

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Barnard v. The Portage Mutual Insurance Company*, 2026 NSSC 64

**Date:** 20260220

**Docket:** *Hfx*, No. 514704

**Registry:** Halifax

**Between:**

Nathan Paul Forest Barnard and Dougalenes Bowman

*Plaintiffs*

v.

The Portage Mutual Insurance Company, CAA Insurance Company, The Personal Insurance Company of Canada, Intact Insurance Company, Royal & Sun Alliance Insurance Company of Canada, Aviva General Insurance Company, Unifund Assurance Company, Northbridge General Insurance Corporation, Allstate Insurance Company of Canada, Security National Insurance Company, Sonnet Insurance Company, Economical Mutual Insurance Company, Pembridge Insurance Company, Echelon General Insurance Company, The Wawanesa Mutual Insurance Company, TD Home and Auto Insurance Company, Travelers Insurance Company of Canada and Co-operators General Insurance Company

*Defendants*

**DECISION ON MOTION TO CERTIFY CLASS PROCEEDING**

**Judge:** The Honourable Justice Gail L. Gatchalian

**Heard:** April 22, 23, 24 and 25, 2025 in Halifax, Nova Scotia

**Final Written Submissions:** Defendants: December 22, 2025  
Plaintiff: January 8, 2026

**Counsel:** Mike Dull, K.C. and Basia Sowinski, for the proposed representative Plaintiffs  
Jillian Kean and Melanie Comstock, K.C., for the Defendants  
The Portage Mutual Insurance Company, CAA Insurance

Company, The Wawanesa Mutual Insurance Company, and  
Travelers Insurance Company of Canada  
D. Geoffrey Machum, K.C., Jason W.J. Woycheshyn and  
Daniel MacKenzie, for the Defendant The Personal Insurance  
Company of Canada  
Scott Campbell, K.C., for the Defendants Intact Insurance  
Company and Royal & Sun Alliance Insurance Company of  
Canada  
Paul Martin and Jocelyn M. Campbell, K.C., for the  
Defendant Aviva General Insurance Company  
Glenn Zacher and Lesley Mercer, for the Defendant Allstate  
Insurance Company of Canada  
Michelle M. Kelly, K.C., for the Defendant, Security National  
Insurance Company  
Brenda J. Lutz, K.C., for the Defendant, Economical Mutual  
Insurance Company  
Erin E. Best and David Barry, for the Defendant, Co-operators  
General Insurance Company

**By the Court:**

**Introduction**

[1] This is a motion to certify an action as a class action under the *Class Proceedings Act*, S.N.S. 2007, c.28. When I refer to the Statement of Claim in these reasons, I am referring to the Fourth Amended Notice of Action and Statement of Claim filed on March 1, 2024. Dougalenes Bowman is the sole proposed representative plaintiff.

[2] As stated in the Plaintiff’s brief, “[t]he proposed class action seeks a determination on the legality of Nova Scotia’s insurance industry’s systemic practice of deducting certain collateral benefits from weekly indemnity benefits. The central issue is the interpretation of the standard automobile insurance policy, which is uniformly held across the proposed class. The Plaintiffs argue that the Defendants’ interpretation of this policy – consistently applied to the detriment of all class members – gives rise to contractual and/or tortious liability”: Plaintiff’s Certification Brief, para.2.

[3] Automobile insurance in Nova Scotia is mandatory. All drivers must have a *Standard Automobile Policy (S.P.F. No.1)*. The Defendants are providers of

automobile insurance in Nova Scotia. They provide automobile insurance coverage to insured drivers pursuant to the same *Standard Automobile Policy (S.P.F. No.1)*.

Pursuant to s.140 of the *Insurance Act*, R.S.N.S. 1989, c.231, the *Standard Automobile Policy (S.P.F. No.1)* must include *Section B – Mandatory Accident Benefits* (the “Section B Contract”), as set out in the *Automobile Insurance Contract Mandatory Conditions Regulations*, NS Reg 181/2003. The Section B Contract is therefore worded identically for all insureds.

[4] The weekly indemnity payment is calculated as follows in the Section B Contract:

**Amount of Weekly Payment –**

The amount of a weekly payment shall be the lesser of,

- (a) \$250 per week; or
- (b) 80 percent of the insured person’s gross weekly income from employment, less any payments for loss of income from employment received by or available to such person under,
  - (i) the laws of any jurisdiction,
  - (ii) *wage or salary continuation plans available to the person by reason of his employment,*

...

[emphasis added]

[5] The members of the proposed class are:

1. all persons who carried a policy of automobile insurance with one of the Defendants in Nova Scotia, and
2. who have received weekly payments for loss of income (“Weekly Indemnity Payments”) under Section B – Mandatory Accident Benefits of the Standard Automobile Policy (S.P.F. No.1) for Nova Scotia (“the Section B Contract”) with the Defendants since April 2007, and
3. who have had their Weekly Indemnity Payments reduced due to the receipt of one or more of the following “Collateral Disability Benefits”:
  - (a) disability benefits received from an insurance company for which he/she personally paid insurance premiums in whole or in part (“LTD Benefits”),
  - (b) Canada Pension Plan Disability benefits (“CPP Disability Benefits”), and
  - (c) Employment Insurance Disability Benefits (“EI Disability Benefits”).

[6] The Defendant insurers are:

1. The Portage Mutual Insurance Company
2. CAA Insurance Company
3. The Personal Insurance Company of Canada
4. Intact Insurance Company
5. Royal & Sun Alliance Insurance Company of Canada
6. Aviva General Insurance Company
7. Allstate Insurance Company of Canada
8. Security National Insurance Company
9. Economical Mutual Insurance Company
10. The Wawanesa Mutual Insurance Company
11. Travelers Insurance Company of Canada
12. Co-operators General Insurance Company

[7] Ms. Bowman discontinued the action against the following Defendants:

1. Unifund Assurance Company
2. Northbridge General Insurance Corporation
3. Sonnet Insurance Company
4. Pembridge Insurance Company
5. Echelon General Insurance Company
6. TD Home and Auto Insurance Company

[8] The Plaintiff alleges that the Defendant insurers' systemic, industry-wide practice of deducting Collateral Disability Benefits from Weekly Indemnity Payments gives rise to liability in (a) breach of contract (the Section B Contract), (b) unjust enrichment, (c) bad faith (breach of the duty of good faith) and (d) fraudulent misrepresentation and concealment.

[9] With respect to the breach of contract claim, the Plaintiff alleges that the Collateral Disability Benefits are not "wage or salary continuation plans available to the person by reason of his employment" within the meaning of the Section B Contract (Statement of Claim, paras. 28-32, p.12 - top of p.13).

[10] The unjust enrichment, bad faith, fraudulent misrepresentation and fraudulent concealment claims are based on the following allegations:

- (1) that the Defendants were aware of internal legal opinions that concluded that it was unlawful for the Defendants to deduct Collateral Disability Benefits from the Weekly Indemnity Payments;
- (2) that the Defendants colluded with each other at meetings and conferences to systematically inform their insureds that the deduction of Collateral Disability Benefits from Weekly Indemnity Benefits was lawful, when each Defendant knew or ought to have known this to be false and misleading;
- (3) that the Defendants withheld relevant information from their insureds about the lawfulness of these deductions; and
- (4) that the Defendants uniformly and systematically misrepresented the lawfulness of these deductions to their insureds.

[Statement of Claim, paras.28 to 35, pp.13-14]

[11] The Plaintiff relies on the equitable doctrine of fraudulent concealment to assert that the one-year limitation period should be extended.

[12] In support of the certification motion, the Plaintiff relied on affidavits from the following twelve individuals who said that their Weekly Indemnity Payments were reduced due to their receipt of one or more Collateral Disability Benefits:

1. Dougalenes Bowman, insured by Intact Insurance
2. Nathan Barnard, insured by Portage la Prairie Mutual Insurance
3. Joan Baker, insured by Aviva General Insurance
4. Trudy Demone, insured by Economical Insurance
5. Catherine Old, insured by The Cooperators General Insurance Company
6. Paula Avery, insured by Travelers Insurance Company of Canada
7. Eric Wright, insured by CAA Insurance Company
8. Chris Gallant, insured by Allstate Insurance Company of Canada
9. Andrea Skeet, insured by Royal & Sun Alliance Insurance Company of Canada
10. Jacqueline Foster, insured by Security National Insurance Company

11. Belinda Works, insured by Wawanesa Mutual Insurance Company
12. Ashley Byrne, insured by The Personal Insurance)

[13] The Plaintiff also relied on affidavits from the following:

1. Matthew Krofchick, an expert in forensic economics
2. Charles Ford, lawyer, who practiced law in association with Plaintiff counsel, Valent Legal, at the time he swore the Affidavit.

[14] The Plaintiff's witnesses were cross-examined in court, with the exception of Ashley Byrne, who was cross-examined out of court.

