

CANADA / JUDGMENT

Shrieves v. British Columbia (Attorney General)

2024 BCSC 889

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 889 Shrieves v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shrieves v. British Columbia (Attorney General),

2024 BCSC 889

Date: 20240523

Docket: S241786

Registry: Vancouver

Between:

Joanne Lesley Shrieves and

Trial Lawyers Association of British Columbia

Petitioners/Applicants

And

Attorney General of British Columbia

and Isabel Leontine Snelgrove

Respondents

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

April 30, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 23, 2024

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I. Introduction

- [1] The petitioners, Joanne Lesley Shrieves and the Trial Lawyers Association of British Columbia ("TLABC"), have brought this proceeding because they believe that the regulation imposing a cap on recoverable disbursements in motor vehicle personal injury actions, most recently promulgated in the form of s. 5 of the Disbursements and Expert Evidence Regulation, B.C. Reg. 31/2021 [DEER], is invalid for constitutional and other reasons, and therefore ought to be declared of no force and effect.
- [2] Pending the hearing of their petition, they have applied for an interlocutory injunction suspending the operation of that provision. They also seek to be relieved from the obligation that would otherwise arise on such an application to provide an undertaking as to any damages that such an order might cause if it were to be granted but the petition ultimately fails.
- [3] The application is opposed by the respondents, the Attorney General of British Columbia ("AGBC") and Isabel Leontine Snelgrove. Ms. Snelgrove is the defendant in a separate action that Ms. Shrieves has brought seeking damages for injuries she claims to have sustained in a motor vehicle accident in which they were both involved. The respondents say that the petitioners have, for various reasons, failed to satisfy the applicable test for the relief they seek on the application.
- [4] For the reasons that follow, I have concluded that the application should be refused.

II. Background

A. Legislative Reform and Associated Litigation

- [5] DEER, in its most recent iteration, is the latest in a series of legislative reforms aimed at addressing what had become a financial crisis in British Columbia's automobile insurance regime, overseen by a crown corporation known as the Insurance Corporation of British Columbia ("ICBC"). The factors contributing to the problem, and the steps that the government might take to address it, were considered in a government-commissioned report prepared in 2017 by Ernst & Young, entitled "ICBC - Affordable and Effective Auto Insurance - A New Road Forward for British Columbia" (the "EY Report").
- [6] The authors of the EY Report attributed the problems at ICBC, which has a monopoly on basic automobile insurance in the province, in large part to be the tort-based litigation model that the province still had in place, a model that had been abandoned in recent decades by virtually all of the other Canadian provinces. They observed that nearly a quarter of ICBC's budget was being expended in the courtroom, with litigation costs taking up a greater share of ICBC's budget than, for example, the cost of administering the system or compensating insured claimants. They noted that British Columbia already had the second highest motor vehicle insurance premiums in Canada, with the prospect of a further 30% increase on the horizon in the absence of reform.

- [7] One of the sources of overspending in motor vehicle personal injury actions was seen to be a disproportionate use of expert evidence by plaintiffs. To address this, the authors suggested, among other things, that the government impose limits of various kinds on ICBC's exposure to such disbursements.
- [8] The provincial government responded to the EY Report with several legislative reforms, many of which have attracted legal challenges by TLABC and others in this court. TLABC is a British Columbia society with a membership of over 1,500 legal professionals, roughly 60% of whom practice personal injury litigation.
- [9] First, in 2019, amendments were made to the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 [CRTA], granting to the Civil Resolution Tribunal ("CRT") non-exclusive jurisdiction to decide liability and damages for "minor injuries" resulting from motor vehicle accidents, including claims which, until then, would have been litigated exclusively in this court.
- [10] TLABC and several motor vehicle injury plaintiffs commenced a proceeding seeking to have the amendments declared inoperative, on the basis that they offended s. 96 of the Constitution Act, 1867. Although their challenge was successful in this court before Hinkson C.J., his decision was later overturned and the amendments ultimately upheld on appeal: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2022 BCCA 163 ("Trial Lawyers 2022"), leave to appeal ref'd [2022] S.C.C.A. No. 262.
- [11] Next, the government amended Rule 11-8 of the Supreme Court Civil Rules with a view to limiting to three the number of expert reports that could be adduced at trial on the issue of damages in motor vehicle injury actions. Unlike the parallel legislation in other provinces, the provision did not leave the court with any discretion to make exceptions if the limit proved to be unduly prejudicial in any given case.
- [12] TLABC successfully brought proceedings in this court to challenge that amendment. By order of Hinkson C.J., it was set aside on administrative law grounds and for contravening s. 96 of the Constitution Act 1867: *Crowder v. British Columbia (Attorney General)*, 2019 BCSC 1824. Among other things, Hinkson C.J. found that the rule amendment lacked statutory authority and was deficient for failure to allow for discretionary exceptions.
- [13] There was no appeal. Instead, the government responded by enacting a new statutory provision in the form of s. 12.1 of the Evidence Act, R.S.B.C. 1996, c. 124 [Act]. That provision, among other things:
- a) empowers the Lieutenant Governor in Council ("LGIC") to make regulations limiting recoverable disbursements in motor vehicle claims; and
 - b) restores the three expert report limit, but allows the court to make exceptions in appropriate cases.

