no evidence is needed to support the assertion.[47] Similarly, in Ontario, imposing a tax rate on those who cannot work and in excess of the taxation rate charged on those who can work is blatant discrimination. Denying those with significant disabilities access to the Superior Courts for large private party contract disputes is *prima facie* discrimination. Nonetheless, Mr. Campisi has gone to lengths to provide evidence from expert and lay affiants. It is further submitted that Justice Belobaba's distinguishing the public interest standing to a lawyer to constitutionally challenge the **Citizenship Act**, in ***Galati v. Canada***[48] was an error of law in that the fact that the **Charter** was not involved in ***Galati*** was by choice and irrelevant, in that standing for different constitutional grounds was granted.

43. Finally, the learned Judge failed to provide intelligible reasons or apply a legal test upon which standing could be denied with respect to the s. 96 of the *Constitution Act, 1867*.

44. It is respectfully submitted that the Court's ruling on standing further taints and colors the terse, inadequate, erroneous, and "alternative" findings on the merits of the Application.

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[45] Appeal Book: Volume 1, p18, para 15.
[46] See *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086, 1099.
[47] *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110, at p. 133.
[48] *Galati v Canada (Governor General)*, 2015 FC 91.

C. Section 267.5(1) of the *Insurance Act* violates s. 7 of the *Charter* and is not saved by s. 1

45. The test set out by the learned Judge is: (1) Does the law deprive the person of life, liberty or security of person? And, (2) Is the deprivation in accordance with the principles of fundamental justice? [49]

46. It is trite law that physical and psychological integrity of a person are protected by s.7 of the **Charter**.[50] As noted in *Chaoulli v. Quebec (Attorney General)* ("*Chaoulli*"), serious psychological effects may trigger s. 7 protection for the security of person.[51] It is submitted that there is evidence that both ss. 267.5(1) and 280 have serious negative psychological effects affecting the security of person. Moreover, a victim of a motor vehicle accident is, to varying degrees, physically and psychologically disabled and the legislative scheme interferes with the rehabilitation and recovery from those disabilities which triggers s. 7 rights and interests.

47. The learned Judge notes that evidence was filed, yet the evidence was not considered in his reasons.

48. The learned Judge relied on the 1990 case of *Whitbread v. Walley* in his reasons. This case stood for the proposition that capping the amount of damages that could be awarded based on the size of a ship did not violate s. 7.[52] Subsequently, fifteen years later, *Chaoulli* was decided. *Chaoulli* stood for the proposition that prohibitions on private insurance could violate s. 7 if the prohibition caused physical or psychological harm to an individual due to delay in receiving treatment.[53] In relying upon *Whitbread* without considering its evolution or the avalanche of s.7 jurisprudence, the learned Judge made

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[49] Appeal Book: Volume 1, p21 at para 30.
[50] See *Singh et al.*. MEI, [1985] 1 SCR 177 (SCC); See also *R v Morgantaler*, [1988] 1 SCR 30 (SCC); See also *R v O'Connor*, [1995] 4 SCR 411; See also *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791.
[51] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35 (CanLII), headnote.
[52] *Whitbread v. Walley*, [1990] 3 SCR 1273, 1990 CanLII 33 (SCC), headnote.
[53] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35 (CanLII), at paras 118-119.

overriding and palpable errors in misapprehending and misapplying the facts, as well as erring in law.

49. Unlike *Whitbread,* in which the amount recoverable was constant, the current legislation has the effect of constantly reducing the amount that can be recovered. Each year of delay results in the application of a $30,000 provincial tax on Mr. Gerritsen's recovery amount. The Supreme Court of Canada has held that reductions for lost income are not a matter for tort law but are rather a question of tax policy.[54] The Supreme Court of Canada has also held that deducting tax from a damage award that would otherwise be payable is an undue preference for the defendant or their insurance company.[55]

50. In imposing a 30% pre-trial tax, Ontario has made it too expensive for accident victims to pursue claims for their full benefits, particularly if these individuals are already living below the poverty line. They cannot afford additional expenses to pursue a continuously diminishing claim. In providing an undue preference to defendants the provincial government has encouraged defendants to delay resolving the case, thus interfering with their physical and psychological recovery from the accident.

