# COURT OF APPEAL FOR ONTARIO

CITATION: Tomec v. Economical Mutual Insurance Company, 2019 ONCA 839
DATE: 20191011
DOCKET: M50782 (C66763)

Trotter J.A. (Motion Judge)

BETWEEN

Sotira Tomec

Responding Party (Appellant)

and

Economical Mutual Insurance Company

Responding Party (Respondent)

and

Steven Soares

Moving Party/Proposed Intervener

Cynthia Kuehl, for the moving party

Joseph Cescon, for the appellant

Lisa Armstrong and Shalini Thomas, for the responding party

Heard: September 16, 2019

## REASONS FOR DECISION

**Introduction**

[1] Sotira Tomec was seriously injured in a motor vehicle accident. She commenced an action against the respondent in relation to her entitlement to statutory accident benefits. The Divisional Court dismissed her judicial review application: 2018 ONSC 5664. She obtained leave to appeal to this court. Her appeal is scheduled to be heard on October 16, 2019.

[2] Steven Soares was also seriously injured in a motor vehicle accident. His claim was also refused. He has commenced an appeal to the Divisional Court, which has yet to be heard.

[3] Mr. Soares submits that the issue in his case is very similar, if not identical, to the issue raised in Ms. Tomec's appeal. In order to protect his litigation interests, he wishes to have his case heard at the same time. The problem is that his case is not pending before this court. Mr. Soares proposes to participate in one of two ways: (1) by having this court reconstitute itself as a panel of the Divisional Court and hear his appeal immediately after Ms. Tomec's appeal; or (2) by being granted leave to intervene as a party.

[4] Ms. Tomec does not oppose the motion brought by Mr. Soares. The respondent, Economical Mutual Insurance Company ("Economical"), does.

[5] At the end of the oral hearing, I dismissed both claims for relief, with reasons to follow. These are my reasons.

**Factual Background**

[6] It is not necessary to go into great detail about the facts of the Tomec and Soares cases. Both were seriously injured in car accidents. Both received attendant care and housekeeping benefits from their insurer, Economical: *Insurance Act*, R.S.O. 1990, c. I.8; *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, O. Reg. 403/96. Both Ms. Tomec and Mr. Soares were notified in writing that 104 weeks was the maximum period of entitlement to such benefits "unless you have been determined to have sustained Catastrophic Impairment as defined by the Statutory Accident Benefits Schedule." An insured faces a two-year limitation period to dispute the refusal of SABS benefits.

[7] In the case of Ms. Tomec, her medical condition slowly deteriorated over five years. A medical expert found her to be catastrophically impaired. She then sought attendant care and housekeeping services on an ongoing basis. Economical denied her claim on the basis that it was statute-barred. The Licence Appeal Tribunal ("LAT") agreed that the limitation period had expired. The Divisional Court upheld the LAT's decision.

[8] Mr. Soares arguably stands in a similar position. In the aftermath of his accident, Mr. Soares was found not to be catastrophically impaired. However, his condition continued to deteriorate. Roughly five years after the accident,

Economical advised Mr. Soares that he had been designated as catastrophically impaired. He began to receive benefits again. However, Economical stopped paying benefits to Mr. Soares on the basis that his claim was statute-barred because he failed to dispute the initial refusal within the two-year limitation period. The LAT agreed. Mr. Soares has filed an appeal of this decision to the Divisional Court under s. 11(6) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1990, c. 12, Sched. G, which provides a statutory route of appeal on a question of law. I was advised by the parties that the appeal has been perfected, but not yet heard.

[9] As noted, Ms. Tomec's appeal will be heard on October 16, 2019. On September 12, 2019, Hoy A.C.J.O. granted intervener status to the Ontario Trial Lawyers Association ("OTLA") as a friend of the court, pursuant to r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

**Reconstituting as the Divisional Court**

[10] The first part of the claim for relief is that the appeals be heard at the same time, or one immediately after the other. This type of consolidation may be ordered under r. 6.01 of the *Rules of Civil Procedure*, which provides:

> 6.01(1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
>
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

> (c) for any other reason an order ought to be made under this rule,
>
> the court may order that,
>
> (d) the proceedings be consolidated, or heard at the same time or one immediately after the other. [Emphasis added.]

Mr. Soares also relies on s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("*CJA*"), which states: "As far as possible, multiplicity of legal proceedings shall be avoided."

