JURISDICTIONAL ISSUES RAISED BY BRITISH COLUMBIA'S NEW MOTOR VEHICLE REGIME AND THE BALANCE BETWEEN COST, EFFICIENCY AND ACCESS TO JUSTICE

By Michael Thomas and Drummond Lambert

On May 17, 2018, Bill 20,[1] amending the *Insurance (Vehicle) Act*,[2] and Bill 22,[3] amending the *Civil Resolution Tribunal Act*,[4] received royal assent. The amendments took effect on April 1, 2019. On November 9, 2018, order-in-council 595/2018 approved regulations to the *Insurance (Vehicle) Act* and order-in-council 594/2018 approved regulations to the *Civil Resolution Tribunal Act*. This package of enactments (together, the "new legislation") replaces the long-standing common law tort system involving minor injuries caused by motor vehicle accidents and grants exclusive jurisdiction for the resolution of these claims to the Civil Resolution Tribunal ("CRT"). The new legislation raises potential jurisdictional issues and demonstrates the Attorney General's willingness to unilaterally address concerns over cost and efficiency within our justice system.

AN OVERVIEW OF THE NEW LEGISLATION

There are essentially two elements to the new legislation. The first is an attempt to "simplify dispute resolution processes" for cases under $50,000 involving people injured by at-fault drivers of motor vehicles, allowing these cases "to be resolved in as little as 90 days, where currently these disputes can last two to three years in B.C. Supreme Court".[5] The second element is to "establish the framework for the first major improvements in accident benefits in more than 25 years" and "dramatically increase the care available for anyone injured in a crash, regardless of fault".[6]

The most controversial aspects of the legislation are the creation of a cap of $5,500[7] on non-pecuniary damages for "minor injuries" incurred in motor vehicle accidents and the expansion of the CRT's jurisdiction.

The new legislation defines a "minor injury" as one that does not constitute a "serious impairment"[8] or a "permanent serious disfigurement".[9] Minor injuries include:

- abrasions, contusions, lacerations, sprains or strains;
- pain syndromes;
- psychological or psychiatric conditions that do not result in an incapacity;
- concussions that do not result in an incapacity;
- temporomandibular joint ("TMJ") disorders (defined as injuries that involve or surround the TMJ); and
- whiplash associated disorder ("WAD") injuries.[10]

The CRT's jurisdiction has been expanded to include assessing the appropriate level of compensation for pecuniary losses of up to $50,000 and determining whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act*. If the injury is a "minor injury", a cap of $5,500 on non-pecuniary damages will be imposed. An injury is presumed to be minor and the onus of proof rests with the party alleging the injury is not minor.[11] It is clear that the intent of the legislature was to eliminate the Supreme Court's jurisdiction to hear cases deemed to be "minor injury" cases by the CRT. This flows from the fact that pursuant to s. 56.7(1) of the *Civil Resolution Tribunal Act*, s. 58 of the *Administrative Tribunals Act*[12] applies to claims within the CRT's exclusive jurisdiction, and the determination of whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act* falls within the exclusive jurisdiction of the CRT.[13] Therefore, judicial review by the Supreme Court in "minor injury" cases will be limited to decisions that are "patently unreasonable".[14]

The CRT is self-described, on its website, as "Canada's first online tribunal".[15] It began accepting strata property disputes in 2016 and as of June 2017 obtained jurisdiction over small claims disputes of up to $5,000. CRT proceedings are to be conducted "with as little formality and technicality and with as much speed as permitted by the requirements of [the *Civil Resolution Tribunal Act*], the rules and a proper consideration of the issues in the dispute".[16] The CRT is not bound by the rules of evidence and may receive or accept any evidence it considers relevant, necessary and appropriate, whether or not admissible in a court of law.[17] There are few procedural safeguards, limited disclosure obligations and no formal system for *viva voce* evidence or cross-examination.