[15] The evidence of the twelve individuals who say that their benefits were reduced may be summarized as follows:

- (a) **CPP Disability Benefits deducted:** The following Defendants deducted CPP Disability Benefits from the calculation of the following witnesses' gross weekly income from employment in determining the amount of the Weekly Indemnity Payment:
  - (i) **Security National** - Jacqueline Foster
  - (ii) **CAA** - Eric Wright

- (b) **EI Disability Benefits** deducted:
- (i) **Wawanesa** commenced Weekly Indemnity Payments to Belinda Works only when she exhausted her EI Disability Benefits.
- (c) **LTD Benefits deducted:** The following Defendants deducted LTD Benefits from the calculation of the following witnesses' gross weekly income from employment in determining the amount of the Weekly Indemnity Payment
- (i) **Portage** - Nathan Barnard
  - (ii) **Intact** - Dougalenes Bowman
  - (iii) **The Personal** - Ashley Byrne
  - (iv) **Allstate** - Chris Gallant
  - (v) **Aviva** - Joan Baker
  - (vi) **Travelers** informed Paula Avery that should she qualify for LTD Benefits, they would be deducted
- (d) **EI Disability and LTD Benefits** deducted: The following Defendants deducted both EI Disability Benefits and LTD

Benefits from the calculation of the following witnesses' gross weekly income from employment in determining the amount of the Weekly Indemnity Payment

- (i) **Royal & Sun Alliance** - Andrea Skeet
  - (ii) **Travelers** - Paula Avery
  - (iii) **Economical** - Trudy DeMone
  - (iv) **Co-Operators** - Catherine Old
- (e) **CPP Disability Benefits not deducted:**
- (i) **The Personal** did not deduct CPP Disability Benefits from Ashley Byrne
  - (ii) **Portage** did not deduct CPP Disability Benefits from Nathan Barnard

[16] The Defendants relied on affidavits from the following individuals:

1. Chris S. Weber, paralegal
2. Leah Folland, paralegal.
3. Affidavit of Alex Boucher, principal and Strategic Leader, Workforce Total Health Management at Mercer Marsh

Benefits: evidence regarding the structure and features of group disability plans underwritten by insurance companies (“Group Insured Disability Plans”).

[17] Mr. Boucher was cross-examined in court.

[18] The Defendants filed a book of transcripts of the cross-examinations.

### **Objection to the Affidavit of Chuck Ford**

[19] At the beginning of the hearing of the certification motion, I heard the Defendants’ motion to strike several paragraphs of Mr. Ford’s Affidavit. The motion is allowed in part. See Appendix “A” to this decision for my reasons.

### **The Test for Certification**

[20] I must determine whether a class action is the appropriate method to advance issues common to the class. The motion does not concern the merits of the action.

[21] Under the *Class Proceedings Act*, the court shall certify a class proceeding where the following five-part test in s.7(1) is met:

- (a) the pleadings disclose or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by a representative party;

- (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
- (e) there is a representative party who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
  - (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of the other class members.

[22] The test for certification is to be applied in a purposive and generous way, to give effect to the important goals of class actions:

1. promotion of judicial efficiency by avoiding unnecessary duplication in fact-finding and legal analysis
2. improved access to justice for claims that may not otherwise be asserted
3. modification of the behaviour of actual and potential wrongdoers

*Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras.26-29 and *Hollick v. Metropolitan Toronto (City)*, 2001 SCC 68 at paras.14-15

[23] Certification is intended to be a low bar. The proposed representative plaintiff need only to establish that there is “some basis in fact” to conclude that each criterion is satisfied (apart from the requirement that the pleadings disclose a

cause of action, for which no evidence can be considered): *Surette v. Northwoodcare Group Inc.*, 2024 NSSC 388, at para.8, aff'd 2025 NSCA 52, citing *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68 at para.40; *Hollick* at para.25; and *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57 at paras.63, 71 and 97. Therefore, I do not assess probative weight at this stage, nor am I to resolve conflicting facts and evidence: *Surette* at para.8, citing *Pro-Sys* at para.102 and *Wright* at paras.46-47. On the other hand, it is insufficient to engage in a superficial level of analysis of the evidence that amounts to nothing more than symbolic scrutiny: *Surette* at para.9, citing *Pro-Sys* at para.103.

### **The Pleadings Disclose a Cause of Action [s.7(1)(a) of the Act]: The Test**

[24] A plaintiff satisfies the cause of action requirement unless it is “plain and obvious” that the pleadings disclose no reasonable cause of action: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 14 and 87-90. Assuming the pleaded facts to be true, do they disclose a cause of action? See *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38 at para.18.

[25] Pleadings must be read generously to allow for any inadequacies arising from drafting frailties and lack of access to documents or discovery: *Organigram*

at para.19. However, the pleaded facts must support the underlying cause of action: *Organigram* at para.19. Failure to properly plead a cause of action usually results in striking it out: *Organigram* at para.20.

### **Cause of Action: Breach of Contract**

#### ***The Pleading***

[26] The Statement of Claim pleads the following under the heading “Breach of Contract”:

- the existence of a contract – the Section B Contract – between the Defendant insurers and the class members which provides for Weekly Indemnity Payments to (i) an insured person, who (ii) sustains bodily injury from an accident arising out of the use and operation of a motor vehicle, and who (iii) meets the relevant definition of disabled;
- that the Defendants breached the terms of the Section B Contract by deducting Collateral Disability Benefits from class members’ Weekly Indemnity Payments because Collateral Disability Benefits are not “wage or salary continuation plans available to the person by reason of his employment”; and
- that, without exception, each of the Defendants have systematically deducted and continue to systematically deduct Collateral Disability Benefits from Weekly Indemnity Payments.

[Statement of Claim, paras.27-32 from page 11 to the top of page 13]

#### ***EI Disability Benefits and LTD Benefits: Conceded by the Defendants***

[27] The Defendants concede that the pleadings disclose a cause of action in breach of contract with respect to the deductibility of EI Disability Benefits and LTD Benefits. I accept that concession.

[28] The Plaintiff's claim that Defendants have systematically deducted and continue to systematically deduct Collateral Disability Benefits from Weekly Indemnity Payments (set out in para.30 on p.12 of the Statement of Claim) is not a breach of contract claim, but rather a claim of a breach of the duty of good faith, and I find that the pleadings (in para.30 on p.12 of the Statement of Claim) disclose a cause of action in breach of the duty of good faith: see *Crotty v. Aviva General Insurance Company*, 2025 NLCA 39 at paras.95-97.

***CPP Disability Benefits: Contested***

[29] The Defendants state that the Statement of Claim discloses no cause of action with respect to the deductibility of CPP Disability Benefits because, according to the Defendants, Nova Scotia courts have already determined that CPP Disability Benefits are properly deducted in subparagraph (b) of the calculation of Weekly Indemnity Payments. The Defendants rely on *Dugas-Mattatall v. General Accident Assurance Co of Canada*, 1994 CanLII 4027 (NSCA), upholding *Dugas-Mattatall v. The General Accident Assurance Company of Canada*, 1984 CanLII 6375; *Humphrey v. Portage la Prairie Mutual Insurance Co.*, 2009 NSSC 153 at paras.32-33; and *Poulain v. Iannetti*, 2015 NSSC 181 at para.141, reversed on other grounds, 2016 NSCA 93.

[30] The Plaintiffs say that the above cases did not definitively decide the issue. The Plaintiffs instead rely on the decision in *Cugliari v. White*, (1998) 38 O.R. (3d) 641 at para.18, where the Ontario Court of Appeal held that CPP Disability Benefits are not payments received “for loss of income” under the laws of any jurisdiction under a section of the Ontario *Insurance Act* that reduces damages awarded for personal injuries suffered in a motor vehicle accident: at paras.1, 3-5, 11-12 and 19.

[31] *Dugas-Mattatall* did not concern a dispute about the deductibility of CPP Disability Benefits. The issue in that case was whether the Section B insurer’s obligation to pay Weekly Indemnity Benefits terminated by reason of the insured’s settlement with the third-party tortfeasor. There was an agreed statement of facts at trial in which the parties agreed that CPP Disability Benefits were properly deducted under subparagraph (b) of the “Amount of Weekly Payment” calculation.

[32] *Humphrey* did not concern a dispute about the deductibility of CPP Disability Benefits. In *Humphrey*, the issue was whether loss of income payments made by a tortfeasor are payments received or available to the insured under “(i) The laws of any jurisdiction”: see para.17. The Honourable Justice Duncan Beveridge, as he then was, mentioned CPP Disability Benefits and EI Disability Benefits in *obiter* as follows at para.35:

The reduction of payments for loss of income from employment received or available to such person under “The laws of any jurisdiction” has been held to include employment insurance, (but not welfare payments), (*Akiens v. Pitts Insurance Co.* [ 1981] O.J. No. 312 ( Co. Ct.), and Canada Pension Plan benefits ( *Paese v. United States Fidelity & Guarantee Co.*, [1985] O.J. No. 2733 (Dist. Ct.); *Dugas - Mattatall, supra.*)

[33] The Nova Scotia Court of Appeal directly addressed the issue of the deductibility of CPP Disability Benefits in *Poulain v. Ianetti*, a solicitor’s negligence case. In that case, the Honourable Justice David Farrar, writing for a unanimous Court of Appeal, held that the trial judge had erred in finding that the negligence of Mr. Iannetti caused a loss to Mr. Poulain. Justice Farrar found that Mr. Poulain had failed to establish that he suffered any reduction in his claim against the tortfeasor by signing a release of the Section B claim: see para.54. Justice Farrar stated that, as the appeal was allowed on the causation argument, it was not strictly necessary to address the damages calculation by the trial judge. However, Justice Farrar stated that, “because of his errors in the calculation of the damages, it is instructive to do so.” In examining the trial judge’s damages calculation, Justice Farrar held that the trial judge had “properly calculated the damages” when he determined that CPP Disability Benefits are deductible as “payments for loss of income from employment received by or available to such person” under “(i) the laws of any jurisdiction”: at paras.64-65 of the Court of Appeal decision and paras.135-142 and para.154 of the trial decision. The deductibility of CPP Disability Benefits was in dispute at the trial: see paras.105

and 112 of the trial decision. While not necessary to its decision, the Court of Appeal directly addressed the issue of the deductibility of CPP Disability Benefits, 16 years after *Cugliari*, and the decision is binding on this court.

