THE LAWYER'S DAILY

The Lawyer's Daily | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Personal Injury

Supreme Court sees no absurdity in Court of Appeal decision in light of Vavilov

By **Joseph Cescon and Ryan Marinacci**

Joseph Cescon

Ryan Marinacci

(June 23, 2020, 2:55 PM EDT) -- On June 4, the Supreme Court of Canada dismissed with costs Economical Mutual Insurance Company's application for leave to appeal the Ontario Court of Appeal's decision in *Tomec v. Economical Mutual Insurance Company* 2019 ONCA 882. The Court of Appeal allowed the insured's appeal from an application for judicial review of a decision of the Licence Appeal Tribunal (LAT), upheld by the Divisional Court, where Economical had successfully raised a limitation defence.

The Supreme Court of Canada's refusal to grant leave follows on the heels of its landmark decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65, where six months earlier, the court reshaped many fundamental principles of administrative law. According to *Vavilov* — released after the Court of Appeal decision in *Tomec* — the "relative expertise" of the administrative tribunal no longer underpins the presumption of reasonableness. In addition, the majority did away with the "contextual analysis" and held that the presumption of reasonableness could be rebutted by the presence of a statutory appeal mechanism.

That the Supreme Court of Canada refused leave to appeal in *Tomec* despite shifting the judicial review framework in *Vavilov* is notable for two reasons.

First, the Court of Appeal in *Tomec* relied on Supreme Court jurisprudence, which arguably is no longer good law after the *Vavilov* majority eliminated the role of specialized expertise from the standard of review analysis. The court cited paragraph 22 of *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.* 2016 SCC 47, as authority for the presumption of reasonableness where an administrative decision-maker interprets a statute closely related to its function. This was the case in *Tomec*, according to the court, because the LAT had to determine whether discoverability applied to a limitation period prescribed by the *Insurance Act* and the *Statutory Accident Benefits Schedule* (SABS).

However, paragraph 22 of *Edmonton*, in turn, draws upon the oft-cited passage "[d]eference is in order where the Tribunal acts within its specialized area of expertise" at paragraph 46 of *Mouvement laïque québécois v. Saguenay (City)* 2015 SCC 16. After *Vavilov*, the specialized expertise of the tribunal no longer serves a reason to apply deference as a rule, yet it was on this basis that the Court of Appeal in *Tomec* found reasonableness to be the presumptive standard.

Second, the *Vavilov* majority held that the presumption of reasonableness could now be rebutted in one of two ways: where the legislature indicated that it intended a different standard to apply, and where the rule of law required the standard of correctness to be applied.

Relevant to *Tomec* is the first situation, because ss. 11(1) and (3) of the *Licence Appeal Tribunal Act*, 1999 provide for appeals to the Divisional Court on questions of law as of right. At issue before the LAT was a question of law, according to the Court of Appeal, albeit one it found not to be of central importance to the legal system as a whole.

Nonetheless, after *Vavilov*, the presence of this type of statutory appeal mechanism arguably warranted an appellate standard of review, and not a deferential one. That said, the majority in *Vavilov* did find that the existence of a circumscribed right of appeal did not preclude applications for judicial review of decisions to which the appeal mechanism did not apply.

However, where the statutory right of appeal is applicable — as was the case here since a question of law was at issue — it is unclear how this affects the standard of review analysis. Arguably, correctness should apply, otherwise form takes precedence over substance and the decision-maker is deferred to simply because the decision was judicially reviewed and not appealed.

Despite these apparent tensions, leave to appeal was not granted. The Court of Appeal was correct in finding that the LAT's decision was unreasonable and could not stand regardless of the applicable standard of review. This was especially so in light of *Pioneer Corporation v. Godfrey* 2019 SCC 42, where Justice Russell Brown stated that discoverability applied where the limitation arises out of a cause of action and which decision was released after the Divisional Court's decision in *Tomec*.

Here, the cause of action was the denial of a benefit. But there could be no denial before the appellant was eligible for the benefits. Hence, the two-year limit to dispute the enhanced benefits that became available to the appellant once she was determined to be catastrophically impaired could not start before that determination was actually made.

Writing for a unanimous panel, Justice C. William Hourigan found that discoverability had to apply over a hard limitation in the context of the SABS to give effect to the consumer protection purposes of the legislation. Justice Hourigan also found that a hard limitation would result in absurd outcomes:

> Here, the decisions below thrust the appellant into a Kafkaesque regulatory regime. A hard limitation period would bar the appellant from claiming enhanced benefits, before she was even eligible for those benefits. However, if the appellant had not claimed any benefits until she obtained CAT status in 2015, she would not be caught by the limitation period: *Machaj v. RBC General Insurance Company* 2016 ONCA 257, at para. 6. Alternatively, if the appellant had coincidentally obtained CAT status before 2012, the hard limitation period would not bar her claim for enhanced benefits.

Since there was no principled basis to distinguish between these scenarios, a hard limitation could not stand: "This outcome is absurd. There is no principled reason for barring the appellant's claim for enhanced benefits in the first scenario but allowing the claim in the second and third scenario. To do so would effectively penalize the appellant for accessing benefits she is statutorily entitled to, or for developing CAT status too late."

Justice Hourigan also did not accede to Economical's argument in respect of filing "placeholder" applications, noting that these were neither feasible nor likely to succeed:

> "The impossible position a hard limitation places the appellant is best illustrated by having regard to Economical's counsel's oral submissions. Counsel denied that the appellant was put in a lose-lose situation. She argued that the appellant could have applied to the LAT before the expiry of the limitation period for a declaration that, in the future, she would be entitled to extended benefits if she were subsequently found to be CAT.
>
> "I start by noting that courts must be cognizant of the significant disparity in resources between large insurance companies and their insureds, who do not have unlimited resources to bring multiple proceedings, including prophylactic claims based on a future contingency … .
>
> "In any event, if such a proceeding were commenced for a declaration, it is difficult to imagine how it could succeed. At best, the appellant could only lead speculative evidence that she might be CAT at some unknown point in the future. Faced with that evidentiary record, the LAT would likely decline to make the requested declaration."

In the result, Justice Hourigan concluded that LAT's decision to apply a hard limitation put the appellant in so impossible a position as to render its decision unreasonable. With the Supreme Court's dismissal of Economical's leave application, we expect that the Court of Appeal's decision in

Tomec will encourage a more sensible application of the SABS in the future.

Joseph Cescon is a partner at McLeish Orlando LLP*. His personal injury practice is dedicated exclusively to personal injury and wrongful death cases. Ryan Marinacci joined McLeish Orlando as a summer student and will be completing his articles at the firm.*

Photo credit / peterspiro ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily*, contact Analysis Editor Yvette Trancoso-Barrett at* Yvette.Trancoso-barrett@lexisnexis.ca *or call 905-415-5811.*