51. The unchallenged evidence is that s. 267.5(1) has exacerbated the adjustment disorder and post traumatic stress disorder from which Mr. Gerritsen suffers due to the hopelessness and helplessness he feels about his situation. Similarly, Ms. Vanderkopp faced the real risk of death due to the delays of her tort settlement as she could not afford non-OHIP treatment or even full dose homeopathic treatments. Due to a lack of resources, Ms. Vanderkopp became socially isolated and suffered severe depression.

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[54] *Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee*, [1994] 1 SCR 359, 1994 CanLII 120 (SCC), p. 418.
[55] *Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee*, [1994] 1 SCR 359, 1994 CanLII 120 (SCC), p. 417.

52. The legislative effects, in these circumstances, prohibit access to fundamental health care, cause ongoing serious psychological impairments, and are caused by a delay imposed by the legislation and its implementation. As such, this case is analogous to *Chaoulli*.

53. In summary, it is respectfully submitted that s. 267.5(1) of the *Insurance Act* violates s. 7 of the *Charter* by:

    a. threatening the security of person by causing ongoing physical and psychological harm and by impeding recovery from physical and psychological damage from the accident, and

    b. violating the principles of fundamental justice due to arbitrariness insofar as it is inconsistent with the objectives of the legislative scheme, overbroad by including individuals who are highly motivated to settle as quickly as possible, and grossly disproportionate as it punishes those who cannot work to a greater extent than any other group for delays in litigation.[56]

D. Section 280 of the *Insurance Act* violates s. 7 of the *Charter* and is not saved by s. 1

54. With respect to section 280, the learned Judge relied on two cases, *Filip v. Waterloo (City)* and *Rogers v. Faught*,[57] to support the finding that the denial of access to the courts would not be a violation of s. 7 of the *Charter*.

55. The learned Judge erred in law by relying upon *Rogers* as there was no action brought for damages against a regulatory body. In *Rogers*, Ms. Rogers sought to commence an action against regulators for failing to establish programs and standards dealing with temporomandibular joint disorders. She sought to employ s. 7 of the *Charter* as an independent cause of action for damages but was unable to do so as s. 7 does not grant an

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[56] *R v Morgantaler*, [1988] 1 SCR 30 (SCC); *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791; *R v Heywood*, [1994] 3 SCR 761 (SCC); *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331; *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101.

[57] *Filip v. Waterloo (City)*, 1992 CanLII 8652 (ON CA); *Rogers v. Faught*, (2002) 212 D.L.R. (4th) 366 (C.A.).

independent right to bring an action for damages for failing to impose standards. In applying this case, the learned Judge either made an error in law or misapprehended the facts to such an extent that he determined the case to be relevant.[58]

56. The learned Judge similarly erred in considering *Filip. Filip* dealt with a situation where a person's lawyer could have complied with the 7 day limitation period and accessed the courts but failed to do so for 9 days. The court held that there was no violation of s. 7 in denying the individual the right to sue as the person had a right but did not exercise it.[59]

57. The learned Judge should have considered, but ignored, *Gosselin v. Québec (Attorney General)*, dictating that s. 7 **does encompass the administration of justice, and not just criminal proceedings.** Unlike *Gosselin*, based on the current facts, there has been a deprivation of security of person for those who have suffered the most significant disabilities, such as Ms. Vanderkopp, who was engaged in disputes for more than a decade with her insurer.[60]

58. In her affidavit, Ms. Vanderkopp, a person with cognitive and physical disabilities, stated that she had been denied income replacement benefits once again. Ms. Vanderkopp, who has historically suffered depression and chronic pain, and who has been in many disputes with her insurer, has provided uncontested evidence that she will suffer additional psychological and physiological stress as a result of limiting dispute resolutions to the LAT as trier of fact instead of the Superior Courts.

59. It is lastly submitted that splitting the tort/SABS dispute(s) as between the Superior Court and the LAT leads to multiplicity of proceedings and inconsistent findings, with respect to the same facts and case, as the legal determinations overlap.