[34] It is plain and obvious that the Statement of Claim in this case does not disclose a reasonable cause of action in breach of contract or breach of the duty of good faith with respect to the deduction of CPP Disability Benefits from Weekly Indemnity Payments.

### **Cause of Action: Unjust Enrichment**

#### ***Elements of Unjust Enrichment***

[35] In order to make a claim for unjust enrichment, a plaintiff must prove:

1. an enrichment of the defendant,
2. a corresponding deprivation of the plaintiff, and
3. the absence of a juristic reason for the enrichment.

*Garland v. Consumers Gas Co.*, 2004 SCC 25 at para.30.

#### ***The Pleading***

[36] The Plaintiff's unjust enrichment claim is set out at paras. 28 to 31 of the Statement of Claim under the heading "Unjust Enrichment":

28. The Defendants provided *first party contracts of insurance* with the Plaintiff and Class Members. The Defendants each had a duty of good faith and fair dealings to the Plaintiff and Class members who *contracted* with them and paid insurance premiums to the Defendants. The Defendants had a duty to provide clear and accurate information about coverage, claims process and lawful deductions. The Defendants had a duty to treat policy holders fairly and avoid actions that could be construed as acting against policyholder's best interests. The Defendants are in breach of these duties.
29. The Defendants knew or ought to have known that it was *unlawful to deduct Collateral Disability Benefits from Weekly Indemnity Benefits* owed to their disabled insureds. The Defendants received, and continue to receive, *enormous revenues by making unlawful deductions to Weekly Payments* owed to disabled insureds.
30. The Plaintiffs and Proposed Class Members suffered and continue to suffer *a deprivation that corresponds to the Defendants' benefit*.
31. There is *no juristic reason* for the Defendants' benefit and Proposed Class Members' corresponding deprivation. *The Defendants have breached their contracts with the Proposed Class Members* and have engaged in unjust practices by virtue of their false, misleading and deceptive representations concerning the lawfulness of the deductions. The Proposed Class Members are entitled to restitution in order to remedy the Defendants' unjust enrichment.

[emphasis added]

### ***Technical Requirements Met***

[37] Technically speaking, Ms. Bowman has adequately pleaded the constituent elements of an unjust enrichment claim:

1. that the Defendants received and continue to receive enormous revenues by making unlawful deductions to Weekly Indemnity Payments owed to class members,
2. that the class members suffered and continue to suffer a deprivation that corresponds to the Defendants' benefit, and

3. there is no juristic reason for the Defendants' benefit and the class members' corresponding deprivation.

[38] As explained in her brief at para.62, the Plaintiff alleges that the Defendants knowingly made improper deductions of Collateral Disability Benefits from Weekly Indemnity Payments, despite case law suggesting they lacked the legal authority to do so, and that these deductions resulted in the enrichment of the Defendants and the corresponding deprivation to the class. Ms. Bowman asserts that there is no juristic reason to allow the Defendants to profit from improper benefit reductions otherwise payable to their disabled insureds.

***Unjust Enrichment Claim Unsustainable***

[39] In their brief, the Defendants argued that the unjust enrichment claim is unsustainable because, having plead breach of contract, the Plaintiff is unable to plead unjust enrichment based on the same facts: para.49 of the Defendants' Brief. The Defendants relied on the decision in *Organigram*, where the Honourable Justice Peter Bryson, writing for the court at para.46, stated that “[c]ontract trumps unjust enrichment because the law favours parties autonomously allocating risks between themselves,” and cited the following passage from McInnes in *The Canadian Law of Unjust Enrichment*, (Toronto: LexisNexis, 2014) at p.645:

*Contract trumps unjust enrichment in several respects. Most obviously, restitutionary relief is not available if the claimant possess [sic] a right to contractual relief.*

[40] Justice Bryson stated that, while pleas of breach of contract and unjust enrichment are inconsistent, one may plead facts and related legal consequences that are inconsistent, in the alternative: at para.48. The plaintiff in *Organigram* only pleaded facts material to a breach of contract. Justice Bryson held that those facts could not simultaneously sustain an unjust enrichment claim: at para.49. The claim for unjust enrichment was struck.

[41] In her reply brief, the Plaintiff says that she is pleading unjust enrichment and seeking disgorgement of profits as an alternative remedy to restitution for breach of contract: at para.14. In oral argument, Plaintiff's counsel confirmed that the "profits" are the alleged "substantial revenue" generated through the systemic practice of deducting Collateral Benefits as well as the investment income derived therefrom. The Plaintiff confirmed that she was targeting the Defendants' gain, and not the class members' loss.

[42] In my view, it is plain and obvious that the unjust enrichment claim as pleaded does not satisfy the cause of action criterion, for the following reasons;

1. Disgorgement is not an available remedy for unjust enrichment. As explained by Brown J., writing for the court in *Atlantic Lottery Corp.* at

para.24, restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies that are distinct from each other.

Disgorgement requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while restitution is awarded in response to the causative event of unjust enrichment, where there is correspondence between the defendant's gain and the plaintiff's deprivation: *Atlantic Lottery Corp.* at para.24. Ms. Bowman states as follows in her reply brief at para.24: "Even when restitution is ordered, the Defendants may remain unjustly enriched unless they are required to disgorge investment gains obtained through their wrongful conduct." It is incorrect to use the phrase "unjustly enriched" in this context, as the alleged investment gains do not correspond to the class members' deprivation. As Brown J. stated in *Atlantic Lottery Corp.*, "restitution is the law's remedial answer to circumstances in which a benefit moves from the plaintiff to the defendant, and the defendant is compelled to restore that benefit": at para.23. The availability of gain-based relief, such as disgorgement, "lies in 'aligning the remedy with the injustice it corrects": *Atlantic Lottery Corp.* at para.32, citing E.J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000), 1 *Theor. Inq.L.* 1, at p.23 [emphasis added].

2. Because the class members' alleged impoverishment (their transfer of wealth to the Defendants by way of the deduction of Collateral Disability Benefits from the Weekly Indemnity Payments) is equal to their breach of contract claim, there is no concurrent claim in restitution: see *Davis v. Amazon Canada Fulfillment Services, ULC*, 2023 ONSC 3665 at para.216; upheld on other grounds, 2025 ONCA 421, application for leave to appeal dismissed, 2024 CanLII 74730 (SCC); and *Organigram* at para.46, citing McInnes, *The Canadian Law of Unjust Enrichment*, (Toronto: Lexis Nexus, 2014) at p.645.

3. The Plaintiff pleads inconsistent causes of action (breach of contract and unjust enrichment) – from common facts (breach of contract). An alleged breach of contract cannot simultaneously sustain an unjust enrichment claim. See *Organigram* at paras.48-49.

4. Finally, the unjust enrichment claim suffers from the same defect as the bad faith, fraudulent misrepresentation and fraudulent concealment claims, as described in detail below: (a) the unjust enrichment claim turns on the allegation that the Defendants knew or ought to have known that the deductions were unlawful, and engaged in false, misleading and deceptive representations concerning the lawfulness of the deductions, but fails to

provide full particulars of those claims; and (b) the claim is manifestly incapable of being proven.

[43] It is plain and obvious that the Statement of Claim discloses no reasonable cause of action in unjust enrichment.

**Cause of Action: “Bad Faith”, Fraudulent Misrepresentation and Fraudulent Concealment**

***The Pleading of “Bad Faith”***

[44] The Plaintiff pleads the following under the heading, “Bad Faith,” where she alleges dishonesty on the part of the Defendants:

32. The Defendants owed the Plaintiff and Proposed Class Members a duty of good faith and fair dealing. This duty exists independent of and in addition [to] the terms of the contract between an insurer and an insured.
33. The Defendants are in a position of power over the Plaintiffs and Proposed Class Members. The insurance contracts between the Defendants and Proposed Class Members are a product of bargaining between parties in uneven positions. The Defendant took advantage of this uneven bargaining position to the detriment of their Proposed Class Members. Specifically, the Defendants:
  - i. Chose to ignore or disregard internal legal opinions concluding that it was unlawful for the Defendants to deduct Collateral Disability Benefits from weekly indemnity payments;
  - ii. Colluded with each other at meetings and in conferences to systematically create a uniform environment in Nova Scotia where each Defendant would inform their respective insureds that Collateral Disability Benefits were lawfully deducted in Nova Scotia, when each Defendant knew this to be false and misleading;
  - iii. Deliberately withheld relevant information from their insureds on the lawfulness of Collateral Disability Benefits deductions.

[45] The Plaintiff claims “damages for bad faith conduct” in paragraph 38(h) of the Statement of Claim, under the heading, “Relief Sought.”

***Fraudulent Misrepresentation and Fraudulent Concealment***

[46] The elements of the tort of fraudulent misrepresentation are:

1. The making of a false representation to the party alleging the wrong,
2. made either
  - a. knowing it to be untrue,
  - b. without belief in its truth, or
  - c. reckless as to whether it be true or false
3. The false representation caused the complaining party to act and to suffer a loss.

*Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para.19

[47] Fraudulent concealment is "an equitable doctrine that prevents limitation periods from being used ‘as an instrument of injustice’”: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para.52. Where the defendant fraudulently conceals the existence of a cause of action, the limitation period is suspended until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud: *Pioneer*

*Corp.* at para.52. Fraudulent concealment is “a form of ‘equitable fraud’ . . . which is not confined to the parameters of the common law action for fraud”: *Pioneer Corp.* at para.52. Fraudulent concealment arises when “it would be, for *any* reason, *unconscionable* for the defendant to rely on the advantage gained by having concealed the existence of a cause of action”: *Pioneer Corp.* at para.54. Equitable fraud may be established by pointing to a special relationship by which a defendant might conceal the existence of a cause of action or to other forms of unconscionable behaviour, for example, abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts: *Pioneer Corp.* at para.54.