[11] The underscored words in r. 6.01, above, highlight the problem with this motion. The rule applies to proceedings that are in the same court, not in different courts.

[12] Mr. Soares's proposed solution is to have this court reconstitute itself as a panel of the Divisional Court. This may be achieved through the combined operation of ss. 13 and 18 of the *CJA*. Section 18(2) provides that the "Divisional Court consists of the Chief Justice of the Superior Court of Justice, who is president of the Divisional Court, the associate chief justice and such other judges as the Chief Justice designates from time to time." Every judge of the Superior Court is also a judge of the Divisional Court: s. 18(3).

[13] Section 13(1) of the *CJA* permits the Chief Justice of Ontario, with the concurrence of the Chief Justice of the Superior Court, to perform the work of a Superior Court judge. By virtue of his or her office, a judge of the Court of Appeal

has “all the jurisdiction, power and authority” of a Superior Court judge: s. 13(2). Indeed, when appointed, judges of the Court of Appeal are also appointed judges, *ex officio*, of the Superior Court, and vice versa.

[14] The combined effect of these provisions enables three judges of the Court of Appeal to sit as a panel of the Divisional Court with the consent of the Chief Justice of the Superior Court of Justice. However, this court rarely reconstitutes itself as the Divisional Court. It typically occurs with the consent of all parties: see e.g., *Wall v. Shaw*, 2018 ONCA 929, 28 C.P.C. (8th) 351, at para. 3. There must also be compelling reasons to do so. In *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.* (2001), 54 O.R. (3d) 76 (C.A.), at para. 12, Rosenberg J.A. explained the circumstances in which this might be done: “It is an option that is generally only resorted to where the jurisdictional issue is noticed after the appeal has been argued and is done to save the parties the expense and inconvenience of having to reargue the appeal.”

[15] The application brought on behalf of Mr. Soares is not a reaction to a newly discovered jurisdictional defect. This is not a situation in which an appeal was erroneously brought in this court when it should have launched in the Divisional Court. Here, there has been no mistake; instead, Mr. Soares wishes to bypass a level of court in order to consolidate his appeal with Ms. Tomec’s appeal. He argues that this process of reconstitution and consolidation will be more efficient and avoid inconsistent outcomes.

[16] While it may be more efficient to have the appeals heard together, this alone is not a sufficient reason to grant the relief requested. If this court were to reconstitute as the Divisional Court, for all intents and purposes, it would involve bypassing the Divisional Court. The Divisional Court is an important pillar of Ontario's court structure, with a rich jurisprudence in administrative law. Allowing Mr. Soares to bypass the Divisional Court would deprive the Court of Appeal of the benefit of a considered judgment from that court. For these reasons, it is undesirable to bypass the Divisional Court absent compelling reasons for doing so. Here, there are none.

[17] Moreover, there is nothing unique about multiple cases with the same or similar issues traveling through the system at the same time, but at different levels of court. This, in itself, does not beget inconsistent judgments. To the extent that the issues in the Tomec and Soares cases are the same, the Divisional Court would be bound by the legal determinations made by this court, thereby avoiding inconsistent findings. Moreover, as counsel for Economical submits, there are many, many cases "in the system" that involve the same or similar issues as the one raised in Ms. Tomec's appeal. Each will have to move through the established appeal/judicial review process in due course.

[18] Consequently, there is no basis to have this court reconstitute itself as the Divisional Court in these circumstances. Even if it could be done, consolidating the proceedings would result in Ms. Tomec's appeal being adjourned due to the lack

of additional court time available on October 16, 2019. Although Ms. Tomec does not oppose an adjournment, Economical does. An adjournment would be unwarranted in the circumstances.

**Intervention as a Party**

[19] In the alternative, Mr. Soares seeks to intervene as a party in Ms. Tomec's appeal. The power to grant intervention status as an added party is found in r. 13.03 of the *Rules of Civil Procedure*. Rule 13.03(2) provides that leave to intervene in the Court of Appeal may be granted by "a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them." I have been designated by the Associate Chief Justice of Ontario to decide this motion.

[20] Mr. Soares's arguments for this form of relief mirror those in support of his request that this court reconstitute itself as the Divisional Court. Again, the impact of such an order would be to effectively bypass the Divisional Court for the sake of convenience. Moreover, granting leave to intervene as a party would result in an expansion of the record and would derail the October 16, 2019 hearing date.

**Conclusion**

[21] The application is dismissed. As no party sought costs, no order will be made.

"Gary Trotter J.A."