**<u>SUPREME COURT OF NOVA SCOTIA</u>**

**Citation:** *Richards Estate v. Industrial Alliance Insurance and Financial Services*, 2019 NSSC 3

**Date:** 20190205
**Docket:** Hfx No. 445372
**Registry:** Halifax

**Between:**

Sandra Nicole Richards and John Paul Bartlett Richards, Executors on behalf of the Estate of Paul Thomas Richards

*Plaintiff/Respondent*

v.

Industrial Alliance Insurance and Financial Services

*Defendant/Applicant*

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|---|---|
| **Judge:** | The Honourable Justice Ann E. Smith |
| **Heard:** | June 26 and 29, 2018, in Halifax, Nova Scotia |
| **Final Written Submissions:** | July 6, 2018 |
| **Further Written Submissions:** | January 11, 2019, Counsel for the Defendant/Applicant;<br>January 21, 2019, Counsel for the Plaintiff/Respondent |
| **Counsel:** | Nicolle A. Snow, for the Plaintiff/Respondent<br>Michelle C. Awad, QC, for the Defendant/Applicant |

**By the Court:**

**INTRODUCTION**

[1] The plaintiffs, Sandra Nicole and John Paul Bartlett Richards, (the "Richards"), on behalf of the Estate of their late father, Paul Thomas Richards ("Mr. Richards"), in an action commenced on November 13, 2015, allege that the defendant, Industrial Insurance and Financial Services Inc. ("Industrial Alliance"), breached the terms of a policy of insurance with Mr. Richards when they determined he was not eligible to continue to receive long-term disability benefits.

[2] The Richards also claim for life insurance benefits pursuant to the same policy. The Richards amended their action by Order of this Court dated May 8, 2018, to claim against Industrial Alliance in their own right, as well as on behalf of their late father's estate.

[3] Mr. Richards was an employee of Fisher Scientific Company and was an insured person under a policy of group insurance between Fisher Scientific and Industrial Alliance (the "Policy"). Industrial Alliance paid Mr. Richards long-term disability benefits under the Policy from April 22, 2010, until December 31, 2011.

[4] In November 2011, Industrial Alliance advised Mr. Richards that he no longer satisfied the Policy's definition of total disability and that his benefits would cease.

[5] Mr. Richards appealed Industrial Alliance's decision to terminate his benefits to Industrial Alliance's Appeal Committee. He was advised by a letter dated March 12, 2012 that the Appeal Committee had denied his appeal.

[6] Mr. Richards passed away on September 25, 2015.

[7] The Richards commenced an action against Industrial Alliance on November 15, 2015. In the Statement of Claim, the Richards allege that Industrial Alliance unreasonably denied Mr. Richards' claim for additional disability benefits and that Industrial Alliance breached the Policy. The Richards also allege that, but for the unreasonable denial of further disability benefits and breach of the Policy, Mr. Richards would have continued to be covered under the life insurance

provisions of the Policy and his beneficiaries would have received life insurance benefits upon his death.

[8] The motion before this Court is brought by Industrial Alliance for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04. Industrial Alliance says that there is no genuine issue of material fact requiring a trial because the Richards' claim and action for breach of contract are barred by both the contractual limitation period under the Policy and the statutory limitation period for suing under s. 23 of the *Limitations of Actions Act*, S.N.S. 2014, c. 35 (the "*New Limitations Act"*) and s. 209 of the Nova Scotia *Insurance Act*, R.S.N.S. 1989, c. 231. Industrial Alliance says that the applicable limitation period for the Richards' claims for the payment of disability benefits for Mr. Richards expired in 2013 and the within action was not filed until November, 2015.

**Evidence on the Motion**

[9] In support of the summary judgment motion, Industrial Alliance filed the affidavits of Cheryl Nicholson (original and supplementary) and the affidavit of Michelle Awad, Q.C., counsel for Industrial Alliance.

[10] Ms. Nicholson is a Manager for Industrial Alliance.

[11] Ms. Awad's affidavit provides evidence concerning requests she made, through the Richards' counsel, Ms. Snow, for information and documentation related to dealings Mr. Richards had with the OmbudService for Life & Health Insurance ("OLHI").

[12] In response to the summary judgment motion, the Richards filed only the solicitor's affidavit of Ms. Snow. The contents of Ms. Snow's affidavit will be reviewed later in this decision.

**Summary of the Applicant's Position on the Applicable Source and Length of the Limitation Period**

[13] Industrial Alliance says that the limitation period for the Richards' claim for the payment of additional disability benefits for Mr. Richards expired in March, 2013, one year after he was notified that his appeal was denied. It relies upon the Policy.

[14] Industrial Alliance also refers to the *New Limitations Act*. It says that the claims were discovered before September 1, 2015, the effective date of the *New Limitations Act*, and therefore s-s. 23(3) applies and provides that the Richards' claims could not be brought after the earlier of:

(i) The date when the "former" limitation period expired; and

(ii) August 31, 2017.

[15] Industrial Alliance says that the "former limitation period" refers to s. 209 of the *Insurance Act* which provides for a one-year limitation period for bringing a claim for disability benefits.

[16] Finally, Industrial Alliance says that if the Richards' claim for additional disability benefits is struck, their claim for life insurance proceeds also fails.

**Summary of the Richards' Position on the Applicable Source and Length of the Limitation Period**

[17] Counsel for the Richards argue that neither the Policy, nor s. 209 of the *Insurance Act* apply.

[18] On behalf of the Richards, counsel argues that the *New Limitations Act* applies, and the reference in s. 23(3)(b) to the "former limitation period" is to the limitations period in the former *Limitations of Actions* Act, R.S.N.S. 1989, c. 258 (the *Old Limitations Act*) which they say gave them a six-year period to commence their claim (i.e., until March 2018). Because s. 23(3)(b) provides that the limitation period is the earlier of two years from the effective date of the *New Limitations Act* (September 1, 2017) and the date the former limitation period expired, the Richards say that they had until August 31, 2017, to commence their action.

[19] The Richards say that the Policy allows for a one-year limitation on actions, or "refers back" to the "legislation of the jurisdiction" of the action. They contend that this would be the *New Limitations Act*, which they interpret as stated above.

[20] In the alternative, the Richards say that if the *Insurance Act* applies, s. 209(1) should be interpreted to allow the bringing of a claim for disability benefits within a six-year period.

[21] Accordingly, the Richards say that their claim, being filed on November 13, 2015, was filed in time.

**Background**

[22] Mr. Richards was an insured person under the Policy issued by Industrial Alliance to his employer, Fisher Scientific Company, effective May 1, 2005.

[23] Mr. Richards applied for disability benefits under the Policy by way of a Disability Claim Form Initial Request Member's Statement signed on December 1, 2008. In this document, Mr. Richards stated that he became unable to work on October 7, 2008. He said that fatigue, elevated blood pressure, depression, poor vision and gastric problems were the conditions preventing him from working.

[24] Mr. Richards' employer completed a "Disability Claim Form, Initial Request, Policyholder's Statement" on November 12, 2008. Ms. Ann Asselin, on behalf of the employer, stated on the form that "Employee was terminated on October 21/08. Has salary continuation for 18 months."

[25] According to the affidavit evidence of Ms. Cheryl Nicholson, Industrial Alliance reviewed Mr. Richards' disability claim and determined that while he was eligible for short-term disability benefits (which were available for up to 17 weeks, less five days), the payment of 18 months' salary continuance by Mr. Richards' employer, meant that no benefits were <u>then</u> payable.

[26] Mr. Richards subsequently applied for long-term disability benefits under the Policy. His claim was approved based on Industrial Alliance's assessment that his medical condition at the time prevented him from performing, substantially, the duties of his own occupation and earning more than 80% of his pre-disability gross monthly salary. Mr. Richards was advised of this approval in correspondence from Karen Smith, Senior Disability Specialist with Industrial Alliance dated April 14, 2009. Ms. Smith stated in that letter, "You are currently covered under salary continuance from your employer, which is due to expire in April 2010. If you are still eligible for benefits at that time, your benefits will be calculated… ."

[27] In the same letter, Ms. Smith advised Mr. Richards that as long as he remained totally disabled, premiums for his long-term disability benefits and life insurance would be waived effective February 25, 2009.

[28] By letter dated February 17, 2010, Ms. Claire Beaumier, Disability Specialist with Industrial Alliance, advised Mr. Richards that Industrial Alliance required updated medical information from him and his doctor in order to assess whether he continued to qualify for long-term disability benefits. She wrote to Mr. Richards again on March 2, 2010 advising him of a change in the Policy's definition of disability, effective February 17, 2011. Ms. Beaumier stated that she was unable to determine whether or not Mr. Richards would continue to qualify for benefits when the definition changed, but that Industrial Alliance would continue to assess his claim.

[29] On April 16, 2010, Industrial Alliance received a fax from Mr. Richards attaching various documentation in support of his claim for ongoing long-term disability benefits.

[30] By letter dated May 25, 2010, Ms. Beaumier advised Mr. Richards that Industrial Alliance had reviewed the information he had provided and stated that he had been approved for ongoing benefits. Once again, Ms. Beaumier stated that Industrial Alliance would continue to assess his claim for benefits after the change of definition on February 17, 2011.

[31] In a letter to Mr. Richards dated August 25, 2010, Ms. Cheryl Panchoo, Case Manager at Industrial Alliance, advised Mr. Richards that in order to determine whether he would qualify for benefits beyond the change of definition date, she had started a comprehensive review of his claim. She requested updated medical information.

[32] The affidavit evidence of Ms. Nicholson provides that between mid-2010 and the fall of 2011, Industrial Alliance obtained and relied upon further information from Mr. Richards and others as part of its ongoing assessment of his claim.

[33] Industrial Alliance sent Mr. Richards a letter dated November 14, 2011, advising that the

> medical information on file does not indicate that you are unable to perform your own occupation as a Sales Representative or alternate occupation. <u>As such, you no longer satisfy the definition of total disability, and are no longer entitled to disability benefits under the group contract</u>.
>
> [emphasis added]

The letter advised Mr. Richards of his right to appeal the decision within 60 days of the date of the letter.