***The Pleadings - Fraudulent Misrepresentation and Fraudulent Concealment***

[48] The Plaintiff pleads fraudulent misrepresentation and fraudulent concealment together under the heading “Fraudulent Misrepresentation and Concealment” as follows:

34. The Defendants uniformly and systematically informed the Plaintiffs and class Members that they were legally permitted to deduct Collateral Disability Benefits from weekly indemnity payments when

they knew this to be incorrect and that such deductions were, in fact, unlawful.

35. The Defendants knew that this information to be false and misleading. The Defendants were in a position of power over the Class Members and made the false statements with the intention that the Class Members rely on the statements as being truthful and correct. The Class Members did, in fact, rely on the statements and suffered harm as a result.

***Requirement for Full Particulars of Claims of Bad Faith, Unconscionable Conduct and Fraud***

[49] The Defendants take the position that there is no plausible claim for “bad faith” (more accurately, breach of the duty of good faith), fraudulent misrepresentation or fraudulent concealment because, contrary to Civil Procedure Rule 38.03(3), the Statement of Claim fails to provide full particulars of the claims.

[50] Bald allegations in the nature of bad faith, malice, and abuse of power do not constitute material facts for pleading purposes unless they are particularized: see *Kasheke v. Canada (Attorney General)*, 2017 NSSC 61 at para.27, aff’d 2018 NSCA 2.

[51] This principle is reflected in Civil Procedure Rule 38.03(3), which provides that “[a] pleading must provide *full particulars* of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice” [emphasis added].

[52] The bad faith, fraudulent misrepresentation and fraudulent concealment claims allege unconscionable conduct on the part of the Defendants.

[53] The Defendants assert that the Plaintiff was required to plead the “who, when, where, how and what” of the alleged conduct forming the basis of the “bad faith,” fraudulent misrepresentation and fraudulent concealment claims, for example, particulars of the alleged internal legal opinions, specifics about the alleged meetings and conferences, and details of the alleged “relevant information” that the Defendants withheld: Defendant’s Reply Brief at para.59.

[54] In her rebuttal brief, Ms. Bowman states that the Defendants are seeking evidence, as opposed to particulars: Plaintiff’s Rebuttal Brief at paras.32-33.

[55] In her supplementary brief dated January 8, 2026, the Plaintiff relies on the recent decision of the Newfoundland Court of Appeal in *Crotty* to support the viability of her claim that the Defendants breached the duty of good faith.

However, *Crotty* is distinguishable because the proposed representative plaintiffs

in that case were not alleging bad faith, dishonesty or unconscionable conduct as part of the alleged breach of the duty of good faith. Therefore, the question of whether the proposed plaintiffs complied with the obligation to provide full particulars of the claim did not arise.

[56] As stated by the Federal Court of Appeal in *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227:

[17] [Sufficient material facts are] the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

[18] There is ***no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum***, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

[19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. ***The pleading must tell the defendant who, when, where, how and what gave rise to its liability.***

[emphasis added]

[57] See also *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.*, 2012 ONSC 414 at para.40, citing *Balanyk v. University of Toronto*, [1999] O.J. No. 2162

(S.C.J.) at para.28 and *Mills v. Association of Professional Engineers and Geoscientists of Alberta*, 2022 ABQB 540 at paras.10-11.

[58] The Plaintiff claims against each Defendant severally: para.26 of the Statement of Claim. There are twelve separate corporate Defendants. The claim encompasses an 18-year period. The Statement of Claim does not identify who authored the internal legal opinions or for whom or for which corporate Defendant; when those legal opinions were authored; who or which corporate Defendant was aware of those internal legal opinions; or when, or what, when or where the alleged meetings and conferences took place.

[59] With respect to the claim of fraudulent misrepresentation, the Statement of Claim does not identify how the statements were made, the maker of those statements, how the Class Members relied on the statements or how they suffered harm as a result. It is not sufficient to simply plead the constituent elements of the tort of fraudulent misrepresentation devoid of any details whatsoever: see *EnerWorks* at paras.35-36.

[60] Each Defendant is entitled to know the material facts of its wrongdoing: see *EnerWorks* at paras.61 and 65. The Statement of Claim does not tell any of the Defendants who, when, where, how and what gave rise to each of their liability.

[61] Looking at the pleadings at a whole, I am not satisfied that the pleadings define the issues of bad faith, fraudulent misrepresentation or fraudulent concealment with sufficient precision to make these proceedings manageable or fair. The Statement of Claim does not inform any of the Defendants of the nature of the case they each have to meet, prevent the Defendants from being taken by surprise at trial, enable the Defendants to know what evidence they ought to be prepared with and to prepare for trial, limit the generality of the pleading, limit the issues to be tried and as to which discovery is required, or tie the hands of the Plaintiff so that she cannot without leave go into any matters not included: see *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257 at para.60. The bald allegations, which revolve around the alleged internal legal opinions and alleged collusion, are not bounded as to time, persons, Defendants involved, or place.

[62] For these reasons, it is plain and obvious that the “bad faith,” fraudulent misrepresentation and fraudulent concealment claims as pleaded do not satisfy the cause of action criterion.

***Manifestly Incapable of Proof***

[63] The bad faith, fraudulent misrepresentation and fraudulent concealment claims (as well as the unjust enrichment claim) are also manifestly incapable of

being proven: see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para.22, citing *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455; see also *Crotty* at para.26. These claims depend on proving that the Defendants knew that the deductions were unlawful, but made them anyway. This allegation can only be proven if the law had already been decided in the Plaintiff's favour, i.e. that the deductions are not lawful. It is not. Our Court of Appeal has determined that CPP Disability Benefits are deductible from Weekly Indemnity Benefits under the Section B Contract: *Poulain v. Ianetti*. This Court has stated, in *obiter*, that EI Disability Benefits are deductible: *Humphrey*. The courts in this Province have not yet determined whether and in what circumstances LTD Benefits are deductible from Weekly Indemnity Payments. The New Brunswick Court of Appeal has determined that LTD Benefits are not deductible from New Brunswick's version of Weekly Indemnity Payments when provided pursuant to a group benefit plan sponsored by a trade union (See *Co-Operative Fire & Casualty Co. v. Sweet*, 1983 CanLII 2955 (N.B.C.A.), discussed in more detail later in these reasons) but that decision does not appear to apply to LTD Benefits provided pursuant to an employer-sponsored group plan (see *Hill v. Graham and Sun Life Assurance Company of Canada*, 2003 NBCA 24, also discussed in more detail later in these reasons).

[64] Because the law has not already been decided in the Plaintiff's favour, it is plain and obvious that the "bad faith," fraudulent misrepresentation and fraudulent concealment claims (as well as the unjust enrichment claim) do not satisfy the cause of action criterion.

**There is an Identifiable Class of Two or More Persons [s.7(1)(b) of the Act]**

[65] The proposed class must be capable of clear definition: *Dutton* at para.38. The class definition should state objective criteria by which members of the class can be identified: *Dutton* at para.38. The criteria should bear a rational relationship to the common issues asserted by all class members: *Dutton* at para.38.

[66] Most of the Defendants do not dispute that there is an identifiable class of two or more persons.

[67] I agree that the proposed class definition states objective criteria by which members of the class can be identified and that the criteria bear a rational relationship to the common issues asserted by all class members.

***Only One Affiant per Defendant?***

[68] Wawanesa, CAA and Travellers argue that there is no basis in fact for an identifiable class of two or more persons because the evidence adduced on this

motion does not connect more than one affiant to each of those Defendants.

Wawanesa also asserts that Belinda Works, the only affiant insured with it, is not a class member because she settled her Section B claim against it, executing a full and final release. The position of Wawanesa, CAA and Travellers appears to misapprehend the test for an identifiable class. Nonetheless, I reject their arguments. The evidence that they each deducted a Collateral Benefit from one insured is some basis in fact that they deduct those Collateral Benefits from other insureds.

### *Allstate*

[69] Allstate argues that there is no evidence of a single Allstate policyholder who is a member of the proposed class, and that therefore the Plaintiff has failed to satisfy the identifiable class criterion in relation to Allstate. Mr. Gallant, the only affiant insured with Allstate, never had his weekly indemnity benefits reduced. He has, at all relevant times, received the maximum benefit of \$250 per week. The position of Allstate appears to misapprehend the test for an identifiable class. Nonetheless, I reject Allstate's argument. Allstate's correspondence with Mr. Gallant shows that Allstate deducted Mr. Gallant's LTD Benefits from the calculation of Weekly Indemnity Payments. This is some evidence that Allstate

deducts LTD Benefits in calculating the Weekly Indemnity Payments for other insureds in Nova Scotia.

***Overbroad?***

[70] The Defendants assert that the proposed class definition is overbroad because:

(1) it includes all persons who have had the Weekly Indemnity Payments reduced due to the receipt of Collateral Benefits, even those whose Weekly Indemnity Payments did not fall below the maximum benefit of \$250/week; and

(2) it includes all persons who received a Weekly Indemnity Payment from one of the Defendants “since April 2007,” and therefore includes putative class members whose claims are limitations barred: Defendants’ Brief at para.69.

[71] The Defendants rely on *Hollick*, where the court explained that “there must be some showing ... that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue”: at para.21 (emphasis in original).

***Only Those Class Members Whose Weekly Indemnity Benefits Fell Below \$250/Week***

[72] I agree with the Defendants that the class definition should be amended to include only those persons whose Weekly Indemnity Payments fell below \$250/week due to the deduction of Collateral Disability Benefits.