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[58] *Rogers v. Faught*, 2002 CanLII 19268 (ON CA), paras 30-34.
[59] *Filip v. Waterloo (City)*, 1992 CanLII 8652 (ON CA), paras 4, 8.
[60] *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429, headnote.

E. Section 267.5(1) of the *Insurance Act* violates s. 15(1) of the *Charter* and is not saved by s. 1 of the *Charter*

60. The learned Judge held that nothing in the statutory provisions draws lines on the basis of disability and thus there was no discrimination.[61] This is an error of law. The questions that ought to have been asked were: (1) Does the law impose a different treatment in effect; (2) Is one of the enumerated grounds the basis for this treatment; and (3) Does the law have an effect that is discriminatory?[62]

61. Plaintiffs have a duty to mitigate their lost income and only lost income that cannot be mitigated should be compensated.[63]

62. It is common sense that the ability to mitigate loss of income is intrinsically related to the ability to work. As noted by Dr. Katz, there is a correlation between degree of disability and dollar loss. The greater the severity and duration of disability, the less able one is to mitigate the loss. Consequently, the more severe and the longer the disability, the more damages that will be claimed related to lost income. Mr. Gerritsen and Ms. Vanderkopp cannot work as a result of their disabilities and thus have made claims for lost income.

63. The learned Judge found that the pre-trial limitation on recovery applied regardless of the severity of the injuries. It is respectfully submitted that the learned Judge erred in misapplying the law to the evidence: the cause of the accident (i.e. the fact that a vehicle was in operation) determined whether or not a provincial pre-trial tax of 30% would be implemented. However, the cause of the accident did not determine the application of the legislation. Rather, it was the inability to work – due to physical and psychological disability, and thus having a right to recover lost income – that determined whether the 30% tax would apply.

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[61] Appeal Book: Volume 1, p19, para 22.
[62] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, headnote.
[63] *Talon v. Whalley (Ont. C.A.)*, 1988 CanLII 4628 (ON CA).

64. The learned Judge applied *Hernandez v. Palmer*, a case involving people who did not meet the threshold of suffering a permanent, serious impairment.[64] This was an error of law as he failed to consider the effect on the disabled.[65] Had they been involved in motor vehicle accidents but not been disabled to the point of being unable to work, Ms. Vanderkopp and Mr. Gerritsen would not have been affected by s. 267.5(1). They would have continued to work and would have continued to be taxed at the same rate as any other resident of Ontario. They would have been allowed the same deductions as any other resident. However, because of their disabilities, a provincial taxation rate was imposed upon them that was higher than that paid by people earning $300,000 annually who are able to work.[66] This tax, an undue preference to the defendants, would not have existed if Mr. Gerritsen and Ms. Vanderkopp were not disabled and thus able to work.

65. The learned Judge failed to inquire as to the effect of the legislation on those with disabilities compared with those without disabilities. It is the adverse effect of the impugned legislation that must be considered, and not to do so is an error of law.

66. The first two elements of establishing discriminatory conduct have therefore been met as the law has imposed a different treatment, being a higher taxation rate and being deprived from recovering 100% of lost income, on those who are unable to work as a result of a disability arising from a motor vehicle accident. Doing so on those who are disabled is *prima facie* discriminatory. Granting an undue preference to a party, the size of the preference being determined in part by the level of disability of the opposing party, is discriminatory as it perpetuates the view that these individuals are less worthy of the

[64] *Hernandez v. Palmer*, 1992 CarswellOnt65.
[65] *Hernandez v. Palmer*, 1992 CarswellOnt65, para 86.
[66] Appeal Book: Volume 1, pp291-292.

concern and consideration that is granted to the general population. As noted by the Supreme Court of Canada:[67]

> As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their ***entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; .... One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled.*** Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, 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;*. (Emphasis added)

67. Disability is not a cloak which may be doffed. Mr. Gerritsen's splintered leg will not allow him to climb up his crane. Ms. Vanderkopp's cognitive impairments will not allow her to teach. Neither of them can simply go back to their pre-accident lives and return to the labour force. Their disabilities prohibit their participation in the workforce and so they cannot emulate able-bodied norms. Contrary to the attitudes that Ms. Vanderkop has encountered, and are prevalent, they are not "ripping off the system".

