

## COURT OF APPEAL CLARIFIES LIMITATION PERIOD IN SABS DISPUTES

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The Court of Appeal ruled recently on the applicable limitation period for claims for the benefits available to individuals injured as a result of involvement in an automobile accident. In the decision of *Tomec v. Economical* (2019 ONCA 882), the Court of Appeal held that the limitation period is subject to discoverability, essentially finding that a claimant must know that they are potentially entitled to a benefit before a denial of such a benefit can be effective at 'starting the clock' for the limitation period associated with challenging an insurer's denial to pay a benefit.

Ms. Tomec was seriously injured in a motor vehicle accident in 2008. In 2010, 2 years after the accident, Ms. Tomec's AB insurer denied her entitlement to further attendant care benefits and housekeeping benefits on the basis that she has not suffered a catastrophic impairment and, as such, is not entitled to these benefits. These benefits were only available if Ms. Tomec sustained a catastrophic impairment. As Ms. Tomec had not applied for a determination of whether she had suffered a catastrophic impairment on the date of the denial by her insurer, there was no dispute at this time regarding whether she could have a viable claim for the benefits being denied. Unfortunately, Ms. Tomec's health continued to deteriorate and in 2015 her insurer accepted that she in fact did suffer from a catastrophic impairment. Despite this finding, her insurer denied her entitlement to attendant care and housekeeping benefits as she failed to dispute the denial within 2 years as was required by the limitation periods set out in both the *Insurance Act* and the *SABS*.

At all levels below, the AB insurer was successful in arguing that its denial of benefits in 2010 was clear and unequivocal and that the doctrine of discoverability was not applicable to claims for the specific benefits being sought. However, the Court of Appeal relied on the recent Supreme Court decision in *Pioneer Corporation v. Godfrey* (2019 SCC 42) in finding that discoverability is a factor to be considered in claims involving entitlement to *SABS* benefits when determining when a limitation period begins to run. The Court of Appeal held that a denial of benefits and an applicant's ability to make a claim for benefits are inextricably linked and that a refusal without a viable claim is of no effect as it relates to applicable limitation period for challenging an insurer's denial.

The Court of Appeal again identified the *SABS* as a remedial statute with the goal of the statute being to reduce the economic hardship of motor vehicle accident victims. Given

this and as applying a hard limitation period requires an injured person to seek entitlement to a benefit that they know that they are not entitled to, the Court of Appeal found to hold that limitation periods start to run on the date of the denial is incongruous with the purpose of the SABS. To find otherwise, produces an absurd result in that a person who develops a catastrophic impairment 'late' is barred from accessing the enhanced benefits provided by the SABS.

While a further appeal is possible, we expect that this decision will be cited regularly by Applicant's in future disputes relating to catastrophic impairment to seek enhanced benefits that were previously not available to them. Similarly, we expect insurers to more vigorously defend CAT applications given their enhanced exposure should such a determination be made.