SUPREME COURT OF NOVA SCOTIA

Citation: *Cameron v. Nova Scotia Association of Health Organizations Long Term Disability Plan*, 2018 NSSC 90

Date: 2018-04-30
Docket: Ant. No. 470286
Registry: Antigonish

Between:

Angela Lee Cameron

Plaintiff

v.

Nova Scotia Association of Health Organizations Long Term Disability Plan

Defendant

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 1, 2018, in Halifax, Nova Scotia
Counsel:	Tristan Carroll for the Plaintiff David Hutt, for the Defendant

By the Court:

Introduction

[1] In May 2016, Angela Cameron received notice by letter from the defendant disability plan that she was being denied long-term disability benefits. At that point, her options were to engage the claim review process, and possible subsequent appeal, which would require her to waive her right to litigate, or to sue the Plan. The terms of the Plan contained a limitation period for filing a statement of claim; namely, a one-year limitation period, which started to run once she was notified her benefits had been denied.

[2] On November 6, 2017, Ms. Cameron filed a statement of claim with this court. The Plan argues that her claim was started more than one year after she was notified her benefits had been denied. It seeks summary judgment and dismissal of her claim. Ms. Cameron argues that the *Limitation of Actions Act*, S.N.S. 2014, c. 35, governs, and it contains a two-year limitation period; alternatively, she argues on various bases that the running of the limitation period was suspended for sufficient time to make her filing fall within the one-year limitation period contained in the Plan.

[3] I have concluded that I must grant summary judgment against the plaintiff and dismiss her claim.

Background

[4] As an employee, Ms Cameron had the benefit of long-term disability benefits through her employer. As such, she is a *beneficiary* of the trust that is the NSAHO Long-term Disability Plan [the Plan]. The Plan's text provides:

> Article 11.6(1)
>
> *No legal action relating to this plan may be brought against the trustees or their staff and agents more than one year after benefits have been denied. This time limitation begins to run from the date of the claim decision or subsequent claim review decision if applicable.*

[5] Ms. Cameron applied for those benefits on September 14, 2015. By letter dated May 4, 2016, her application was denied because her circumstances and materials provided "do not support the suggested medical restrictions or an inability to perform the specific duties of your occupation".

[6] The denial letter included a "request for claim review" form as well as text from the plan dealing with claim review and an appeal procedure which is noted to be "an alternative dispute resolution mechanism to legal action" (Art. 11.08(1)).

[7] The Plan permits a claim review if the request is filed "within 30 days of the claim decision or within 30 days following the date benefits terminate, whichever is later. For this purpose, the employee is deemed to have received the notice of denial or termination on the fifth business day following the date of mailing."

[8] The plaintiff did not request a claim review. In her affidavit, she stated:

> 10-Due to my symptoms at the time, in particular my lack of concentration, fatigue, and memory issues, I could not comprehend nor could I understand the above letter, other than to mean I would not be receiving LTD benefits.
>
> 11-In the month of April 2017, I attempted to return to work. After three days, I could not continue due to drastically increased anxiety and blood pressure. On May 16, 2017, I met with NSAHO benefits administrator Bernie MacPherson at St. Martha's hospital with respect to the reactivation of my LTD claim and/or appeal of the denial. At this time, Mr. MacPherson informed me he would begin to work on restarting my claim for LTD benefits.
>
> 12-I am unaware of the actions Mr. MacPherson took with regards to my claim.
>
> 13-On June 29, 2017, I called Mr. MacPherson, who was unable to give me an update as to the status of my claim.
>
> 14-At no point during the claim process or after was I notified of a one year limitation on bringing legal action with respect to the denial of LTD benefits.
>
> 15-… I retained MacGillivray law office on September 29, 2017 with respect to my claim denial.

[9] She was cross examined. She testified that:

1. She did not recall when she received the denial of benefits letter dated Wednesday, May 4, 2016, but she knew she had *not* been approved for long-term disability benefits - I infer that the letter was likely sent from Halifax by Friday, May 6, and that it arrived by May 13, 2016, in Antigonish, Nova Scotia;
2. When she returned to work for several days in April 2017, it was because someone from St. Martha's Hospital Human Resources Department had called her, and advised that if she did not attend at work it could affect her pension benefits;

3. When she met with Bernie MacPherson on May 16, 2017, she was in the company of her union representative, and she started the roughly half-hour of contact with him discussing her possible retirement. *He brought up the possibility that her LTD claim could be re-opened*, but said, he would have to get in contact with other persons to explore this possibility;
4. She agreed that Mr. MacPherson gave her a blank application for LTD benefits at that time [although there is no evidence before me that she reapplied for benefits];
5. She agreed that between May 2016 and May 2017, she only made four visits to her family doctor; she was not hospitalized during any of that period; and she was looking after "all my own affairs"

[10] By registered letter of Friday, June 3, 2016, the Plan's administrator advised Ms. Cameron that the *time for filing a request for claim review or appeal had expired*, and her claim would therefore be closed. There was no evidence regarding when this letter was received in Antigonish by Ms. Cameron. I infer she received it by June 10, 2016.

