

CANADA / JUDGMENT

Shrieves v. British Columbia (Attorney General)

2025 BCSC 1792

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Supreme Court of British Columbia

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2025 BCSC 1792 Shrieves v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shrieves v. British Columbia (Attorney General),

2025 BCSC 1792

Date: 20250915

Docket: S241786

Registry: Vancouver

Between:

Joanne Lesley Shrieves and

Trial Lawyers Association of British Columbia

Petitioners

And

Attorney General of British Columbia and

Isabel Leontine Snelgrove

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraphs 27, 31, 48, 105 and 106 on September 19, 2025.

Before: The Honourable Justice Giaschi

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

July 17-19, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 15, 2025

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Introduction

- [1] This petition concerns the validity of s. 5 of the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020 [DEER] as amended by Order in Council 628/2023 (B.C. Reg. 241/2023) [the 2023 Order in Council], a provision that, inter alia, limits the disbursements a plaintiff in a vehicle injury proceeding can recover to 6% of the total damages assessed.
- [2] The petition is the latest in a series of proceedings challenging legislative reform efforts by the Province of British Columbia to reduce the costs associated with legal proceedings involving motor vehicle collisions, costs which are frequently ultimately borne paid by the Insurance Corporation of British Columbia ("ICBC"), a crown corporation. These legislative reforms and challenges are addressed by Justice Millman in *Shrieves v. British Columbia* (Attorney General), 2024 BCSC 889, at paras. 5-17. In brief, in 2019, amendments were made to the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25, granting the Civil Resolution Tribunal jurisdiction to decide liability and damages for minor injuries resulting from motor vehicle accidents. These amendments were challenged but ultimately upheld by the Court of Appeal in *Trial Lawyers Association of British Columbia v. British Columbia* (Attorney General), 2022 BCCA 163, leave to appeal ref'd [2022] S.C.C.A. No. 262. Then, amendments were made to Rule 11-8 of the Supreme Court Civil Rules, limiting the number of expert reports on the issue of damages in motor vehicle injury actions to three. These amendments were successfully challenged in *Crowder v. British Columbia* (Attorney General), 2019 BCSC 1824 [Crowder], where Chief Justice Hinkson set aside the amendments on administrative law grounds and for contravening s. 96 of the Constitution Act, 1867.

- [3] In response to the judgment in *Crowder*, the province enacted s. 12.1 of the Evidence Act, R.S.B.C. 1996, c. 124 [Evidence Act], which, inter alia, gave the court discretion to depart from the three-expert limit in defined circumstances and empowered the Lieutenant Governor in Council ("LGIC") to make regulations limiting recoverable disbursements in motor vehicle actions. Then, on February 12, 2021, DEER was amended by the addition of s. 5 limiting the disbursements a plaintiff in a vehicle injury proceeding can recover to 6% of the total damages assessed.
- [4] This validity of s. 5 was successfully challenged by the Trial Lawyers Association of British Columbia ("TLABC") and others in *Le v. British Columbia (Attorney General)*, 2022 BCSC 1146 [Le BCSC], affirmed on appeal 2023 BCCA 200 [Le BCCA]. In this court, Justice N. Smith held s. 5 of DEER was invalid on administrative law grounds as being inconsistent with s. 12.1 of the Evidence Act. He also held the provisions was invalid as being contrary to s. 96 of the Constitution Act, 1867. In both cases, the lack of any discretion in the court to make exceptions was central to the outcome. At the court of appeal, all three justices agreed that s. 5 was invalid on administrative law grounds. The justices differed in their opinions as to whether s. 5 was also invalid as being contrary to s. 96 of the Constitution Act, 1867, with one holding it was and two holding it was not.
- [5] The province responded to the judgments in *Le BCSC* and *Le BCCA* by amending s. 5 of DEER through the 2023 Order in Council. Section 5, as amended, retains the 6% limit on disbursements but, subject to specified conditions, permits a plaintiff to bring an application and grants the court discretion to have specific disbursements excluded from the limit. Pursuant to s. 5(8)(a), one of the conditions imposed is that the application be made before the disbursements are incurred.
- [6] The petitioners acknowledge that the amendments promulgated in the 2023 Order in Council address the main problem identified in *Le BCSC* and *Le BCCA*, the lack of any discretion in the court to make exceptions to the imposed limits, but say the amendments introduce new issues. Specifically, they say s. 5(8)(a) of DEER is an unauthorized or otherwise unreasonable exercise of the LGIC authority under s. 12.1(9) of the Evidence Act and that s. 5(8)(a) is of no force and effect under s. 52 of the Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11 (the "Charter") as it unjustifiably infringes the s. 15 Charter rights of plaintiffs. The petition is opposed by the respondents.
- [7] I observe that the petitioners had originally challenged all of s. 5 of DEER and originally alleged in the petition that s. 5 also infringed s. 7 of the Charter. However, at the hearing of the petition they advised, and later confirmed in writing on July 19 2024, that the challenge was limited to s. 5(8)(a) of DEER. They also advised that they abandoned their arguments under s. 7 of the Charter.

- [8] For the reasons that follow, the petition is dismissed. On a reasonable interpretation of the Evidence Act, s. 5(8)(a) of DEER is within the regulation making power granted to the LGIC and is consistent with the proportionality objectives of s. 12.1 of the Evidence Act. Moreover, it does not infringe the s. 15 Charter rights of plaintiffs.

Facts

Parties

- [9] The petitioner, TLABC is a non-profit society with a membership of legal professionals, most of whom are litigators who represent individuals in civil and criminal proceedings in British Columbia.
- [10] The petition respondent, The Attorney General for British Columbia, is of course, the minister responsible for the Evidence Act, the enabling legislation for DEER.
- [11] The petitioner, Joanne Lesley Shrieves, is alleged to have suffered various personal injuries in a motor vehicle accident that occurred on May 23, 2018 near Nelson, British Columbia. She commenced action VLC-S-M-206059 to recover damages for her alleged injuries. The petition respondent, Isabel Snelgrove, is the defendant in action VLC-S-M-206059.
- [12] I have been advised that action VLC-S-M-206059 was resolved after the hearing of this petition. The parties are agreed that the settlement of the action does not render this petition moot, a position with which I agree.

The Evidence Act and DEER

- [13] On August 10, 2020, s. 12.1 of the Evidence Act was enacted which, inter alia:
- a) defined "vehicle injury proceedings", as meaning a civil proceeding that includes a claim for damages for personal injury, or death, resulting from the use or operation of a vehicle;
 - b) prohibited a party from having more than three experts on damages issues in a vehicle injury proceeding except on consent or with leave of the court; and
 - c) authorized the LGIC to make regulations including regulations establishing limits on the amount of disbursements that are payable to a party in a vehicle injury proceeding.

- [14] The relevant provisions of s. 12.1 of the Evidence Act are:

12.1(1) In this section and section 12.2:

"fast track vehicle injury proceeding" means a vehicle injury proceeding prescribed by regulation as a fast track vehicle injury proceeding;

"joint expert" means an expert that is jointly appointed by all parties to a vehicle injury proceeding;

"vehicle injury damages" means damages for personal injury, or death, resulting from the use or operation of a vehicle as defined in the Motor Vehicle Act;

"vehicle injury proceeding" means a civil proceeding in the Supreme Court that includes a claim for vehicle injury damages.

- (2) Except as provided under this section or the regulations,
 - (a) a party to a vehicle injury proceeding, other than a fast track vehicle injury proceeding, must not tender the following at trial:
 - (i) expert evidence on the issue of vehicle injury damages, of more than 3 experts;
 - (ii) more than one report on the issue of vehicle injury damages from each expert referred to in subparagraph (i),
 - (b) a party to a fast track vehicle injury proceeding must not tender the following at trial:
 - (i) expert evidence on the issue of vehicle injury damages, of more than one expert;
 - (ii) more than one report on the issue of vehicle injury damages from the expert referred to in subparagraph (i), and
 - (c) the court must not allow a party to tender expert evidence at the trial of a vehicle injury proceeding if doing so would result in exceeding the limits set out in this subsection.
- (3) Despite subsection (2), if the parties to a vehicle injury proceeding appoint a joint expert, a party may tender at trial the expert evidence of that joint expert.
- (4) With the consent of all other parties to a vehicle injury proceeding, a party may tender at trial
 - (a) expert evidence of one or more additional experts, despite the limit set out in subsection (2) (a) (i) or (b) (i), or
 - (b) one or more additional reports from an expert referred to in subsection (2) (a) (i) or (b) (i) or paragraph (a) of this subsection, despite the limit set out in subsection (2) (a) (ii) or (b) (ii), as applicable.
- (5) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (6) are met, grant leave to
 - (a) allow expert evidence of one or more additional experts to be tendered, despite the limit set out in subsection (2) (a) (i) or (b) (i), or
 - (b) allow the party to tender as evidence one or more additional reports from an expert referred to in subsection (2) (a) (i) or (b) (i), (4) (a) or paragraph (a) of this subsection, despite the limit set out in subsection (2) (a) (ii) or (b) (ii), as applicable.
- (6) The following are the conditions for the purposes of subsection (5):