68. It is submitted that the appropriate view to take of the challenged legislation is to consider the biomedical condition and whether the legislation is an appropriate response to that condition.[68] Legislation that increases provincial taxation to persons with disabilities, at the same time providing an undue preference to the opposing party in a dispute, all based on level of disability, runs contrary to s. 15(1) of the *Charter*. Such legislation cannot be saved under section 1 as it does not minimally impair the violation of *Charter* rights and the effects are not proportionate to the rights violated.

F. Section 280 of the *Insurance Act* violates s. 15(1) of the *Charter* and is not saved by s. 1

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[67] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 2000 SCC 28.
[68] Ibid at headnote.

69. The learned Judge compared the present case to *Nova Scotia (Workers' Compensation Board) v. Martin* ("*Martin*"), a matter involving a government-run worker's compensation program in which the government stood between the employer and employee, collected payments, as appropriate, from the employer, and dispensed amounts to the injured worker. Liability was not required to make a claim. Mr. Martin did not allege that he had a tort claim or that he was placed in a worse position as a result of the scheme. The Court noted that to challenge one aspect of workers' compensation would require a challenge to the whole scheme, which would have reverted Mr. Martin to tort compensation with no claim. In the current appeal, the government does not stand between the private parties. As such, challenging an applicant's denial of access to the Superior Courts does not result in a challenge to the whole scheme. Paralleling the current application with *Martin* is therefore an error of law. [69]

70. The learned Judge also referred to *Daley v. Economical Mutual Insurance Company* ("*Daley*"). *Daley* dealt with weekly payments calculated based on the length of time *Daley* was employed before the accident. The length of employment before the accident affected the calculation of the weekly income replacement benefit that *Daley* would receive. Disability did not negatively affect the calculation. Rather, the longer *Daley* was disabled, and unable to work, the greater the financial benefit that *Daley* would receive. It is submitted that *Daley* was compliant with s. 15 as the amount of benefit increases with duration of disability, which is not the case here.[70]

71. In applying *Daley* without considering the effects, the learned Judge erred in law. In this case, the more severe the disability, the larger the potential amount of accident benefits in dispute. Ms. Vanderkopp was denied income replacement which she is eligible until age

[69] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2002 SCC.
[70] *Daley v. Economical Mutual Insurance Company*, 2005 CanLII 47590 (ON CA), at para 2.

65. Over the span of one year, Ms. Vanderkopp would be entitled to approximately $30,000 in income replacement benefits based on her insurance contract. The larger the amount in dispute, the greater the need to protect the independence of the original trier of fact and the greater the need to have access to the Courts to potentially settle multiple disputes such as wrongfully denying income replacement benefits. This is evidenced in the monetary limits of Small Claims Court. While s. 280 is in effect for all insurance contract disputes, the adverse effect is most felt by those who have suffered the greatest disability. As noted in *Eldridge*:[71]

> The principle that discrimination can accrue from a failure to take positive steps to **ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.** It is also a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. (Emphasis added)

72. It is submitted that: (a) s. 280 imposes a different treatment, in effect, by disallowing the independent access to the Superior Courts for all insurance contract disputes, regardless of amount and regardless of whether there is a concurrent claim for punitive damages or a tort claim; (b) disability is the main driver for entitlement to benefits and the amount of benefits which could be accessed; and (c) the law has the effect of denying persons with disabilities access to the Superior Courts, a common law, statutory, and constitutional right for all significant contractual disputes.

73. In summary, s. 280 violates s. 15 of the *Charter* and cannot be saved by s. 1 as the limitation on access to the Superior Courts is absolute. The price of the limitation is too high on the most vulnerable who will suffer physical and psychological damages as a result of the denial. Further, there is no reason to deny access as this has been historically available.

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[71] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, at headnote.