The combination of a cap on minor injuries and the delegation to the CRT of the exclusive jurisdiction to determine minor injuries modifies com-

mon law tort rights. The scheme does not eliminate British Columbians' right to claim compensation for tortiously caused motor vehicle injuries and replace such rights with statutory no-fault benefits. Rather, the scheme reduces the level of compensation British Columbians can claim for non-pecuniary damages pursuant to their common law tort rights and grants the CRT exclusive jurisdiction over determining entitlement to and the quantum of minor injury awards.

The grant of exclusive jurisdiction to the CRT contrasts with the jurisdiction granted to the Provincial Court under the *Small Claims Act*,[18] which is concurrent with that of the Supreme Court. Pursuant to s. 3 of the *Small Claims Act* and the Small Claims Court Monetary Limit Regulation,[19] the Small Claims Court has jurisdiction for civil cases up to $35,000. The grant of jurisdiction to the Provincial Court is not "exclusive" and does not eliminate the Supreme Court's jurisdiction to hear cases involving up to $35,000. In other words, the *Small Claims Act* grants jurisdiction to the Provincial Court, but does not remove it from the Supreme Court. Indeed, the *Small Claims Act* reads harmoniously with s. 3 of the *Supreme Court Act*,[20] which permits the Supreme Court to hear all civil cases in the province.

A POTENTIAL JURISDICTIONAL ISSUE RAISED BY THE NEW LEGISLATION

The expansion of the CRT's jurisdiction into the traditional purview of the superior court potentially raises the issue of whether the new legislation constitutes an appropriate exercise of provincial jurisdiction pursuant to s. 92(14) of the *Constitution Act, 1867* or whether such a grant of jurisdiction to the CRT is prevented by s. 96.

Section 96 has been interpreted as giving constitutional status to a federally staffed and remunerated bench across the country. In *Reference re Amendments to the Residential Tenancies Act (N.S.)*,[21] McLachlin J. (as she then was) described s. 96 as "one of the ultimate safeguards of the rule of law"[222] in Canada and went on to note:

> [73] It follows from the constitutional status of the s. 96 courts that neither Parliament nor the legislatures may impair their status. Their status could be impaired by transfers of their work to inferior tribunals. So the wholesale transfer of superior court powers cannot be allowed. Only the transfer of powers found to be subsidiary to a valid administrative scheme or necessarily incidental to an otherwise *intra vires* legislative goal are allowed. Shadow courts and tribunals usurping the functions of the superior courts guaranteed by s. 96 are prohibited.

Justice McLachlin continued by confirming the three-step test for determining whether a conferral of power on an inferior tribunal violates s. 96 of the *Constitution Act, 1867*:

> [74] ... (1) does the power conferred "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation? (2) if so, is it a judicial power? (3) if so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function? The first two steps may be seen as identifying potential violations of s. 96; the last step as setting out the circumstances in which the transfer of a s. 96 power to an inferior tribunal is "transformed" and hence constitutionalized by the administrative context in which it is exercised.

A personal injury lawyer's constitutional challenge to the imposition of a no-fault automobile regime in Ontario in *Campisi v. Ontario*[23] illustrates the constitutional issues raised by the new legislation in B.C. Under the Ontario regime, auto insurance policies issued in Ontario are statutorily deemed to provide no-fault accident benefits according to the Statutory Accident Benefits Schedule ("SABS").[24] The applicant in *Campisi* challenged s. 280 of Ontario's *Insurance Act*,[25] which granted sole jurisdiction to the Licence Appeal Tribunal ("LAT") to resolve SABS disputes, subject only to appeals on questions of law or applications for judicial review.

Justice Belobaba for the Superior Court dismissed the case on a number of grounds, including on the bases that the legislation did not violate s. 96 of the *Constitution Act, 1867* and that Mr. Campisi lacked standing to challenge the legislation.

In his analysis of the three-part test described above, Belobaba J. first summarily addressed the second step by noting the LAT obviously exercised judicial powers when deciding SABS disputes.[26] In our view, B.C.'s new legislation also clearly involves the delegation of a judicial power to the CRT.