- (a) the subject matter of the additional evidence to be tendered is not already addressed by expert evidence of the party making the application as permitted under subsection (2) or (4);
- (b) without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.
- (7) In an application under subsection (5), a party must include the following:
 - (a) the name of each expert whose evidence the party intends to tender at trial;
 - (b) the scope of expertise of each expert whose evidence the party intends to tender at trial;
 - (c) records that support the need for the additional evidence.
- (8) Nothing in this section limits any authority of the court to appoint the court's own experts on the court's own initiative.
- (9) For the purposes of this section, the Lieutenant Governor in Council may make regulations as follows:
 - (a) respecting disbursements, including but not limited to the following:
 - (i) establishing limits on the amount of disbursements that are payable to a party in a vehicle injury proceeding, including, without limitation, establishing limits
 - (A) on the amount of disbursements payable for an expert report,
 - (B) on the amount of disbursements payable as a percentage of the total amount recovered in an action, and
 - (C) in relation to expert evidence by reference to the number of experts tendering evidence at a trial or the number of reports by experts tendered at trial;
 - (ii) authorizing the court to make an order
 - (A) for the amount of disbursements that are payable to a party in a vehicle injury proceeding in circumstances in which limits established under subparagraph (i) do not apply, or
 - (B) determining whether to include or exclude prescribed disbursements when determining the application of a limit established under subparagraph (i);
 - (b) respecting the following matters in relation to expert evidence on the issue of vehicle injury damages in a vehicle injury proceeding:
 - (i) the timelines for serving expert evidence;
 - (ii) the consequences of a party failing to serve expert evidence within a timeline prescribed under subparagraph (i), including but not limited to restricting the party from tendering the expert evidence at trial;

- (c) for the purposes of the definition of "fast track vehicle injury proceeding", prescribing as a fast track vehicle injury proceeding a proceeding that is governed by rules made under section 2 of the Court Rules Act;
- (d) providing for exemptions from the application of subsection (2) or a regulation made under this section, including but not limited to regulations that
 - (i) establish circumstances in which the exemption applies, and
 - (ii) set conditions of, or limitations on, the application of the exemption.
- (10) If a regulation made under subsection (9) (a) (i) or (b) (i) is inconsistent with a rule made under the Court Rules Act, the regulation under subsection (9) (a) (i) or (b) (i) prevails.
- (11) In making a regulation under subsection (9), the Lieutenant Governor in Council may make regulations that are different for fast track vehicle injury proceedings and other vehicle injury proceedings.

[15] By Orders in Council No. 468/2020 and No. 75/2021, the LGIC enacted and later amended DEER. The relevant portions of Regulation, as it read in 2021 and 2022, provided as follows:

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 incurred for an expert report on the issue of liability, if the court ordered that those expenses are excluded disbursements.
- (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.

Le v. British Columbia (Attorney General)

[16] The validity of DEER was challenged by the TLABC and others. In reasons indexed as Le BCSC, N. Smith J. determined that s. 5, as it then read, was inconsistent with s. 12.1 of the Evidence Act, and contrary to s. 96 of the Constitution Act, 1867 and therefore of no force and effect.

[17] In his reasons, N. Smith J. observed that:

- a) The impugned regulation operates to the immediate and primary benefit of ICBC (para. 15);
- b) There is no necessary or direct relationship between the amount of a damages award and the amount of disbursements that had to be incurred to obtain it (para. 17);
- c) Plaintiffs who bear the onus of proof on most damages issues often call more evidence than do the defendants (para. 22);
- d) The impugned regulation supersedes Rule 14-1(5) of the Supreme Court Civil Rules, which provides that the costs recoverable by a successful party must include a reasonable amount for disbursements that "have been necessarily or properly incurred in the conduct of the proceeding" (para. 25);
- e) The final amount of a settlement or judgment is not easily predictable at the time the costs for expert reports and/or testimony are incurred meaning plaintiffs will not know what amount can be spent without risk of exceeding the 6% limit (para. 33); and
- f) The impugned regulation applies a fixed limit only on the recovery of disbursements by plaintiffs and gives the court no discretion to permit exceptions in the circumstances of individual cases (para. 34).

[18] Justice N. Smith held that DEER, as it was then worded, was of no force and effect on both administrative law and constitutional law principles. In both cases, he held that the lack of any discretion in the court to increase the disbursement limit was fatal. In particular, applying administrative law principles, he held the 6% limit in DEER was inconsistent with s. 12.1 of the Evidence Act, which gives the court discretion to allow more than three experts. At paras. 70-72 he wrote:

[70] The impugned regulation applies the same limit of 6% of total damages to all cases, without regard to the legislature's recognition of judicial discretion and the increased costs likely to flow from it. The discretion is specifically provided to avoid serious prejudice, but the impugned regulation creates a financial barrier or disincentive, and therefore possible further prejudice, to litigants asking the court to exercise that discretion.

- [71] Because the impugned regulation fails to recognize the judicial discretion contained in the governing statute, I find it to be inconsistent with the objective, language and purpose of the statute and is therefore not authorized by s. 12.1 of the EA.
- [72] Although I find that lack of judicial discretion to be the major reason the impugned regulation is inconsistent with the enabling statute, there is a further inconsistency in relation to some cases. Section 12.1 of the EA creates a limit that expressly applies to expert evidence on "vehicle injury damages." In authorizing the LGC to enact regulations, it provides the LGC may do so "[f]or the purposes of this section [12.1 of the EA]." It says nothing about experts needed to prove a defendant's liability. But s. 5(1) of the impugned regulation also denies recovery of the cost of a liability expert's attendance at trial. I find that to be a limitation on recovery not contemplated by the governing statute.
- [19] Justice N. Smith's reasons invalidating DEER on constitutional grounds are encapsulated at paras. 90-92, as follows:
- [90] The impact of the impugned regulation on individual plaintiffs will obviously vary depending on the circumstances of each plaintiff and the issues in each case. But I am satisfied, on the basis of the evidence and on those aspects of the civil litigation system of which I am entitled to take judicial notice, that the impugned regulation, in its present form, will prevent or discourage some plaintiffs from accessing the court for a decision of their case on its merits. Some plaintiffs will be unable to marshal all of the evidence necessary to prove all aspects of their case without sacrificing other reasonable expenses or necessary portions of their compensatory damages. Others may have the evidence in the form of the necessary expert reports, but will be unable to proceed to trial because of the additional costs and risks associated with having those experts testify.
- [91] Like the hearing fees that were at issue in *Trial Lawyers 2014*, a limit on disbursements comes within the province's constitutional jurisdiction over the administration of justice, but that jurisdiction must be exercised in a manner that is consistent with other constitutional requirements:
- [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 *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[92] In the absence of a provision that preserves judicial discretion to relieve against the consequences of the impugned regulation in appropriate cases, including cases where the court exercises its related discretion to allow a party to exceed the presumptive limit of three experts, I find that the impugned regulation, as with the rule that was at issue in Crowder, "compromises and dilutes the role of the court, and encroaches upon on a core area of the court's jurisdiction to control its process." (Crowder at para. 185).

[Emphasis added.]

[20] As indicated, N. Smith J.'s order was upheld on appeal to the Court of Appeal.

[21] At the Court of Appeal, all three justices agreed with N. Smith J. that the appropriate test under administrative law was reasonableness and further agreed that DEER was inconsistent with s. 12.1 of the Evidence Act. The majority judgment was delivered by Justice Harris and Voith, who wrote:

[133] The question before us is whether the impugned Regulation can be justified on any reasonable interpretation of the statute pursuant to which it is authorized. Analyzing the issue in this way is, as with reasonableness review generally, a deferential exercise. For the reasons we articulate, we do not think that the impugned Regulation, in the form in which it has been enacted, can be justified on any reasonable interpretation of the purpose and object of the authorizing statute. The fundamental problem, as we shall explain, is that the particular means adopted by the Regulation (to impose an inflexible percentage cap on recoverable disbursements) in order to advance the statutory objective of promoting a conception of proportionality, leads to the potential for disproportionately prejudicial outcomes in a significant number of cases. This we consider to be inconsistent with or conflict with an important objective of s. 12.1 which is to avoid such outcomes. Accordingly, adopting this particular Regulation without providing for, as contemplated by s. 12.1, a discretion to depart from the percentage cap in circumstances where it would be prejudicially disproportionate not to do so is not valid on any reasonable interpretation of the purpose and object of the statute.

[153] Section 5 of the Regulation does not reflect any reasonable interpretation of proportionality incorporated within the Act. Rather, to the extent it reflects a possible meaning of what is "proportionate" it is fundamentally different from and in conflict with the meaning of proportionate embedded in the Act. The meaning of "proportionate" found within the Regulation more closely resembles the dictionary definition of proportionality, one based on a linear relationship between the award a plaintiff obtains and 6% of that award. It contemplates an inflexible relationship that is based on two numeric values. It does not allow for any consideration of prejudice, or the importance or complexity of the issues in a case. It has nothing to do with the specifics of a particular case or particular plaintiff. It applies the same 6% figure in circumstances where a plaintiff has adhered to the presumptive three-expert report limit in s. 12.1(2) and in cases where a judge has determined the presumptive limit does not, by virtue of s. 12.1(5) and (6), advance

proportionality. In our view, to the extent the Regulation incorporates proportionality within its terms, it does so in a manner not reasonably supported by or consistent with any reasonable interpretation of proportionality within the enabling statute. To the contrary, it conflicts with the meaning of proportionality in the enabling statute and in fact undermines the statutory object or purpose in many cases. [Emphasis added.]