[11] On November 6, 2017, a statement of claim was filed in this court seeking the provision of benefits pursuant to the Plan, including arrears of payment, commencement of prospective payments subject to the terms of the contract, and a claim for mental distress.

[12] On January 26, 2018, a defence was filed. In the Plan's defence, the trustees plead that:

1. The filing of the statement of claim herein was "more than one year after the claim decision had been made and provided to the plaintiff";
2. Between the claim decision and commencing action, the plaintiff took no steps to advance, seek a review of, or appeal her claim for benefits under the Plan;
3. The trustees rely upon the contractual terms of the Plan, and the *Limitation of Actions Act*, S.N.S. 2014, c. 35 ("the new *Act*"). They say "the plaintiff's action is out of time and contract barred, and request the case be dismissed with costs";
4. In the alternative the trustees plead:

i. Ms. Cameron's disability claim was evaluated, fully, fairly, reasonably and in good faith, and her health condition did not render her totally disabled within the meaning of the Plan;

ii. Ms. Cameron breached the terms of the Plan or failed to mitigate her losses and is thus not entitled to benefits – specifically;

   a. Failure to seek, pursue, accept or attempt work in another occupation within her alleged restrictions;

   b. Failure to take all reasonable steps to improve her condition; and

   c. Failure to follow specialist recommendations including with respect to activity, resumption of activity, addressing physical deconditioning, counselling, and attempting a return to the workforce.

iii. Even if Ms. Cameron is found to have been "totally disabled within the meaning of the Plan at the relevant time", her entitlement is reduced "by amounts received from sources enumerated as offsets in the Plan, including…"; and

iv. The trustees deny that Ms. Cameron has suffered any mental distress of a degree warranting compensation.

[13] On January 25, 2018, the trustees of the Plan filed a motion seeking summary judgment on evidence "on the basis of the one-year contractual time limit for commencement of action."

The position of Ms. Cameron

[14] The plaintiff argues that summary judgment should not be granted because there are genuine issues of material fact, and fact mixed with law, and her action has a real chance of success at trial.

[15] She rests her argument specifically on the following:

1. The one-year limitation period in the Plan does not trump the two-year limit in the *Limitation of Actions Act*;

2. Even if the one-year limitation period in the Plan applies, this can be extended by Section 19 of the *Limitation of Actions Act* on the basis that Ms. Cameron was "incapable" and not reasonably able to bring a claim forward "for a period of time due to anxiety disorder";

3. Moreover, she argues that the plan is a "peace of mind" contract. By common law (*Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30) and by the terms of the Plan itself in Article 5.06, *the trustees have a good faith obligation*, which was breached here by not providing specific notice to her of the one-year limitation period in the Plan, either in the May 4, 2016, denial letter, or the May 16, 2017, meeting, or any of their subsequent contacts, including with the Plan's representative Bernie MacPherson.

The application of the law to the facts in this case

[16] Justice Fichaud provided a concise commentary on the applicable law in *Upham (c.o.b. M.U. Rhino Renovations) v. Dora Construction Ltd.* (appeal by Shannex Inc.), 2016 NSCA 89:

> 31 The amended Rule says:
>
> (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

(a) determine the question of law, if there is no genuine issue of material fact for trial;

(b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

32 The former Rule 13.04(1) said, if the evidence on the motion satisfies the judge that the challenged statement of claim or defence "fails to raise a genuine issue for trial", the judge "must grant summary judgment". The former Rule 13.04(2) said the judge "may grant judgement for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence". This wording generated a twofold test. In *Burton*, Justice Saunders explained:

[42] At this point a summary of the analytical framework may be helpful. In the first stage the judge's focus is concerned only with the important factual matters that anchor the cause of action or defence. At this stage the relative merits of either party's position are irrelevant. It is only if the judge is satisfied that the moving party has met its evidentiary burden of showing there are no material factual matters in dispute that the judge will then enter into the second stage of the inquiry. The focus of that stage is not - as the judge put it here - to see if the "undisputed facts" ... give rise to a genuine issue for trial" That is a misstatement of the test established in *Guarantee* [*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423]. Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether the claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. ...