G. Sections 267.5(1) and 280 of the *Insurance Act* violates the unwritten constitutional right to equality of treatment before and under the law

74. Justice Belobaba ruled that unwritten constitutional "principles" did not assist in this case. The learned Judge made reference to *British Columbia v. Imperial Tobacco Canada Ltd.* ("*Imperial Tobacco*")[72], a case dealing with a corporation, to support his decision. It is submitted that the Court misstated and mischaracterized the argument and did not deal with the issue pleaded and argued at length. The Appellant had argued that equality is an underlying constitutional **right** (not a principle). He argued that equality of treatment before and under the law is an independent basis for striking down legislation independent of s.15 of the **Charter** in the same way that other rights, such as the right to an independent judiciary, or freedom of expression and religion are rights, which are **unwritten constitutional** rights pre-**Charter**, as well as being mirrored in the **Charter**.[73]

75. It is submitted that, as argued before Justice Belobaba, 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 right emanating from the Rule of Law, Constitutionalism, and Respect for Minorities.

76. 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)...[74]

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[72] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 SCR 473, at para 65.

[73] See for example *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3; See also *Switzman v. Elbling*, [1957] SCR 285;

[74] *Fundamentals of the Criminal Justice System*, Donald A. MacIntosh, Carsewell 1989, at p. 7.

77. 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 a refusal of a bus license to a foreigner (an American corporation), that equality of treatment is a constitutional imperative.[75]

78. 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 the right to equal treatment of all individuals before and under the law. The equality imperative, an unwritten **right**, stems from all four pillars enunciated in ***Quebec Secession Reference.***

79. 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.**

80. It is submitted that, looked at another way, this "equality of treatment" is much akin to the application of "due process", 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.***[76]

81. 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:

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[75] *Winner v S.M.T. (Eastern) Ltd.*, [1951] SCR 887 at p 928.
[76] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at paras 129-133.

> ***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. 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.***[77]

82. 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).[78]

83. 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 ss7 and 15 (extradition) and s.11(e) (criminal charge) must subjectively 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**

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[77] *Bolling v Sharpe*, 374 US 497 (1954) (USSC) [emphasis added].
[78] *USA v Schmidt* [1987] 1 SCR 50 at para 40; see also *R. v. Turpin*, [1989] 1 S.C.R. 1296.

treatment. This treatment of equality is not restricted to the **Charter**, but also lays as an unwritten Constitutional imperative.

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

85. 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.[79]

86. It is submitted that the proposition that equality of treatment is an unwritten constitutional right, apart from s. 15 of the **Charter**, has further been supported by academic writing.[80]

87. It is lastly submitted that, in the context of motor vehicle accident and personal injury, and the need for expert evidence and a recognized medical diagnosis as between psychological and physical injury, the Supreme Court of Canada, in *Saadati* recently ruled as follows:

> [35] In short, no cogent basis has been offered to this Court for erecting distinct rules which operate to preclude liability in cases of mental injury, but not in cases of physical injury. **Indeed, there is good reason to recognize the law of negligence as already according each of these different forms of personal injury — mental and physical — identical treatment...**
>
> [36] It follows that requiring claimants who allege one form of personal injury (mental) to prove that their condition meets the threshold of "recognizable psychiatric illness", while not imposing a corresponding requirement upon claimants alleging another form of personal injury (physical) to show that their condition carries a certain classificatory label, is inconsistent with prior statements of this Court, among others. **It accords unequal — that is, less —**

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[79] *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 (1954); *USA v Schmidt* [1987] 1 S.C.R. 500 at para 40.

[80] Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (Fall 1999) 22 Dalhousie L.J. 5.

> **protection to victims of mental injury.** And it does so for no principled reason (Beever, at p. 410). I would not endorse it.[81]

I. Section 280 of the *Insurance Act* violates section 96 of the *Constitution Act, 1867*

88. The learned Judge found that s. 280 did not meet parts 1 and 3 of the *Residential Tenancy*[82] test and that there was therefore no violation of s. 96 of the *Constitution Act, 1867*.[83]

89. The learned Judge found that the power did not broadly conform to an exclusive power of the Superior Courts at the time of Confederation. He found that: (1) they were statutory contracts and not private party contracts, and (2) that this was a novel power.