- [157] To be clear, s. 5 of the impugned Regulation does not conflict with the Act in an operational sense -- the application of one does not categorically prevent the application of the other. However, a conflict of purpose is readily apparent: the Regulation imposes an inflexible ceiling on the recovery of disbursements by litigants without regard to the nature of a plaintiff's case, the complexity of the issues involved, or the quantity of evidence required to advance reasonable and potentially meritorious claims. Put differently, in many cases the Regulation reflects a disregard for proportionality itself, the animating purpose of the enabling statute under which the Regulation was promulgated.
- [158] Going further, it would seem the Regulation actively frustrates the proportionality objective. As a result of the ruling in *Crowder*, the Act now provides for judicial discretion to allow parties to adduce more than three-expert reports to prevent prejudice. As a practical matter, there will be many cases where the Regulation makes adducing additional reports uneconomic for injured plaintiffs who conclude it is not worthwhile to incur the cost of reports likely to exceed the 6% cap in light of their anticipated recovery. In this sense, the Regulation frustrates that judicial discretion to remedy prejudice in the use of expert evidence and, in doing so, frustrates the goal of proportionality that underpins it.
- [166] It is for the LGC to decide what regulations respecting disbursements it chooses to enact. It is necessary, however, for such regulations to be consistent with s. 12.1 and its central purpose. For the reasons described, we are of the view that s. 5 of the Regulation is not consistent with s. 12.1 and, in particular, with the object of proportionality. Accordingly, it is unreasonable. We would not accede to this ground of appeal.
- [22] Justice Newbury essentially agreed with this analysis. She wrote:
- [101] In my view, the same considerations that applied in *Crowder* to the three-expert limitation in R. 11-8 apply in this case to the 6% ceiling in s. 5 of the Regulation. In enacting s. 12.1(5-6) of the Evidence Act, the Legislature obviously accepted the ruling in *Crowder* and intended that the Court would have the discretion to relieve against the three-expert limit where it would result in prejudice. Yet the exercise of such discretion by the Court may be largely neutered, or "hollowed out", by the 6% limit on disbursements: a plaintiff may adduce the evidence of the number of additional experts permitted by the Court, but may not be able to recover the cost thereof after trial. Plaintiffs will be forced to take the risk that the cap will be exceeded, to abandon all or part of their cases, or to settle without going to trial. If this is correct, then damage awards and settlement amounts, as well as costs, are also likely to be less than they would be without the cap, since plaintiffs will be able to prove only part of their damages or will be constrained to 'settle for less' than would

otherwise be the case. Obviously, these effects redound to the benefit of ICBC.

- [102] I acknowledge that as a matter of statutory interpretation, the 'hollowing out' of the Court's discretion to permit more than three experts does not amount to an 'operating conflict' in the sense used where two different statutory provisions are in apparent conflict: see chapter 11 of Ruth Sullivan, *The Construction of Statutes* (7th ed., 2022). A conflict will generally be found only where one law implicitly or explicitly precludes application of the other (see *Thibodeau v. Air Canada* 2014 SCC 67 at para. 94) or where the application of both concurrently would produce an unreasonable or "absurd" result. (See *Thibodeau* at para. 95, quoting from *Lévis (City) v. Fraternité des policiers de Lévis Inc.* 2007 SCC 14 at para. 47.) In the case at bar, however, it is the absence of a provision in s. 5 of the Regulation that creates the difficulty. And, while it is true that in *Lévis*, Bastarache J. for the majority suggested at para. 56 that a conflict may arise where one statute implicitly takes away what another statute has explicitly allowed, the facts of *Lévis* were very different from those before us. In any event, "Matters of statutory interpretation are [now] not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard." (*Vavilov* at para. 115.) [Emphasis added.]
- [104] One of the relevant "constraints" or "applicable common law principles" or "precedents" in this case is the ruling in *Crowder* that in the absence of any judicial discretion to grant relief against prejudice to a party, the three-expert limit was invalid. As *Vavilov* suggests, it may be unreasonable for a decision maker to ignore or fail to take a constraint of this kind into account when enacting subordinate legislation. In my respectful view, that occurred in the case at bar: s. 5 imposed a *Crowder*-like restriction but no exception was made in the Regulation to enable the Court to relieve against prejudice or unfairness in appropriate cases. The result was to negate in large part the exception to the three-expert limit now found at s. 12.1(5-6) of the Act and to impose an inflexible restriction that runs contrary to the essence of *Crowder*. In my view, this result reflects an unreasonable interpretation by the LGC of the enabling legislation, s. 12.1.
- [23] The Court of Appeal panel disagreed on the constitutional issue. Justice Newbury held that, in the absence of a provision providing the court with discretion to relieve a party from the 6% limit, DEER was inconsistent with the "basic judicial function" of superior courts and infringes their core jurisdiction.
- [115] Not surprisingly, the Attorney General seeks to restrict *Trial Lawyers 2014* to cases dealing with hearing fees or other measures that might "bar" people from "accessing" the courts, either physically (as in *B.C.G.E.U. v. British Columbia (Attorney General)* 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214) or financially (as in *Trial Lawyers 2014* itself). In my view, however, the reasoning in *Trial Lawyers 2014* is not limited to the matter of hearing fees, nor to the wholesale prevention of access to the Court. It establishes the principle that the authority of the provinces over superior courts is not unlimited. It 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." (At para. 36.) This principle was echoed in *Crowder*,

where the Court stated the function of a superior court is to "decide a case fairly upon the evidence adduced by the parties." (At para. 172.) To my mind, it is implicit in this principle that both parties may adduce all the relevant and admissible evidence that is "proper or reasonably necessary to conduct the proceeding". The fulfilment of that function depends on the parties' ability to frame the issues and marshal the necessary evidence before a neutral arbiter. (See Mian at para. 38, quoting Ginsburg J. in *Greenlaw v. United States* 554 U.S. 237 (2008) at 243.) As Cromwell J. succinctly stated in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* 2012 SCC 45:

Courts function as impartial arbiters within an adversary system. They depend on the parties to present the evidence and relevant arguments fully and skilfully. "[C]oncrete adverseness" sharpens the debate of the issues and the parties' personal stake in the outcome helps ensure that the arguments are presented thoroughly and diligently: see e.g., *Baker v. Carr*, 369 U.S. 186 (1962) at p. 204. [At para. 29.]

[116] To the extent, then, that one of the effects of s. 5 is to force plaintiffs in motor vehicle accident cases to decide they simply cannot afford to proceed with their claims, or parts of their claims -- a result the Attorney acknowledged was intended -- I conclude it is inconsistent with the "basic judicial function" of superior courts and infringes their core jurisdiction. (See *Trial Lawyers* 2014 at para. 32.) In the absence of a provision that permits the Supreme Court to exempt a party not only from the three-expert rule but also from the 6% disbursement ceiling, I see no option but to follow the authority of *Trial Lawyers* 2014 and *Crowder*. In my respectful view, s. 5 of the Regulation infringes the core jurisdiction of the Supreme Court under s. 96 of the Constitution Act, 1867 and thus runs contrary to an important 'constraint' on the regulation-making authority of the LGC under the Evidence Act.

[24] Justices Harris and Voith disagreed with Newbury J. on the constitutional issue. They held that DEER did not infringe the core jurisdiction of the courts because it did not prohibit a party from calling evidence or prevent or effectively deny parties access to the court. Their reasons are summarized in paras. 173-175 as follows:

[173] As we emphasised earlier in these reasons, it is significant that in this case it is the Regulation and not the enabling legislation in s. 12.1 that is being challenged. With this in mind, it is not necessary to determine whether *Crowder* is correctly decided or the exact scope of the constitutional principle it exemplifies. What does matter here is that the rationale underlying the result in *Crowder* does not apply to the Regulation. Unlike s. 12.1, the Regulation does not directly prohibit the calling of evidence; rather, it prevents the recovery of disbursements that exceed 6% of a plaintiff's total damage award. And unlike s. 12.1, the Regulation does not engage the court directly, or at all, in decisions about what evidence either party will call. That decision is left to the parties who make their own assessment of what evidence is worth calling, subject to the potential restriction on the number of experts imposed by the statute and the opportunity to persuade a judge to exercise the discretion to permit more than three. To the extent the court might become

involved in sanctioning what expert evidence will be called, it is because s. 12.1(5) and (6) confer that function, not the Regulation.

[174] By way of an overview, we accept as our starting point that s. 92(14) of the Constitution Act, 1867 confers constitutional authority on the legislature to make laws governing the administration of justice. Equally, in exercising that jurisdiction the legislature must respect the constitutionally protected status of s. 96 superior courts. Neither the legislature or the executive can enact measures that infringe the "core jurisdiction" of those courts. This was the central concern of Trial Lawyers 2014.

[175] However, we consider Trial Lawyers 2014 to set an exacting test for infringement satisfied only where financial barriers prevent or effectively deny parties access to the court. In our respectful opinion, the cap on recoverable disbursements does not have that effect and the evidence on the record falls far short of demonstrating it does. The cap does not act as the price of entry to a courtroom; it operates to potentially reduce the value of the ultimate net recovery of compensable damages at the end of the day. Standing alone -- and the constitutional challenge is to the Regulation standing alone -- it does not prevent, limit, or deny a party the ability to call whatever expert evidence the party decides to lead.

[Emphasis added.]

The Regulation as Amended

[25] Following the decision of the Court of Appeal, DEER was amended. Inter alia, by adding ss. 5(1)(e) and (f) and 5(6) through 5(9). The amendments effectively added provisions allowing the court, on application by a party, to exclude disbursements from the 6% ceiling. The relevant provisions of s. 5 of the Regulation, as it currently reads, provide:

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 an expert report on the issue of liability, if the court ordered that those expenses are excluded disbursements.
 - (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.
- (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.

[26] It is to be noted that ss. 5(7), (8) and (9) impose conditions for an application to exclude disbursements from the 6% limit, namely:

- a) Section 5(7) requires the application be brought together with any application under s. 12.1(5) of the Evidence Act;
- b) Section 5(8)(a) requires that the application must be brought before the disbursement is incurred; and
- c) Section 5(9) stipulates the type of evidence that must be proffered in the application including evidence of a reasonable risk the disbursement limit will be exceeded, evidence that the disbursement is necessary, and evidence that the party would be unable to incur the disbursement without undue hardship.

Evidence on this Petition

[27] In support of the petition, the petitioners have filed: an affidavit from Joanne Lesley Shrieves; two affidavits sworn by Richard Parsons, the past President of the TLABC and counsel to Ms. Shrieves in action VLC-S-M-206059; and an affidavit of Jamie Haramina, a legal assistant with counsel for the petitioners. The respondents have filed affidavits by Michelle Vukosavic, a paralegal with the Ministry of the Attorney General, and Kirandeep K. Dhaliwal, legal counsel for ICBC.