- [14] On February 12, 2021, the government promulgated the original version of DEER under the authority of that provision. Subsection 5(2) of DEER, as originally enacted, operated to prevent motor vehicle injury plaintiffs from recovering disbursements incurred in an amount exceeding 6% of either the total damages awarded by the court or the amount negotiated in a settlement, subject only to such exceptions as the LGIC might allow in a future regulation (but no such regulation was ever promulgated before the provision was struck down). The court was without authority to relieve plaintiffs from the operation of the cap in exceptional cases, even where the court had already granted an exception to the three-expert limit under the parent statute.
- [15] TLABC challenged the validity of that provision in this court, once again on both administrative law and constitutional grounds. The challenge was successful both in this court (*Le v. British Columbia (Attorney General)*, 2022 BCSC 1146 [Le BCSC]) and on appeal (*British Columbia (Attorney General) v. Le*, 2023 BCCA 200 [Le BCCA]).
- [16] In *Le BCSC*, Smith J. struck down the impugned provision, finding that the absence of any room for the court to make exceptions rendered the provision inconsistent with the object of the parent statute to encourage proportionality in motor vehicle injury litigation. He also found the provision to be inconsistent with s. 96 of the *Constitution Act, 1867*, for similar reasons. In *Le BCCA*, a panel of three Court of Appeal justices unanimously upheld that decision on the administrative law ground. One of them, Newbury J.A., would also have upheld it on the constitutional ground, but the other two, Harris and Voith JJA., who were in the majority, disagreed and overturned that aspect of the decision.

B. DEER Amended

- [17] In response to *Le BCCA*, the government amended DEER once again, this time by Order in Council No. 628/2023 (B.C. Reg. 241/2023), which came into effect on November 27, 2023, thereby creating the version of DEER that is the subject of this proceeding. The latest amended version of DEER applies to all motor vehicle injury actions with trials starting on or after February 28, 2024.

- [18] As amended, s. 5 of DEER now states as follows:

Limits on amount of disbursements

5 (1) In this section:

"disbursement limit" means, in relation to a vehicle injury proceeding,

- (a) the amount that is 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered, or

- (b) if the court dismisses the vehicle injury proceeding or, at the conclusion of the vehicle injury proceeding, does not make an award of damages, the amount determined by the court;

"excluded disbursements" means the following:

- (a) fees payable to the Crown under the Supreme Court Civil Rules;
 - (b) fees payable to the sheriff for non-refundable deposits in civil jury trials under the Supreme Court Civil Rules;
 - (c) disbursements incurred by a party if the court ordered the costs of the vehicle injury proceeding to be paid as special costs;
 - (d) disbursements for expert evidence, or an expert report, on the issue of liability;
 - (e) disbursements that all parties to the vehicle injury proceeding have consented to allow as excluded disbursements;
 - (f) disbursements that the court has ordered to be excluded disbursements on application made under subsection (6).
- (2) Only the following may be allowed or awarded to a party in a vehicle injury proceeding as disbursements:
- (a) disbursements up to the disbursement limit;
 - (b) excluded disbursements.
- (3) Repealed. [B.C. Reg. 241/2023, s. 1 (c).]
- (4) The limits set out in subsection (2) do not apply to a vehicle injury proceeding if the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is no more than 3 months after the coming into force of this subsection.
- (5) If the trial date set out in the notice of trial filed in relation to a vehicle injury proceeding is more than 3 months after the coming into force of subsection (4), the limits set out in subsection (2) do not apply to disbursements incurred by a party if the court is satisfied that the party necessarily or properly incurred those disbursements before the coming into force of subsection (4).
- (6) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (8) are met, order that the disbursements itemized in the order are excluded disbursements.
- (7) If disbursements to be incurred for expert evidence or expert reports are the subject of an application under subsection (6) and the applicant is also making an application under section 12.1 (5) of the Act, the applicant must make both applications at the same time.

- (8) The following are the conditions for the purposes of subsection (6):
- (a) the application is made before the disbursements are incurred;
 - (b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.
- (9) In an application under subsection (6), a party must include the following:
- (a) the nature and the evidentiary value of each disbursement that is the subject of the application;
 - (b) evidence of the prejudice the party would suffer were the disbursements that are the subject of the application not excluded, which must include
 - (i) evidence that there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle injury proceeding will exceed the disbursement limit,
 - (ii) evidence that the disbursements that are the subject of the application are necessary to justly resolve the vehicle injury proceeding in light of the complexity of the vehicle injury proceeding or the importance of the issues in dispute, and
 - (iii) evidence that the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded.
- (10) For certainty, this section applies to all vehicle injury proceedings, whether or not the proceeding was commenced before the coming into force of this subsection.

C. Ms. Shrieves and her Motor Vehicle Injury Claim

- [19] Ms. Shrieves has commenced an action against Ms. Snelgrove for damages alleged to have been sustained in a motor vehicle accident that occurred in Nelson, British Columbia on May 23, 2018. Ms. Snelgrove has denied both liability and damages. The action is scheduled to proceed to trial commencing on February 3, 2025.
- [20] Ms. Shrieves alleges that the collision caused multiple injuries to her head, face, neck, shoulders, chest, wrist, knee, and foot, including broken ribs and a broken sternum. She also alleges that the collision caused her to suffer vision issues, cognitive issues, tinnitus, difficulty sleeping, headaches, anxiety, and other psychological symptoms. She says she has been unable to return to work since the collision and that she continues to suffer from chronic pain and concussion symptoms. She is unable, she says, to participate in physical activities she enjoyed prior to the collision.
- [21] Ms. Shrieves' claim has been complicated by a suspected stroke she suffered in January 2019. Ms. Shrieves believes that Ms. Snelgrove will seek at trial to attribute at least some of Ms. Shrieves' symptoms to that stroke, rather than the collision.

- [22] Ms. Shrieves lives in Balfour, British Columbia, which is 35 km east of Nelson. To attend appointments related to her claim, she will need to fly or drive for seven hours to Vancouver, where, she has been advised, most of the medical experts she will have to see are located. Because Ms. Shrieves needs to stay overnight to attend those appointments in Vancouver, she expects that her travel costs for each such appointment will be in the range of \$1,000-\$2,000.
- [23] Moreover, Ms. Shrieves says that plaintiffs like her must incur disbursements to prove their entitlement to damages for future care costs that they will ultimately never receive because ICBC will agree to pay Part 7 benefits, which are deducted from any award she may receive pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. That deduction lowers the 6% cap in such cases, she argues, despite the fact that the disbursements had to be incurred to secure the deduction in the first place.
- [24] In light of all these considerations, Ms. Shrieves and her counsel believe that she will need to incur disbursements in excess of the 6% cap. Nevertheless, she has not sought Ms. Snelgrove's consent to incur disbursements above the cap, nor has she brought an application under s. 5 of DEER to have one or more of those anticipated disbursements treated as excluded.