[34] Mr. Richards appealed the decision to discontinue his receipt of long-term disability benefits. His appeal was denied. He was so advised in a letter from David Lum, Disability Specialist at Industrial Alliance, dated March 12, 2012.

[35] Ms. Teresa Greco, an employee of Industrial Alliance, recorded in a "claim summary" dated March 26, 2012, "Claimant is in hospital and will be sending appeal to OmbudService Canada as per appeal decline letter. Claimant asked that copy of letter be resent to him via email." Industrial Alliance resent its letter of March 12, 2012 to Mr. Richards on March 26, 2012.

[36] Industrial Alliance's next contact with Mr. Richards, or someone on his behalf, was approximately three-and-a-half years later when plaintiffs' counsel, Ms. Snow, wrote to Industrial Alliance on August 25, 2015 to advise that she had been retained by Mr. Richards. Unfortunately, as noted earlier in this decision, Mr. Richards passed away on September 25, 2015.

[37] The within action was commenced on behalf of Mr. Richards' estate by his children on November 15, 2015. The claim was later amended to include claims by the Richards against Industrial Alliance in their own right.

## ISSUES

[38] The following two main questions must be determined by this Court:

1. What is the test for summary judgment on evidence?
2. Should summary judgment be granted, and the Richards' claims against Industrial Alliance be dismissed, because the applicable limitation period expired before the Richards' action was commenced?

[39] In order to determine Issue 2, the following additional questions must be answered:

(a) What is the source and length of the applicable limitation period?

(b) Did Industrial Alliance provide Mr. Richards with a clear and unambiguous denial of future LTD benefits?

(c) Did Mr. Richards lack capacity to bring a claim so as to engage s. 19 of the *New Limitations* Act?

(d) Are the claim for life insurance benefits and the bad faith claim separate from the disability claim, and do those claims run on their own time limits?

(e) Do the principles of *contra proferentum*, imperfect compliance and relief from forfeiture apply?

## Issue 1: What is the Test for Summary Judgment on Evidence?

[40] Industrial Alliance's motion for summary judgment on evidence is brought pursuant to *Civil Procedure Rule 13.04*. The Rule states:

**Summary judgment on evidence in an action**

**13.04** **(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.

[41] Rule 13.07(1) provides that an order for summary judgment may provide any remedy the Court provides on the trial.

[42] In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, Fichaud J.A. set out the following analytical framework for motions for summary judgment on evidence:

> [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 (CanLII), 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 SCC 7 (CanLII), [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.
>
> …
>
> [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?

[43] In the context of a defendant’s motion for summary judgment based on an expired limitation period, the Nova Scotia Court of Appeal, in *Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52, articulated the test as follows at paras. 20 and 23:

> [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 [citations omitted]

**Issue 2: Should Summary Judgment be granted and the Richards’ claims against Industrial Alliance be dismissed because the applicable limitation period expired before the Richards’ action was commenced?**

### *(a) What is the source and length of the applicable limitation period?*

[44] Industrial Alliance relies upon the one-year limitation period set forth in the Policy:

> LIMITATION ON LEGAL ACTIONS
>
> No action or proceeding against the insurer shall be commenced within the first 60 days following the date on which written proof of claim is provided to the insurer in accordance with the terms and conditions of this policy.
>
> Notwithstanding any other provisions of this policy, any action or proceeding against the insurer (including any action or proceeding against the insurer's officers, directors or employees) for all losses, benefits or damages of any kind, arising out of or in any way related to a claim under this policy, whether directly or indirectly, **shall be absolutely barred unless the action or proceeding is commenced within one year (or such longer period as is required under the applicable legislation of the jurisdiction of the action**) immediately following the earliest of:
>
> a) The date on which proof of the claim was provided to the insurer, if it was provided in accordance with the terms and conditions of this policy;
>
> b) The date on which proof of the claim was required to have been submitted to the insurer under the terms and conditions of this policy;
>
> c) The date on which the cause of action arose. Where there is more than one cause of action arising out of or in any way related to the claim, the date that shall apply in regards to all such causes or actions shall be the date on which the first cause of action arose.
>
> [emphasis added]

[45] Industrial Alliance says that clause (c) of the Policy is applicable. It says that Mr. Richards' receipt of the March 12, 2012 letter clearly and finally denied his claim for further benefits, and March 12, 2012, is therefore the "date on which the cause of action arose." However, since Industrial Alliance resent its letter of March 12, 2012 to Mr. Richards (at his request) on March 26, 2012, Industrial Alliance is prepared to accept the latter date as the date when the cause of action arose and the one-year limitation period under the Policy began to run.

[46] The parties disagree as to the meaning of the Policy language "or such longer period as is required under the applicable legislation of the jurisdiction of the action."

[47] The Richards say this phrase refers to the *New Limitations Act*, which they say allows the action to be brought until August 31, 2017.

[48] Industrial Alliance says that the *Insurance Act*, R.S.N.S. 1989, c. 231, is the "applicable legislation."

[49] As noted previously, the Policy provided for both disability and life insurance benefits.

[50] Section 3 of the *Insurance Act* contains definitions which categorize policies. Industrial Alliance says that the Policy falls within the linked definitions of "disability insurance" and "life insurance" in s-ss. 3(i) and 3(o), which provide as follows:

> 3 In this Act,
>
> (i) "disability insurance" means insurance undertaken by an insurer as part of a contract of life insurance where the insurer undertakes to pay insurance money or to provide other benefits in the event that the person whose life is insured becomes disabled as a result of bodily injury or disease;
>
> …
>
> (o) "life insurance" means insurance whereby an insurer undertakes to pay insurance money
>
> (i) on death,
>
> (ii) on the happening of an event or contingency dependent on human life,
>
> (iii) at a fixed or determinable future time, or
>
> (iv) for a term dependent on human life,
>
> ...
>
> and, with restricting the generality of the foregoing includes
>
> (vi) disability insurance, and
>
> …
>
> (s) "sickness insurance" means insurance by which the insurer undertakes to pay insurance money in the event of sickness of the person or persons insured, but does not include disability insurance…
>
> [emphasis added]

[51] Counsel on behalf of the Richards has not argued that the Policy was a policy of sickness insurance. The disability insurance at issue could not be

sickness insurance because the definition of "sickness insurance" in the *Insurance Act* clearly provides that sickness insurance does not include disability insurance.

[52] In support of its contention that the Policy is correctly classified as life insurance, Industrial Reliance refers to the text *Disability Insurance Law in Canada* (Toronto, Carswell: 2010) by Eric J. Schjerning and David Norwood, at pp. 91 and 92, as follows:

> The definition provisions of the insurance statutes and/or regulations of all the common law provinces draw a distinction between life insurance on the one hand and accident and sickness insurance on the other. Newfoundland has one statute for life insurance and another for accident and sickness insurance, whereas the insurance acts of the other common law provinces have separate parts that deal with those two types of insurance. Pursuant to the relevant statutory or regulatory definitions, some LTD coverage is classified as life insurance and some is classified as accident and sickness insurance.
>
> If LTD coverage is "part of a policy of life insurance", then the relevant statutory or regulatory definitions provide that such coverage is governed by the life insurance parts of the insurance statutes of all of the common law provinces. The life insurance parts of all the common law provincial statutes share a single limitation period for all contracts of life insurance, both group and individual policies.
>
> On the other hand, again pursuant to the relevant statutory or regulatory definitions, LTD coverage is governed by the accident and sickness parts of the insurance statutes of the common law provinces if it is *not* part of a contract of life insurance (and it is not incidental to a policy of some other class of insurance).
>
> [emphasis of the authors]

[53] Counsel for the Richards says that the Policy is properly classified as "Group Insurance" and that matters related to group coverage fall under Part VIII of the *Insurance Act*. Industrial Alliance also says that the Policy falls within Part VIII of the *Insurance Act*. However, the parties disagree as to which provisions falling under Part VIII apply, and how those provisions are to be interpreted.

[54] This Court notes that s. 174(1) of the *Insurance Act* provides:

> APPLICATION OF PART
>
> **Application of Part**

> **174(1)** Notwithstanding any agreement, condition or stipulation to the contrary, this Part applies to a contract made in the Province on or after the first day of July, 1962, and, subject to subsections (2) and (3), applies to a contract made in the Province before that day

Section 173(d) of the *Insurance Act* defines “contract” as meaning “a contract of life insurance.”

[55] Counsel for the Richards argues that the limitation period in the *Insurance Act* does not apply. She notes that the phrase “disability benefits” does not appear in s. 206 or s. 209.

[56] However, this Court notes that Part VIII of the *Insurance Act* deals with life insurance. Part VIII clearly applies to policies providing life and disability insurance such as the Policy at issue. I have already referred to the definitions in s. 3 of the *Act*, which clearly include disability insurance within the definition of life insurance.

[57] The “Interpretation” provision of Part VIII includes a definition of “group insurance” as follows:

> s. 173 In this Part
>
> (j) “group insurance” means insurance, other than creditor’s group insurance and family insurance, whereby the lives of a number of persons are insured severally under a single contract between an insurer and an employer or other person…

[58] Industrial Alliance relies upon s. 206 of the *Insurance Act*, which it says sets out how a claim for disability benefits must be handled by an insurer. Section 206 provides:

> 206 Where an insurer receives sufficient evidence of
>
> (a) the happening of the event upon which insurance money becomes payable;
>
> (b) the age of the person whose life is insured;
>
> (c) the right of the claimant to receive payment; and
>
> (d) the name and age of the beneficiary, if there is a beneficiary.
>
> It shall, within thirty days after receiving the evidence, pay the insurance money to the person entitled thereto.

[59] If a claim submitted by an insured is denied after the information required by s. 206 is provided, s. 209 provides that the insured then has one year to commence a legal action in respect of the denial. Section 209(1) provides:

> 209(1) Subject to subsection (2), an action or proceeding against an insurer for the recovery of insurance money shall not be commenced more than <u>one year after the furnishing of the evidence required by section 206, or more than six years after the happening of the event upon which the insurance money becomes payable, whichever period first expires</u>.
>
> [emphasis added]

[60] Subsection 209(2) deals with declarations of presumptions of death and is not applicable to the facts before this Court.