Turning to the first step, Belobaba J. concluded the power in issue did not conform with a power exercised exclusively by the superior courts at the time of Confederation. It was determinative of this issue that the LAT was resolving disputes concerning statutorily prescribed no-fault benefits—a novel jurisdiction that did not exist in 1867.[27]

The relevant aspects of the new legislation in B.C. do not involve the establishment of threshold no-fault automobile insurance. Rather, the legislation imposes a cap on minor injuries and transfers the jurisdiction to adjudicate these claims from the superior court to the CRT. In our view, as compared to the legislation at issue in *Campisi*, the new legislation in B.C. is far more likely to engage the first part of the test.

With respect to the third step, whether the transfer of a s. 96 power to an inferior tribunal is "transformed" by the administrative context in which it is exercised, Belobaba J. concluded that the LAT resolution of SABS disputes was "necessarily incidental to the broad policy goals that led the provincial legislature to establish threshold no-fault automobile insurance in the first

place"[28]—namely, establishing a quick and efficient system of no-fault compensation for people injured in motor vehicle accidents. He further concluded that, "in a larger context", the grant of jurisdiction to the LAT was "necessarily incidental to the overall system of automobile accident insurance regulation".[29]

The applicant appealed on the basis that Belobaba J. erred with respect to standing. The Court of Appeal dismissed the appeal.[30] An appeal to the Supreme Court of Canada has been filed.[31]

In our view, the constitutionality of the new legislation in B.C. will depend on whether the following are necessarily incidental to the overall scheme of B.C.'s motor vehicle accident insurance legislation: (1) granting jurisdiction to the CRT to resolve the common law tort rights of people injured in motor vehicle accidents; (2) prohibiting access of these people to superior courts as an alternative remedy; and (3) limiting the scope of judicial review of the CRT's decision by a superior court.[32] Even if the new legislation is necessarily incidental to the overall scheme, if its effect is to transform the CRT into a superior court, or infringe upon a core jurisdiction of a superior court, the scheme risks being *ultra vires* the province.[33]

If the new legislation is interpreted as an attempt to replace the current tort system administered by the superior courts with a cheaper, faster tort system administered by the CRT, the new legislation may be contrary to s. 96 of the *Constitution Act, 1867*.

THE FUTURE OF BALANCING COST CONCERNS WITH ACCESS TO JUSTICE?

The provincial government has been critical of the time and expense involved in the assessment of damages associated with injuries sustained in motor vehicle accidents.[34] However, prohibiting access to superior courts is a draconian step. In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*,[35] Chief Justice McLachlin considered the impact that provincial legislation which imposed hearing fees, without allowing for appropriate judicial discretion, had on litigants attempting to access superior courts. In determining that the legislation was *ultra vires* the province, she noted:

> [32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Consti-*

> *tution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.
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> [33] The jurisprudence under s. 96 supports this conclusion. The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; [*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725]; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.
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> [36] It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867*. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.

Access to justice, lack of cost effectiveness and lack of efficiency pose significant challenges to our justice system. The Action Committee on Access to Justice in Civil and Family Matters along with the Canadian Forum on Civil Justice are proponents of fostering a strategic approach to reforms and coordinating the efforts of all participants concerned with civil justice. Cost, speed and efficiency need to be balanced against the principles of natural justice to ensure the continued effectiveness of our justice system. How to balance these considerations is a multi-factored problem that requires input from all interested parties. Without consideration of the system as a whole, cost-cutting measures could dramatically impact procedural fairness principles that lie at the core of our system.

The new legislation in B.C. and the corresponding amendments to the *Supreme Court Civil Rules*[36] limiting the number of experts allowed to testify in personal injury cases[37] represent a direct intervention by the provincial government into how our Supreme Court manages and resolves personal injury cases. The changes to the rules were enacted unilaterally by the provincial government without recommendation or approval of the rules committee or the Chief Justice.[38] Regrettably, the new legislation indicates a willingness on the part of the current government to unilaterally address cost and efficiency issues within our justice system with little regard for procedural fairness.