Shrieves Affidavit

[28] Ms. Shrieves' affidavit is, for the most part, relatively uncontroversial. She deposes to the facts of her motor vehicle accident, her injuries, the consequences of the accident, her medical treatments, and her retaining of a lawyer.

[29] The respondents object to the last sentence of para. 15 of the Shrieves' affidavit. The petitioners agree this sentence is hearsay. This sentence is to be struck from the affidavit. The respondents also object to para. 21 of the Shrieves affidavit. This paragraph provides:

21. My lawyer for my civil claim has informed me that it is highly likely that the disbursements I need to incur to make out my claim will exceed 6% of the total award.

[30] The respondents say this paragraph is hearsay. The petitioners say it is not hearsay because they do not rely upon it for the truth of its contents but only for the fact the statement was made. I agree with the respondents that the paragraph is inadmissible hearsay. The fact that the statement was made to Ms. Shrieves is, by itself, of no relevance to this petition unless the content of the statement is true. Paragraph 21 is to be struck. However, in my view, nothing turns on this.

Parsons Affidavits

[31] As indicated, Mr. Parsons is the past President of the TLABC and counsel to Ms. Shrieves. The respondents object to multiple paragraphs in his two affidavits. I will first review the uncontroversial parts of his evidence and will then address the objections.

[32] The uncontroversial parts of Mr. Parsons' first affidavit are as follows:

- a) At paras. 5-9 he deposes to the membership and activities of the TLABC. He observes that many clients of TLABC members are persons of modest means who have suffered personal injuries in motor vehicle accidents and require accessibility services to participate in court proceedings;
- b) At paras. 11-21, he deposes to TLABC's interest in this proceeding and to its experience as an intervenor in other court proceedings;
- c) At paras. 24-29, he deposes to his general observations on DEER. In particular,
 - i. At para. 25, he says it would be difficult, if not impossible for a majority of plaintiffs to properly advance an MVA claim where compensable disbursements are limited to 6%, and
 - ii. At para. 27, he says, in his experience, "an MVA claim that is worth between \$100,000 and \$300,000 conservatively requires disbursement spending of \$20,000 or more".
- d) At paras. 30-43, he deposes to Ms. Shrieves' MVA claim outlining her accident, injuries, the consequences of her injuries, his assessment of her likely award, and his assessment of needed expert evidence. In particular,
 - i. He foresees the possibility of needing three to five medical experts plus an economist,
 - ii. He estimates each medical expert report will cost between \$6,000 and \$8,000 and that the costs will likely double if the matter proceeds to trial, and
 - iii. He anticipates "the cost of assembling the expert evidence and other disbursements necessary to prove Ms. Shrieves's MVA claim will easily exceed 6% of overall damages".

- e) At paras. 54-56, he deposes that, as a consequence of DEER, he may no longer be able to seek preliminary assessments from medical experts because the costs will eat into the 6% cap on disbursements. He further deposes that, with DEER, such decisions involve either abandoning certain aspects of a claim, a reduction of potential damages awards due to a claw-back, or disclosing privileged information;
 - f) At para. 66, he deposes that even plaintiffs with modest claims will have to bring applications for relief from the disbursement cap;
 - g) At para. 71, in relation to alleged discriminatory effects of DEER, he deposes that TLABC members often represent plaintiffs who require accessibility services to ensure they can participate in court proceedings; and
 - h) At para. 76, he deposes Ms. Shrieves is more likely to have to bring an application under s. 5(6) of DEER and therefore will have to disclose privileged information or else have a portion of her award clawed back.
- [33] The paragraphs of Mr. Parsons' affidavit #1 objected to are paras. 12, 44-48, 49-53, 57-65, 67-70, 72-75, and 77-83. The respondents say these paragraphs are inadmissible argument or opinion evidence. For the most part, the petitioners disagree.
- [34] The content of the impugned paragraphs from Mr. Parsons' affidavit #1 is as follows:
- a) At para. 12, he deposes that capping disbursements will cause significant prejudice to injured persons "if they can only seek relief from the disbursements cap by disclosing privileged information".
 - b) At paras. 44-53, he outlines three options available to Ms. Shrieves and the consequences to her of each option. Option 1 is to incur disbursements in excess of the cap without a prior application, in which case there will be a claw-back from her ultimate award of damages. Option 2 is to forego a disbursement in excess of the cap, in which case she will not be remedied for certain losses. Option 3 is for her to bring an application under s. 5(6) of DEER, in which case she will need to forego confidentiality and privilege. He deposes to his belief and understanding that assessments of what evidence to gather, intended expert witnesses and their areas of expertise are areas protected by litigation privilege. He deposes that an application under s. 5(6) would divulge his litigation strategy and require disclosure of solicitor-client communications.
 - c) At paras. 57-65, he addresses the implications of a plaintiff being subject to the cap but not the defendant. In such cases, he says a plaintiff must respond to evidence adduced by a defendant but, to do so, must make repeated applications under s. 5(6). He also notes that DEER presents difficulties in that the cap depends on the value of the claim, which is not known and depends on the expenditure of the disbursement in question. Similarly, he deposes DEER requires that he identify the "evidentiary value" of the requested disbursement but this is only available once the disbursement is made and the evidence obtained. Finally, he deposes that s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231

[IVA], further complicates decisions about if and when to make applications under s. 5(6) of DEER.

- d) At paras. 67-70, he deposes that s. 5(6) will be a drain on court resources and could result in an approved disbursement being challenged in an assessment of costs.
- e) At paras. 72-75, he deposes the costs of accessibility services (interpreters, personal support workers, transportation or assistive technology) are subject to the cap and only recoverable if an application is made under s. 5(6). He says the burden of the cap will be more acute for persons requiring accessibility services and for plaintiffs who receive lower awards because of their personal circumstances, such as age and their employment.
- f) At paras. 77-83, he addresses urgency and harm to plaintiffs. He deposes that DEER introduces a new procedural and financial hurdle for plaintiffs. He believes that 75% of his firm's clients will require s. 5(6) applications. He again observes that, if an application is not made, a plaintiff risks failing to prove their claim and if an application is made, a plaintiff will be required to disclose privileged information.

[35] I agree with the respondents that the above paragraphs of Mr. Parson's affidavit #1 are inadmissible as constituting argument in the guise of evidence and must be struck. Indeed, these same arguments were made before me by the petitioners without referring to any evidence and without the need to refer to any evidence. Moreover, this is a petition for judicial review and evidence not before the decision maker is generally not admissible: *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427, at paras. 179-181.

[36] Mr. Parson's affidavit #2 addresses the effect that s. 83 of the IVA, will have on Ms. Shrieve's claim for special damages and costs of future care. His evidence consists of the following:

- a) At para. 5, he notes that Ms. Shrieves has an extended health care benefit through her employment and through a policy held by her spouse. He further notes she has access to \$300,000.00 in ICBC Part 7 medical and rehabilitation benefits.
- b) At para. 6, he states that, pursuant to s. 83 of the IVA, any benefits under Part 7 will be deducted from any award for special damages or cost of future care.
- c) At para. 7 he says it is commonplace for ICBC to have a representative swear an affidavit indicating it will pay all amounts payable under Part 7, without question or challenge; and
- d) At para. 8 he deposes that "it is likely that all or most of the amounts she is awarded for special damages up to the date of trial, and costs of future care following the trial, will be deducted from her judgment pursuant to s. 83 of the IVA". He says this deduction "will reduce the quantum of her claim and directly effect the calculation of her allowable disbursements pursuant to DEER".

[37] Paragraphs 9-10 of Mr. Parson's affidavit #2 are objected to on the grounds that they are argument.

- a) At para. 9, Mr. Parsons deposes that "operation of s. 83 and DEER combined is punitive for plaintiffs like Ms. Shrieves". He explains that it is in a plaintiff's interest to have a future care claim determined by the court because, in his experience, that is often a catalyst for ICBC to make an unequivocal promise to pay Part 7 benefits.
 - b) At para. 10, he deposes that when ICBC agrees to pay future care costs through Part 7, "the plaintiff is effectively denied the right to recover any of the disbursements that were necessary to achieve the care award" because the total award is reduced by the amount of the deduction.
- [38] I agree with the respondents that paras. 9-10 of Parson's affidavit #2 are argument and must be struck. Again, before me, the petitioners have made the same arguments as are contained within these paragraphs.

Haramina Affidavit

- [39] Ms. Haramina merely attaches two documents to her affidavit, being a printout of a webpage of the Accessibility Directorate and a copy of the Province of British Columbia's Accessibility Plan for 2022-23 to 2024-25, entitled "AccessibleBC: B.C.'s Accessibility Plan 2022/23-2024/25."
- [40] The webpage describes the function and purpose of the Accessibility Directorate as follows:
- The Accessibility Directorate focuses on improving accessibility for people with disabilities. Located within the Ministry of Social Development and Poverty Reduction, the directorate works across government and with the disability and business communities.
- Government has a vision to make B.C. a truly inclusive province for all people with disabilities. We want to remove barriers that prevent equal and meaningful participation in society. British Columbia supports the principles outlined in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). We are strongly committed to advancing and safeguarding those principles within the province.
- [41] The Accessibility Plan is a policy document that confirms the government's commitment to accessibility, outlines actions taken to enhance accessibility and identifies priorities for increasing accessibility for persons with disabilities.
- [42] The parties made minimal submissions on the Accessibility Directorate or the Accessibility Plan. I do not intend to address them further.

Vukosavic Affidavit (Reports and Hansard)

- [43] The Vukosavic affidavit is approximately 1,000 pages in length. It attaches multiple documents, which are said to be the record of proceedings relating to the decision to enact the 2023 Order in Council. The attached documents include various reports and studies, extracts from Hansard, news releases, submissions and letters relating to proposed amendments to the Evidence Act.