[61] Industrial Alliance says that the "furnishing of the evidence" required by s. 206 means evidence of Mr. Richards' alleged right to receive further payments, and that was the information which Mr. Richards provided on January 13, 2012; and therefore as argued by Industrial Alliance, January 13, 2012 is the start date for the one-year limitation period under s. 209(1) of the *Insurance Act*.

[62] Accordingly, Industrial Alliance says that using either the latest possible receipt of its March 12, 2012 denial letter sent to Mr. Richards, (resent on March 26, 2012), or using the date of the "furnishing of the evidence required by s. 206" of the *Insurance Act*, the one-year limitation period applicable to Mr. Richards' claim expired on either January 13, 2013, or March 25, 2013. As noted previously in this decision, the Richards' action was not started until November 13, 2015.

[63] The Richards' counsel argues that <u>neither</u> the Policy nor the *Insurance Act* apply. She says that only the *New Limitations Act* applies. To be precise, counsel argues that the Policy provision which provides for a one-year limitation period for actions against Industrial Alliance also states, "or such longer period as is required under the applicable legislation of the jurisdiction of the action." That "longer period…required under the applicable legislation", counsel says, is six years, based upon her interpretation of the transition provisions of the *New Limitations Act*.

[64] In the alternative, counsel for the Richards argues that s. 209(1) was,

> meant for life insurance claims; or in the alternative, the first part is meant to apply to life insurance claims, while the second part is meant for more general application and could include a disability claim.

Counsel for the Richards argues that to use the first part of s. 209(1) in the way counsel for Industrial Alliance suggests "leads to an absurd result." Counsel for the Richards contends that "the legislature's addition of the second part was intended to deal with the conundrum that is presented when the first part is interpreted in the very way that the Defendant has interpreted it in this proceeding."

[65] The Richards' counsel says that applying the first part of s. 209(1), i.e., "one year after the furnishing of the evidence required by Section 206" to a disability claim allows an insurer to start running a limitation timeline from the date it receives documents (after the furnishing of the evidence) and during the period in which it is considering whether the documentation supports disability. That would mean that the timeline would start to run before any final decision as to the acceptance or refusal of the application for disability benefits has been made, and could run during a period of time when benefits are being paid. Counsel for the Richards points out that a decision on Mr. Richards' appeal was not made until March 12, 2012, so the interpretation of s. 209(1) advanced by Industrial Alliance cannot be what the Legislature intended as it would have the effect of shortening the one-year time limit by two months.

[66] In *Gumpp v. Co-operators Life Insurance Co.*, 2004 BCCA 217 Southin J.A. referred to s. 65 of that Province's *Insurance Act* (the equivalent of s. 206) as "inapt for claims under the disability provisions of life insurance policies." I invited counsel to provide this Court with post-hearing submissions on the effect, if any, of the *Gumpp* decision, on the issues before this Court. Each counsel did so.

[67] In *Gumpp* the insurer had paid group disability benefits, but then notified the insured that the medical information she had submitted "no longer supports that you are totally disabled from all types of employment." Ms. Gumpp was told that benefits were approved up to and including November 30, 1998, and her file would be closed after that date. The insured sought review of the decision, unsuccessfully, and was informed that the decision remained unchanged and the file remained closed. The action was commenced on May 24, 2001.

[68] In *Gumpp*, the limitation period in the policy expired one year after the proof of claim was first required, or from the date on which the company terminated the payment of benefits, whichever occurred first.

[69] The British Columbia Court of Appeal required additional assistance from counsel on the nature of the policy and the applicable limitation period. It received

an overview of insurance law in British Columbia from counsel. The assistance provided to the Court in respect of the type of insurance they were dealing with was that disability benefits could not be sickness insurance and so must be life insurance.

[70] Section 65(1) of the British Columbia *Insurance Act*, R.S.B.C., 1996 c. 226, was identical in all material respects to s. 209(1) of the Nova Scotia *Insurance Act*. Also like the Nova Scotia *Insurance Act*, s. 30 of the British Columbia *Act* provided that that Part applied to any contract, despite any stipulation to the contrary.

[71] Southin J.A. said that s. 65 was "inapt for claims under the disability provisions of life insurance policies. By its very terms, it contemplates a single event, i.e. death."

[72] With respect to the reference to "more than six years after the happening of the event on which the insurance money becomes payable", the Court of Appeal stated:

> 14. The obvious purpose of the second branch, "more than six years after the happening of the event … " is to cover those cases now rare in the modern world in which, for some years after its happening, the death of the life insured cannot be proven or, indeed, is not even known to the beneficiary.

[73] The Court of Appeal also stated:

> 17. It is unfortunate that the draftsman who fashioned the words grafting onto what is now Part 3 of the Insurance Act, "disability insurance" did not ask himself whether s. 65 was apt to claims under a disability policy.

[74] Southin J.A. referred to the decision of Huddart J.A., in *Balzer v. Sun Life Assurance Co. of Canada*, 2003 BCCA 306, where the Court addressed s. 22(1) of the British Columbia *Insurance Act*, which provided a limitation period as follows:

> 22(1) Every action on a contract must be commenced within one year after the furnishing of reasonably sufficient proof of a loss or claim under the contract and not after.

I agree with the summary of the key findings in *Balzer*, as set forth in the brief of Industrial Alliance at para. 15:

> In *Balzer*, benefits were paid for about 18 months and discontinued in December, 1994, due to a change in the policy's definition of disability. The Plaintiff commenced an action against the insurer in February, 2000 and the insurer applied for summary judgment on the basis that the one-year limitation period had expired. The British Columbia Court of Appeal found that the limitation period set out in the Insurance Act required adaptation to give effect to the Legislature's intention to create a one-year limitation period. Since a clear denial was not specifically required by the statutory limitation period, the Court implied that requirement into the legislation, stating the following paras. 40-42:
>
> > It is at denial of coverage or termination of benefits that an insured would have reason to sue the insurer. That is when a limitation period should begin to run, not while benefits are being received, not on some later date when an insured decided to file a proof of loss or commence an action. This sensible result is at the root of the reasoning in the authorities cited to us.
> >
> > I am persuaded that good sense dictates the solution to the conundrum posed by the entirely inadequate words the Legislature has chosen to incorporate into every group accident and sickness policy by the convoluted provisions of the *Insurance Act*. Read literally, the words of s. 22(1) create the absurd result that the limitation period in this case would have begun to run while the benefits were being paid, or alternatively, would not begin to run until after a claim is made.

[75] The Court in *Gumpp* referred to the situation caused by the statutory drafting as "ridiculous", and refused to apply it to the case before it, holding that the policy was binding on the parties, unless "Part 2, General Provisions" of the *Insurance Act* came into play. The Court decided that Part 2 of the General Provisions did apply, which brought s. 22(1) into play. They referred to Madam Justice Huddart's reasoning in *Balzer* at para. 43:

> A clear and unequivocal denial of coverage precludes the need to furnish a claim (where the policy does not require the filing of a proof of claim) and triggers the commencement of the limitation period. This general rule permits a case-by-case application of the one-year limitation period appropriate to the wide variety of factual circumstances that may give rise to disputes about continuing coverage under generic group accident and sickness policies. It avoids the absurd results a literal reading of the words of s. 22(1) would otherwise produce in this and like cases. It leaves room for their application to cases where the policies permit that reading.

[76] Based on this reasoning, the Court of Appeal in *Gumpp* said the clear and unequivocal denial of benefits started both the statutory and policy limitation

periods running on November 30, 1998, the day Ms. Gumpp's insurer told her that the medical information she had submitted no longer supported that she was totally disabled from all types of employment, that her benefits were approved up to and including November 30, 1998, and her file would be closed after that date.

[77] Wood J. of this Court generally applied the reasoning in *Balzer* in *Thornton v. RBC General Insurance Company*, 2014 NSSC 215. Justice Wood considered a limitation period in a policy for long term disability benefits which contained a limitation period related to the date on which proof of claim was given, or alternatively the date on which the proof of claim was required and also stated that a limitation period could run from the date on which the cause of action arose. Justice Wood stated at para. 55:

> The policy is not clear about what happens if there are ongoing discussions with an insured concerning the sufficiency of medical information or if benefits are paid for a period of time and then terminated. I believe this ambiguity should be interpreted against the defendant and I would take the approach of the British Columbia Court of Appeal in *Balzer* and find that the limitation period does not being to run until there is a clear and unambiguous denial of benefits.

[78] Industrial Alliance argues that various courts dealing with provisions similar to ss. 206 and 209 have not followed the *Gumpp* reasoning, or have questioned it. In *Esau v. Co-operators Life Insurance Co.*, 2006 BCCA 249, [2006] B.C.J. No. 1156, Thackray J.A., speaking for the Court on this point, said:

> 28 …[W]hile the appellant agreed for trial purposes that section 65 was the relevant limitation, she now submits that the judge erred in failing to hold that section 22 of the *Insurance Act* contained the applicable limitation. Her authority is *Gumpp,* where Madam Justice Southin said that Section 65 is "inapt for claims under the disability provision of life insurance policies" because it contemplates only one "event", that being death. Madam Justice Southin then quoted from *Balzer* … and concluded that "on that footing" it was section 22 that applied and in that there had been a clear and unequivocal denial of future benefits the action was statute barred. Those remarks raise concerns and point to possible disagreement as to the state of the law in this area.

[79] It was ultimately unnecessary for the Court to decide which limitation period applied in *Esau*, since "the action was brought outside of all possible limitation periods" (para. 31). Counsel for Industrial Alliance nevertheless submits that the remark about "possible disagreement as to the state of the law" (para. 28) suggests the Court was reluctant to accept the *Gumpp* conclusion that s. 65 of the British Columbia Act applied only to life insurance claims.