[43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.

[44] The phrase "real chance' should be given its ordinary meaning -- that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on a hunch, hope or speculation. A claim or defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/ herself the question:

Is there a reasonable prospect of success on the undisputed facts?

The answer would be yes.

See also the expanded summary of the principles in *Burton*, para. 87.

33 The amended Rule 13.04 frames, but does not materially change *Burton*'s tests. On the first test, instead of the former Rule's "genuine issue for trial", the new Rule 13.04(1) speaks of a "genuine issue of material fact, whether on its own or mixed with a question of law". On the second, the amended Rule 13.04(3) repeats the former Rule 13.04(2), that the judge may grant judgment, dismiss a proceeding, and allow or dismiss a claim or defence. These provisions remain consistent with Justice Saunders' formulation in *Burton*.

34 I interpret the amended Rule 13.04 to pose five sequential questions:

* **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.

The analysis of this question follows *Burton*'s first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

* **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind -- whether material fact, law, or mixed fact and law.

* **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

* **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

35 "Discretion": The judge's "discretion" under the amended Rule 13.04(6)(a) governs the option *whether or not to determine the full merits -- i.e.* the Fourth Question. I disagree with Mr. Upham's factum that Rule 13.04(6)(a) gives the judge "unfettered" discretion to just dismiss Shannex's summary judgment motion. The Civil Procedure Rules do not authorize judges to allow or dismiss summary judgment motions on an unprincipled or arbitrary basis.

36 "Best foot forward": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.

37 Conversion to an application: Lastly, the judge and counsel "must" bear in mind Rule 13.08(1)(b):

13.08(1) A judge who dismisses a motion for summary judgment on the evidence *must*, as soon as is practical after the dismissal, schedule a hearing to do either of the following:

(a) give directions for the conduct of the action, if it is not converted to an application;

(b) on the motion of a party or on the court's own motion, convert the action to an application in court, set a time and date for the hearing of the application, and give further directions as called for in Rule 5 - Application.

[emphasis added]

38 Two reasons are often cited to support the request that an action be determined by a chambers judge upon affidavits. First is that the responding party's pleading has no merit. Second is that the disputed issues may be determined more efficiently by an abbreviated procedure without a full trial.

39 Some jurisdictions address both factors with one Civil Procedure Rule: *e.g.* Ontario's amended Rule 20, that was discussed in *Hryniak*. Ontario's Rules do not have a general mechanism to convert actions into hybrid applications. Nova Scotia separates the functions with two Rules. Rule 13 addresses the first scenario with summary judgment. Rule 6 permits a chambers judge to convert an action to an application that will more proportionately allocate resources. Rule 6.02 lists the governing criteria, and a body of jurisprudence under Rule 6 has developed the principles for conversion. These include factors like those discussed in *Hryniak*.

40 It is important to distinguish the functions of Rules 13.04 and 6. That is because different tones and criteria govern the two reasoning paths. A summary judgment motion frontally, sometimes scornfully attacks merit. A conversion motion considers the more efficient process to adjudicate a plausible claim.

41 Rules 13.08(1)(b) and 6 acknowledge that, in Nova Scotia, the two functions follow separate channels. This affects the analysis of a summary judgment motion. The mere fact that an application by affidavit may allocate resources more proportionately than a trial is not a reason to *summarily* dismiss a pleading as *unmeritorious* under Rule 13.04. Rather, the proportionality factor should trigger consideration, by the judge or counsel: (1) whether the judge should exercise the discretion to decide an isolated point of law under Rule 13.04(6)(a), as discussed earlier, and (2) whether the action should be converted to an application under Rules 13.08(1)(b) and 6. See *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, paras. 11-20.

42 Rule 13.08(1) says that a judge who dismisses the motion for summary judgment "must" schedule a hearing to consider conversion or directions.

> Accordingly, a dismissed motion under Rule 13.04 triggers the supplementary question:
>
> * **Fifth Question**: If the motion under Rule 13.04 is dismissed, **should the action be converted to an application** and, if not, what directions should govern the conduct of the action?

[17] I should note here that specifically in relation to an argument on summary judgment on evidence regarding the defence of expired limitation periods, the test under the old Rules was set out in *Milbury v. Nova Scotia (Atty. Gen*.), 2007 NSCA 52, at paras. 20 and 23 (see also para. 32, *Fendley v. Omura*, 2015 NSSC 260, per Pickup J):

> 20-Did the defendants establish that there are no genuine issues of fact on the question of whether the plaintiff's action is statute barred because the limitation period has expired…
>
> 23-When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example of the discoverability rule.