90. The learned Judge cited *Simison v. Catlyn* ("*Simison*") as authority that SABS contracts were statutory contracts. *Simison* was a case that dealt with interpreting the terms of a SABS insurance contract and it was held that since the terms were imposed by statute, the contract should be interpreted as though it was a statute. It is respectfully submitted that the learned Judge failed to provide intelligible reasons as to why *Simison* would not allow the disputes to be broadly characterized as private party contract disputes. The learned Judge has failed to describe the nature of the dispute which is an error of law. [84]

91. The learned Judge cited *Reference re Young Offenders Act* as authority that SABS were novel jurisdiction not within the power of the Superior Courts. The learned Judge noted that neither cars nor car insurance existed at the time of Confederation. It is respectfully submitted that this is an irrelevant consideration and an error of law. What is relevant is the characterization of the nature of the dispute: a private party insurance contract dispute. While cars, car insurance, and car accidents, did not exist, horse-drawn carriages, rail and street cars did, as did different forms of insurance for negligence and injury, with

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[81] *Saadati v Moorhead*, 2017 SCC 28 (CanLII), [2017] SCJ No 28 (QL).
[82] *Re Residential Tenancies Act*, [1981] 1 SCR 714, headnote.
[83] Appeal Book: Volume 1, pp23-24 at paras 41-42.
[84] *Simison v. Catlyn*, 2004 CanLII 22313 (ON CA), at para 27.

respect to injuries arising from those modes of transportation. Other forms of liability insurance also existed.

92. It is respectfully submitted that the learned Judge failed to appreciate the nuanced approach of the Supreme Court in the *Young Offenders* decision where it was found that, historically, a juvenile Court had existed and was administered by two justices of the peace or by a stipendary magistrate. In *Young Offenders*, the Court considered the remedy. It was found that the remedy of diversion to other systems instead of jail was novel jurisdiction. The Supreme Court noted that this approach, of considering the remedy, should only be considered in criminal matters. As noted in *Sobeys*, it is the **nature of the dispute** that is to be used to characterize the matter. [85]

93. In the current application, the learned Judge has failed to opine or provide intelligible reasons as to how the disputes are novel. Private party insurance contract disputes are historically a matter that has been the sole jurisdiction of the Superior Courts when the contract has a potential value exceeding $60,000 to $65,000 in present day dollars. All automobile insurance contracts have values that potentially exceed $1,000,000, and so have historically been in the sole jurisdiction of the Superior Courts. As noted in *Sobeys*, the first step represents a threshold step; a method of deciding whether, in a formal sense, s. 96 has been violated at all. As noted in *Sobeys*, at the first step there is a need to search for an analogous – not identical – jurisdiction. This step must be guided by the type of dispute. While the jurisdiction of inferior courts will not be frozen, it also will not be expanded so as to undermine the independence of the judiciary. Any consideration of devolution of authority comes at the third stage. As noted in *Sobeys*, one of the relevant questions is: whether the inferior court jurisdiction is restricted by pecuniary limits so as

[85] *Reference Re Young Offenders Act (P.E.I.)*, [1991] 1 SCR 252, pp 267-268.

to reduce its scope, even allowing for inflation.[86] In other words, if the legislation had existed at the time of confederation, would the authority for deciding these disputes, which could amount to millions of dollars, been decided by the Superior Courts or by inferior courts?

> In all cases, however, the inquiry should be directed to the question whether or not the work of the inferior courts at the time of Confederation was broadly co-extensive with that of the superior courts. Only if this standard is met will the history of shared jurisdiction validate the contemporary scheme under the historical test.[87]

94. It is submitted that the appellant has offered evidence that the first step of the *Sobeys* threshold test is met. The LAT exercises powers that broadly conform to powers that were limited to Superior Courts at the time of Confederation.

95. The learned Judge accepted that the LAT exercises a judicial power and so the second step of the *Sobeys* test is also met.