- [44] I do not intend to review the many exhibits attached to the Vukosavic affidavit as the parties have made minimal reference to most of them. Moreover, the key reports have been the subject of judicial comment. Specifically, in *Le BCCA Newbury J.* summarized the key aspects of the reports as follows:
- [2] In a very real sense, these measures had their origins in various studies and reports prepared over the last 20 years regarding civil justice reform. These include the Report of the Civil Justice Reform Working Group entitled *Effective and Affordable Civil Justice* dated November 2006. The Working Group was chaired by the late Chief Justice Brenner and Mr. Allan Seckel, then Deputy Attorney General of the Province. Their efforts led to substantial changes in the Rules of the Supreme Court, including the introduction of 'fast-track' proceedings and mandatory mediation in some cases. As well, the concept of "proportionality" -- i.e., conducting proceedings in ways that are proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding -- was embedded as a guiding principle in R. 1-3. The same Rule stated that the object of the Rules was to "secure the just, speedy and inexpensive determination of every proceeding on its merits." (Emphasis added.)
- [3] In 2017, a "Justice Reform Working Group" was formed by various stakeholders to "develop recommendations for improving efficiency and reducing costs in motor vehicle litigation through amendments to the Supreme Court Civil Rules." In its 2018 report, the Working Group discussed expert fees, the number of experts "linked to the quantum of damages", and disbursements "linked to a percentage of settlement value." The report stated that "Enumerating the right balance between potential limits on experts and proportionality proved to be a challenge" for the Group. Although a proposal to limit disbursements to a percentage of damages "seemed to attract some of the strongest support", the Group did not reach agreement on specific recommendations. It did acknowledge that "resources are finite" and that consideration should be given to the issue of proportionality in connection with the cost of experts.
- [4] Most important, however, was a report prepared in 2017 for the provincial government by Messrs. Ernst & Young ("EY") entitled *ICBC -- Affordable and Effective Auto Insurance -- A New Road Forward for British Columbia*. EY began the Report by noting "rapidly increasing vehicle repair and bodily injury claims costs, as well as a concerning increase in the number of car crashes on BC roads." These had led to concerns about the "long-term affordability of auto insurance in the province." The stated objective of the Report was to provide a "range of options for ICBC and the B.C. government to consider that would increase fairness and affordability related to Basic insurance, with the goal of keeping future Basic rate increases in line with the rate of inflation ...".
- [5] In its executive summary, EY noted that British Columbia's "litigation-based insurance model" allows drivers who are not at fault to sue drivers who are at fault, for both economic loss and pain and suffering, regardless of the severity of injury. British Columbia was the only province in Canada that had not modified this adversarial model, as all other Canadian

provinces had altered their insurance schemes over the past 20 years in response to escalating claims costs and concerns about affordability. EY expressed concern about the costs of the present model and its future sustainability. In the words of the Report:

Premiums collected by ICBC today are higher than other provinces that have shifted away from a predominantly litigation-based model (they are the second highest in Canada), yet they are not high enough to cover the true cost of paying claims. More accidents are occurring on BC's roads, and the number and average settlement of claims are increasing. Only recent government intervention has protected BC drivers from the currently required 15%-20% price increases. This rate of protection has eroded ICBC's financial situation to a point where it is not sustainable. The average driver in BC may need to pay almost \$2,000 in annual total premiums for auto insurance by 2019, an increase of 30% over today's rates, assuming current trends persist, ... and significant reform is not undertaken.

- [6] One of the five "key issues" identified by EY as requiring change was that costs in respect of claims for minor injuries had increased from 30% to almost 60% of total bodily injury claims costs since 2000. Minor injuries (defined by EY to mean sprains, strains and whiplash symptoms without neurological damage) were singled out because they accounted for "more annual costs than serious or catastrophic injuries, and legal costs are higher than either of these costs." Legal costs relating to minor injuries constituted 24% of ICBC's total annual costs and were said to exceed the "cost of running ICBC and benefits received for minor or non-minor injuries by insured parties." The "target outcome" envisioned by EY for the resolution of this problem included limitations on costs relating to pain and suffering, increased focus on lifetime care, and a "significant reduction to legal costs and disbursements."
- [7] The EY Report recommended the "redesign" of ICBC's "product", to be informed by the guiding principles of efficiency, sustainability, fairness and simplicity. It outlined a continuum of different insurance models, one of which was the continuation of the adversarial-based system under which benefits are received through cash payments negotiated between the parties or ultimately determined by the Court. Each party attempts to build its case and the claimant's focus "tends to be on maximizing the award as opposed to the effectiveness of treatment. There are no caps on benefits awarded by the courts." [1] Farther along the spectrum, "hybrid" models feature caps on certain benefits such as damages for pain and suffering. These caps normally apply only to minor injuries, so that seriously and catastrophically injured claimants are not affected by them. Other hybrid models might limit benefits that could be "accessed as lump sums", instead focusing payments on medical treatment and care. [2] At the other end of the spectrum, the focus would shift completely away from monetary awards to care and treatment for injured claimants. In this scenario, "the burden on the provincial court system would be significantly reduced, freeing up those resources for more strategic uses. This model is still based on fault as unsafe drivers will pay more for their insurance while safer drivers will see significant reductions."

- [45] Justice Milman also commented on the Ernst & Young report in *Shrieves v British Columbia* (Attorney General), 2024 BCSC 889, as follows:
- [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.
- [46] The Vukosavic affidavit also includes various Hansard transcripts. Exhibit M includes the comments made by the Honourable David Eby on March 4, 2020, upon the second reading of Bill 9, the Evidence Act Amendment Act, 2020. He said:

This bill amends the Evidence Act to allow us to better achieve the just, speedy and inexpensive determination of personal injury claims in a manner proportionate to the value of the claim in the courts of this province. These amendments will discourage the use of duelling adversarial experts that can have the effect of artificially driving up claim amounts and certainly has the impact of increasing expenses. Parties will still have the ability to use experts, but the number of experts will be limited.

[In response to previous concerns, the court will also have discretion to allow the parties to use more experts than the limits allow where it would still be proportionate and it is needed to avoid serious prejudice to the parties participating.

The costs a party can recover for expert reports will also be limited through a regulation-making authority. These changes will encourage parties to select experts in a way that is proportional to their injuries and their claims at the outset of the litigation process

The bill also includes a regulation-making power to link the amount of costs a successful party can recover to the overall amount of the award assessed by the court. This limit will encourage proportional spending on the litigation process and help to discourage parties from incurring costs that are disproportionate to the amount in issue in a motor vehicle personal injury case. Initially, these changes will apply only to motor vehicle personal injury litigation.

We are optimistic that this careful balance will help to realize the anticipated cost savings to the benefit of all British Columbians. This bill includes a regulation-making power to permit the expansion of these improvements to all forms of personal injury litigation at a future date.

[47] Exhibit "N" is the Hansard transcript for March 5, 2020. The Honourable David Eby then said:

[At 2:35 p.m.]

the object of the rules is the same as the object of this bill. Our objective here is to be, so far as practicable, conducting the proceeding in way that are proportionate to the amount involved, the importance of the issues and the complexity of the proceeding. That is exactly the intent behind this bill. So it shares an intent with the rules.

The rules themselves are silent on any kind of limit on the number of expert reports, and motor vehicle collisions do not, as I say, provide an incentive to use those joint experts. So this is a complement to the objective of the rules.

[At 4:05 p.m.]

Hon. D. Eby: The rules of court say that the process should be proportionate to the amount that is at issue. It doesn't say what that is equivalent to. So we are setting out a value of 5 percent as being proportionate in this proposal.

The registrar will still play an important role here. Government really just wanted to clarify what exactly a proportionate amount of disbursements is in our view.

In addition to the valuable role played by the registrar, I think there is consensus that the 2010 amendments to the rules of court did not realize the kinds of benefits that were intended around, among other things, efficiency in relation to adversarial experts. Our hope is that this will assist, on the motor vehicle side as a start, in articulating a value -- like a specific numerical value -- around proportionality while recognizing that the registrar and the courts will still play an important superintending oversight.

[At 5:05 p.m.]

The decision of government was not to tell people about how much they should spend on experts. That's up to them. The decision of government was to say that the maximum amount that you can recover is 5 percent and \$3,000 per report.

You want to go out and pay more for a particular expert because you think that helps your case? You can do that. Just like now, you can go out and retain an expert to do an exam, receive the report, never serve it, never disclose it as part of your litigation privilege and pay for the whole thing by yourself. These are decisions that people can make in litigation. It seems to us to be less restrictive to put the emphasis on what can be recovered as a discipline, rather than to say that you can only retain people who charge this amount of money.

Dhaliwal Affidavit

[48] Ms. Dhaliwal is an employee of ICBC. She essentially deposes to ICBC's policies and practices in relation to requests for disbursements to be excluded from the cap. In particular, she deposes:

- a) ICBC established a core team to oversee the operation of DEER, of which he is a member;
- b) The team has made best efforts to oversee issues arising under DEER;
- c) ICBC has generally sought to resolve a request or application under DEER by consent;
- d) As a condition of consent, ICBC has insisted that ss. 5(8) and 5(9) be complied with, but it has not insisted on actual applications being made. ICBC has been prepared to consider informal requests;
- e) Since DEER was promulgated, ICBC has received several hundred requests to exclude disbursements, only a small portion of which have proceeded to a contested hearing;
- f) ICBC has generally instructed counsel to consent to exclude experts' fees so long as the s. 5(9) requirements are made out;
- g) ICBC has generally instructed counsel to allow the plaintiff's portion of a mediation fee as an excluded disbursement;
- h) ICBC has generally instructed counsel to not consent to allowing as excluded disbursements,
 - i. rebuttal reports or expert cancellation fees,
 - ii. conduct fees,
 - iii. discovery transcript fees, although in some cases it does consent, particularly where liability is in dispute, and
 - iv. photocopy fees;
- i) ICBC has generally instructed counsel to consent to excluding disbursements associated with interpreters and accessibility services but, as of the date of the making of the affidavit, June 10, 2024, the core team does not appear to have received any such requests.