[18] And I would add here the following paragraph as well:

> 24- In the context of a summary judgment application where a limitation defence is pleaded, the *defendant applicant* must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.

[19] Let me then examine the position put forward by Ms. Cameron.

1. The plaintiff says the one-year limitation period in the Plan does not trump the two-year limit in the *Limitation of Actions Act* (2014) - I find that it does, for the following reasons.

[20] Ms. Cameron does not dispute that at all material times, there is a so-called contractual one-year limitation period, and she did not strictly comply with it. She argues that she is not bound by that one-year limitation period. She relies on a

statutory limitation period. I agree with both counsel that the new Act applies to this litigation, if there is a statutory limitation.

[21] The plaintiff argues that the relevant statutory limitation period is contained in the new Act, which came into force September 1, 2015. She relies on Section 8(1)(a), which contains a two-year limitation period "from the day on which the claim is discovered", with May 13, 2016 being the discovery date.

[22] I should note here that the agreement's one-year limitation period "begins to run from the date of the claim decision or subsequent claim review decision if applicable", per Article 11.06(1). Clearly this must be interpreted as from the date the decision was received by Ms. Cameron. Her evidence suggests that she received a true copy of the letter dated May 4, 2016, but she does not state when she received it. Ms. Sue Eisener-Murphy's affidavit, as Exhibit "E", contains an "activity note" which contains identical wording to that in the May 4, 2016 letter. It is noted to have been created on June 3, 2016, and includes the following comments:

> Description – denial letter sent to claimant
>
> Full note – denial letter sent to claimant – posted late in error

[23] The reference to "posted late" is more likely in my view to be a reference to the late inclusion of the letter in an activity note in the Plan's computer database, as opposed to the date it was mailed by post to Antigonish.

[24] I note that Section 21 of the new Act which became effective on September 1, 2015, contemplates contractual limitation periods:

> (1) The limitation period established by this Act may be extended, but not shortened, by agreement.
>
> (2) Subsection (1) does not affect an agreement made before the coming into force of this *Act*.

[25] Thus, according to the new Act, through agreement, parties may have shortened a limitation period before September 1, 2015, which shortened limitation period survives by virtue of Section 21(2) of the new Act.

[26] Therefore, the general limitation period in Section 8 of the new Act is superseded by the specific one year period in the Plan, being the "agreement" referred to in s. 21(2).

2. The plaintiff submits that even if the one-year limitation period in the Plan applies, this can be extended by section 19 of the new Act on the basis that Ms. Cameron was "incapable", and not reasonably able to bring a claim forward "for a period of time due to anxiety disorder" – I conclude that Section 19 is not applicable to Ms. Cameron's circumstances, or if it is, no genuine issue of material fact arises therefrom.

[27] Section 19 reads:

> (1) The limitation periods established by this Act do not run while a claimant is incapable of bringing a claim because of the claimant's physical, mental or psychological condition.
>
> (2) Where the running of the limitation period is suspended under subsection 1, and the limitation period has less than six months to run as of the day on which the suspension ends, the limitation period is extended to include the day that is six months after the day on which the suspension ends.

[28] On its face, the applicability of this section only applies to "the limitation periods established by this Act". The so-called contractual one-year period is therefore not affected by Section 19. It cannot be extended by "incapacity".

[29] This is different from the former Act which permitted the application of equitable factors pursuant to ss. 3(2), (3), and (4) to contractual limitation periods by virtue of the express inclusion (in the definition of "time limitation") of a limitation period "pursuant to… the provisions of an agreement or contract."

[30] In the alternative, if section 19 can be applied to a contractual limitation period, I must consider in law what is meant by "incapable of bringing a claim because of the claimant's physical, mental or psychological condition."

[31] Ms. Cameron references a similar section in New Brunswick's *Limitation of Actions Act*, S.N.B. 2009, c. L – 8.5. Section 18 of the New Brunswick Act reads:

> (1) The operation of the limitation period in paragraph 5(1)(a), subparagraph 9(1)(b)(i) or paragraph 11(a) or 14(a) is suspended during any period in which the claimant is incapable of bringing the claim because of his or her physical, mental or psychological condition.
>
> (2) If the limitation period has less than one year to run when the suspension ends, the period is extended to the day that is one year after the day on which the suspension ends.

