The LAT Survives a Constitutional Challenge

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There has been much consternation among the plaintiff personal injury bar about the introduction of the Licence Appeal Tribunal (LAT) as the only means to resolve SABS disputes.

In 2014, the provincial legislature amended s. 280 of the *Insurance Act* so that all SABS disputes would be resolved exclusively by the LAT. This came into effect on April 1, 2016.

While an insured person previously had the option of either bringing an application to FSCO or suing in Superior Court if a matter failed at mediation, the amendment removed the court option. An insured can proceed to court only on an application for judicial review or to appeal a decision of the LAT on a question of law.

Joseph Campisi, a personal injury lawyer at Campisi LLP, became the flag bearer for opposition to the LAT and personally launched a court proceeding against the Ontario government challenging the constitutionality of s. 280 of the *Insurance Act* (as well as s. 267(5), which limits the pre-trial income loss recovery to 70% of a plaintiff's gross income).

The approach was certainly unique and resulted in the Insurance Bureau of Canada moving for intervener status for only the third time in over 30 years at the court of first instance. The challenge was soundly dismissed by Justice Belobaba in the recently released decision of *Campisi v. Ontario*, 2017 ONSC 2884.

In the decision, Justice Belobaba first addressed the issue of standing (a legal stake in the dispute). He noted that Mr. Campisi is a personal injury lawyer who has not been injured in an automobile accident and is not disputing a SABS benefit before the LAT. Further, the evidence elicited through the cross-examination of a paralegal at Mr. Campisi's office (Mr. Campisi questionably did not file his own affidavit) highlighted that his firm very rarely dealt with SABS complaints.

While Mr. Campisi claimed that he drove an automobile and therefore had "a concern for the welfare of all accident victims", Justice Belobaba highlighted that this is not enough to establish that he was directly affected by s. 280 of the *Insurance Act*. As such, Mr. Campisi was found to lack private interest standing to bring the constitutional challenge.

Mr. Campisi was also found to lack public interest standing since he failed to demonstrate that he had a real stake or genuine interest in the constitutional validity of the provisions in question. Justice Belobaba highlighted that an individual actually injured in an accident is more directly affected by the legislation than Mr. Campisi and could have challenged the constitutionality of s. 280 in their submissions to the LAT.

While Justice Belobaba found that Mr. Campisi lacked standing, he stated that, if he was wrong on this issue, he would still dismiss the application on the merits.

Regarding s. 15(1) of the Charter (equality rights), His Honour found that, while auto accident victims may be seriously injured, the legislation does not discriminate between persons based on physical disability or any analogous ground. The fact that an insured person may be physically disabled, and is required to proceed before the LAT and not a court, is not a distinction on the basis of disability.

Justice Belobaba then turned to the allegation that the legislation breaches s. 7 of the Charter (right to life, liberty, and security of the person). There was little evidence filed on

this issue and the challenge failed since case law has established that the elimination of a court option does not offend s. 7 of the Charter.

Moreover, Justice Belobaba found that there was no violation of s. 96 of the *Constitution Act, 1867* in terms of the legislature conferring jurisdiction on the LAT.

Having addressed all the issues, it was concluded that Mr. Campisi lacked standing to bring the application and, in any event, the application would still fail on the merits.

While there may be an appeal, it appears based on the strength of this decision that the LAT is here to stay as the exclusive means to address SABS disputes.

We are now over a year into the LAT and statistics illustrate that of the 57 reported decisions reviewed to February 2017, 30 favoured the insurer while 25 favoured the claimant, with two divided decisions (a judgment call was made to determine success for some decisions). There was only one CAT decision and it favoured the claimant. Minor Injury Guideline (MIG) determinations have been clearly pro-insurer. Disputes surrounding individual benefits have been pro-insurer while disputes involving treatment plans have favoured the applicant.

As such, while the right to sue in court has been removed, the result has been a system that remains imperfect in various ways but is at least anecdotally more balanced than the historically claimant friendly FSCO.