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CASE SUMMARY: PUMP THE BRAKES – SECTIONS 133(1)(B) AND (C) OF THE CIVIL RESOLUTIONS TRIBUNAL ACT, S.B.C. 2012, C. 25 ARE DECLARED UNCONSTITUTIONAL AND OF NO FORCE AND EFFECT

Sections 133(1)(b) and (c) of the Civil Resolution Tribunals Act, S.B.C. 2012, c. 25 have been declared unconstitutional and of no force and effect.

**Administrative law – Legislation – Legislative Assembly – Constitutional law –
Boards and tribunals – Jurisdiction – Practice and procedure – Summary
proceedings – Remedies**

Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),
[2021] B.C.J. No. 389, 2021 BCSC 348, British Columbia Supreme Court, March 2,
2021, C.E. Hinkson C.J.S.C.

Effective April 1, 2019, the provincial government introduced a package of reforms consisting of amendments to the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 (the “Act”), the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, and the *Insurance (Vehicle) Regulations*, B.C. Reg. 447/83. Two new regulations were also introduced: the *Accident Claims Regulation*, B.C. Reg. 233/2018 and the *Minor Injury Regulation*, B.C. Reg. 234/2018. These reforms in part gave the Civil Resolution Tribunal (the “CRT”) jurisdiction over motor vehicle accident claims, including jurisdiction to determine entitlement to no-fault accident benefits payable under the *Insurance (Vehicle) Act*, where an injury is a “minor injury” under the *Insurance (Vehicle) Act*, and liability and damages for personal injury of \$50,000 or less. The amendments to the *Insurance (Vehicle) Act* included a new cap on the amount of non-pecuniary damages that may be awarded in claims based on “minor injuries.”

Contemporaneously with these amendments, the Trial Lawyers Association of British Columbia filed a notice of civil claim challenging their constitutional validity. The individual plaintiffs brought claims arising from motor vehicle accidents for a value of less than \$50,000. The plaintiffs filed a notice of constitutional question in the proceedings and brought an application to have a section 96 challenge determined by way of summary trial or summary judgment.

The sections of the *Act* at issue were section 133 and section 16.1. Section 133 of the *Act* provides as follows:

133 (1) Except as otherwise provided in section 113 [restricted authority of tribunal] or in this Division, the tribunal has jurisdiction in a dispute, in respect of an accident, over a claim concerning one or more of the following:

- (a) the determination of entitlement to benefits paid or payable under the *Insurance (Vehicle) Act*,
- (b) the determination of whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act*,

(c) liability and damages, if the amount, including loss or damage to property related to the accident but excluding interest and any expenses referred to under section 49 [order for payment of expenses], is less than or equal to the tribunal limit amount.

(2) For the purposes of this *Act*, the tribunal

(a) has exclusive jurisdiction in respect of claims described in subsection (1) (a) or (b) of this section, and

(b) is to be considered to have specialized expertise in respect of claims described in subsection (1) (c) of this section.

(3) For certainty, a person may make a request for tribunal resolution in more than one tribunal proceeding relating to an accident.

Section 16.1 provides as follows:

16.1 (1) Subject to subsection (2) and section 16.4 (1) and (2) [bringing or continuing claim in court], if, in a court proceeding, the court determines that all matters are within the jurisdiction of the tribunal, the court must,

(a) in the case of a claim within the exclusive jurisdiction of the tribunal, dismiss the proceeding,

(b) in the case of a claim in respect of which the tribunal is to be considered to have specialized expertise, dismiss the proceeding unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim, or

(c) in any other case, stay or dismiss the proceeding, as the court considers appropriate, unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim.

(2) Subject to section 16.4 (1) and (2), if, in a court proceeding, a party alleges that a matter in a proceeding before the court relates to a minor injury within the jurisdiction of the tribunal under section 133 (1) (b) or (c) [claims within jurisdiction of tribunal for accident claims], the court must stay the proceeding until the tribunal determines, as applicable,

(a) in the case of an accident claim under section 133 (1) (b), whether an injury is a minor injury, and

(b) in the case of an accident claim under section 133 (1) (c), unless it is not in the interests of justice and fairness for the tribunal to make the determination, whether a party has established that there is a substantial likelihood that damages will exceed the tribunal limit amount.

(3) For the purposes of subsection (2), “minor injury” and “tribunal limit amount” have the same meaning as in section 132 [definitions for Division – accident claims].

The plaintiffs argued section 133(1) of the *Act* vests a judicial function in the CRT which was historically within the exclusive jurisdiction of the superior courts; that is, because the members of the CRT are appointed by the provincial Cabinet and not by the Governor General, the CRT is in effect a section 96 court within the provincial executive. The plaintiffs further argued that section 16.1 of the *Act* denies certain claimants access to the Supreme Court of British Columbia for adjudication of their claims, presenting obstacles to the exercise of their right to be heard by a section 96 judge.

The parties agreed that the test to be applied on the application is the test initially set out by the Supreme Court of Canada in *Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, referred to as the “Residential Tenancies Test.” The test is comprised of three parts, which the Court applied as follows:

1. Does the power or jurisdiction at issue conform to the power or jurisdiction exercised by superior, district, or county courts at the time of Confederation?

If this historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by section 96 courts, that is the end of the matter.

In this case, the court found the jurisdiction conferred upon the CRT under section 133(1) of the *Act* is properly characterized as personal injury claims in tort. The court held the CRT’s power to decide liability and damages in relation to unintentional injuries caused by another is precisely the sort of work the superior courts have traditionally done.

The court held that at the time of Confederation, the superior courts had inherent jurisdiction, and therefore had jurisdiction over those types of claims.

2. Does the power exercised truly have a judicial character when viewing the function within its institution?

It is the subject-matter rather than the apparatus of the adjudication that is determinative under this part of the test. The primary issue is the nature of the question which the tribunal is called upon to decide. If it is not being exercised as a judicial power, that is the end of the matter.

In this case, the court found the primary issues the CRT was called upon to decide pursuant to sections 133(1)(b) and (c) of the *Act* are the liability of those involved in motor vehicle accidents and damages for injuries. The court held it is difficult to see that role something other than a judicial role, and the legislation therefore purports to grant the CRT a judicial function.

3. In the institutional context of the legislative scheme, is the power exercised still in the nature of a section 96 court power, or has it been transformed to a power that is ancillary or necessarily incidental to the new scheme or legislative goal?

The scheme is only invalid when 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.”

In this case, the court accepted the Legislature’s policy goals in respect of the *Act* were to enhance access to justice and preserve the sustainability of the public automobile insurance industry.

The court was not persuaded that the CRT’s power to make determinations under section 133 of the *Act* was necessarily incidental to the Legislature’s goal of enhancing access to justice for low-value motor vehicle accident claims. The court found the CRT’s powers to be part of a scheme to transfer adjudicative power over tort claims from the Supreme Court to the CRT. The court held the judicial powers conferred on the CRT under section 133 were neither subsidiary nor ancillary to the Legislature’s goal or any general administrative functions.

The court held section 133(1)(b) and (c) of the *Act* are unconstitutional and of no force and effect. Consequently, section 16.1 was left with no application or meaning in relation to accident claims, except for accident benefits under section 133(1)(a) of the *Act* and is therefore to be read down insofar as it applies to accident claims except for the determination of accident benefits under that subsection.

This case was digested by [Mollie A. Clark](#), and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Mollie A. Clark at mclark@harpergrey.com.