D. This Proceeding

- [25] Ms. Shrieves and TLABC commenced this proceeding by way of petition on March 15, 2024, naming the AGBC as respondent. The petition alleges that s. 5 of DEER, as recently amended, is an unauthorised or otherwise unreasonable exercise of the LGIC's authority under s. 12.1 of the Act and should therefore be set aside. It also alleges that the provision unjustifiably infringes ss. 7 and 15 of the Charter, and should therefore be declared of no force and effect.
- [26] The petitioners filed this application on March 20, 2024.
- [27] By a consent order dated April 25, 2024, Ms. Snelgrove was added as a respondent to the petition.

III. The Applicable Test

- [28] The parties agree on the test to be applied on an application of this kind, which is well-settled: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. In general, that test requires that the applicant establish the following:
- a) there is a serious question to be tried;
 - b) there is a risk of irreparable harm; and
 - c) the balance of convenience supports granting an injunction.

[29] Special considerations apply where, as here, the applicant seeks an interlocutory injunction to suspend the operation of legislation alleged to be unconstitutional. It has been said that such applications will succeed only in the "clearest of cases": *Harper v. Canada (Attorney General)*, 2000 SCC 57. Interlocutory invalidation of legislation in advance of a constitutional ruling has been described as an "extraordinary remedy": *Bacon v. British Columbia (Minister of Finance)*, 2020 BCSC 578, at para. 91; *RJR*, at 339. Cases that seek such relief therefore "stand on a different footing from ordinary cases": *RJR* at 343. It is only in "rare" and "exceptional" circumstances that democratically-enacted legislation can be suspended before a finding of unconstitutionality: *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at 147-48. For those reasons, most applications to enjoin legislation fail, even in the face of proof of irreparable harm to the applicant in the refusal of interlocutory relief: *Harper* at para. 9; *AC and JF v. Alberta*, 2021 ABCA 24, at para. 62

IV. Discussion

A. Have the petitioners made out a fair question to be tried?

[30] It is common ground that interlocutory injunctive relief is available to the petitioners only on the constitutional aspect of the claim. The administrative law aspect cannot support such relief.

[31] It is also common ground that the first element of the test presents a low bar to the petitioners. They need only show that their claim presents a fair or serious question to be tried, or, in other words, that the claim is not frivolous or vexatious: *RJR* at 314. Nevertheless, the respondents argue that the petitioners' constitutional claims are so devoid of merit that they do not even meet that low threshold.

[32] The petitioners allege that the impugned provision unjustifiably infringes ss. 7 and 15 of the Charter. The constitutional challenges to the previous rounds of legislative reform described above invoked s. 96 of the Constitution Act, 1867, rather than the Charter provisions relied upon here. Those earlier authorities are therefore of only limited assistance on this question.

[33] Section 7 of the Charter states that "[e]veryone 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." Impugned legislation is said to violate s. 7 of the Charter if: (1) it limits the right of a claimant to life, liberty or security of the person; and (2) that limitation is not in accordance with the principles of fundamental justice: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [PHS].

[34] The petitioners cite *PHS and Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 for the proposition that state action that interferes with or delays a person's access to health care services can amount to a violation of s. 7. They contend that s. 5 of DEER has such an effect on motor vehicle injury plaintiffs who may need to expend more than 6% of their anticipated recovery on disbursements in order to advance their claims.