[32] In *Eastland Auto Inc. v Stiles Auto and Machine*, 2015 NBQB 12, Justice Rideout presided over a trial where Mr. Dugas, the plaintiff company's president, suffered from "the mental disability of hoarding which may affect his ability to make decisions" (para 23). Expert evidence had been presented by a psychologist. In relation to the issue of what is required to find a person "incapable of bringing the claim because of his… mental or psychological condition", Justice Rideout stated:

> I do not believe the *Limitation of Actions Act* requires the person to be a "mentally incompetent person", but some affect [sic] must be put to the words "incapable of bringing the claim". Mr. Dugas is functioning in society, maintaining employment for over 20 years and is capable of managing his apartment building and generally to carry on commerce." (para 25).

[33] The court went on to review the specifics of Mr. Dugas' taking care of his own affairs, and concluded that "these activities do not indicate an incapacity to make decisions including that of bringing an action as contemplated in Section 18" (para. 26)

[34] Ms. Cameron also cites Justice Perell's decision in *Landrie v. Congregation of the Most Holy Redeemer*, 2014 ONSC 4008. Section 7 of the *Ontario Limitations Act*, SO 2002, c. 24, Schedule B, reads as follows:

> Incapable persons
>
> 7(1) The limitation period established by Section 4 [2 years after the day on which the claim was discovered] does not run during any time in which the person with the claim, is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and is not represented by litigation Guardian in relation to the claim.
>
> Presumption
>
> (2) A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved.

[35] At paras. 32 and 35 Perell J. stated:

> Section 7 of the current Act does not require the plaintiff to be a mentally incompetent to stop the running of the limitation period; section 7 requires only that the plaintiff be incapable of commencing a proceeding in respect of the claim because of a physical, mental or psychological condition.… The evidentiary onus to show incapacity is on the party relying on section 7, and in other cases, plaintiffs have failed to toll the running of the limitation period when they have failed to provide evidence, particularly medical evidence, to establish incapacity.

[36] In a footnote he cites further cases for that proposition – see in particular *Deck International Inc. v. Manufacturers Life Insurance Co.,* 2012 ONCA 309.

[37] Our Act contains no definition of "incapable of bringing a claim…". Bearing in mind that Ms. Cameron's factual claim is that she was incapable primarily because of her "lack of concentration, fatigue and memory issues", there may be value in examining the *Personal Directives Act,* SNS 2008, c. 8, which defines "capacity" in section 2(a) as:

> … the ability to understand information that is relevant to the making of a personal - care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

[38] "Personal care" is defined in s. 2(l) of the Act as:

> Includes, but is not limited to, healthcare, nutrition, hydration, shelter, residence, clothing, hygiene, safety, comfort, recreation, social activities, support services and any other personal matter that is prescribed by the Regulations.

[39] "Health care" is defined in s. 2(2) of the *Personal Directives Regulations*, O.I.C. 2010 - 71:

> "Health care" means any examination, procedure, service or treatment that is done for a therapeutic, preventative, palliative, diagnostic or other health-related purpose, and includes a course of health care or a care plan

[40] This legislation was in place at the time [September 1, 2015] that the new *Limitation of Actions Act* came into force. The Legislature was aware of this definition. I note that this definition was largely adopted in the *Adult Capacity and Decision-making Act*, S.N.S. 2017, c. 4, (in force from December 28, 2017: s. 102). That Act defines "capacity" in section 2 as follows:

> "Capacity" means the ability, with or without support, to
>
> (i) understand information relevant to making a decision,
>
> (ii) appreciate the reasonably foreseeable consequences of making or not making a decision including, for greater certainty, the reasonably foreseeable consequences of the decision to be made.

[41] Though any evaluation of "capacity" will be fact driven, I find it helpful to consider the definitions in the *Personal Directives Act* and the *Adult Capacity and Decision-Making Act* in this motion. As noted in *Sullivan on the Construction of Statutes*, 6th edn. (Markham, Ont.: LexisNexis, 2014) at 217:

> It is presumed that the legislature uses language carefully and consistently so that within any statute or other legislative instrument the same words have the same meaning and different words have different meanings.… The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

[42] Even though the words used, "incapable of bringing a claim because of the claimant's physical, mental or psychological condition" and "the ability… to understand information relevant to making a decision, and appreciate the reasonably foreseeable consequences of making or not making a decision…", are not "the same" in the sense of being identical, the spirit of the legislative drafting is similar.