***The Limitation Period***

[73] I will now consider the Defendants' limitations argument.

[74] The applicable limitation period is one year, as dictated by s.145 of the *Insurance Act* and by the *Automobile Insurance Contract Mandatory Conditions Regulations*.

[75] Section 145 of the *Insurance Act* provides as follows:

Every action or proceeding against an insurer under a contract with respect to insurance provided under Section 139 or 140 shall be commenced within the limitation period specified in the contract but, in no event, shall this be less than one year after the happening of the accident.

[76] The *Automobile Insurance Contract Mandatory Conditions Regulations* provide as follows:

Every action or proceeding against the Insurer for the recovery of a claim under this section shall be commenced within one year from the date on which the case of action arose and not afterwards.

[77] The Plaintiff chose April of 2007 as the temporal limit of the class definition to correspond with the ultimate 15 year limitation period in the *Limitation of Actions Act*, S.N.S. 2014, c.35.

[78] The Defendants assert that the causes of action arising prior to May 4, 2021, more than one year before the Statement of Claim was filed, are statute-barred.

[79] A claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn: *Grant Thornton LLP v. New Brunswick*, [2021] 2 S.C.R. 704 at paras. 29 and 42. The material facts that must be actually or constructively known are that the injury, loss or damage occurred; that the injury, loss or damage was caused by or contributed to by an act or omission; and that the act or omission was that of the defendant: *Grant Thornton* at para.43. A plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence: *Grant Thornton* at para.44.

[80] The Defendants argue that, in the circumstances of this case, where the cause of action is breach of contract, the contract language is standardized and provided for by statute, and the triggering event for the cause of action was the Defendants' reduction of Class Members' Weekly Indemnity Benefits on account of their receipt of Collateral Disability Benefits, bringing the payments below \$250 per week, each Class Member, exercising reasonable diligence, ought to have discovered his or her claim when the Collateral Benefits deduction was made from their Weekly Indemnity Payments, bringing their payments below \$250/week. At that time, each ought to have known that a loss occurred and that the loss was

caused by their insurer. This was sufficient to draw the plausible inference that the insurer had breached the Section B Contract, which is provided for by statute.

There was nothing else to discover.

[81] The Defendants argue that this case is analogous to cases such as *Graham v. Impark*, 2010 ONSC 4982 (an action challenging parking violation fees, where the claim ought to have been discovered as of the date that the class member received a demand that asserted the defendant's right to claim the violation fee: see paras.160-161 and 166) and *Magill v. Expedia Canada Corporation*, 2010 ONSC 5247 at paras.73 and 77-79 (a claim challenging the billing practices of a website travel agency, where the claim ought to have been discovered when the class member made a hotel reservation), and not a case where the resolution of limitations and discoverability issues would require individualized inquiries. The Defendants say that resolution of the limitations issue does not depend on a factual inquiry about when each class member knew or ought to have known the facts constituting the action.

[82] I agree with the Plaintiff that, absent exceptional circumstance, limitations issues should generally not be addressed at certification: see *Godfrey v. Sony Corp.*, 2017 BCCA 302 at para.67, aff'd in *Pioneer Corp. v. Godfrey*, 2019 SCC 42. Because an inquiry into discoverability will be part of the limitations argument

and because that inquiry must typically be done individual by individual, a limitations defence should generally be addressed as part of the individual trials following a common trial: see *Cloud v. Canada (A.G.)*, [2004] O.J. No.4924 (Court of Appeal) at para.6. I am not persuaded that this is an exceptional case. The alleged breaches are not as obvious and immediate as they were in *Graham v. Impark* or *Magill v. Expedia*. Moreover, in this case, no defences have been filed, and the Plaintiff has therefore not had the opportunity to consider amending its Statement of Claim in response to a limitations defence having been raised.

***Conclusion re: Identifiable Class***

[83] The Plaintiff has met the “some basis in fact” standard for demonstrating that there is an identifiable class of two or more persons that would be represented by a representative party as follows:

1. all persons who carried a policy of automobile insurance with one of the Defendants in Nova Scotia, and
2. who have received weekly payments for loss of income (“Weekly Indemnity Payments”) under *Section B – Mandatory Accident Benefits of the Standard Automobile Policy (S.P.F. No.1)* for Nova

Scotia (“the Section B Contract”) with the Defendants since April 2007, and

3. who have had their Weekly Indemnity Payments reduced due to the receipt of one or more of the following “Collateral Disability Benefits”:

- (a) disability benefits received from an insurance company for which he/she personally paid insurance premiums in whole or in part (“LTD Benefits”), and

- (b) Employment Insurance Disability Benefits (“EI Disability Benefits”) and

4. whose Weekly Indemnity Benefits fell below \$250/week due to the deduction of Collateral Disability Benefits.

**Claims of the Class Members Must Raise a Common Issue [s.7(1)(c) of the *Act*]**

***The Test***

[84] Common issues are defined under s.2(e) of the *Act* as:

- (i) common but not necessarily identical issues of fact, or
- (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[85] The underlying question in determining commonality is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis: *Capital District Health Authority v. Murray*, 2017 NSCA 28 at para.45, citing *Pro-Sys* at para.108.

[86] The principles for determining whether issues are common are:

1. The commonality question should be approached purposively.
2. An issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim.
3. It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
4. It is not necessary that common issues predominate over non-common issues. However, the class members’ claims must share a substantial ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
5. Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

*Pro-Sys* at para.108, citing *Dutton* at paras.39-40

[87] The common success requirement must not be applied inflexibly:

*Del’Aniello v. Vivendi Canada Inc.*, 2014 SCC 1 at para.45, citing *Rumley v.*

*British Columbia*, 2001 SCC 69 at para.32. A common question can exist even if the answer given to the question might vary from one member to another:

*Del’Aniello* at para.45. Therefore, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members: *Del’Aniello* at para.45. However, success for one member must not result in failure for another: *Del’Aniello* at para.45.

### ***The Proposed Common Issues***

[88] Only the breach of contract claim and the discrete breach of the duty of good faith claim at para.30 on p.12 of the Statement of Claim have met the cause of action stage of the certification test. The proposed common issues related to the other causes of action, including the claim of “bad faith”, and the proposed common issue related to punitive damages, which are claimed as a remedy for the breach of the duty of good faith, must therefore fail.

[89] I will only consider the proposed common issues that the Plaintiff placed under the heading “Breach of Contract” and “Aggregate Damages,” which are as follows:

*A. Breach of Contract*

- (i) Are “Collateral Disability Benefits” received by Class Members “payments for loss of income from employment” under the meaning of the Section B policy of insurance?
- (ii) Did the Defendants have a uniform policy or practice of deducting “Collateral Disability Benefits” from weekly indemnity payments payable to Class Members? [the breach of the duty of good faith claim]
- (iii) If the answers to questions (i) and (ii) are yes, do such deductions constitute a breach of the insurance policy?

...

*D. Aggregate Damages*

- (i) Can damages of Class Members be determined, in whole or in part, on an aggregate basis? If so, by which methodology should damages be determined, and in what amount?

***Caution: Focus is on Commonality, not Whether the Acts Alleged Occurred***

[90] The Defendants say that there is no basis in fact for the common issues, arguing in part as follows: (1) the Plaintiff claims against them severally, and evidence of one Defendant’s approach to deductibility is not evidence of any other Defendant’s approach; (2) the Plaintiff has advanced no evidence whatsoever that the Defendants took a common approach to the deductibility of Weekly Indemnity Benefits; and (3) the evidence of the Plaintiff’s affiants only show the following:

- Only two Defendants were shown to have deducted CPP Disability Benefits from Weekly Indemnity Payments: Security National and CAA. There is no evidence that those Security National or CAA deducted any other Collateral Benefits.
- There is evidence that two of the Defendants do not deduct CPP Disability Benefits: (1) Portage La Prairie and (2) The Personal.
- There is no evidence as to how the remaining eight Defendants handle CPP Disability Benefits.
- Only five Defendants were shown to have deducted EI Disability Benefits from Weekly Indemnity Payments: Wawanesa, Royal & Sun Alliance, Travelers, Economical and Co-Operators. There is no evidence that Wawanesa deducted any Collateral Benefits other than EI Disability Benefits. The other four also deducted LTD Benefits, but there is no evidence that they deducted CPP Disability Benefits.
- There is no evidence as to how the remaining seven Defendants handle EI Disability Benefits.

- Only nine Defendants deducted LTD Benefits: Royal & Sun Alliance, Portage La Prairie, Intact, The Personal, Travelers, Allstate, Aviva, Economical, and Co-Operators. There is no evidence that Portage La Prairie, Intact or the Personal deducted any other Collateral Benefits.
- There is no evidence as to how the remaining three Defendants handle LTD Benefits.
- There is no evidence that any of the Defendants deducted all three Collateral Benefits. Six deducted only one Collateral Benefit. The other six deducted two.

[91] However, our Court of Appeal has recently confirmed that the focus of the analysis of s.7(1)(c) is on commonality, not whether the acts alleged occurred: see *Surette* (NSCA) at para.29, citing *Pro-Sys* at para.110 and *Murray* at para.45. The factual evidence required at this stage goes only to establishing whether the proposed questions are common to all the class members: *Surette* (NSCA) at para.29.

[92] As Rothstein J. stated in *Pro-Sys*, the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action, but rather it focuses on the form of the action

in order to determine whether the action can appropriately go forward as a class proceeding: at para.102. As a result, the outcome of a certification proceeding will not be predictive of the success of the action at the trial of the common issues: *Pro-Sys*. at para.105. The certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing her case at trial: *Pro-Sys*. at para.105. After an action has been certified, additional information may come to light calling into question whether the requirements of certification continue to be met: *Pro-Sys*. at para.105.