[80] Counsel for the Richards points out that the issue of the applicability of s. 65 was not before the Court in *Esau*, since the parties had agreed that it applied. The plaintiff also says there was no indication that Thackray J.A. believed *Gumpp* was wrongly decided. Further, the Richards say, the concurring judgments of Hall and Levine JJ.A. suggest support for *Gumpp*. Hall J.A. called for legislative amendments to the limitations provisions of the *Insurance Act* (para. 45). Levine J.A. commented at length on the need for legislative action respecting the information required to be provided by insurers respecting limitation periods (paras. 48-59). Neither of the concurring judges, it seems to me, were directly addressing the technical question of which limitation period applied to a disability claim, nor is it clear that they were showing "clear alignment" with the conclusion of Southin J.A. in *Gumpp* on that issue, as counsel for the Richards suggests.

[81] Similarly, in *Falk v. Manufacturers Life Insurance Co*., 2008 BCSC 173, [2008] B.C.J. No. 231, the Court was again not required to make a determination as to which provision applied, since every possible limitation period had passed (see para. 52). Industrial Alliance submits that "a similar sentiment" to that supposedly found in *Esau* "can be gleaned" from *Falk*, but, in both cases, this seems to overstate the case. While it is clear that both *Esau* and *Falk* accept the comments in *Gumpp* about the poor drafting of the statute, it does not follow that they accepted or rejected its reasoning as to which limitation period applied.

[82] In *Ruffolo v. Sun Life Assurance Co. of Canada*, 2007 CarswellOnt 7557, [2007] O.J. No. 4541 (Ont. Sup. Ct. J.), affirmed, 2009 ONCA 274, leave to appeal denied, [2009] S.C.C.A. No. 222, the Court held that a claim for recovery of CPP disability benefits deducted from an LTD benefit by the defendant insurer was statute barred under the former s. 206(1) of the Ontario *Insurance Act*, which was substantially the same as s. 209 of the Nova Scotia Act and s. 65(1) of the British Columbia Act. Section 203 was substantially identical to s. 206 and 62. Addressing the insurer's limitation period defence, Perell J. said:

> 151 Sun Life relies on s. 206(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 to raise a limitation period defence against Mr. Ruffolo. Subsection 206(1) applies to life insurance policies and to disability insurance policies that are provided in conjunction with life insurance…
>
> …
>
> 155 Ruffolo disputed that s. 206(1) applied to his action, His first submission is that: (a) s. 206(1) imposes a limitation period for a claim for the recovery of "insurance money," which is defined in the *Insurance Act* as the amount payable by an insurer under a contract, and includes all benefits, surplus, profits,

dividends, bonuses, and annuities payable under the contract; but (b) his action is not for the recovery of insurance money, but for a declaration that Sun Life cannot offset the children's CPP benefit; and, (c) therefore s. 206(1) does not apply at all. I see no merit in this submission. Mr. Ruffolo seeks a judgment that Sun Life pay him LTD disability benefits that he says it unlawfully deducted. That is an action for insurance money that might be caught by s. 206(1).

156 Section 206(1) sets two durations with different starting points for defining the limitation periods that will preclude an action for the recovery of insurance money: (1) one year after furnishing of the evidence required by section 203; and (2) six years after the happening of the event upon which the insurance money becomes payable, whichever period first expires.

…

158 In *Irish v. Sun Life Assurance Company of Canada*, *supra*, which concerned a claim under an accidental death and dismemberment group insurance policy, the Ontario Court of Appeal considered the application of s. 206(1) of the *Insurance Act*, and Doherty, J.A. in paragraph 23 of his judgment pointed out that "some statutory limitation periods run from the occurrence of a specific event which is not germane to the existence of a cause of action." He held that s. 206(1) of the *Insurance Act* was this type of limitation period, and thus the discoverability principle used to measure the commencement of a limitation period that runs from the existence of a cause of action was no assistance in interpreting the limitation period set out in s. 206(1).

159 The one-year limitation period in s. 206(1) is not triggered by the perfection of a cause of action but rather by proof of claim as measured by s. 203 of the Act or by denial of coverage…

…

161 In the case at bar, Mr. Ruffolo furnished Sun Life with the evidence required by s. 203 of the *Insurance Act*, and Sun Life unequivocally and manifestly denied his claim to an LTD benefit unreduced by CPP dependent benefits. The one-year limitation period in s. 206(1) began to run from January 1994, and Mr. Ruffolo's claim was therefore statute-barred no later than January 1995.

[emphasis added]

[83] Counsel for the Richards says *Ruffolo* is distinguishable on the grounds that the case concerned deductibility of CPP disability benefits from an LTD benefit, and was not a summary judgment motion, and therefore s. 206 of the Ontario Act was being considered in a different context. Counsel also submits that *Ruffolo* is better known for its significance to the deductibility of CPP benefits from LTD payments. Further, counsel points to the omission of the exact section of the *Insurance Act* from the pleading similar to that noted at para. 153 of *Ruffolo*. The plaintiff also notes that the legislation at issue in *Ruffolo* had been repealed. In my

view, none of these objections seem relevant to the question of whether s. 209 is the applicable limitation period here. I note particularly Perell J.'s unequivocal statement that s. 206(1) "applies to life insurance policies and to disability insurance policies that are provided in conjunction with life insurance" (para. 151).

[84] In *Sunjka v. Manufacturers Life Insurance Co. (c.o.b. Manulife Financial)*, 2011 ONSC 447, [2011] O.J. No. 193, the Court dismissed a motion for summary judgment on limitations grounds because there was a genuine issue for trial respecting discoverability. The Court held that s. 206 of the Ontario Act was the applicable provision:

> 17 The one year limitation period in the *Insurance Act* begins to run on the occurrence of an event and the reasoning in *Irish* and *Ryan* referred to earlier, support the view that the principle of discoverability applies to the shorter limitation period of one year. It is not clear however that this analysis applies to the six year limitation period where discoverability may still apply.
>
> …
>
> 22 I conclude that there is an issue which requires a trial concerning the discoverability of the plaintiff's claim and the application of the six year limitation period under the *Insurance Act*. This issue requires an examination of the plaintiff's circumstances at the relevant times.

[85] Counsel for the Richards says there was no suggestion that the application of s. 206 was in dispute in *Sunjka*, and no specific reasoning on that issue. While this is not inaccurate, the absence of dispute in itself tends to support the view that s. 206 was applicable.

[86] There is also authority from Prince Edward Island and New Brunswick suggesting that those provinces' equivalents to s 209 apply to disability insurance claims: see *Redden v. Manufacturers Life Insurance Co.*, 2013 NBQB 327, [2013] N.B.J. No. 309, at paras. 23-24; *Gallant v. Assumption Life Insurance Co.*, 2001 NBQB 174, [2001] N.B.J. No. 340, at paras. 16-22; and *Deveau Estate v. Blue Cross Life Insurance Co. of Canada* (1996), 141 Nfld. & P.E.I.R. 286, [1996] P.E.I.J. No. 34 (S.C.T.D.), at para. 26.

[87] The plaintiff submits that there was no indication in *Redden* that the application of s. 168 of the New Brunswick *Insurance Act* (equivalent to s. 209) was raised. While the issue was not addressed – summary judgment was denied on other grounds – the defendant did assert that s. 168 was the applicable defence, and

it does not appear that the plaintiff disputed that this would be the applicable limitation period to claims other than bad faith or declaratory relief (paras. 20-21).

[88] In *Gallant* the Court dismissed a defence motion for summary judgment respecting the denial of disability benefits. The motion was dismissed, it appears, on the basis of insufficient evidence respecting the applicable limitation period within s. 168. As in the cases discussed above, however, there was no apparent dispute that s. 168 was the relevant limitation provision for the disability claim.

[89] As to the Prince Edward Island decision in *Deveau Estate*, the plaintiff in that case argued that accidental death benefits were not subject to any limitation period in the *Insurance Act*, but rather were governed by the provincial Statute of Limitations. The Court rejected this position, holding that such benefits were subject to the *Insurance Act* provisions. Counsel for the Richards takes no exception to this conclusion, submitting that "this is vastly different from the issue before this court, where the Plaintiffs argue that s. 206 does not fit appropriately within the context of a disability claim…" To that extent, I agree that *Deveau Estate* does not speak to the issue of whether s. 209 applies to disability claims. However, the legislation in *Deveau Estate* identified accidental death insurance as a deemed form of life insurance, as it did disability insurance (para. 14). This would suggest both forms of insurance should receive similar treatment for limitations purposes, absent any indication to the contrary.

[90] In addition to relying on case law involving similar provisions, counsel for Industrial Alliance says the *Gumpp* reasoning is overly narrow and should not be followed in any event. Referring to the requirements of s. 206, the defendant argues that ss. 206(a) – "the happening of the event upon which insurance money becomes payable" – and 206(c) – "the right of the claimant to receive payment" – are both clearly applicable to death or disability. The requirement for evidence of "the age of the person whose life is insured" (s 206(b)) is arguably more relevant to a disability claim than a life insurance claim, since disability coverage may terminate at a certain age, such as retirement age. Life insurance, by contrast, would be payable regardless of age. As to s 206(d), requiring information about "the name and age of the beneficiary, if there is a beneficiary" is clearly referring to life insurance, but is also relevant to disability, where there is no "beneficiary" required. As such, Industrial Alliance submits, the information required by s. 206 is relevant both to disability and life insurance claims.

[91] While the language is awkward, I agree that nothing in s. 206 requires that its scope be limited to a narrow definition of life insurance, rather than the various forms of life insurance falling within the *Insurance Act* definition. That would include disability insurance.

[92] Counsel for Industrial Alliance further notes that when British Columbia introduced new insurance legislation in 2012, the limitation provision was amended to create a distinction between insurance payable on death and other types of insurance: see *Insurance Act*, R.S.B.C. 2012, c. 1, s. 76. The new legislation imposes the same two-year limitation period for both life and disability claims, suggesting, counsel says, "a legislative objective of consistency."

[93] Industrial Alliance maintains that s. 209 is "easily applicable" to both life and disability claims, with the one-year period applicable where the information has been provided under s. 206, and the six-year period applicable where it has not been provided. Counsel says the six-year period would apply in situations where the claimant or beneficiary is unaware of the insurance coverage.