[43] Thus, I find it of assistance to ask: did Ms. Cameron have the ability to understand the information that was contained in the May 4, 2016, letter and appreciate the reasonably foreseeable consequences of her making a decision, or not, in relation thereto?

[44] The evidence presented regarding Ms. Cameron's ability to understand information presented to her is limited to the following:

> 1- Her claims in her affidavit:
>
> Due to my symptoms at the time, in particular my lack of concentration, fatigue, and memory issues, I could not comprehend nor could I understand the above letter, other than to mean I would not be receiving LTD benefits; and
>
> 2- Her cross-examination, in which I find she agreed that she knew she had *not* been approved for long-term disability benefits, and that she was herself taking care of "all my affairs" during the entire time period May 2016 – May 2017. She also confirmed that she had only been to see her family doctor four times during that year, and had not been hospitalized at any time.

[45] By her own admission, Ms. Cameron understood that she "would not be receiving LTD benefits" upon receipt of the May 4, 2016, denial of benefits letter.

[46] The May 4, 2016 letter also included the following:

> … Therefore, your claim for long-term disability will be declined.
>
> Our decision to decline your claim may be appealed. The NSAHO LTD Plan provides a claim review and appeal process [document attached] whereby you

[the claimant] are given the opportunity to submit additional medical evidence for review by the claims adjudicator, Manulife Financial. Should you wish to accept this opportunity, you must complete the attached "request for claim review" form and provide it to Manulife Financial within 30 days of the date of this letter, by June 3, 2016 at the address below:…

Upon receipt of the completed "request for claim review" you will have an additional 30 days to submit additional medical evidence in support of your claim. The responsibility for providing information that supports a status of total disability [as defined above] remains with you, the claimant. As such, we are not able to reimburse you or your physicians for any associated cost related in obtaining medical reports you wish to have considered.

The 30 days will be calculated five business days from the date you sign the claim review form. If medical appointments and reports cannot be obtained within this time period, you may request an extension. Any requests for extensions must be in writing and be delivered to this office before the end of the 30 day time limit.

Upon receipt of the medical information or the expiration of the 30 days, Manulife Financial will review your claim based on the information on file at that time. Please note Manulife Financial will have 30 days to conduct a review and another 14 days to notify you of the decision. If the decision is to approve the claim, Manulife Financial will approve benefits, notify you, your employer and the NSAHO of the decision and proceed with the normal course of claims management.

If the decision is to maintain the denial, you then have an opportunity to appeal the decision further by proceeding to an appeal hearing. To initiate this stage of appeal you must sign another form [that is sent with the claim review decision] and return it within 30 days to the NSAHO offices.

Please note, this initiates the proceedings for appeal hearing and waives your right to litigate and take further legal action against the trustees of the NSAHO LTD Plan Trust Fund.

At the appeal hearing, the Appeal Board [an independent medical examiner] allows each party [you and Manulife Financial] to present their case. Please note this physician will not examine you. The examiner's role is to "hear" the cases presented and render a final determination regarding your medical disability and entitlement to benefits based on the information at the time of the hearing. This decision is final and binding on both parties.

Please refer to the attached "appeal procedures" document for further details.

Should you have any questions or concerns regarding this or your claim, please do not hesitate to contact me directly at 902 – 453 – 4300 – extension 217553 or 1-800-565-0627, extension 217553.

Sincerely Crystal MacCaul, Case Manager

[47] Attached to the letter is a blank form titled, "NSAHO Long Term Disability Plan Request for Claim Review", and several pages entitled "NSAHO LTD Plan Claim Review and Appeal Process," as per the LTD Plan Text Effective October 1, 2010, containing a complete recitation of Articles 11.07 [claim review], 11.08 [Appeal Board], and 11.09 [Appeal Hearing].

[48] Regarding the plaintiff's suggested "incapacity", there is *no evidence* that on or about May 13, 2016, she did not understand the key factual trigger to the running of the limitation period here – i.e. that she had been denied long-term disability benefits. She is claiming that she understood her benefits were terminated, but not that she had to appeal within one year if she wished to litigate. She must have been aware that there was an internal review and appeal procedure, due to the repeated references to the procedure, and copies of the relevant articles from the Plan. Notably, she did not engage that process either. Ms. Cameron had one year from May 13, 2016, to file a statement of claim. There is no evidence that she was incapable of understanding the information contained in the May 4, 2016, letter on that date or during the ensuing year, and appreciate the reasonably foreseeable consequences of her making a decision, or not, in relation thereto.