- [35] In particular, the effect of that provision, they say, is to require plaintiffs in that position to choose one of three options, all of which are said to be unfairly prejudicial. They may either:
- a) incur the additional disbursements at their own expense, in which case the cost will reduce their ultimate recovery to that extent;
 - b) forego incurring any disbursements above the cap and risk being left with a consequently reduced damages award or settlement; or
 - c) apply for an exception under s. 5 of DEER, and thereby face a forced waiver of solicitor-client and litigation privilege as a condition of obtaining that relief.
- [36] The respondents dispute that motor vehicle injury plaintiffs who face a legitimate need to exceed the 6% cap are prejudiced in the manner alleged. Rather, they say, the prejudice alleged is speculative, curable and avoidable.
- [37] In any event, they say, even if the petitioners were able to demonstrate prejudice of that or some other kind, it cannot amount to a violation of s. 7 because s. 7 does not protect individuals from state action that causes merely financial harm (citing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 1003-1004; *Whitbread v. Walley* (1988), 26 B.C.L.R. (2d) 203 (C.A.) at paras. 40-41 (per McLachlin J.A., as she then was, for the Court), aff'd [1990] 3 S.C.R. 1273; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at paras. 45-46). In particular, tort damages have been held to be "proprietary in nature", such that restrictions on their recovery cannot infringe a right protected by s. 7: *Whitbread*; *Morrow v. Zhang*, 2009 ABCA 215.
- [38] I agree with the respondents that this case resembles *Whitbread* and *Morrow* more than it does *PHS* or *Chaoulli*. The effect of the impugned legislation is not to delay or impede motor vehicle injury plaintiffs' access to health care services per se, but, at best, only to damages or other forms of financial compensation for their injuries. I therefore agree with the respondents that the petitioners have not raised a fair question to be tried under s. 7.
- [39] I turn next to the alleged infringement of s. 15. To establish an infringement of that provision, a claimant must demonstrate that the impugned legislation: (1) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating arbitrary disadvantage: *R. v. Sharma*, 2022 SCC 39; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
- [40] The petitioners argue that the impugned legislation has such an effect, insofar as it creates a distinction based on an enumerated ground for motor vehicle injury plaintiffs who happen to be disabled, hearing impaired, or visually impaired. Such plaintiffs, it is argued, may have to incur additional disbursements to bring their claim to court and therefore are more likely to be prejudiced by the cap than others. In addition, it is alleged, disabled or previously injured plaintiffs are more likely to need to incur additional disbursements in order to show that their symptoms are attributable to the motor vehicle accident that is the subject of their

claims, rather than some other cause.

- [41] The respondents argue that the impugned legislation is, on its face, a neutral policy that does not draw a distinction on the basis of an analogous or enumerated ground. The petitioners must therefore establish "adverse impact" or "indirect" discrimination, which occurs when a seemingly neutral law has a disproportionate negative impact on a group protected by s. 15: *Fraser v. Canada (Attorney General)*, 2020 SCC 28. Here, the respondents say, the petitioners have adduced no such evidence, nor are they likely to be in a position to do so, given the nature of the proceeding they have commenced.
- [42] I agree with respondents that the evidence adduced, or that may be adduced, does not appear to support the s. 15 claim advanced by the petitioners. There is, in particular, no evidence before me to suggest that ICBC would, if asked, refuse a request to exclude disbursements falling in that category, or, if it did, that the court would refuse a s. 5(6) application advanced on those grounds.
- [43] Nevertheless, it is at least arguable that motor vehicle injury plaintiffs in the position described by the petitioners may be forced to seek ICBC's consent or bring an application to the court under s. 5(6), a step not required for other plaintiffs with otherwise similar claims. Although the respondents have adduced some evidence as to the policies that ICBC has developed in assessing plaintiffs' requests for consent to be relieved from the cap, there appears to be no presumptive exclusion in place for disabled plaintiffs who must incur additional disbursements in order to access the court.
- [44] On that basis, I am satisfied that the petitioners have made out at least a fair question to be tried under s. 15.

B. Will the petitioners or others suffer irreparable harm if an injunction is not granted?

- [45] In order to satisfy this second element of the test, the petitioners must adduce "clear and non-speculative evidence that irreparable harm will follow if the application is denied": *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395. In particular, the petitioners must demonstrate that irreparable harm will likely result if the relief is refused, not that it arguably might: *Cimolai v. Children's & Women's Health Centre of British Columbia*, 2001 BCSC 1537 at para. 34; *Viet Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2015 BCSC 1657 at paras. 38-41.
- [46] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or cannot be cured: *RJR* at 341. In cases such as this one involving constitutional rights, harm to third parties who are not before court may properly be considered for this purpose: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2020 BCCA 349.
- [47] The petitioners contend that, if this application is refused, the following kinds of irreparable harm are likely to occur until the petition is resolved:

- a) motor vehicle injury plaintiffs who wish to seek ICBC's consent to exceed the cap or, failing receipt of such consent, to bring a s. 5(6) application to the court, will face compelled disclosure of their privileged information;
 - b) those who choose not to seek ICBC's consent or a s. 5 order will lose the opportunity to prove their claims in full (if they elect not to incur necessary disbursements) or see their net recovery reduced (if they elect to pay for disbursements themselves); and
 - c) the public will lose confidence in the bar.
- [48] I agree with the respondents that these alleged harms are speculative, avoidable and curable, and therefore not "irreparable".
- [49] They are speculative because, as I noted already, there is no evidence that ICBC would refuse a request for consent from a disabled plaintiff in need of incurring additional disbursements in order to access the court, or if it did, that a s. 5(6) application would pose an unduly onerous barrier for such individuals.
- [50] I appreciate that, as the petitioners argue, ICBC is hardly a neutral government arbiter when its consent is sought under s. 5 of DEER. Although it is a crown corporation with a mandate to act in the public interest, it is also charged with defending the claim, placing it in an adversarial position in contentious litigation. I therefore agree with the petitioners that the observations of Hinkson C.J. in *Harm Reduction Nurses Association v. British Columbia (Attorney General)*, 2023 BCSC 2290, apply with even greater force here. That case involved an application, similar to the one before me here, for interim injunctive relief to prevent impugned legislation from coming into force. The provincial government argued that the strength of the plaintiffs' claim should be considered in the context of forthcoming regulations that would moderate the effect of the impugned legislation. In rejecting that argument, Hinkson C.J. stated that the fact that the LGIC "may have the authority to tailor the application" of the impugned legislation "does not guarantee the form that any such tailoring may take, nor does it guarantee that any such tailoring will occur at all" (at para. 56).
- [51] However, the respondents have adduced evidence showing that, in the brief period that the impugned legislation has been in force, only about 10% of exclusion requests made to ICBC could not be resolved and led to s. 5(6) applications.
- [52] Moreover, I disagree with the petitioners' premise that plaintiffs whose s. 15 rights are in issue and who, due to a disability, require an exception from the cap, will not be able to obtain one without having to waive privilege. This is not a case like *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, relied upon by the petitioners, where impugned legislation purporting to compel lawyers to disclose privileged information was seen to risk an erosion of public confidence in an independent bar. I am not persuaded that the impugned legislation can reasonably be expected to have such an effect.

- [53] In particular, neither the language of s. 5 nor this court's application of it on s. 5(6) applications to date can realistically be said to compel plaintiff applicants to disclose their privileged information in order to make their case for an exclusion. Although such a concern has occasionally been raised in passing (see, e.g., *Jabbal v. Venier*, 2024 BCSC 151, at para. 22), the weight of authority in this court is to the effect that, when faced with applications under s. 5(6), the court will apply the criteria set out in s. 5(9) in a generous manner that is sensitive to the need to avoid that result: *Garcia v. Gill*, 2024 BCSC 617, at para. 24; *Kwiatkowski v. Russo*, 2024 BCSC 278, at para. 25; *Fedor v. Fedirchuk*, 2024 BCSC 499, at para. 86; *Tran v. Ozee*, 2024 BCSC 208, at para. 20.
- [54] A similar argument was raised and rejected in *Garcia*. In dismissing an appeal from the decision of an associate judge refusing a s. 5(6) application, *Majawa J.* disagreed that "requiring particularized disbursements" and "an estimate" of damage "collaterally attacks the [plaintiff's] right to litigation privilege" (para. 33). He explained his conclusion in that regard as follows:
- [35] In any event, the evidence that has been accepted by this Court in other similar applications to exclude disbursements includes evidence of estimates of a wide range of possible damage awards, that, in my view, would do little to undermine litigation privilege. For example, in *Gill v. Zadeh*, 2024 BCSC 284, the plaintiff assigned a value of between \$100,000 and \$1 million. In *Chan v. Hogan*, 2024 BCSC 328, the plaintiff provided a range of between \$100,000 and \$500,000.
- [36] In *Kwiatkowski v. Russo*, 2024 BCSC 278, Associate Judge Robertson was provided with evidence that the damage award could range from \$65,000 to \$400,000. Although more precision would be helpful, Associate Judge Robertson did not find that more evidence was required. Indeed, Associate Judge Robertson suggested that requiring more precision could be an incursion on litigation privilege: at para. 25.
- [55] I also agree with the respondents that the alleged harm is avoidable and curable. Plaintiffs wishing to exceed the cap retain the option to incur additional disbursements at their own expense in the first instance. If this proceeding succeeds and the impugned provision is struck down before their trials (or more importantly, the subsequent cost hearings) conclude, then they can still seek to be reimbursed for any additional disbursements at that stage. To protect their position, they can put off their cost hearings to await the outcome of this proceeding. I am not persuaded that such delays would amount to irreparable harm, as the petitioners argue. Indeed, there is authority that they would not.
- [56] In *British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia*, 2022 BCCA 289, *Fenlon J.A.* dismissed a similar application by TLABC and others seeking to suspend the operation of the impugned amendment to the CRTA, following their unsuccessful challenge to that legislation, summarised above, pending their application for leave to appeal to the Supreme Court of Canada. One of the alleged sources of irreparable harm asserted by the applicants was that motor vehicle trials will have to be delayed while