[94] Counsel for the Richards denies that s. 206 and 209 are clearly or easily applicable to disability benefit claims, pointing to such cases as *Balzer*, *Gumpp*, and *Colgur v. Manufacturers Life Insurance Co.*, 2009 BCSC 1125, [2009] B.C.J. No. 1644, at paras 16-25. In *Colgur*, the Court was concerned with interpreting *Balzer*'s comments about the application of s. 22(1) of the former British Columbia Act.

[95] The plaintiff also points to *Morris v. Royal Bank of Canada*, 2007 NSSC 73, [2007] N.S.J. No. 175, where Davison J. said, without any reference to authority, "[t]here is no specific reference to medical information or medical documents in s. 206. By the use of the general word "event" in s. 206(a), the interpretation could be stretched to include long term disability benefits. It seems to me the section is with reference to "life insurance" (para. 40). It does not appear that there was any argument or authority provided to the Court on the point, however, and there is no reference to the fact that disability insurance is defined as "life insurance" under the Act: see ss. 3(o)(vi) and 173(n), which together define the term "insurance" for the purpose of Part VIII, including ss. 206 and 209.

[96] I conclude that the weight of the case law, and the scheme and construction of the *Insurance Act*, indicate that s. 209 is applicable to disability insurance claims. While the Court's remarks in *Gumpp* are valid criticisms of the statutory language, it does not follow that the limitation provision does not apply.

Moreover, there is no indication that the Legislature did not intend the applicable definition of insurance under Part VIII – which includes disability insurance – to apply to ss. 206 and 209.

[97] The Court in *Gumpp* was of the view that the six-year alternative would govern situations where the relevant event could not be proven or was not known. Similarly, in *Sunjka*, the Ontario Superior Court suggested that discoverability would apply to the six-year limitation period.

[98] In any event, I am satisfied that the event on which insurance was allegedly payable in this case was the denial or termination of benefits, and that it is the one-year limitation period that would be applicable.

[99] I find that ss. 206 and 209 of the *Insurance Act* apply and that despite the perhaps awkward wording in the context of disability benefits, it is clear that the Legislature meant that a one-year limitation period for commencing an action against the insurer applies. Given the various definitions, and the scheme of the *Act*, s. 209 applies to disability insurance, as a subset of life insurance. It would make little sense for the Legislature to include a limitation period for "life" insurance claims in the *Insurance Act* – effectively the "home" statute – while leaving "disability" insurance claims to the general limitations statute.

[100] On the facts before this Court, the supposed "furnishing of the evidence" referred to in s. 206 of the *Insurance Act* occurred on January 13, 2012. The alleged clear denial of benefits was on March 12, 2012. I find that I do not need to decide which date triggered the running of the one-year limitation period, because the action was started in November 2015, almost three and a half years after the latest of the two dates.

***The New Limitations Act***

[101] Both parties say that the *New Limitations Act* applies. However, they have fundamentally different interpretations of the "transition provision" of that *Act*. Section 23 provides:

> 23(1) In this section,
>
> (a) "effective date" means the day on which this Act comes into force;
>
> (b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date;

> (2) Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in section 11, and in respect of which no proceeding has been commenced before the effective date.
>
> (3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of
>
> (a) two years from the effective date; and
>
> (b) the day on which the former limitation period expired or would have expired.
>
> (4) A claimant may bring a claim referred to in section 11 at any time, regardless of whether the former limitation period expired before the effective date.
>
> [emphasis added]

[102] Section 11, referred to in s-s. 23(4), is not relevant to this motion, as it concerns proceedings in respect of claims relating to trespass of the person, assault or battery.

[103] Counsel for the Richards agrees that the claim was "discovered" on March 26, 2012, the day Industrial Alliance's March 12, 2012 denial letter was resent to Mr. Richards. Industrial Alliance is prepared to agree that March 26, 2012 is the date the claim was discovered.

[104] Counsel for the parties also agree that s-s. 23(3) applies, i.e., the claim was discovered before September 1, 2015, which is the effective date of the *New Limitations Act*, and the within proceeding was commenced on November 13, 2015, after the effective date.

[105] Counsel differ, however, as to the proper interpretation of s-s. 23(3)(b), i.e., "the day on which the former limitation period expired or would have expired."

[106] As noted above, s-s. 23(1) defines "former limitation period" as "the limitation period that applied to the claim before the effective date."

[107] What is the limitation period that applied to Mr. Richards' claim before September 1, 2015? Counsel for the Richards argues that the reference to "the former limitation period" is to the *Old Limitation Act*, which she says provided for a limitation period of six years "after the cause of action arose." If she is correct, then the Richards had six years from March 26, 2012 to commence the action, i.e., until March 26, 2018. Since that date is later than September 1, 2017, she says that

the Richards had until September 1, 2017, to commence the action, and the claim was filed on November 13, 2015, well before the September 1, 2017 deadline.

[108] Counsel for the Richards refers to s. 2(1)(f) of the *Old Limitation of Actions Act*:

> 2(1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:
>
> …
>
> (f) All actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission I not by speciality, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose.

[109] This Court finds that counsel for the Richards' interpretation of s-s. 23(3) is simply incorrect.

[110] Firstly, the reference to "the former limitation period" is not to the *Old Limitation Actions Act* as counsel contends. Rather, the "former limitation period" refers to whatever source the limitation period might come from. Many Nova Scotia statutes set limitation periods which are different from the limitation periods in both the *Old* and *New Limitation Acts*. To name but two, the *Defamation Act*, R.S.N.S. 1989, c. 122, requires that an action against a newspaper or broadcaster be commenced within six months after the publication of the allegedly defamatory material became known. The *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, provides for a 12-month limitation period.

[111] Secondly, the interpretation does not take into account the fact that s. 6 of the *New Limitations Act* specifically excludes claims for which a limitation period has been established under another enactment. Section 6 provides:

> 6. Where there is a conflict between this Act and any other enactment, the other enactment prevails.

This Court finds that the *Insurance Act*, and specifically s. 209, applies and that it establishes a one-year limitation period for the bringing of Mr. Richards' claim for

additional long term disability benefits. Section 209 constitutes the "former limitation period" referred to in s. 23 of the *New Limitations Act*. That was the limitation period that applied to Mr. Richards's claim before September 1, 2015. That limitation period expired on March 26, 2013 – one year after Mr. Richards was resent and received the March 12, 2012 letter from Industrial Alliance denying additional benefits. The Policy also established a contractual one-year time period to bring an action. The reference in the Policy to "such longer period as is required under the applicable legislation" is to s. 209 of the *Insurance Act*, which provides the same one-year time period for bringing an action as does the Policy.

[112] However, the Richards also say that the letter of March 12, 2012 did not clearly and unequivocally deny Mr. Richards further LTD benefits. If they are correct, then the one-year limitation period did not start to run on March 26, 2012.

**Issue 2(b)** ***Did Industrial Alliance provide Mr. Richards with a clear and unambiguous denial of future LTD benefits?***

[113] The March 12, 2012 letter which Industrial Alliance relies upon as providing a clear denial of future LTD benefits to Mr. Richards provided, in part, as follows:

> We are writing further to our letter dated January 18, 2012 in regards to your appeal in the declination of your Long Term Disability (LTD) claim. Please note your file was reviewed by the Appeals Committee, which consisted of 3 senior staff members from the Industrial Alliance Group Insurance Department. Your file was also reviewed by our medical consultant.
>
> …
>
> Based on our review of all the information received to date, there is little clinical medical evidence supporting a continuous disabling condition of such severity that would satisfy the definition of disability stated above beyond December 31, 2011. <u>As such, in accordance with the policy provisions and the review of all the medical information on file, our decision to decline your LTD claim remains</u>.
>
> If you disagree with our decision you may contact the OmbudService for the Canadian Life and Health Insurance Association ("OLHI") at:
>
> > OmbudService for Life & Health Insurance
> >
> > 401 Bay Street
> >
> > PO Box 7
> >
> > Toronto Ontario
> >
> > M5H 2Y4

> 1-800-268-8099
>
> Please find enclosed a brochure for OHLI.
>
> [emphasis added]

[114] Counsel for the Richards say this letter was ambiguous. She points to the fact that the letter refers to the decision to terminate benefits based on the information "received to date." She says that the letter advised Mr. Richards that if he disagrees with its decision "you may contact the OmbudService" at an address in Ontario. Counsel says that these comments leave the door open as to the finality of Industrial Alliance's decision. Counsel also says that Industrial Alliance did not advise Mr. Richards of his right to litigate or of the timeline within which to bring an action, and did not indicate that its decision was final and would not be reconsidered. Counsel points to the website information for the OmbudService which was attached as an exhibit to Ms. Nicholson's affidavit and says that this website indicates a four-step process designed to try to bring about "settlement of the dispute." Again, counsel says that this suggests that the door was still open for Mr. Richards to either submit more information or to deal with the insurer through the Ombud office to resolve the dispute.

[115] Counsel for the Richards relies upon the cases of *Smith v. Co-operators General Insurance Company*, 2002 SCC 30, and *Thomas v. Manufacturers Life Insurance Co.* (2001), 294 A.R. 391, 2001 CarswellAlta 1798 (Alta. Q.B.) in support of the position that the denial letter of March 12, 2012 did not provide a clear and unequivocal denial of Mr. Richards' claim for benefits.

[116] *Smith v. Co-operators* concerned a claim by the plaintiff for statutory accident benefits following a motor vehicle accident. The insured qualified for, and received, benefits. However, the insurer determined to stop paying the benefits. It sent a letter to the insured stating, in part, as follows:

> If you disagree with our assessment, please contact us immediately. If we cannot settle the application to your satisfaction, you have the right to ask for mediation.
> …

[117] The Ontario Court of Appeal upheld the decision of the motions judge who had dismissed the action based on the applicable, expired limitation period.

[118] The Supreme Court of Canada allowed the appeal on the basis that the insurer had not complied with a provision in the Ontario *Insurance Act* which

required an insurer who refused to pay benefits "to inform the person in writing of the procedure for resolving disputes relating to benefit … ."