[49] If Section 19 of the new Act is applicable, and: the running of the limitation period is suspended as a result of Ms. Cameron having been "incapable", that suspension ends as of a day that is within six months of the end of the one-year limitation period; then the limitation period is deemed by law to be extended "to include the day that is six months after the day on which the suspension ends".

[50] The limitation period here cannot be extended by any claimed "incapacity". Ms. Cameron has not met the evidentiary standard. The limitation period ended May 13, 2017. There is no genuine issue of material fact in relation to the pleaded limitation period. Ms. Cameron did not file her statement of claim until November 6, 2017. This is a difference of five months.

3. Ms. Cameron argues that the Plan is a "peace of mind" contract, and that by common law (*Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30) and by the terms of the Plan itself in article 5.06, *the trustees have a good faith obligation, which was breached here by not providing specific notice to her of the one-year limitation period in the Plan,* either in the May 4, 2016, denial letter, or the May 16, 2017, meeting or any of their subsequent contacts, with the Plan's local representative Bernie MacPherson.

[51] Firstly, I note that no persuasive jurisprudence has been presented to support this view – nor has any sound rationale been suggested that would support Ms. Cameron's position. The Trustees have no direct legal obligation to specifically bring the one-year limitation period to Ms. Cameron's attention. As Justice Bryson stated for the court in *NSAHO Long-term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50, at para. 36 –7:

> 36 The other argument advanced on behalf of Ms. Amirault was that somehow she should be relieved of the consequence of proceeding with legal action in breach of the plan terms because there was "an inequality of bargaining power" between her and the trustees. This submission misunderstands the concept of inequality of bargaining power, which is usually captured by the concept of unconscionability, invoked to relieve a contracting party of the terms of a contract, (see, for example, Fridman, *The Law of Contract in Canada*, 6th ed at p. 318). The plan is in fact a trust, providing benefits to employees who work for participating health organizations. Ms. Amirault enjoyed the benefits of the plan by being an employee of a participating employer.
>
> 37 The plan is not a contract to which Ms. Amirault is a party or which she could negotiate. The plan itself is the result of a contract negotiated by employer and employee representatives. If Ms. Amirault were employed by a participating employer, she would receive whatever benefits the plan conferred. If not, she would not. It is as simple as that.

[52] Ms. Cameron has argued that the provisions of the *Insurance Act*, R.S.N.S. 1989, c. 231, apply and are of assistance to her. In my opinion, the Plan is not an insurance contract. Therefore, neither the Act, nor the authorities cited relying upon the *Insurance Act* are helpful.

[53] Ms. Cameron testified that her union representative accompanied her during her May 16, 2017, meeting with Bernie MacPherson. She also testified that she was called into work in April 2017 by staff of the Human Resources Department of St. Martha's Hospital. There is no evidence that she made efforts through them, or otherwise at any time, to further ascertain her legal position regarding the denial of her long-term disability benefits, though clearly St Martha's Hospital was her direct employer. Thus, she also had her union, and possibly her direct employer, as potential convenient sources of information regarding the limitation period, and other matters affecting her rights arising from her employment, including long-term disability benefits.

[54] As set out in Ms. Eisener – Murphy's affidavit, the provisions of the Plan were easily accessible on the internet, and in hard copy. Ms. Cameron, in her affidavit, confirmed that she had been employed at St. Martha's Hospital during

the 25 years before 2015. She had the benefit of union representation and advice. At page 6 of Exhibit "B", we find the "Long-term Disability Benefit" pamphlet, which states:

> If you are taking legal action against the Plan, you must start proceedings within one year of your LTD benefit being denied or terminated.

[55] Similarly, at Exhibit "C" of Ms. Cameron's affidavit in the May 4, 2016, letter we find:

> Please note, this [the claim review decision process] initiates the proceedings for appeal hearing and waives your right to litigate and take further legal action against the trustees of the NSAHO LTD Trust Fund.

[56] While these references are not in the plainest language, they were readily available, and with minimal diligence the full meaning thereof was easily discoverable. As Justice Campbell noted in *Thompson v. RBC life insurance Company*, 2014 NSSC 434 at para. 26: "… A person cannot avoid a limitation period by ignoring it, or not noticing it." [1]

4. What is the significance of Ms. Cameron's interactions with Bernie MacPherson, the Plan's benefits administrator at St. Martha's Hospital?

[57] Given my findings regarding the limitation period otherwise ending May 13, 2017, contrasted with the November 6, 2017, filing of the statement of claim, it is possible that the limitation period could be extended if there was a genuine issue of material fact arising from Ms. Cameron's argument that Bernie MacPherson's representations to her could have amounted to promissory estoppel.