96. The learned Judge found that the LAT was necessarily incidental to a broader policy goal. The learned Judge erred in law in the analysis he carried out, as he ought to have analyzed the judicial power in the context of the functions carried out by the LAT, not the legislation. The LAT has essentially been bestowed with the powers of a Court of general jurisdiction. It does not have purely administrative functions that are the dominant function of the tribunal. The LAT's sole relevant function is to adjudicate contract disputes between private parties based on a set of rules in relation to the *Insurance Act*. It is submitted that, based on the legislation, it is evident that the LAT is solely an adjudicative tribunal and it is not enmeshed with the administration of any legislative scheme and thus fails the third part of the test. As noted in *Sobeys*, "the scheme is only invalid where the adjudicative function is a sole or central function of the tribunal so that the tribunal can be said to be operating like a section 96 court." Moreover, the LAT has

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[86] *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 SCR 238, headnote.
[87] *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 SCR 238, at para 33.

adjudicative jurisdiction over more than thirty (30) pieces of unrelated and divergent legislation.[88]

97. The learned Judge offered no intelligible reasons or comment on the ousting of the Superior Court's concurrent jurisdiction. This was an error of law.

98. It is submitted that the learned Judge failed to apply the two-part test as delineated in *MacMillan Bloedel* to determine whether the power of the Superior Court could be ousted. First, it must be determined if the power can be granted; second, it must be determined if removing this power from the Superior Courts affects their inherent jurisdiction. It is asserted that the hearing of private party contract disputes that exceed $60,000 cannot be ousted by the Ontario Government without changes to the Constitution as this is part of the inherent jurisdiction of Superior Courts, requiring no legislation. Removing this jurisdiction strips the courts of its jurisdiction and this is contrary to s. 96 of the *Constitution Act, 1867*.[89]

Part V- Relief Sought

THE APPELLANT ASKS that the Judgment of the Honourable Mr. Justice Belobaba of the Superior Court of Justice dated May 31, 2017 be set aside and a judgment be granted as follows:

1. a Declaration that the Appellant, Mr. Joseph Campisi, had and has private and/or public interest standing to bring the application (court file no. CV-15-520150);
2. a Declaration that section 280 of the *Insurance Act,* R.S.O. 1990, c I.8:
   (a) violates s. 7 of the *Charter* and cannot be saved under section 1 of the *Charter*;
   (b) violates s. 15(1) of the *Charter* and cannot be saved under section 1 of the *Charter*;

[88] See Appeal Book: Volume 5, pp3298-3299.
[89] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725, 1995 CanLII 57 (SCC).

(c) violates the underlying constitutional right to equality of treatment before and under the law;

(d) violates s. 96 of the *Constitution Act, 1867*;

(e) is of no force or effect under s. 52 of the *Constitution Act, 1982*;

3. in the alternative to para. 2(e), with respect to any *Charter* violation, an Order reading into:

(a) s. 280(2) of the *Insurance Act* the requirement for the insurer to obtain the agreement of the insured before applying to the LAT to resolve a dispute described in s. 280(1);

(b) s. 280(3) of the *Insurance Act* the qualification that court proceedings are barred only when a LAT proceeding has been commenced as per section 280(2);

4. a Declaration that s. 267.5(1) of the *Insurance Act,* RSO 1990, c I.8:

(a) violates s. 7 of the *Charter* and cannot be saved under s. 1 of the *Charter*;

(b) violates s. 15(1) of the *Charter* and cannot be saved under s. 1 of the *Charter*;

(c) violates the underlying constitutional right to equality of treatment before and under the law;

(d) is of no force or effect under s. 52 of the *Constitution Act, 1982*;

5. an Order granting leave to appeal the Order of Mr. Justice Belobaba dated July 6, 2017 and the costs awarded against the Appellant be set aside;

6. an Order granting costs of the application before Belobaba J., and the within appeal; and

7. such further and other relief as counsel for the Appellant may advance and this Honourable Court accept.

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Lawyer for the Applicant

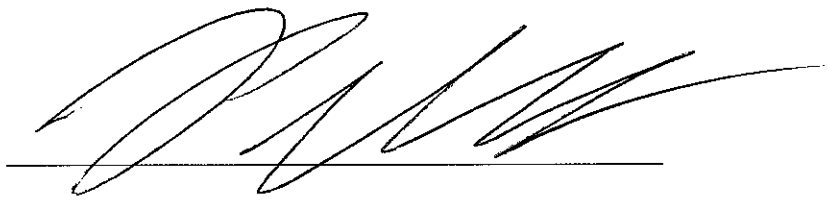
CERTIFICATE

I, Peter Murray, lawyer for the appellant, certify that:

(i) The record and the original exhibits from the court or tribunal from which the appeal is taken are not required.