[119] Gonthier J. in *obiter*, at para. 20 expressed doubt as to whether the notice given by the insurer would be considered a refusal, on the basis that there was an "equivocal sense of indeterminacy" in the insurer's decision, giving the insured the impression that it might change its position if it were contacted for a review of the matter.

[120] Gonthier J. did note, however, that a subsequent letter sent by the insurer to Ms. Smith's solicitor "removes any doubt by clearly stating: Ms. Smith is no longer entitled to Income Replacement Benefits."

[121] In *Thomas v. Manufacturers Life* a widow applied to the defendant insurer claiming under her late husband's group life policy. The limitation period under the policy expired two years after the last day on which a proof of claim would have been accepted. Ms. Thomas filed a proof of loss claim in March 1997. The insurer issued a formal denial of coverage in June 1998 after investigating the claim. During the period of investigation, the insurer was in regular contact with Ms. Thomas, telling her it was still conducting an investigation of the claim. The insurer did not tell her about the limitation period.

[122] Grant J. determined that the limitation period did not start to run until June 1998, stating at paras. 20 and 21:

> I am satisfied that the actions of the representatives of Manulife led the claimant to conclude that the information set forth in the proof of claim was not sufficient and a further investigation was warranted. I have sufficient evidence within the meaning of section 272 until approximately June of 1998 and that the two year limitation period did not commence to run until that time.
>
> I have great difficulty with the suggestion that the limitation period stipulated in Section 275 of the Insurance Act will start to run against a claimant without notice on an indeterminate date that is not communicated to a claimant when the insurance company decides unilaterally and internally that it has sufficient evidence within the meaning of the Act. The problem is aggravated in this case where the insurance company maintains regular contact with the claimant and leads the claimant intentionally or not, to believe that they have not reached a decision and are continuing an investigation to permit them to come to a conclusion with respect to the claim. I am of the opinion that the limitation defence argument in that case borders on the unconscionable.

[123] Wood J. of this Court in *Thornton* (*supra*) reviewed the *Balzer* decision in concluding that, on the evidence before him, an insurer had given a clear and unambiguous denial of disability benefits to its insured. The correspondence relied upon the defendant insurer in that case stated, in part:

> With regret, we must confirm that you are not eligible for benefits. We hope that this explanation will assist you in understanding our assessment, but please feel free to contact us further if we can answer any questions or provide further information.

[124] In determining whether Industrial Alliance clearly and unequivocally advised Mr. Richards that it was terminating his benefits, this Court must take into account Mr. Richards' conduct as well as Industrial Alliance's previous letter to him of November 14, 2011. That letter advised Mr. Richards that Industrial Alliance considered the medical information on file to not indicate that he was unable to perform his own occupation as a sales representative or alternate occupation. The letter clearly advised, "As such, you no longer satisfy the definition of total disability, and are no longer entitled to disability benefits under the group contract." The letter also advised Mr. Richards that he could appeal the decision to terminate his benefits by requesting, in writing, an appeal within 60 days of the November 14, 2011 letter.

[125] The November 14, 2011 letter also stated that Industrial Alliance was offering Mr. Richards job search training and a three-month period for Mr. Richards to search for a job, "at the end of which your claim will be closed." Mr. Richards was asked to contact Industrial Alliance no later than December 14, 2011, with his decision regarding its offer for job search training. The letter stated that if Industrial Alliance did not hear from Mr. Richards by December 14, 2011, "your file will be closed on December 31, 2011."

[126] The letter of November 14, 2011 further advised Mr. Richards that "since your claim for long-term disability benefits will be ending, the waiver of premium benefits on group life coverage will also end the same day."

[127] Mr. Richards wrote to Industrial Alliance on December 14, 2011, advising that he was appealing the decision to terminate his claim and would be submitting additional medical information. He stated that he was deferring his decision on the vocational assistance offered pending the results of his appeal.

[128] On day 59 of the 60-day appeal period, Mr. Richards sent a letter to Industrial Alliance dated January 12, 2012, stating, in part:

> Enclosed are documents related to my appeal as outlined in my fax of December 14. A Package with accompanying lab reports will arrived [sic] by Purolater [sic] tomorrow Friday 13 2012 … Also would you let me know when I can expect an answer to my appeal.

[129] Industrial Alliance acknowledged receipt of Mr. Richards' appeal in a letter dated January 18, 2012. The letter of denial, of March 12, 2012, states:

> While we acknowledge in your letter of appeal you report diminished mental capacities along with hypertension, retinopathy, nephropathy, neuropathy hyperkalemia and gastritis and you advised Dr. Squires is arranging psychiatric help for depression, the clinical medical information submitted in appeal does not support a level of disability that prevents you from working in ANY occupation beyond December 31, 2011.

The letter goes on to state:

> As such, in accordance with the policy provisions and the review of all the medical information on file, our decision to decline your LTD claim remains.

[130] The final paragraph of the letter states that, "if you disagree with our decision, you may contact the OmbudService for the Canadian Life and Health Insurance Association" ("OLHI"). The civic address and a toll-free telephone number were provided. The letter also enclosed a brochure for OLHI.

[131] Ms. Nicholson's affidavit evidence indicates that OLHI is an entity which is independent from Industrial Alliance and offers assistance to consumers of health and life insurance in Canada.

[132] Ms. Nicholson's affidavit attaches an Industrial Alliance document titled "Claim Summary", with entries made by Ms. Teresa Greco on March 26, 2012, stating, "Claimant is in hospital and will be sending appeal to Ombudservice Canada as per appeal decline letter. Claimant asked that copy of letter be resent to him via email." Ms. Greco resent the denial letter of March 12, 2012 to Mr. Richards on March 26, 2012.

[133] Nothing in the letter of March 12, 2012 suggests that a further appeal to Industrial Alliance was available to Mr. Richards. The letter contains no offer to review or accept any additional information, medical or other.

[134] The facts of the *Thomas v. Manufacturers Life* case are distinguishable. The insured in that case was led to believe by the insurer that no decision on the claim had been made.

[135] Ms. Awad's affidavit evidence attaches as an exhibit an email to Ms. Awad from the Acting Director of OLHI, copied to Ms. Snow, dated March 23, 2017. In that email the Acting Director states, "I can confirm that OLHI has never received and therefore does not have any documents relating to his case. I can further confirm that the date Mr. Richards called our office was March 26, 2012."

[136] March 26, 2012, is the same date that Mr. Richards requested that Industrial Alliance resend its denial letter of March 12, 2012.

[137] The next contact Industrial Alliance had with Mr. Richards was on August 25, 2015, when it received correspondence from his legal counsel, some three years and five months later.

[138] On the whole of the evidence, I am of the view that Mr. Richards understood that the letter of November 14, 2011 was notice to him that his benefits would be terminating on December 31, 2011. I conclude that Mr. Richards understood that he had 60 days to appeal that decision and he did so, filing his appeal on day 59.

[139] Further, Mr. Richards contacted OLHI on March 26, 2012. The absence of documentation in the possession of OLHI concerning Mr. Richards' claim leads to the conclusion that he decided not to pursue the matter with OLHI. He did not contact Industrial Alliance again asking about a further appeal or reconsideration of its denial of further benefits.

[140] Counsel for the Richards did not provide this Court with any case law supporting her contention that an insurer has a positive duty to advise its insured of the existence or particulars of the applicable limitation period or periods to commence an action against it. I find that Industrial Alliance had no such duty.

[141] All of this leads this Court to conclude that Industrial Alliance's letter of March 12, 2012 to Mr. Richards was a clear and unequivocal denial of future benefits.

**Issue 2 (c)** ***Did Mr. Richards lack capacity to bring a claim so as to engage s. 19 of the New Limitations Act?***

[142] The Richards take the position that Mr. Richards was incapable of bringing an action due to his physical and mental condition. They rely upon s. 19 of the *New Limitations Act*:

> **Incapacity**
>
> 19(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.
>
> [emphasis added]

[143] Counsel for the Richards says in her written brief to this Court that "there is very little judicial interpretation of this provision." She relies upon the 2015 decision of the New Brunswick Court of Queen's Bench in *Eastland Auto Inc. v. Stiles Auto and Machine*, 2015 NBQB 12, leave to appeal denied, [2015] N.B.J. No. 67, 2015 CanLII 14499 (N.B.C.A.). A provision of the New Brunswick *Limitation of Actions Act* provided that certain of the limitation periods set forth in that Act were "suspended during any period in which the claimant is incapable of bringing the claim because of his or her physical, mental or psychological condition."

[144] The plaintiff in *Eastland Auto Inc.* called a psychologist to testify at the trial and he was declared an expert by consent. Rideout J. determined on the evidence that the plaintiff was not "incapable bringing the claim" and dismissed his claim as statute barred.

[145] There is, in fact, a Nova Scotia decision which interprets s. 19 of the *New Limitations of Actions Act*.

[146] In *Cameron v. Nova Scotia Association of Health Organizations Long Term Disability Plan*, 2018 NSSC 90, Rosinski J. determined that s. 19(1) of the *New Limitations Act* applied only to "the limitation periods established by this Act." Justice Rosinski found that the one-year limitation period established by a policy of long term disability insurance was therefore not affected by s. 19. He determined that it could not be extended by "incapacity" (para. 28). Justice Rosinski noted, at para. 29, that s. 19 differed 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.

[147] In the alternative, Justice Rosinski considered whether there was an evidentiary basis on which he could conclude that Ms. Cameron was incapacitated. He observed, at para. 48:

> Regarding the plaintiffs' 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 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 ensuring year, and appreciate the reasonably foreseeable consequences of her making a decision, or not, in relation thereto.
>
> [emphasis of Rosinski J.]

[148] This Court notes that, in relation to s. 19 of the *New Limitations Act*, the Richards in fact do not rely upon <u>any</u> limitation period established in that Act. They rely upon a limitation period which they say was established by the *Old Limitations of Actions Act*. This alone is sufficient to defeat their argument.