ENDNOTES

1. Bill 20, *Insurance (Vehicle) Amendment Act, 2018*, 3rd Sess, 41st Parl, British Columbia, 2019 (assented to 17 May 2019), SBC 2019, c 19.
2. RSBC 1996, c 231.
3. Bill 22, *Civil Resolution Tribunal Amendment Act, 2018*, 3rd Sess, 41st Parl, British Columbia, 2019 (assented to 17 May 2019), SBC 2019, c 17.
4. SBC 2012, c 25.

5. Insurance Corporation of British Columbia, Press Release, "ICBC Legislation Focuses on Affordability and Supporting Crash Victims" (23 April 2018), online: <www.icbc.com/about-icbc/newsroom/Pages/2018-Apr23.aspx>.
6. *Ibid.*
7. Minor Injury Regulation, BC Reg 234/2018, s 6(1).
8. A "serious impairment" means a physical or mental impairment that is not resolved within 12 months, or another prescribed period, if any, after the date of an accident, provided it meets prescribed criteria: *Insurance (Vehicle) Act, supra* note 2, s 101(1).
9. A "permanent serious disfigurement" means "a permanent disfigurement that, having regard to any prescribed criteria, significantly detracts from the claimant's physical appearance": *ibid.*
10. See Minor Injury Regulation, *supra* note 7, ss 1–2; *Insurance (Vehicle) Act, supra* note 2, s 101(1). The definition of "WAD injuries" in s 1(1) of the Minor Injury Regulation is derived from the Quebec Task Force definition and includes as a whiplash injury other than one involving one or both of the following: (a) "decreased or absent deep tendon reflexes, deep tendon weakness or sensory deficits, or other demonstrable and clinically relevant neurological symptoms"; (b) "a fracture to or dislocation of the spine".
11. Minor Injury Regulation, *supra* note 7, s 4.
12. SBC 2004, c 45 [*ATA*].
13. *Civil Resolution Tribunal Act, supra* note 4, ss 133(1)(b), 133(2)(a).
14. *ATA, supra* note 12, s 58(2)(a).
15. <civilresolutionbc.ca>.
16. *Civil Resolution Tribunal Act, supra* note 4, s 18.
17. *Ibid*, s 42.
18. RSBC 1996, c 430.
19. BC Reg 179/2005.
20. RSBC 1996, c 443.
21. [1996] 1 SCR 186.
22. *Ibid* at para 72.
23. 2017 ONSC 2884 [*Campisi*], aff'd 2018 ONCA 869.
24. O Reg 34/10.
25. RSO 1990, c I.8.
26. *Campisi, supra* note 23 at para 42.
27. *Ibid* at paras 44–47.
28. *Ibid* at para 51.
29. *Ibid* at para 53.
30. 2018 ONCA 869.
31. Docket 38515 (filed February 8, 2019).
32. See e.g. *Crevier v Attorney General of Quebec*, [1981] 2 SCR 220.
33. See *McEvoy v Attorney General for New Brunswick*, [1983] 1 SCR 704 at 720–21.
34. See e.g. "David Eby Announces Cap on Expert Witnesses to Address Losses at ICBC", *CBC News* (11 February 2019), online: <www.cbc.ca/news/canada/british-columbia/david-eby-icbc-losses-1.5014286>.
35. [2014] 3 SCR 31.
36. BC Reg 168/2009.
37. See order-in-council 40/2019, which arguably eliminates the discretion of a superior court judge to allow a party to lead expert evidence from more than three experts in a Supreme Court trial involving personal injury or death. Although limitations on expert evidence have been introduced in other jurisdictions, the authors are unaware of any jurisdictions that do not provide judicial discretion to enable parties to retain additional experts (there are provisions for additional joint experts in the amended BC rules).
38. See British Columbia, Ministry of the Attorney General, "Attorney General's Statement on Engagement with Rules Committee" (27 February 2019), online: <news.gov.bc.ca/releases/2019AG0016-000288>.