Positions of the Parties

- [49] The petitioners acknowledge that the 2023 Order in Council cured the fundamental defect identified by N. Smith J. and the Court of Appeal by providing the court with a discretion to exclude disbursements from the 6% limit; however, they submit that the amendments have introduced new defects. As I have noted, the position of the petitioners has changed since the petition was filed. In summary, they now submit the amended regulation is an unauthorized or otherwise unreasonable exercise of the powers under s. 12.1(9) of the Evidence Act in that s. 5(8)(a) of DEER frustrates the purpose of s. 12.1 of the Evidence Act and compromises the coherence or internal rationality of the legislative scheme. They additionally submit DEER is invalid on administrative law grounds because the LGIC failed to take into account the values underlying s. 15 of the Charter. They further submit that s. 5(8)(a) of DEER unjustifiably infringes the s. 15 Charter rights of plaintiffs and is therefore of no force or effect.
- [50] The respondents submits that DEER in general, and s. 5(8)(a) in particular, address a significant public policy concern, namely, the proportionate use of expert evidence and disbursements in vehicle injury proceedings and the affordability of motor vehicle insurance premiums. They say DEER appropriately and reasonably advances the proportionality objectives of the Evidence Act. In particular, they say s. 5(8)(a) does not create disproportionate prejudice and does not abrogate privilege. More particularly, they say:
- a) Section 5(8)(a) falls squarely within the LGIC's statutory mandate under subpara. 12.1(9)(a)(ii) and para. 12.1(9)(d) of the Evidence Act.
 - b) Delaying any application under s. 5(6) of DEER would frustrate the purposes of s. 12.1 of the Evidence Act; and
 - c) Requiring s. 5(6) applications to be brought before a disbursement is incurred remedies the uncertainty surrounding the recoverability of disbursements and advances proportionality.
- [51] Concerning the petitioner's Charter arguments, the respondents submit DEER does not infringe the s. 15 Charter rights of the plaintiffs as the evidence does not establish that disabled plaintiffs are more likely to incur disbursements in excess of the 6% cap. Alternatively, they submit any infringement of s. 15 of the Charter is minimal, proportionate, and justified as a reasonable limit prescribed by law.

Issues

[52] The issues are:

- a) Is s. 5(8)(a) of DEER an unauthorized or unreasonable exercise of the LGIC's authority under s. 12.1(9) of the Evidence Act?

- b) Is s. 5(8)(a) of DEER of no force and effect under s. 52 of the Constitution Act for unjustifiably infringing the s. 15 Charter rights of plaintiffs?

Analysis

Is s. 5(8)(a) of DEER unauthorized or unreasonable?

[53] Before commencing my analysis, I note several pertinent considerations that were highlighted by Justices Harris and Voith in *Le BCCA* at paras. 120-128. In summary, they are:

- a) The issue is not whether the province can enact laws about litigation costs but whether it has exercised its power to enact such laws "consistently with statutory and constitutional restraints";
- b) The role of the court is not to assess the policy merits of the impugned regulation but is to assess if it accords with a reasonable interpretation of the authority conferred by its enabling statute, and within the relevant factual and legal constraints, regardless of the court's own normative assessment of its efficacy or underlying policy rationale;
- c) The existing legal context must be taken into account, including the Supreme Court Civil Rules which provide, inter alia that a successful plaintiff may be deprived of costs in certain circumstances; and
- d) Expert evidence is typically required to advance any claim for personal injury including medical experts.

[54] The parties are agreed that the standard of review to apply in a judicial review of a regulation is reasonableness. This was affirmed by the Court of Appeal in *Le BCCA* at paras. 96 and 133, and most recently in *Auer v. Auer*, 2024 SCC 36, at para. 3. The question is whether the impugned regulation can be justified on any reasonable interpretation of the statute pursuant to which it is authorized. In the circumstances of this case, given the amended position of the petitioners, the question is whether s. 5(8)(a) of DEER can be justified on any reasonable interpretation of the Evidence Act. In my view, it can.

[55] I commence the analysis with the observation that, by its very language, s. 12.1(9)(a) of the Evidence Act clearly gives the LGIC the power to make regulations respecting disbursements including the power to limit disbursements to a percentage of the amount awarded in a motor vehicle action. For ease of reference, I set out again the relevant portions of s. 12.1(9).

- (9) For the purposes of this section, the Lieutenant Governor in Council may make regulations as follows:
- (a) respecting disbursements, including but not limited to the following:
 - (i) establishing limits on the amount of disbursements that are payable to a party in a vehicle injury proceeding, including, without limitation, establishing limits

- (A) on the amount of disbursements payable for an expert report,
- (B) on the amount of disbursements payable as a percentage of the total amount recovered in an action, and
- (ii) authorizing the court to make an order
- (A) for the amount of disbursements that are payable to a party in a vehicle injury proceeding in circumstances in which limits established under subparagraph (i) do not apply, or
- (B) determining whether to include or exclude prescribed disbursements when determining the application of a limit established under subparagraph (i);

[Emphasis added.]

- [56] Section 12.1(9) first gives a general power to make regulations respecting disbursements. This power is not limited as indicated by the words "including but not limited to". The section then expressly confers the power to make regulations establishing limits on the amount of disbursements including limits based on a percentage of the total amount recovered in an action. It then expressly confers the power to make regulations authorizing the court to make orders for determining whether to include or exclude prescribed disbursements.
- [57] Accordingly, by the clear and unequivocal terms of s. 12.1(9)(a), the LGIC is empowered to make regulations generally respecting disbursements and with express authority to make regulations limiting recoverable disbursements in motor vehicle actions to a percentage of the total amount recovered in the action. Further, by the terms of s. 12.1(9)(a)(ii)(B), the LGIC is empowered with express authority to make regulations authorizing the court to determine whether to include or exclude prescribed disbursements.
- [58] Notwithstanding the language of s. 12.1(9), the petitioners say s. 5 of DEER is inconsistent with the Evidence Act. In particular, they say:
- a) The requirement in s. 5(8)(a) that an application be brought before disbursements are incurred is inconsistent with s. 12.1 of the Evidence Act, which allows applications to increase the number of experts to be brought at any time;
 - b) Section 5(8)(a) of DEER is disproportionately prejudicial to plaintiffs as only they are impacted;
 - c) The requirement in s. 5(8)(a) that an application be brought before disbursements are incurred necessitates that plaintiffs disclose strategic information that is subject to solicitor-client or litigation privilege, but the Evidence Act does not expressly or impliedly abrogate such privilege; and
 - d) The LGIC failed to proportionally balance the limitations on Charter values caused by s. 5(8)(a) against the statutory objectives in the Evidence Act.

- [59] I will address the various alleged inconsistencies but, before I do so, I remind myself that "regulations benefit from a presumption of validity" and courts "should not be too eager to find conflict" but "should favour an interpretation of subordinate legislation that does not conflict with the enabling statute": Le BCCA, para. 135.

Objects and Purposes of the Evidence Act

- [60] The objectives and purpose of the Evidence Act were addressed by the majority in Le BCCA, at paras. 133 and 141. At para. 133, they wrote that an important objective of s. 12.1 was to avoid "the potential for disproportionately prejudicial outcomes in a significant number of cases". At para. 141, they identified the purposes and objects as including to advance or enhance proportionality, to reduce the cost of motor vehicle litigation, and to avoid disproportionate prejudicial outcomes.
- [141] Our colleague has earlier identified various working papers and Hansard transcripts that confirm a central purpose of the Act is a desire to advance or enhance proportionality. This is part of a larger purpose to reduce the cost of motor vehicle litigation arising from what is thought to be excessive use of adversarial experts and to increase the incentive to settle cases. Nonetheless, protecting proportionality, in the sense of avoiding disproportionately prejudicial outcomes, is also an essential object or purpose of the statutory provision. This conclusion is evident in the text of the section, most clearly in ss. (5) and (6). But in any event, as the petition judge observed before him "[t]he Attorney General argue[d] that the purpose of the statute and the regulation is to enforce the need for proportionality in vehicle injury litigation and relies on statements to that effect in the legislative debate on the [Evidence Act] amendments". The appellants' factum also emphasizes that purpose: the Attorney General describes "proportionality" as "the principal objective" of s. 12.1 of the Act. We accept the Attorney General's assertion with the caveat that in exercising its powers the LGC could not enact a Regulation inconsistent with that principal objective: one that produces disproportionately prejudicial outcomes. [Emphasis added.]
- [61] In Le BCCA, the impugned regulation was found to be inconsistent with the proportionality objective in the Evidence Act because the regulation, as it then was, did not allow for any consideration of prejudice, or the importance or complexity of the issues in a case: Le BCCA at para. 153. It was this conflict that the amendments to DEER were intended to rectify by allowing the court, on application by a party, to exclude disbursements from the 6% ceiling.

Intrusion into Privilege

- [62] In their reformulated argument, the petitioners submit that the amendments are disproportionately prejudicial to plaintiffs because s. 5(8(a) of DEER requires an application be made before a disbursement is incurred. They say this requires plaintiffs to disclose their case in advance to the defendant, something which diminishes litigation privilege and solicitor-client privilege. I do not agree.