[93] In opposing certification of the proposed common issues related to the claim of breach of contract and deduction of LTD Benefits, the Defendants rely heavily on the affidavit evidence of Mr. Boucher. I must be very careful in assessing the evidence called by either the Plaintiff or the Defendants, and I must not veer into an evaluation of the merits of the claim, or the probative weight of the evidence said to support it, or the potential for success: *Wright Medical Technology Canada* at para.47. The question remains whether the Plaintiff has presented sufficient evidence to persuade the court that the conditions for certification have been met: *Wright Medical Technology Canada* at para.46.

***Deductibility of CPP Disability Benefits Already Determined***

[94] In the event that I was wrong to consider *Poulain* at the cause of action stage of the analysis, I will consider it at this stage in assessing whether the proposed questions relating to the deduction of CPP Disability Benefits are common to all class members.

[95] Resolution of the question of the lawfulness of deducting CPP Disability Benefits is not an issue, let alone a common issue, and will not materially advance the litigation, as our Court of Appeal has already determined that CPP Disability Benefits are “payments for loss of income from employment received by or available to such person under ... the laws of any jurisdiction,” and properly deducted in subparagraph (b) of the calculation of the Weekly Indemnity Payment.

***Deductibility of LTD Benefits Requires Individual Inquiries***

[96] There is no basis in the evidence to support Proposed Common Issue #1 as a common issue as it relates to the deductibility of LTD Benefits. The proposed class members in relation to LTD Benefits are those whose Weekly Indemnity Payments were reduced due to receipt of disability benefits received from an insurance company for which he/she personally paid insurance premiums in whole or in part. In order to determine whether such an individual’s LTD Benefits are “payments for loss of income from employment received by or available to such person under

... wage or salary continuation plans available to the person by reason of his employment” within the meaning of the Section B policy of insurance, the common issues judge will have to examine the relevant features of each individual class member’s LTD plan. Proposed Common Issue #1 depends on findings of fact that have to be made with respect to each individual claimant, and for that reason, it is not a common issue: see *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 at para.123, citing *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para.81.

[97] In coming to this conclusion, I rely on: (a) two decisions of the New Brunswick Court of Appeal which considered the deductibility of disability benefits provided by an insurance plan, (b) the evidence of the Plaintiff’s affiants whose LTD Benefits were deducted from their Weekly Indemnity Benefits, and (c) the evidence of Mr. Boucher about the variability of group insured LTD benefit plans.

[98] In *Hill v. Graham*, the New Brunswick Court of Appeal decided that the LTD payments at issue were payments in respect of loss of income under an income continuation benefit plan within the meaning of New Brunswick’s *Insurance Act* and therefore must be deducted from an award of damages in an action arising out of a motor vehicle accident. The Court took a “purpose-driven

approach” in determining whether the LTD payments were payments “in respect of loss of income”: at para.19. The Court relied on the fact that the plan at issue was an employer-sponsored group plan (at paras.3) and on the text of the policy (e.g. the definition of total disability and the calculation of the monthly benefit: at paras.19-21). The court had already reviewed the nature of the plan (an employer-sponsored group plan) and the plan terms when it moved on to the next question of whether the payments were payments “under an income continuation benefit plan”: at paras. 22-37.

[99] In *Sweet*, the New Brunswick Court of Appeal upheld the decision of the trial judge that disability benefits paid to Mr. Sweet under an insurance policy was not a wage or salary continuation plan available to the plaintiff by reason of his employment and therefore was not to be deducted from weekly indemnity benefits provided by the plaintiff’s automobile insurance policy (the equivalent to Nova Scotia’s Section B Contract). Mr. Sweet was a member of IBEW Local 502, a trade union. His disability benefits were paid pursuant to an insurance policy agreement between the Trustees of Saint John IBEW Local 502 Health, Welfare and Pension Plan and Excelsior Life Insurance Company: *Sweet v. Co-Operative Fire and Casualty Company* (1983), 42 N.B.R.(2d) 657 (Q.B.) at paras.4 and 7. The Court of Appeal considered the union’s objective in developing the insurance

arrangement and the details of the plan, including the eligibility provisions, how the premiums were paid, the involvement of the employer in the arrangement, the payment being a set amount as opposed to being based on Mr. Sweet's wages, and whether the policy was related to the contract of employment: at paras.4-12.

[100] See also:

- *McLean v. Portage La Prairie Mutual Insurance Company*, 2018 NSSC 110 at paras.28-36, where the Honourable Justice Denise Boudreau considered the provisions of the *Workers' Compensation Act* describing Extended Earnings Replacement Benefits in determining that those benefits were payments "for loss of income from employment" and must be deducted in the Weekly Indemnity Payment calculation: at paras. 28-36; and
- *Roach v. Nordic Insurance Company of Canada*, 2023 NSSC 342, where the Honourable Justice Patrick Murray followed the decision in *McLean* and reviewed several sections of the *Workers' Compensation Act* dealing with Extended Earnings Replacement Benefits to find that Extended Earnings Replacement Benefits were deductible from the plaintiff's Section B benefits: at paras.14-18.

[101] There is no evidence that the relevant features of the LTD Plans held by class members are similar across the class. Rather, the evidence of the Plaintiff's affidavits about their LTD plans, where it is available, demonstrates that class members' plans vary:

- At the time of her accident, Ashley Byrne was employed full time as an Enforcement Assistant Office with the Nova Scotia Department of Justice, Maintenance Enforcement Division. According to her affidavit, she had an LTD policy with Manulife, a "private policy of insurance" that she "had been paying into for some time previously." In cross-examination, she confirmed that the Manulife LTD Plan is a plan that she has through her work. Ms. Byrne's LTD Benefits are fully taxable, and she is required by her union, the Nova Scotia Government and General Employees Union, and Manulife to contribute to her pension while she is in receipt of LTD Payments.
- Andrea Skeet's LTD Plan was with Manulife, for which she paid premiums for many years before her accident. Manulife informed her in a letter that if she had a wage plan (e.g. STD, LTD) "at work," she must use those benefits first.

- Dougalenes Bowman was employed as a receptionist for the Strait Regional Centre for Education at the time of her accident. Her LTD Plan was with Blue Cross. She had been “contributing to the payment of premiums” for many years before her accident.
- Christopher Gallant’s LTD Plan was with Canada Life that he had “paid into.” The LTD Plan was available to him as a group benefits plan through his employment with Credit Union Atlantic.
- At the time of Catherine Old’s accident, she was a unionized employee with Homes for Independent Living, and a member of the Nova Scotia Union of Public and Private Employees. Her LTD Policy was with Blue Cross, and was a group policy provided through her employer. She had been contributing to the plan for many years before her accident.
- At the time of Joan Baker’s accident, she was a CCA with the Nova Scotia Health Authority. Her LTD Benefits were provided by Manulife through her employer. She contributed to the LTD plan.
- Paula Avery was employed as a teacher at the time of her accident. Her LTD Plan is a “private policy of insurance” that she pays into. She did not qualify for LTD Benefits.

- Trudy DeMone was employed as a Continuing Care Assistant at Harbour View Haven at the time of her accident. She had an LTD policy that she “had been paying into [herself].” The policy was provided through her workplace.
- Nathan Barnard was employed as a driver with Farmers Cooperative Dairy Limited at the time of his accident. He received LTD Benefits from “a private policy of insurance that [he] had been paying into.”

[102] The uncontradicted evidence of Mr. Boucher is that Group Insured Disability Plans vary in many ways. Not all variations set out in Mr. Boucher’s Affidavit are necessarily relevant to the determination of the deductibility of LTD Benefits from Weekly Indemnity Benefits. But some are, given the factors relied on by the court in *Hill v. Graham* and *Sweet*. For example, Group Insured Disability Plans are offered by various types of organizations, including employers, unions, professional associations, and jointly-managed trust programs (typically employers and unions): Affidavit of Mr. Boucher, paras.11, 14 and 18. While the baseline component for most Group Insured Disability Benefits is a flat or tiered percentage of pre-disability income, a fixed benefit amount unrelated to pre-disability income level is sometimes used in high risk industries where there is variable income, such as in construction and seasonal work (like the situation in

*Sweet*), or in industries where commissions constitute a significant component of employee income: Boucher Affidavit at para.51. Sometimes premiums are funded entirely by employees in employer-sponsored Group Insured Disability Plans, given the tax implications: if premiums are funded to any extent by the employer, the disability benefits will be fully taxable in the hands of the employee, whereas if the premiums are funded entirely by the employees, the disability benefits will be non-taxable in the hands of the employee: Boucher Affidavit, para.37.

[103] The Plaintiff argues at para.73 of her Rebuttal Brief that “[t]he proper inquiry is whether it was lawful to adopt a blanket deduction policy absent any contract-specific analysis.” This is not how Proposed Common Issue #1 is framed. The question as framed is whether LTD Benefits are wage or salary continuation plans available to the person by reason of his employment within the meaning of the Section B policy of insurance. As acknowledged by Plaintiff counsel in oral argument, the class action will not be successful unless the court finds that the deductions are unlawful. Thus, the first question is whether the deductions were unlawful, not whether it was lawful to adopt a blanket deduction policy.

[104] The Plaintiff argues that “[a] common issues judge can determine under what circumstances, if any, it was lawful for the Defendants to make the deductions”: Plaintiff’s Brief, para.74. I interpret this to mean that the common

issues judges can determine, in the abstract, without regard to the relevant features of any individual class member's LTD plan, when it is lawful or unlawful to deduct LTD Benefits. Answering the question in the abstract will not move the litigation forward or avoid duplication of fact-finding or legal analysis.