[149] In my view, s. 19(1) is not applicable to either the Policy limitation period, or to the *Insurance Act* limitation period, and as such, the Richards cannot claim relief under that section of the *New Limitations of Actions Act*.

[150] If I am wrong, and s. 19 is applicable, I find that the evidence before this Court is insufficient to establish that Mr. Richards was incapable of bringing the claim because of his physical, mental or psychological condition. Earlier in this decision I determined that Industrial Alliance's denial letter of March 12, 2012 was clear and unequivocal in its denial of future benefits. I reviewed Mr. Richards' actions in response to that letter. I will not recount his actions again, but note that I am prepared to presume, as did Justice Rosinski in *Cameron v. Nova Scotia Association of Health Organizations Long Term Disability Plan*, that Mr. Richards knew that his benefits had been denied and appealed that denial decision. There is no evidence that Mr. Richards did not appreciate the information contained in the March 12, 2012 letter, either at the time he received it, or during the ensuing year.

[151] I will now review the evidence before this Court on the issue of "incapacity." As noted earlier in this decision, the only evidence the Richards filed

in response to the motion for summary judgment was Ms. Snow's solicitor's affidavit. That affidavit attaches, among other documentation, the following:

(a) Indexes from the Plaintiffs' and Defendants' Affidavits Disclosing Documents, attaching "a pared down excerpt of documents" contained in each party's disclosure;

(b) a Rule 55 expert report of Dr. Joel Maser, internal medicine specialist, filed with the Court on December 2, 2016;

(c) medical chart notes made by Mr. Richards' family physician, Dr. Squires, from 2009 to February 24, 2016;

(d) documentation provided by Industrial Alliance in response to requests for production made during the discovery examination of Cheryl Nicholson;

(e) copies of records of Dr. Fonberg, a medical consultant to Industrial Alliance.

[152] Counsel for Industrial Alliance moved to strike large portions of this evidence, on various bases, at the outset of the hearing of this motion. I reserved my decision and heard the motion. At the conclusion of the hearing of the motion, I invited counsel to comment on the decision of Wood J. of this Court in *MacAulay v. Ali*, 2013 NSSC 271. Both counsel provided written submissions on July 6, 2018.

[153] Industrial Alliance's specific objections to Ms. Snow's solicitor's affidavit relate to (i) expert reports attached as exhibits for the truth of their content; and (ii) medical information from the Affidavits Disclosing Documents exchanged by the parties.

[154] In *MacAulay*, the defendant sought summary judgment, on evidence. The proceeding was a personal injury claim where the plaintiff alleged that she had been injured as a result of a motor vehicle accident between a car driven by the defendant and a Metro Transit bus on which she was a passenger. The affidavit filed by the defendant in support of the summary judgment motion was from a claims examiner with the insurer for the defendant driver. The exhibits to this affidavit included a DVD received from Halifax Regional Municipality and a functional capacity evaluation co-authored by an occupational therapist and a physiotherapist, which had been produced in the plaintiff's affidavit disclosing documents. The affidavit filed on behalf of the plaintiff in response to the summary judgment motion was from a paralegal employed at the office of the plaintiff's legal counsel. Attached to that affidavit as exhibits were two

handwritten prescription notes from a physician's office and a report from a chiropractor.

[155] Wood J. commented on this evidence as follows:

> [7] The deponents of both affidavits had no personal knowledge of the materials attached as exhibits. Their affidavits might be sufficient to prove that the documents were produced in the litigation; however, that is not sufficient to allow them to be admitted for the truth of their contents. *Civil Procedure Rule 22.15(1)* states that the rules of evidence shall apply to the hearing of a motion including any affidavits. Subsection (2) permits hearsay on certain motions, none of which are applicable in the present case.
>
> [8] The principle that only admissible evidence should be considered on a motion for summary judgment was reiterated by the Nova Scotia Court of Appeal in the recent decision of *Abbott and Haliburton Company v. WBLI Chartered Accountants* 2013 NSCA 66 (CanLII), where the Court stated at para. 159:
>
>> A judge hearing a motion for summary judgment should only hear admissible evidence. Here, the motions judge committed no error in striking the affidavit of Mr. O'Hearn. However, the motions judge did not articulate and apply the correct legal principles in determining if Ms. MacMillan's affidavit was admissible.

Wood J. found that the chiropractic report and the functional capacity evaluation had "clearly not been proven", stating, "the factual statements in those documents are hearsay and any opinions require qualification of the author as an expert." Wood J. also found the physician notes to be inadmissible. Importantly, Wood J. noted as para. 17:

> As an aside, I would note that this case highlights the problems associated with the use of affidavits from administrative personnel on motions. For the most part, this will not constitute proof of the attached exhibits which would allow them to be admitted for the truth of their contents. In preparing for any substantive motion, counsel need to carefully consider the evidentiary record on which they intend to rely and ensure that it is properly admissible.

[156] The following exhibits to Ms. Snow's Affidavit are objected to by Industrial Alliance:

The *Rule* 55 Expert's Report of Dr. Tina Squires dated January 8, 2018

[157] On behalf of the Richards, Ms. Snow attaches to her affidavit as an exhibit, a letter addressed to her from Dr. Tina Squires dated January 8, 2018. This letter is

in the form of a *Rule* 55 expert report. As a result of the objections to this evidence raised by Industrial Alliance's counsel, Ms. Snow indicated that the only part of this letter that the Richards rely upon is the second paragraph of the letter, where Dr. Squires opines as to Mr. Richard's cause of death.

[158] Dr. Squires says that Mr. Richards died of a heart attack on September 25, 2015. She opines that Mr. Richards' "longstanding severe diabetes was the root cause of all significant health issues." Dr. Squires goes on to relate the various complications of diabetes which she says Mr. Richards suffered from.

[159] Counsel for the Richards say that the "disputed facts in this proceeding surround whether Mr. Richards' longstanding health condition disabled him from employment." Counsel says that Dr. Squires' report was filed with the Court on May 2, 2018 pursuant to *Rule* 55 and the defendant chose not to submit questions to Dr. Squires pursuant to *Rule* 55.11. Counsel says that the section of Dr. Squires' report relied on relates to the "capacity issue."

[160] Dr. Squires' report and para. 11 of Ms. Snow's affidavit constitute inadmissible hearsay and are struck. The issue before the Court on this motion is not whether Mr. Richards was disabled from employment within the meaning of the Policy, but rather whether the within action was commenced within the time period allowed for in the Policy or the applicable statutory limitation period. The fact that the defendant did not choose to submit questions to Dr. Squires pursuant to *Rule* 55.11 is irrelevant, both on this motion, and on the merits of whether Mr. Richards was totally disabled within the meaning of the Policy.

[161] Even if Dr. Squires' evidence was admissible, it does not establish that Mr. Richards was incapacitated within the meaning of s. 19 of the *New Limitations Act* (which I have found to be inapplicable) during the one-year period after he received the denial of future benefits letter of March 12, 2012.

[162] The Court echoes the views of Wood J. in *Cameron*, concerning the use of solicitor's or paralegal's affidavits to submit expert evidence without proof. Experts' reports should not be simply attached as exhibits to a solicitor's affidavit. They are not proven by doing so. Nor is the expert properly qualified to give the evidence. Responding counsel has no ability to cross-examine the expert.

The *Rule* 55 Report of Dr. Joel Maser dated November 22, 2016

[163] Dr. Maser's report is dated November 22, 2016, and is addressed to Ms. Snow. Dr. Maser is a specialist in internal medicine. Counsel for the Richards says that on this motion she is not relying on all of the opinions expressed by Dr. Maser, but rather only that section of Dr. Maser's report which recounts the history of Mr. Richards' illness, which counsel says goes to the issue of "incapacity."

[164] Paragraph 16 of Ms. Snow's affidavit, which refers to Dr. Maser's report, as well as the report itself, attached as an exhibit, is struck for the same reasons as the the expert's report of Dr. Squires.

[165] Further, even if Dr. Maser's evidence was properly before this Court, Dr. Maser does not opine that Mr. Richards lacked capacity to commence an action against Industrial Alliance within the limitation period, and accordingly his evidence is irrelevant to the issues before this Court.

Documents from the Plaintiff's Disclosure

[166] These documents appear to be largely hospital records containing various notes, reports, results of diagnostic testing, etc. These are attached, *holus-bolus*, to Ms. Snow's affidavit. Counsel refers to some 21 doctors and their reports. Once again, counsel for the Richards says that these documents go to the "issue of capacity, since they illustrate the various medical conditions and complaints of Mr. Richards."

[167] All of these documents and the corresponding provisions of Ms. Snow's affidavit are struck. These documents recount Mr. Richards' health history over the years, but they also contain opinion. The facts are inadmissible hearsay and the opinions require qualification of the authors as experts.

[168] Further, these documents are not relevant to the capacity issue. None of the 21 doctors opine on Mr. Richards' capacity to bring an action. They merely recount their medical assessments of Mr. Richards at given points in time.

Documents from the Defendant's Disclosure

[169] Counsel for the Richards says that multiple medical reports and letters written by Dr. Squires at the request of claims handlers at Industrial Reliance during the currency of the claim are admissible for their truth without the opportunity for Dr. Squires to be cross-examined. She contends that the claims

handler had the opportunity to ask follow-up questions if what Dr. Squires said was unclear.

[170] This reasoning is not legally sound. None of these letters have been proven as evidence and are struck from Ms. Snow's affidavit.

[171] I note that Ms. Snow's affidavit attached as exhibits two letters authored by Dr. Fonberg who carried out "Medical File Reviews" for Industrial Alliance in relation to Mr. Richards' claim on October 15, 2010 and April 18, 2011. In the latter letter Dr. Fonberg opined that "based on the medical information on file, it is possible that the restrictions from performing job-related activities may be supported in the short-term." Mr. Richards continued to receive benefits until December 31, 2011. While the letter might be admitted as a statement against interest on the part of Industrial Alliance, i.e., that Mr .Richards was disabled as of April 18, 2011, Dr. Fonberg's opinions shed no light on Mr. Richards' capacity to bring an action in March 2012 and the ensuing year. As such, they are not relevant to this motion.

