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Constitutional Challenge and Charter Infringement, Accident Benefit Considerations

By

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LAT stays . . . for the present at least!

In *Campisi v. Ontario*, the Ontario Superior Court of Justice dismissed a legal challenge brought by Joseph Campisi, an Ontario personal injury lawyer, and affirmed key provisions of the *Insurance Act.*

This case challenged Section 280 of the *Insurance Act*, which provides for the sole jurisdiction of the Licence Appeal Tribunal (LAT) over statutory accident benefits (SABS) disputes. The choice to proceed through the FSCO system or an accident benefits action in the Superior Court of Ontario was no longer an option. All accident benefit disputes

are to proceed through the LAT, subject only to appeals on questions of law or applications for judicial review.

This case also challenged Section 267.5(1), which limits pre-trial recovery of damages for lost income to 70 per cent of gross income.

Mr. Campisi's application to the court alleged that the above-noted sections of the *Insurance Act* infringe Sections 15(1) and 7 of the *Charter* and also contravene Section 96 of the *Constitution Act, 1867,* which gives the federal courts jurisdiction over civil disputes that exceed $65,000 (in current dollars).

In his decision, Justice Edward Belobaba concluded that Campisi lacked both the private and public interest standing to bring this application to the court. Justice Belobaba also found that even if Campisi had appropriate standing to bring this application, he would dismiss the application on its merits as Section 280 did not breach sections 15 and 7 of the *Charter* or Section 96 of the *Constitution Act, 1867*.

Justice Belobaba held that neither of the sections of the *Insurance Act* in issue draw distinctions based on a prohibited ground enumerated in Section 15(1) of the Charter, or any other analogous ground. He noted that the fact that insured persons with SABS disputes may be physically disabled and are required to proceed through the LAT, with no recourse to the court system except as noted above, was not a distinction on the basis of disability.

He also noted that the pre-trial limitation on recovery of damages for income loss applies whether the insured is physically disabled or not, and regardless of the severity of the injury. The fact that auto accident victims are subject to this limitation while home accident victims are not is not a distinction based on disability – rather it is a distinction based on the cause of injury or place of injury, which are not prohibited grounds under the *Charter*.

Regarding the alleged breach of Section 7 of the *Charter*, Justice Belobaba found that Campisi filed insufficient evidence with respect to any alleged deprivation of life, liberty or security of the person regarding the application or operation of the disputed sections of the *Insurance Act*. Also that the case law is clear that neither a statutory limitation on tort damages nor the elimination of a court option deprives an motor vehicle accident victim of his right to life, liberty or security of the person.

Finally, regarding Section 96 of the *Constitution Act, 1867*, Campisi failed to meet two steps of the three part test for determining when Section 96 allows jurisdiction to be conferred on an administrative tribunal. In terms of the first step, Justice Belobaba noted the type of dispute that the LAT is deciding did not exist in 1867. As "new powers or jurisdiction are not part of the core of jurisdiction protected via s. 96 of the *Constitution Act, 1867*" this finding alone is "dispositive of the matter." The Section 96 challenge also fails the third step of the test – whether the resolution of the disputes by the LAT is "necessarily incidental" to the achievement of a broader policy goal, Justice Belobaba stated "[i]n my view, it cannot be seriously contested that the resolution of

SABs disputes by LAT is necessarily incidental to the broad policy goals that led the provincial legislature to establish threshold no-fault automobile insurance in the first place."

Campisi v. Ontario, 2017 ONSC 2884

The Minor Injury Guideline is found Unconstitutional!

A recent FSCO decision by Benjamin Drory Member addressed whether Sections 3 and 18 of the SABS (i.e. the definitions and monetary caps related to the Minor Injury Guideline) or parts thereof are unconstitutional as unjustifiably infringing upon Sections 7 and/or 15 of the *Charter*. It was found that Section 3 – the definition of "minor injury" and Section 18(2) of the SABS are unconstitutional as infringing upon Section 15(1) of the *Charter* on the basis of physical disability and these infringements are not justifiable under Section 1 of the *Charter*. The definition "clinically associated sequelae" in the definition of "minor injury" in s.3 of the SABS was interpreted to exclude individuals who suffer from chronic pain among the sequelae to the injury and the provision "that was documented by a health practitioner before the accident" in s. 18(2) of the SABS and also in s. 4 of the Superintendent's Guideline No.01/14 (Minor Injury Guideline - MIG) was severed.

The Applicant, represented by paralegals Mohamed Elbassiouni and Essam Elbassiouni, was injured in an MVA on June 19, 2015. The applicability of the MIG was in issue as well as whether the Applicant is entitled to $1,995.32 for a psychological assessment and a special award due to the Insurer unreasonably delaying payments of benefits to

him. The Applicant properly served notice of his intention to raise a constitutional argument upon the Attorney Generals of Ontario and Canada. The Attorney General of Canada did not respond and the Attorney General of Ontario advised it did not intend to intervene in the challenge and simply advised the Applicant that constitutional questions should only be heard as necessary and not in a factual vacuum. Sovereign, the Insurer, also opted not to attend the Preliminary Issue Hearing.

Mr. Drory was satisfied that this tribunal had jurisdiction to consider *Charter* issues although the case law considered made it clear that any decision he reached does not create any general precedential value and the ruling is strictly limited to the present case itself.

Mr. Drory was not satisfied that the MIG violates s. 7 of the *Charter* and did not agree with submissions by the Applicant that the MIG threatens his security of person, without accordance to the principles of fundamental justice. He found that s. 7 prohibits inappropriate actions by government in the course of matters that affect the life, liberty, or security of the person of individuals and would predominantly occur in the criminal law context such as incarceration, arrest powers, and procedures for collecting evidence. Under s.7 it is the government that must directly not interfere with individual rights and he wasn't satisfied that the MIG constituted direct government action – it is a set of rules for how benefits should be paid out by private companies.

However, Mr. Drory found that the MIG violates S. 15 of the *Charter* in that it discriminates against those who suffer chronic pain as a clinically associated sequelae to

the MVA and against those who did not (and frequently could not) have their pre-existing conditions documented by a health practitioner before the MVA.

He also accepted the testimony of Dr. Tajedin Getahun and the medical-legal report of Dr. Ricardo Harris that $3,500 is insufficient in most cases to treat of manage chronic pain and that the $3,500 cap would prevent such insured persons from achieving maximum medical recovery.

He found that the definition of “minor injury” does not minimally impair the rights of chronic pain sufferers and that the infringement of s. 15 is not justified by s. 1.

Abyan and Sovereign General Insurance Co., Re, 2017 CarswellOnt 15853, FSCO A16-003657

Future Considerations

We understand that both of these decisions are being appealed . . .