- [63] The simple answer to this submission is that no part of DEER compels a plaintiff to disclose information that is subject to litigation privilege or solicitor-client privilege. Section 5(6) of DEER merely gives a plaintiff the option to bring an application to have disbursements excluded from the 6% cap. If a plaintiff chooses to bring such an application, then they must comply with the conditions and criteria set forth in ss. 5(8) and (9). This undoubtedly puts a plaintiff to a choice but it does not compel a plaintiff to disclose privileged information.
- [64] The caselaw interpreting ss. 5(8) and (9) of DEER does not support the submissions of the petitioners that litigation and solicitor-client privileged is imperilled by s. 5(8)(a) of DEER. To the contrary, the caselaw indicates that the court has been liberal in applying the evidentiary requirements and has avoided interpretations requiring plaintiffs to open their files or disclose privileged information. In *Tran v. Ozee*, 2024 BCSC 208 [Tran], *Kwiatkowski v. Russo*, 2024 BCSC 278 [Kwiatkowski], and *Chaudhary v. Mehlenbacher*, 2025 BCSC 1439 [Chaudhary], Associate Judge Robertson addressed three applications under DEER to exclude disbursements. In each, she expressed the view that a plaintiff was not required to throw open their file.
- [65] In *Tran*, at para. 20, she wrote:
- [20] As to that evidentiary record, it is somewhat circular to suggest that a party needs to put volumes of evidence before the court, which may cost as much to obtain as the Cap itself, to establish that a disbursement over the Cap is warranted. There is also some inherent risk that in making an application the applicant must, to some extent, tip its hand by possibly highlighting the flaws in its case to establish their risk that the Cap will not be sufficient, which will have to be balanced by the applicant. I would also not expect that the legislature intended to interfere with the right of the applicant to withhold its expert evidence until it is required to disclose it in accordance with the Rules by requiring expert evidence to be tendered on an interim application such as this.
- [66] In *Kwiatkowski*, at para. 25, she wrote:
- [25] Here, the evidence is from plaintiff's counsel, and is general in that it is based on more than one potential outcome as to a damage award ranging anywhere from \$65,000 to \$400,000. While it is unfortunate that a potential outcome cannot be narrowed down, I do not fault plaintiff's counsel for that and nor is more evidence required in respect of the risk factor. In fact, I would go so far as to say it could be unjust to require a plaintiff to come to court and throw open its own file, disclose its strategy and set out an analysis as to all the negatives and weaknesses of its case, in order to satisfy the court that there is a risk that the Cap will be exceeded.
- [67] In *Chaudhary*, at para. 27, she wrote:

- [27] There is, generally, no expectation that the party presenting the application need to open up their file cabinet, and, for example, release or disclose expert reports prior to the 84-day deadline, which they may not otherwise wish to disclose. See for example *Kwiatkowski v. Russo*, 2024 BCSC 278, at para. 25, *Fedor v. Fedirchuk*, 2024 BCSC 499 at paras. 78 and 80, *Tran v Ozee*, 2024 BCSC 20 at paras. 20 and 22.
- [68] In *Garcia v. Gill*, 2024 BCSC 617, Justice Majawa also noted that the evidentiary burden was not high and did little to undermine litigation privilege.
- [33] I will briefly address a final issue raised by the appellant. The appellant submits that by requiring particularized disbursements, the Regulation goes beyond its objective and collaterally attacks the appellant's right to litigation privilege. They also say that asking the appellant to provide an estimate of her damage value would undermine litigation privilege.
- [34] First, I note that litigation privilege can be circumscribed by statutory rules: *General Accident Assurance Company v. Chrusz*, 45 O.R. (3d) 321, 1999 CanLII 7320 (C.A.) at 18; *Badesha v Haider*, 2017 ONSC 1745 at para. 19.
- [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.
- [37] The cases make clear that the evidentiary hurdle is not high. However, as discussed above, there is a hurdle to be cleared in order to comply with the Regulation. In this case, the plaintiff has provided no evidence of the possible damage award (or the anticipated costs of the disbursements), and the plaintiff therefore did not meet the statutory requirement.
- [69] In *James v. Riar*, 2024 BCSC 605, when assessing the undue prejudice requirement in s. 5(9)(b)(iii) of DEER, Justice Wilkinson recognized that DEER imposed difficult trade-offs for plaintiffs and declined to require the plaintiff before her to provide evidence that would undermine litigation privilege.
- [49] The 6% cap means that some plaintiffs will face difficult trade-offs between ensuring their claims were fully investigated and convincingly proven on the one hand and minimizing their financial risk on the other hand: *Le BCCA* at para. 57. If a plaintiff decides to incur a disbursement notwithstanding the 6% cap (even if they are successful in their claim), the unpaid disbursement will act as a claw-back against the damages award. The result is that

the plaintiff will go unremedied to a certain (and perhaps large) degree, even if the disbursement was necessarily, reasonably, and properly incurred. Being put in a position to go unremedied or under-remedied for actual losses pertaining to one's quality of life is to suffer undue hardship.

- [50] It is prejudicial to the plaintiff to identify with any more specificity the existence, nature, and evidentiary value of potential disbursements to the defendant at this stage of the proceedings. To provide such information to the defendant at this time is to severely undermine the plaintiff's litigation privilege, being a "protected area" that "facilitates investigation and preparation of a case for trial by [an] adversarial advocate": *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 24.
- [51] For example, for the defendant to have knowledge of the plaintiff's intention to adduce certain evidence at this stage, only then to be unable to incur the disbursement if it is not excluded, is highly prejudicial to the plaintiff. The defendant could adduce expert opinion evidence going to the same issue knowing that the plaintiff is not in a position to adduce their own corollary expert opinion evidence. This would severely undermine the plaintiff's ability to pursue her claim--not on the basis of merit, but purely on the basis of unequal financial resources as between the insurer defendant and the accident victim plaintiff.
- [52] These significant sources of prejudice to the plaintiff are part of the context of an assessment under s. 5(8)(b) of the Regulation.
- [70] I also observe that Millman J., in his injunction reasons reported at 2024 BCSC 889, was of the view that DEER did not raise serious issues of abrogation of privilege.
- [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.
- [71] Accordingly, in my view, the concerns about disclosure of privileged information are exaggerated by the petitioners. This court has not required plaintiffs to open their litigation files to an extent that seriously undermines either litigation privilege or solicitor-client privilege.
- [72] Additionally, in my view, requiring applications to be made before a disbursement is incurred advances the objectives of the Evidence Act more so than the alternative urged upon me by the petitioners. They say that in the absence of s. 5(8)(a), plaintiffs could bring an application to exclude disbursement at the conclusion of the trial and therefore avoid any

intrusion into privilege. I wholly fail to see how this advances proportionality or reduces the costs of motor vehicle litigation. Such an approach is, as the respondents submit, a return to the status quo ante where a plaintiff is not required to assess proportionality in advance and is subject to the potential prejudice of not having a disbursement recovered. In contrast, if applications are made in advance as is required by s. 5(8)(a), a plaintiff is required to address proportionality considerations and any prejudice is eliminated since the plaintiff will know if a disbursement is excluded from the cap.

- [73] I note that limited incursions into privilege are nothing new. The Supreme Court Civil Rules contain many rules that impinge on privilege in ways that are now accepted as commonplace. For example, parties are not permitted to use a document at trial unless it has been listed in their list of documents (Rule 7-1(21)) and expert reports must be served on the opposite party 84 days before trial (Rule 11-6(3)). These rules are both intrusions into litigation privilege and there are many others.

Inconsistent with s. 12.1

- [74] The petitioners submit that by operation of s. 5(7) of DEER, an application to increase the number of experts must be made at the same time as an application to exclude disbursements from the cap. They say this imposes a limitation on applications for more than three experts that is not present in s. 12.1 of the Evidence Act, namely, that the application under s. 12.1(5) be brought before the disbursement for the expert is incurred. They say this is inconsistent with the objectives and purposes of the s. 12.1 of the Evidence Act since s. 12.1(5) of the Evidence Act allows applications to increase the number of experts to be brought at any time.
- [75] I agree with the petitioners that by the operation of s. 5(7) of DEER, where a plaintiff wishes to tender the evidence of more than three experts and also wishes to exclude disbursements from the 6% cap, then the applications must be brought together and before the disbursement is incurred. I do not, however, agree that this is inconsistent with s. 12.1 of the Evidence Act in general or s. 12.1(5) in particular.
- [76] First, under the petitioners' revised argument, they do not challenge the validity of s. 5(7) of DEER. Hence, the substance of their argument is that s. 5(8)(a) is inconsistent with s. 12.1. However, s. 12.1(9) gives the LGIC the general power to make regulations respecting disbursements and the LGIC has clearly interpreted this general power as providing authority to prescribe when applications to exclude disbursements must be made. In my view, such an interpretation is not unreasonable.
- [77] Second, there is no express conflict between s. 12.1(5) of the Evidence Act and s.5(8)(a) of DEER. Section 5(8)(a) does not address s. 12.1(5) applications. In any event, s.12.1(5) does not stipulate when an application under that section must be brought. It is completely silent on this.

- [78] Third, and most significantly, proportionality is a central objective of s. 12.1 and part of a larger purpose to reduce the cost of motor vehicle litigation. The requirement that an application to exclude disbursements be brought before the disbursements are incurred is reasonably consistent with the proportionality and cost reduction objectives of s. 12.1. Similarly, the requirement that two related applications be brought at the same time is reasonably consistent with these objectives and advances the efficient administration of justice. It would be potentially wasteful and disproportionate if disbursements were incurred before their status is determined, or if two related applications were brought separately.
- [79] I am again reminded that regulations benefit from a presumption of validity and courts should not be too quick to find a conflict between a subordinate regulation and its enacting statute. In my view, the LGIC's decision must attract deference. The question is not whether the LGIC has correctly interpreted their authority under the Evidence Act but whether their interpretation is reasonable and reasonably consistent with the objects and purposes of the Evidence Act. In my view, the LGIC's enactment of s. 5(8)(a) of DEER is based on a reasonable interpretation of the Evidence Act and of its proportionality objective.