Determining whether a class member's LTD Benefits are "payments for loss of income from employment received by or available to such person under ... wage or salary continuation plans available to the person by reason of his employment" within the meaning of the Section B policy of insurance will require individualized inquiries.

[105] The lawfulness of the deductibility of LTD Benefits cannot be decided on a class-wide basis based on common evidence. Proposed Common Issue #1 as it relates to LTD Benefits is not a common issue.

[106] This leaves the issue of whether the proposed questions regarding the deductibility of EI Disability Payments are common issues.

***Deductibility of EI Disability Payments – Common Issues***

[107] As I will explain, the Plaintiff has shown "some basis in fact" that the following questions relating to the deduction of EI Disability Benefits, which I have reworded, are common to all class members:

***Common Issue #1***

1. Are EI Disability Benefits received by Class Members “payments for loss of income from employment received by or available to such person under ... wage or salary continuation plans available to the person by reason of his employment” within the meaning of the Section B Contract?

***Common Issue #2***

2. If the answer to Question #1 is no, are EI Disability Benefits “payments for loss of income from employment received by or available to such person under ... the laws of any jurisdiction” within the meaning of the Section B Contract?

***Common Issue #3***

3. If the answers to question #1 and question #2 are both no, do such deductions constitute a breach of the Section B Contract?

***Common Issue #4***

4. If the answers to Question #1 and Question #2 are both no, did the Defendants have a uniform policy or practice of deducting EI

Disability Benefits from weekly indemnity insurance payments payable to Class Members?

***Common Issue #5***

5. If the answers to Question #1 and Question #2 are both no, and the answer to Question #4 is yes, did the Defendants thereby breach the duty of good faith?

*Only EI Disability Benefits at Issue*

[108] All common issues only refer to the deduction of EI Disability Benefits.

*Common Issue #1 – Reworded to Reflect the Alleged Breach of Contract*

[109] Common Issue #1 should be reworded from what was proposed by the Plaintiff to reflect the alleged breach of contract in the Statement of Claim, which is that the Defendants breached the terms of the Section B Contract by deducting Collateral Disability Benefits from class members' Weekly Indemnity Payments because Collateral Disability Benefits are not "wage or salary continuation plans available to the person by reason of his employment".

*Common Issue #2 – Added to Address "the laws of any jurisdiction"*

[110] Common Issue #2 must be added as a question because, even if EI Disability Benefits are not “payments for loss of income from employment received by or available to such person under ... *wage or salary continuation plans available to the person by reason of his employment*” within the meaning of the Section B Contract, they may be deductible as “payments for loss of income from employment received by or available to such person under ... *the laws of any jurisdiction*” (emphasis added).

*Common Issue #3 – Breach of Contract*

[111] If EI Disability Benefits are found to be neither “payments for loss of income from employment received by or available to such person under ... wage or salary continuation plans available to the person by reason of his employment” nor “payments for loss of income from employment received by or available to such person under ... the laws of any jurisdiction,” then the Court must go on to answer the question of whether the deduction of EI Disability Benefits in the calculation of Weekly Indemnity Payments is a breach of the Section B Contract.

*Common Issue #4*

[112] Common Issue #4 reflects the claim that the Defendants systematically deduct Collateral Disability Benefits, now narrowed down to EI Disability Benefits, from Weekly Indemnity Payments.

*Common Issue #5*

[113] It is necessary to add the question in Common Issue #5 because, if the Plaintiff establishes that the Defendants systematically deducted EI Disability Benefits from Weekly Indemnity Payments, the Court will have to go on to determine whether such conduct amounted to a breach of the duty of good faith.

*Some Basis in Fact Standard Met*

[114] There is some basis in fact to support these five questions as being common to all class members because:

- Automobile insurance in Nova Scotia is mandatory.
- All drivers must have a *Standard Automobile Policy (S.P.F. No.1)*.
- All of the Defendants are providers of automobile insurance in Nova Scotia.

- All of the Defendants provide automobile insurance coverage to insured drivers pursuant to the same *Standard Automobile Policy (S.P.F. No.1)*.
- Pursuant to s.140 of the *Insurance Act*, the *Standard Automobile Policy (S.P.F. No.1)* must include the Section B Contract.
- The Section B Contract is worded identically for all insureds.
- EI Disability Benefits are governed by statute.
- The *obiter* comments of the court in *Humphreys* suggest that EI Disability Benefits are payments for loss of income from employment received or available to such person under “The laws of any jurisdiction” within the meaning of the Section B Contract.
- Five of the Defendants (Wawanesa, Royal & Sun Alliance, Travelers, Economical and Co-Operators) have deducted EI Disability Benefits from gross weekly income from employment in determining the amount of the Weekly Indemnity Payments.

***Revision to Class Definition***

[115] The class definition must therefore be refined as follows to reflect the common issues that are certifiable:

1. all persons who carried a policy of automobile insurance with one of the Defendants in Nova Scotia, and
2. who have received weekly payments for loss of income (“Weekly Indemnity Payments”) under *Section B – Mandatory Accident Benefits of the Standard Automobile Policy (S.P.F. No.1)* for Nova Scotia (“the Section B Contract”) with the Defendants since April 2007, and
3. who have had their Weekly Indemnity Payments ***reduced due to the receipt of Employment Insurance Disability Benefits***, and
4. whose Weekly Indemnity Benefits fell below \$250/week due to the deduction of Employment Insurance Disability Benefits.

### ***Aggregate Damages***

[116] The Plaintiff proposes the following common issue related to the calculation of aggregate damages:

Can damages of Class Members be determined, in whole or in part, on an aggregate basis? If so, by which methodology should damages be determined, and in what amount?

[117] In order to determine if such a loss-related issue meets the “some basis in fact” standard, some assurance is required that the question is capable of resolution on a common basis: *Pro-Sys* at para.114. The proposed expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement: *Pro-Sys* at para.118.

[118] As stated by the former Chief Justice Winkler et al in *The Law of Class Actions in Canada* (2014, Canada Law Book), at page 266, cited by the Honourable Justice Denise Boudreau in *Murray v. East Coast Forensic Hospital*, 2015 NSSC 61 at para.95:

Thus, an aggregate assessment of monetary relief may only be certified as a common issue where resolving the other certifiable common issues could be determinative of monetary liability and where the quantum of damages could reasonably be calculated without proof by individual class members. In circumstances where the assessment of damages is necessarily idiosyncratic to individual members of the class and where an element of liability cannot be determined without the evidence of individual class members, the issue of damages is not common and an aggregate assessment of damages is not appropriate.

[119] The Plaintiff relies on the expert report of Matthew Krofchick, in which Mr. Krofchick proposes a formula for the calculation of aggregate damages. However, as is evident from his report and his cross-examination, Mr. Krofchick's proposed formula does not advance a methodology by which aggregate damages can be quantified. Rather, his proposed formula requires individual information about each individual class member. His proposed formula then totals up information from individual class members.

[120] Mr. Krofchick gave the following answers in cross-examination:

Q. And so if I understand correctly, having gone through all of those steps and having worked through the formula, this formula only helps us to calculate the amount of loss that might have been suffered by an individual class member. Correct?

A. This formula can be applied to all, all class members.

Q. But individually, correct?

A. That's correct, yes.

Q. And so if we wanted to calculate the loss suffered by class members as a whole, first we would need to know who those class members are. Correct?

A. Correct.

Q. And then we would take their individual information and individually apply it to your formula in the circumstances of each individual class member. Correct?

A. That's correct.

Q. And then if we add up all the results from those individual applications of your formula, we would then be able to potentially calculate Class [wide] damages. Correct?

A. That's correct.

Q. But in and of itself, the formula you've presented doesn't calculate Class damages. Correct?

A. The formula that I have presented is the basis for calculating the total damages.

Q. It is the basis for calculating Class damages, but it does not calculate Class damages. Correct?

A. No, it does not total the amount.

Q. And so then to return back to one of my earlier questions, I just want to make sure we're still on the same page here, Mr. Krofchick, based on your suggested methodology and formula, it is clear that we still require evidence or information about each individual class member. Correct?

A. That is correct.

Q. Otherwise, you don't have the appropriate information to plug into the formula that you have presented to the court. Correct?

A. That's correct.

[121] In re-direct, Mr. Krofchick confirmed as follows: "So in order to calculate [...] the total aggregate amount, you would need to perform this formula for each individual member, [...] for each individual plaintiff who had a reduction in their Section B benefits due to the Collateral Benefits outlined. And then you would just total the sum of all of those individuals in order to get the complete list of damages."

[122] Mr. Krofchick's formula therefore does not allow for the calculation of damages on a class-wide basis.

[123] The Plaintiff has failed to establish a basis in fact that aggregate damages is a common issue, as damages cannot be established on a class-wide basis.

**A Class Action Must Be the Preferable Procedure [s.7(1)(d) of the *Act*]**

[124] I have determined that there are five common issues relating to the legality of deducting EI Disability Benefits from gross weekly income from employment in determining the amount of the Weekly Indemnity Payment.

[125] A class action must be the preferable procedure for the resolution of these common issues.

[126] Subsection 7(2) of the *Act* sets out factors that the court must consider determining whether a class proceeding is preferable for the fair and efficient resolution of the dispute:

- 7(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
  - (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
  - (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
  - (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
  - (d) whether other means of resolving the claims are less practical or less efficient;

- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
- (f) any other matter the court considers relevant.