[58] I have considered the principles involved in *Oliver v. Elite Insurance Co*., 2014 NSSC 413. However, the facts here are much simpler, and provide no significant assistance to Ms. Cameron.

[59] I conclude there is no genuine issue of material fact (pure or mixed with law) in relation to promissory estoppel.

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[1] This one year limitation period arose in 1996, and under the former *Limitation of Actions Act*, the Court allowed the plaintiff's appeal having concluded that there were issues of discoverability, and applicability of the one-year agreement limitation period that demanded a trial: *Merner v. Flinn*, 2001 NSCA 142. Both the legislation and facts are distinguishable in Ms. Cameron's case.

[60] Notably, Ms. Cameron does not deny that she understood the May 4, 2016 letter was denying her claim – i.e. that it meant "I would not be receiving LTD benefits". She could not have relied on anything that Mr. MacPherson said because the evidence suggests his only statements to her were made on May 16, 2017, or later, which was three days after the limitation period expired on May 13, 2017; and, in any event, his conduct or statements could not rise to the level required to establish promissory estoppel or genuine issue of material fact.

[61] Almost a year after denial of her benefits in (April 2017), Ms. Camerson returned to work for three days. On May 16, 2017, she met with Bernie MacPherson. According to her affidavit, this was "with respect to the reactivation of my LTD claim and/or appeal of the denial. *At this time, Mr. MacPherson informed me he would begin work on restarting my claim for LTD benefits.* I am unaware of the actions Mr. MacPherson took with regards to my claim. On June 29, 2017, I called Mr. MacPherson, who was unable to give me an update as to the status of my claim." [my italicization added]

[62] Ms. Cameron clarified in cross-examination, that she did *not* approach Mr. MacPherson to speak to him regarding the reactivation of her long-term disability benefits, but rather about her retirement options. *He brought up the potential reactivation of her long-term disability benefits*. There is no evidence that he, by his words or conduct, created a basis from which it could be inferred that he promised her anything with the intention to affect the legal relationship between Ms. Cameron and the Plan. He merely presented her with a blank form to apply for long-term disability benefits, and agreed to make some general inquiries, advising that he would have to get in contact with other persons to explore this possibility.

[63] As Justice Sopinka stated in *Maracle v. Travelers Indemnity Company of Canada*, [1991] 2 S.C.R. 50, at 57, regarding a claim of promissory estoppel:

> … The principles of promissory estoppel require that the promisor, by words or conduct, intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. Whether this inference can be drawn is an issue of fact. If this finding is in favour of the plaintiff and the effect of the admission in the circumstances led the plaintiff to miss the limitation period, the elements of promissory estoppel have been established.

[64] There is no evidence that, by virtue of her contact with Mr. MacPherson more than one year after the limitation period began to run, there is a sufficient link between Ms. Cameron's contacts with Mr. MacPherson, and her having missed the relevant limitation period. There is no evidence that she considered litigation, nor had she done anything in relation to pursuing her claim at that time. There is no evidence that she relied upon, or was prejudiced by, Mr. MacPherson's words or conduct. There is no genuine material issue of fact raised by the evidence presented in relation to this argument. [2]

Conclusion

[65] **First Question**: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?

It does not – The defendant, as the moving party has the onus and has established that there is no genuine issue of fact or mixed law and fact for resolution at trial regarding the expiry of the limitation period. It had expired by May 13, 2017, long before the statement of claim was filed November 6, 2017.

[66] **Second Question**: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

Yes, it does**;** namely, the "incapacity" issue which could arguably suspend the running of the limitation period. [3]

[67] **Third Question**: Does the challenged pleading have a real chance of

success?

No, it does not. The plaintiff has the onus to establish the "incapacity" referred to in section 19 of the new Act. She has not established that there is a genuine issue of fact or mixed law and fact for resolution at trial regarding her argued "incapacity" which would affect the expiry of the relevant limitation period.

[68] Therefore the motion for summary judgment on evidence must be granted.

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[2] In contrast to cases with more fulsome favourable facts for the plaintiff – as in *Temure v. Hache*, 2016 NSSC 67, where Justice Moir refused summary judgment sought by the defendant.

[3] This is so only by presuming that Section 19 of the new *Act* could apply to the so-called contractual limitation period. As a matter of law, I have concluded that it does not apply, but I will complete the analysis as if it did apply.

Costs

[69] If the parties are unable to agree, I direct that they file their written submissions within 30 days of the release of this decision.

Rosinski, J.