(ii) The estimated time of my oral argument is 2.5 hours, not including reply.

September 29, 2017



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Schedule A List of Authorities

1	*Pastore v Aviva Canada Inc.*, 2012 ONCA 642 (CanLII)
2	*Pastore v Aviva Canada Inc.*, 2012 ONCA 887 (CanLII)
3	*Aviva Canada Inc v Pastore*, 2011 ONSC 2164 (CanLII)
4	Pastore and Aviva Canada – Appeal FSCO 2571
5	Pastore and Aviva Canada [-] Arbitration, 2009-02-11, FSCO 2570
6	*Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 SCR 238
7	*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781
8	*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence*, [2012] 2 SCR 524, 2012 SCC 45
9	*Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 (CanLII)
10	*Pluri Vox Media Corp. v. Canada*, 2012 FCA 18 (CanLII)
11	*Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086, 1099
12	*Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110
13	*Galati v Canada (Governor General)*, 2015 FC 91
14	*Singh et al.*. MEI, [1985] 1 SCR 177 (SCC)
15	*R v Morgantaler*, [1988] 1 SCR 30 (SCC)
16	*R v O'Connor*, [1995] 4 SCR 411
17	*Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35
18	*Whitbread v. Walley*, [1990] 3 SCR 1273, 1990 CanLII 33 (SCC)
19	Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee, [1994] 1 SCR 359, 1994 CanLII 120 (SCC)
20	*R v Heywood*, [1994] 3 SCR 761 (SCC)
21	*Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331
22	*Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101
23	*Filip v. Waterloo (City)*, 1992 CanLII 8652 (ON CA); *Rogers v. Faught*, (2002) 212 D.L.R. (4th) 366 (C.A.)
24	*Rogers v. Faught*, (2002) 212 D.L.R. (4th) 366 (C.A.)
25	*Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84
25	*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497
26	*Talon v. Whalley (Ont. C.A.)*, 1988 CanLII 4628 (ON CA)
27	*Hernandez v. Palmer,* 1992 CarswellOnt 65, OJ No.2648 (OCJ Gen Div).
28	*Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 2000 SCC 28
29	*Nova Scotia (Workers' Compensation Board) v. Martin*, 2002 SCC
30	*Daley v. Economical Mutual Insurance Company*, 2005 CanLII 47590 (ON CA)
31	*Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624
32	*British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 SCR 473
33	*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3
34	*Switzman v. Elbling*, [1957] SCR 285
35	*Winner v S.M.T. (Eastern) Ltd.*, [1951] SCR 887

36	*Quebec Secession Reference*, [1998] 2 SCR 217
37	*Bolling v Sharpe*, 374 US 497 (1954) (USSC)
38	*USA v Schmidt* [1987] 1 SCR 50
39	*R. v. Turpin*, [1989] 1 S.C.R. 1296
40	*Saadati v Moorhead,* 2017 SCC 28 (CanLII), [2017] SCJ No 28 (QL)
41	*Re Residential Tenancies Act*, [1981] 1 SCR 714, 1981 CanLII 24 (SCC)
42	*Simison v. Catlyn*, 2004 CanLII 22313 (ON CA)
43	*Reference Re Young Offenders Act (P.E.I.)*, [1991] 1 SCR 252
44	*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725, 1995 CanLII 57 (SCC)

Schedule B Relevant Provisions

1	***Insurance Act*, RSO 1990, c I.8, s. 267.5(1).** **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).
2	**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. **Application to Tribunal** (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. **Limit on court proceedings** (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. **Resolution in accordance with Schedule** (4) The dispute shall be resolved in accordance with the *Statutory Accident Benefits Schedule*. 2014, c. 9, Sched. 3, s. 14. **Orders, powers and duties** (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. **Orders for costs, other amounts** (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.
3	***The Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.** ***Life, liberty and security of person*** **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.
4	***Equality before and under law and equal protection and benefit of law*** **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. ***Affirmative action programs*** (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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JOSEPH CAMPISI	and	HER MAJESTY IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO, and the INSURANCE BUREAU OF CANADA
(Appellant)		(Respondent)

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

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