Disproportionate Prejudice

- [80] The petitioners also submit that DEER is contrary to the objectives and purposes of ss. 12.1 of the Evidence Act in that it is disproportionately prejudicial to plaintiffs and vulnerable persons. The petitioners say, for example, that Ms. Shrieves, suffered multiple injuries in her motor vehicle accident including injuries to her head, face, neck, shoulders, chest, wrist, knee, and foot, broken ribs, a broken sternum, concussion, chronic pain, vision issues, cognitive issues, tinnitus, difficulty sleeping, headaches, anxiety, and other psychological symptoms. They say she has been unable to return to work and is unable to participate in the activities she enjoyed prior to the collision. They further say that she receives \$35,000 annually in disability benefits and that this amount will be deducted from any future capacity award she proves due to the operation of s. 83 of the IVA. They also say she is likely entitled to Part 7 benefits from ICBC but that ICBC will likely not pay such benefits until after trial. They say the result is that she will have to incur disbursements, in reduction of the 6% cap, to establish future medical costs, which she will ultimately not receive because ICBC will agree to the Part 7 benefits. They submit there is a real possibility Ms. Shrieves will need to incur disbursements exceeding the 6% cap and that this puts her to a problematic choice, being: she can incur the disbursements necessary to prove her case, without bringing an application, in which case she will not be fully compensated; or she can bring the application, in which case she will be required to disclose privileged information which will "arm" the defendant with knowledge of her litigation strategy and her counsel's assessment of the claim and risks.

- [81] The petitioners further say that s. 5 of DEER operates in ways that have particularly adverse effects on vulnerable groups such as people with accessibility challenges, the elderly and people who do not speak English. They say such persons are prejudiced because they require accessibility services but the disbursements for such services are not excluded from the 6% cap.
- [82] The petitioners further say that the burden of s. 5 of DEER is imposed only on plaintiffs. Those burdens include having to bring s. 5(6) applications and incur the necessary costs, having to disclose privileged information, and having to incur the costs of the s. 5(6) application. They submit that this is inconsistent with a balanced approach to proportionality required by s. 12.1 of the Evidence Act.
- [83] The petitioners' submissions on disproportionate prejudice have no merit in light of their reformulated argument advanced at the hearing. As indicated, at the hearing and in their memo to the court dated July 19, 2024, they advised "they wished to narrow their challenge to DEER from s. 5 as a whole to s. 5(8)(a)." However, with the exception of the argument related to privileged information, which I have already addressed and rejected, the submissions do not address any prejudice arising from s. 5(8)(a). The alleged burdens imposed on plaintiffs or vulnerable persons arise whether the application is brought before or after the disbursement is incurred. It is not s. 5(8)(a) that imposes these burdens but the imposition of the 6% cap, which is no longer challenged.
- [84] I add that in *Le BCCA*, at para. 154, the majority noted that the 6% cap was proportionate in many cases.
- [154] The data we were provided, and that our colleague has referred to, confirms that in many instances, the figure generated by applying 6% to a plaintiff's award will be proportionate. It will reasonably reflect the cost, complexity and importance of the issues in the case. In this sense, s. 5 of the Regulation is similar to s. 12.1(2) of the Act. But, critically, in other cases this will not be so. Section 5 lacks the outlet or flexibility provided by s. 12.1(5) and (6) of the Act. It provides no mechanism to achieve "proportionality".
- [85] The problem identified in *Le BCCA* was the absence of a mechanism to relieve plaintiffs from the cap in appropriate circumstances. The revised regulation has now provided such a mechanism.

Failure to Consider Charter Values

- [86] The petitioners' final administrative law argument is that s. 5(8)(a) of DEER is unreasonable because the LGIC failed to take into account the values underlying s. 15 of the Charter.

- [87] The parties disagree as to whether this administrative law challenge is available to the petitioners. The petitioners submit that the test set out in *Doré v Barreau du Québec*, 2012 SCC 12 [Doré], applies. The respondents submit that the Doré framework applies only to discretionary administrative decisions and has no application where a law of general application is at issue, as is the case before me. They say such laws can only be struck down on the basis of an unjustified violation of rights or freedoms.
- [88] I agree with the respondents that the Doré framework has no application.
- [89] Doré involved a judicial review of a tribunal decision in which Mr. Doré, a lawyer, was reprimanded for having engaged in professional misconduct. Mr. Doré alleged the decision violated his Charter rights, in particular his right of freedom of expression. The court in Doré addressed two competing frameworks for reviewing discretionary administrative decisions that implicate Charter values: paras. 34-35. The approach ultimately adopted in Doré was as follows: First, the reviewing court must determine whether the administrative decision at issue engages the Charter by limiting Charter protections -- both rights and values; Second, once it is determined that the decision infringes Charter rights or limits Charter values, the court must determine whether the decision is reasonable through an analysis of proportionality: *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories*, 2023 SCC 31, at paras. 61 and 67 [Commission scolaire].
- [90] I observe that Doré involved a decision of a tribunal and not a regulation. Moreover, at para. 36, Justice Abella expressly recognized that the approach used for reviewing administrative decisions was different from that used when addressing a law of general application.
- [36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. Dunsmuir tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular "law" is being assessed for Charter compliance, on the other hand, we are dealing with principles of general application.
- [91] In *Commission scolaire*, at paras. 59-60, the Supreme Court of Canada re-affirmed that the Doré approach applied to discretionary administrative decisions.
- [92] In *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344, Justice Pomerance held at paras. 124-125, that the Doré framework did not apply to a regulation. That decision was upheld on appeal: 2023 ONCA 134, at para 19.
- [93] The petitioners have referred me to no authority where the Doré framework was applied to a regulation, such as is at issue before me. Accordingly, I decline to apply that framework.

[94] In any event, as will be seen, I do not find that s. 5(8)(a) of DEER infringes s. 15 of the Charter.

Does s. 5(8)(a) of DEER infringe s. 15 of the Charter?

[95] The petitioners submit that s. 5(8)(a) of DEER infringes s. 15 of the Charter, is not justified by s. 1 of the Charter and is therefore of no force and effect.

[96] Section 15 of the Charter is the equality provision. It provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[97] The petitioners say that DEER disproportionately burdens plaintiffs who must incur disability related expenses or accessibility related expenses. More particularly, they say:

The Regulation, by imposing a larger burden on plaintiffs who incur disbursements solely due to their disabilities, denies those plaintiffs the equal benefit of the law. It is also not a burden that defendants who may require such services must bear.

[98] It is not disputed that to establish a violation of s. 15 of the Charter a claimant must demonstrate: (a) the impugned legislation creates a distinction based on enumerated or analogous grounds on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *R. v. Sharma*, 2022 SCC 39, at para. 28.

[99] The respondents submit that the petitioners have not satisfied the onus under either part of the test. They say the plaintiffs have not shown DEER, on its face or in its impact, creates a distinction based on the enumerated grounds, or analogous grounds in s. 15 or that DEER reinforces, perpetuates or exacerbates disadvantage. I agree.

[100] DEER does not, on its face, create a distinction between plaintiffs with physical or mental disabilities and persons without such disabilities. The relevant provisions of DEER apply equally to all plaintiffs, whether disabled or not. In such circumstances, any distinctions must be discerned by examining the impact of the law: *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para 50 [Fraser]. This depends on evidence.

[101] In *Fraser*, the Supreme Court addressed the sorts of evidence required to show disproportionate impact.

[56] Two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group. The first is evidence about the situation of the claimant group. The second is evidence about the results of the law.

[57] Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the "full context of the claimant group's situation" (*Withler*, at para. 43; see also para. 64). This evidence may come from the claimant, from expert witnesses, or through judicial

notice (see *R. v. Spence*, 2005 SCC 71 (CanLII), [2005] 3 S.C.R. 458). The goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group, such as an inability to work on Saturdays or lower aerobic capacity (*Homer v. Chief Constable of West Yorkshire Police*, [2012] 3 All E.R. 1287 (S.C.), at para. 14; *Simpsons-Sears*; *Meiorin*, at para. 11). These links may reveal that seemingly neutral policies are "designed well for some and not for others" (*Meiorin*, at para. 41). When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.

- [58] Courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately impacted (*Action Travail*, at p. 1139; *Vizkelety*, at pp. 170-74). This evidence may include statistics, especially if the pool of people adversely affected by a criterion or standard includes both members of a protected group and members of more advantaged groups (*Sheppard* (2001), at pp. 545-46; *Braun*, at pp. 120-21).
- [102] In my view, the evidence before me does not support a disproportionate impact under part one of the test.
- [103] First, as indicated above, the majority in *Le BCCA* noted that in most cases the 6% cap will be proportionate.
- [104] Second, although I accept that plaintiffs with more severe injuries are more likely to incur disbursements that exceed the 6% cap, there is no evidence that disabled persons are more likely to exceed the cap. A plaintiff with severe injuries is not necessarily a disabled person and there is no evidence before me of the number of motor vehicle plaintiffs who are disabled.
- [105] Third, there is no evidence that persons requiring accessibility services are adversely affected. Ms. Dhaliwal of ICBC deposes that as of the date of her affidavit, ICBC had received no requests in relation to accessibility services. Additionally, none of the various cases cited above involving applications under s. 5(6) of DEER concerned accessibility services.
- [106] Fourth, where a plaintiff is likely to exceed the 6% limit, they can seek the consent of ICBC to exclude disbursements. The evidence of Ms. Dhaliwal is that ICBC has received several hundred requests to exclude disbursements, only a small portion of which have proceeded to a contested hearing.

[107] Fifth, if a plaintiff is required to bring an application under s. 5(6), the caselaw to date suggests that the burden is not onerous and the plaintiff, if successful, will normally be entitled to the costs of bringing the application.

[108] I am further of the view that DEER does not reinforce, perpetuate, or exacerbate the disadvantage. In fact, to the contrary, it expressly allows disbursements to be excluded from the cap to alleviate prejudice. The very test set out in s. 5(8) is whether the party making the application would suffer disproportionate prejudice.

[109] Hence, there is no infringement of s. 15 of the Charter.

[110] In view of my decision that there is no infringement of s. 15 of the Charter, I do not need to consider the application of s. 1 of the Charter.

Order

[111] For the reasons set out above, the petition is dismissed.

[112] The parties have leave to speak to me on the matter of costs, if necessary.

"Giaschi J."

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