[172] Finally, counsel for the Richards requested that she be able to file an affidavit of Dr. Squires, in the event that her report and letter were struck. A party responding to a motion for summary judgment on evidence must put their best foot forward. Even if this Court had ruled that all of the medical information the Richards sought to adduce as exhibits to Ms. Snow's affidavit were properly in evidence, that would be insufficient evidence to show that Mr. Richards lacked capacity to bring a claim. In any event, I have found that s. 19 of the *New Limitations Act* is inapplicable.

**Issue 2 (d)** ***Are the claims for life insurance benefits and the bad faith claim separate from the disability claim, and do those claims run on their own time limits?***

***What is the applicable limitation period for the life insurance claim?***

[173] The portion of the Policy which pertains to life insurance provides that life insurance benefits are only payable if the "participant' is an insured at the time of his death. The relevant provision states:

**INSURING AGREEMENT**

> Upon the death of the participant while insured under this benefit, the insurer undertakes to pay to the beneficiary the sum insured as indicated in the Summary of Benefits, subject to the terms and conditions of this benefit and

[174] The Policy defines "employee", "insured person" and "participant" as follows:

| | |
|---|---|
| Employee: | A person who is employed by his employer on a permanent, full-time basis and who is working a minimum of * per week for such employer. |
| Insured Persons: | A person or a dependent of a participant who is insured under this Policy. |
| Participant: | An employee or retired employee who is insured under this policy. |

[175] As noted earlier, Mr. Richards' employment was terminated on October 21, 2008. Accordingly, he could not be an "employee" for the purposes of life insurance. Since I have found that Mr. Richards' claim for additional disability benefits is time barred, then any rights he had to return to the status of a "participant" necessary for his beneficiary to receive life insurance proceeds are also time barred.

***What is the applicable limitation period for the bad faith claim?***

[176] The Richards amended their claim in May 2018 to add various allegations of bad faith on the part of Industrial Alliance. Paragraph 9 of the Amended Claim sets out 15 subparagraphs with particulars of the alleged bad faith. All but one of these deal with Industrial Alliance's dealings with Mr. Richards during the currency of the claim. The only allegation of bad faith after Mr. Richards' appeal was denied, is the allegation that Industrial Alliance misled and failed to inform Mr. Richards about his right "to litigate or of any limitation period associated with same or by providing the Insured with a copy of his policy."

[177] The Richards say that their bad faith claims constitute a separate actionable tort which has a different limitation period than the claim for additional disability benefits.

[178] In certain instances, breach of an insurer's duty of good faith or intentional infliction of mental distress can constitute an independent cause of action: *Whitten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 82.

[179] However, on the evidence before this Court, the allegations of bad faith do not constitute a separate actionable wrong.

[180] I find the reasoning of the Ontario Court of Appeal in *Arsenault v. Dumfries Mutual Insurance Co.*(2002), 57 O.R. (3d) 625, 2002 CanLII 23580 (Ont. C.A.) to be instructive on this point. The issue in *Arsenault* was whether a claim for bad faith damages arising out of an insurer's termination of non-fault accident benefits was subject to the two-year limitation period set out in s. 281(5) of the Ontario *Insurance Act*, R.S.O. 1990, c. 1.8.

[181] The plaintiff in *Arsenault* attempted to mediate her claim, but was unsuccessful. She commenced an action against her insurer after the two-year limitation period expired, alleging wrongful termination of benefits and bad faith. The motions judge dismissed all of the plaintiff's claims on the basis that they were time barred.

[182] Abella J.A. (as she then was), writing for a unanimous Court of Appeal, dismissed the appeal, finding that the bad faith claims were not brought within the two-year limitation period set out in s. 281(5) of the Ontario *Insurance Act*:

> [18] I am prepared to assume, without deciding, that there can be an independent claim for bad faith conduct in respect of the insurer's refusal to pay or continue to pay no-fault benefits. In order to establish such a claim, the appellant would first have to establish that the insurer's termination of her benefits was improper. Such a claim must comply with the requirements outlined in ss. 280-283 of the *Insurance Act*, one of which is the two-year limitation period for the institution of proceedings to determine this question. The appellant cannot, by the device of a claim for bad faith damages, extend three-fold the length of that termination period.

[183] I find that the decisions of the Ontario Court of Appeal in *Dundas v. Zurich Canada*, 2012 ONCA 181, leave to appeal denied, [2012] S.C.C.A. No. 236, and the New Brunswick Court of Queen's Bench in *Redden v. Manulife*, 2013 NBQB 327, are distinguishable from the circumstances before this Court.

[184] In *Redden*, the plaintiff filed a claim for entitlement to disability benefits. The defendant sought summary judgment on the basis that the claim had been

commenced outside the limitation period established by the New Brunswick *Limitation of Actions Act*. The defendant's motion was dismissed on the basis that the defendant had not shown that there was "no merit to the claim." The Court in *Redden* did not make a determination of the limitation period applicable to bad faith claims.

[185] In *Whorpole Estate v. Echelon General Insurance Co.*, 2011 ONSC 2234, Heeney J. of the Ontario Court of Justice distinguished *Arsenault* as follows:

> [19] What distinguishes *Arsenault* from the case at bar is that the limitation period in that case was triggered by the refusal to pay benefits. Any failure to deal with the claim in good faith that led up to the denial of benefits had to have preceded the date of the refusal, and could not logically be separated from the denial of benefits itself. In other words, the bad faith claim and the claim that benefits were wrongly denied were one and the same. Since the Act provided a clear limitation period of two years from the date that benefits were denied, it provided a complete defence to the plaintiff's claims.
>
> [20] The case at bar, though, is quite different. The triggering event for coverage under the insurance policy is the date of the loss, which is the date of the car accident. However, the cause of action regarding the alleged bad faith dealing arises well after that date, including the plaintiff's subsequent dealings with the adjuster and concluding with the dumping of the bloodstained wreck in the plaintiff's driveway. The wrongful denial of coverage itself that is alleged here did not occur until October 9, 2008, more than one year after the accident. The Statement of Claim was issued less than one year later, well within the two-year general limitation period provided in s. 4 of the *Limitations Act 2002*, S.O. 2002 c. 24.
>
> [emphasis added]

[186] Based upon the review of this case law, I find that the claims in bad faith and the claim that benefits were wrongly denied to Mr. Richards are one and the same for the purposes of the limitation analysis. The limitation period for the Richards' bad faith claims was triggered by the denial (March 26, 2012) of further benefits. I have found that pursuant to the Policy and s. 209 of the *Insurance Act*, the Richards had a one-year period to bring the claim. Accordingly, the bad faith claims are statute barred.

**Issue 2 (e)** ***Do the principles of contra proferentum, imperfect compliance and relief from forfeiture apply?***

[187] On behalf of the Richards, counsel relies on s. 30 of the *Insurance Act* which she says means that non-compliance with a provision of the *Insurance Act* does not render a contract invalid as against an insured. Section 30 provides:

> **Imperfect Compliance**
>
> 30 An act or omission of an insurer that results in non-compliance or imperfect compliance with a provision of this Act does not render a contract invalid as against an insured.
>
> [emphasis added]

[188] The Richards say that the letter of March 12, 2012 was ambiguous, and given what they say are very serious allegations of bad faith conduct on the part of Industrial Alliance, that this is an appropriate case for the application of s. 30. They argue that the "ambiguous" letter was an act or omission on the part of Industrial Alliance. Counsel provided this Court with no legal authorities supporting this contention.

[189] This Court has determined that the communication of March 12, 2012 was not ambiguous, but rather clearly communicated to Mr. Richards that Industrial Alliance no longer considered that he was totally disabled in accordance with the Policy provision defining "total disability" and that his receipt of benefits as at an end.

[190] I find that s. 30 of the *Insurance Act* does not apply given the evidence before the Court.

[191] The Richards also claim for relief from forfeiture pursuant to s. 33 of the *Insurance Act*, which states:

> **Court may relieve against forfeiture**
>
> 33 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just. R.S., c. 231, s. 33.

[192] In *Falk Bros. Industries Ltd. v. Elance Fabricating Co.*, [1989] 2 S.C.R. 778, McLachlin J. (as she then was) speaking for a unanimous Court, explained that the purpose of relief from forfeiture in insurance cases

> is to prevent hardship to beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance with the condition will not result in prejudice to the insurer. [at p. 783]

[193] McLachlin J. explained in *Falk Bros.* the distinction between imperfect compliance and non-compliance being "akin to the distinction between breach of a term of the contract and breach of a condition precedent" (p. 784).

[194] In *Falk Bros.*, the issue was whether the claimant's failure to give notice of a claim to the insurer within the prescribed period precluded relief against forfeiture under s. 109 of the Saskatchewan *Insurance Act*, R.S.S. 1978, c. S-26 (with wording identical to s.33 of the Nova Scotia *Insurance Act*). After reviewing case law, McLachlin J. stated, at pp. 784-85, that the failure to give timely notice of a claim has been viewed as imperfect compliance, while failure to institute an action within the prescribed time period has been viewed as non-compliance, or breach of a condition precedent.

[195] I find that the failure of the Richards to commence the action against Industrial Alliance to claim for benefits more than one year after March 26, 2012, constitutes non-compliance with the contract and is not subject to relief from forfeiture.

## CONCLUSIONS – ISSUE 2

[196] Industrial Alliance has established that there are no genuine issues of fact, or mixed fact and law, on the question of whether the Richards' action is statute barred. The Richards have not proven that the time has not expired.

[197] I find that the Richards' pleading does not require determination of a question of law. The Policy limitation is one year, as is the *Insurance Act* limitation. This Court does not need to determine which Act applies.

## CONCLUSION

[198] Summary judgment is granted, and all of the Richards' claims against Industrial Alliance are dismissed, with costs.

[199] I request that Ms. Awad provide me with a form of order, consented to as to form, by Ms. Snow.

[200] If the parties are unable to agree on costs, I will receive written submission within thirty (30) calendar days of this decision.

Smith, J.