the leave application and any ensuing appeal was underway. In rejecting that assertion, Fenlon J.A. stated as follows, at para. 20:

delay in trial dates with corresponding delay in receipt of awards can be remedied by interest payments attaching to damages. I accept that waiting additional months to move forward with proceedings may involve inconvenience and frustration, and for some who cannot fund treatments not covered by Part 7 benefits, even potential delay in recovery. But in the context of proceedings which are typically not brought to trial until four years post-injury, and which include compensation for any extended period of disability and pain experienced, this does not, in my view, amount to harm that cannot be compensated monetarily.

[57] In summary, I am not persuaded that the petitioners have shown that they or others would suffer irreparable harm in the absence of the injunction sought.

C. Does the balance of convenience favour an injunction?

[58] My conclusion in that regard is sufficient to dispose of the application.

[59] Even if the impugned legislation could be said to cause irreparable harm of the kinds alleged or otherwise, any such harm would have to be weighed against the public interest in the continued operation of duly enacted legislation. In the judgment just cited, Fenlon J.A. also held that the balance of convenience did not favour the stay that was sought, for the following reasons:

[24] there is a well-recognized public interest in the continued operation of duly enacted legislation. This factor weighs heavily in the balance of convenience analysis: RJR-Macdonald at 353. The legislation is to be assumed to promote the public interest. To overcome the assumed benefit, the applicants would have to demonstrate a countervailing public benefit to tip the balance of convenience in their favour: RJR-Macdonald at 348-349. Suspension of legislation issues only in rare and exceptional cases: Manitoba (Attorney General) v. Metropolitan Stores Ltd., 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110 at 147-148.

[60] The petitioners argue that the countervailing public interest they have identified here should tip the scales in their favour. They say that the impugned legislation is only one small part of the suite of reforms that the government has put in place with a view to improving ICBC's financial position, and therefore that the public interest asserted by the respondents is that much less compelling. In addition, they say, the impugned legislation does not eliminate the financial costs that the reforms are intended to address, but merely shifts them to injured plaintiffs with meritorious claims. Preventing those plaintiffs from being reimbursed for properly incurred disbursements is said to amount to an unfair windfall in favour of ICBC.

[61] I do not find these arguments persuasive. They amount to little more than an attack on the wisdom or efficacy of the impugned legislation, which must be assumed on this application to promote the public interest. Weighed against that presumed public interest are alleged harms that I have found to be speculative, curable and avoidable. This is not one of those clear cases in which the extraordinary relief sought is justified.

[62] I have therefore concluded that the balance of convenience does not favour the granting of the relief sought.

V. Summary and Conclusion

[63] Having found that the petitioners have failed to meet the applicable test, I am dismissing the application.

"Milman J."

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