[127] In addition, s.10 of the *Act* states that the court shall not refuse to certify a class proceeding by reason only that:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members;
- (d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[128] In order to determine whether a class proceeding would be the preferable procedure for the resolution of the common issues, the common issues have to be considered in the context of the action as a whole and the court must take into account the importance of the common issues in relation to the claims as a whole: *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 at para.21, citing *Hollick* at para.30. In comparing possible alternatives with the proposed class proceeding, the court should adopt a practical cost-benefit approach, and consider the impact of a class proceeding on class members, the defendants and the court: *Fischer* at para.21, citing *Hollick* at para.29.

[129] The preferability inquiry has to be conducted through the lens of the three principal goals of class actions: judicial economy, behaviour modification and access to justice: *Fischer* at para.22, citing *Hollick* at para.27. This does not mean that Ms. Bowman must prove that the proposed class action will *actually* achieve these goals: *Fischer* at para.22. Rather, the preferability inquiry is a comparative exercise: *Fischer* at para.23. The court has to consider the extent to which the proposed class action may achieve the three goals of class proceedings, but the ultimate question is whether other available means of resolving the claim are preferable, not if the class action would fully achieve the three goals: *Fischer* at para.23.

[130] In conducting the preferability analysis, the court must identify all reasonably available means of resolving the class members' claims, both court procedures and non-court procedures: *Fischer* at para.35.

[131] The Plaintiff must show some basis in fact for the following: (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim; and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Fischer* at para.48, citing *Hollick* at paras.28 and 31.

### *Access to Justice*

[132] A class action will serve the goal of access to justice if: (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered: *Fischer* at para.26, citing *Hollick* at para.33. The court may ask a series of questions in order to determine whether both of these elements are present:

1. What are the barriers to access to justice?
2. What is the potential for the class proceeding to address those barriers?
3. What are the alternatives to class proceedings?
4. To what extent do the alternatives address the relevant barriers?
5. How do the two proceedings compare?

*Fischer* at paras.26-38.

#### *What Are the Barriers to Access to Justice?*

[133] The barrier to access to justice in this case is an economic one. An individual action to recover a deduction of EI Disability Benefits from Weekly Indemnity Benefits would involve a modest claim. Given the modest amount involved, there is some basis in fact for the conclusion that individual claims are not viable to litigate individually: see *Fischer* at para.50.

*What is the Potential of the Class Proceeding to Address That Barrier?*

[134] The proposed class action has the potential to make it economically feasible to advance on behalf of the class a group of individual claims that would otherwise not be economically feasible to pursue, and it would provide class members with a fair process to resolve their claims: *Fischer* at para.50.

*What Are the Alternatives to Class Proceedings?*

[135] The only two reasonably available alternatives to a class proceedings identified by the parties are: (1) individual actions and (2) a declaration or the determination of a question of law in a test case.

[136] The Defendants raised the possibility of a complaint to the Superintendent of Insurance under the *Insurance Act* when they discussed whether a class proceeding would further the objective of behaviour modification. To the extent that the Defendants might have also suggested that such a complaint was a reasonably available alternative to a class proceeding, I reject that suggestion. The Defendants adduced no evidence that such a complaint would provide class members with substantive access to justice, that is, that a regulatory complaint would provide class members with a just and effective remedy for their claims: see *Crotty* at para.156.

Individual actions

[137] The Defendants assert that there is no access to justice problem with individual actions for the following reasons:

- There are four reported decisions in Nova Scotia involving insureds suing their Section B insurers for denying or terminating their Weekly Indemnity Benefits: *Dugas-Mattatall*, *Humphrey*, *McLean* and *Roach*.
- All of the Plaintiff's twelve witnesses are or were represented by counsel with respect to their tort claims, and ten of those witnesses confirmed in cross-examination that this representation includes or included representation with respect to their Section B benefits (the other two were not asked the question in cross-examination).
- Three of the twelve witnesses have started actions against their Section B insurers (Catherine Old, Joan Baker and Paula Avery).
- Mr. Ford confirmed in cross-examination that he represents clients in respect of their Section B matters when he accepts a retainer from a client who has been involved in a motor vehicle accident.

- Class members could be made whole for their loss of income by pursuing the Section A insurer in their tort claim.

[138] For the following reasons, I reject the Defendants' assertion that there is no access to justice concern with individual actions:

- *Dugas-Mattatall, Humphrey, McLean and Roach* concerned a complete denial or termination of the insured's Weekly Indemnity Benefits, as do the actions filed by Ms. Old and Ms. Baker.
- While Ms. Avery's claim appears to concern her insurer's deduction of EI Disability Benefits from her Weekly Indemnity Payments, she has not, as yet, pursued that claim to trial and to final resolution.
- There is no reported decision in which an insured brought to trial a claim challenging a reduction in their Weekly Indemnity Payments due to a deduction of a collateral benefit such as EI Disability Benefits (as compared to a complete denial or termination of Weekly Indemnity Benefits) from their Weekly Indemnity Payments.
- Access to justice has both a procedural and substantive component: *Fischer* at para.25. A process may be fair but nonetheless not offer a real

opportunity to recover compensation for all of the losses suffered:

*Fischer* at para.25. The fact that some of the affiants had lawyers for their tort claims who assisted with their Section B claims, or even that some of them have filed actions against their Section B insurers, does not change my conclusion that there is some basis in fact for the Plaintiff's assertion that individual claims are impractical to litigate and that individual class members face an economic barrier in recovering compensation for all their losses.

- Not all those insureds who would experience a reduction in their Weekly Indemnity Payments due to a deduction of EI Disability Benefits would have tort claims. Section B benefits are no-fault benefits.

Test Case/Determination of a Question of Law

[139] *Dugas-Mattatall, McLean and Roach* involved a determination of a question of law concerning the legality of a deduction from Weekly Indemnity Benefits.

[140] The Defendants argue that the result achieved by a trial of the common issues in this class action would accomplish no more for the members of the class, but with much greater complexity, than a declaration or a question of law pursued

as a test case: see *Tiemstra v. Insurance Corp. of British Columbia*, 1997 CanLII 4094 (BCCA) at para.14.

[141] *Tiemstra* is distinguishable. In that case, if the plaintiffs were successful, it would have only resulted in a declaration that the insurer was required to assess each claim on its individual merits. In this case, the common questions would resolve the contractual breach issue and the duty of good faith claim for all class members.

[142] I reject the Defendants' argument that a declaration or a determination of a question of law pursued as a test case would address the access to justice concern, for the following reasons:

- As discussed, there is some basis in fact to conclude that it would not be economical for any one person to pursue a claim to challenge a deduction of EI Disability Benefits from their Weekly Indemnity Payments.
- The Defendants have not suggested that they would indemnify such an individual for the costs required to prosecute such a test case: see *Manuge v. R.*, 2008 FC 624 at para.28.

- None of the Defendants undertook to be bound by the outcome of a successful test case, which would be pursued against one insurer: see *Manuge* at para.29.
- There is therefore no guarantee that any of the Defendants would abide by the outcome of such a test case in relation to any of their other insureds: see *Manuge* at para.30.
- Even if the Defendants had agreed to be bound by the outcome of such a test case and even if there was some way of enforcing that agreement, the Defendants have not explained how the assessment of damages of individual class members would be adjudicated: see *Manuge* at para.47.

How Does the Class Proceeding Compare to the Alternative Proceedings?

[143] If the alternative proceedings were to be pursued – either individual actions or a test case – the access to justice barrier would be left in place: see *Fischer* at para.38, citing *Hollick* at para.33.

### ***Behaviour Modification***

[144] The goal of deterring or modifying wrongful behaviour is not engaged in this case. The *obiter* comment of Justice Beveridge, as he then was, in *Humphrey*

suggests that the deduction of EI Disability Benefits is lawful in Nova Scotia. The Plaintiff's assertion that the Defendants have "chosen to disregard" appellate case law addressing the legality of these deductions (at para.121 of the Plaintiff's Brief) is not accurate.

### ***Judicial Economy***

[145] Judicial economy will be enhanced if the issue of the legality of deducting EI Disability Benefits from Weekly Indemnity Payments is determined in one proceeding. Having a single trial to decide the common issues, rather than have many legal proceedings to determine the same common issue, would promote judicial economy.

[146] However, preferability must be assessed in the context of the action as a whole. Consideration of the remaining statutory factors will assist this assessment.

### ***Whether questions of fact or law common to the class members predominate over any questions affecting only individual members (s.7(2)(a))***

[147] The common issues capable of certification will not necessarily predominate over questions affecting individual members. If EI Disability Benefits are not lawfully deducted, several issues will remain to be determined for each individual class members:

- whether the individual class member's claim is limitations-barred (the proposed class definition includes claims going back to April of 2007),
- whether the individual was made whole in their Section A claim and therefore suffered no compensable loss (eight of the affiants have settled their Section A claims),
- whether the individual signed a release of their Section B claim (one of the affiants settled their Section B claim and signed a release), and
- individual assessment of damages.

[148] Even though these individual issues would remain, resolution of the common issues would advance the litigation.

***Whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings [s.7(2)(b)]***

[149] Two of the affiants who have commenced litigation against their Section B insurers had EI Disability Benefits deducted from their Weekly Indemnity Payments: Catherine Old and Paula Avery. I cannot conclude, on the basis of the record before me, that a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings.

***Whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings [s.7(2)(c)]***

[150] The deductibility of EI Disability Benefits was addressed by the Nova Scotia Supreme Court in *obiter* in *Humphrey*, suggesting that these collateral benefits are properly deducted as part of the calculation of Weekly Indemnity Benefits at subparagraph (b).

***Whether other means of resolving the claims are less practical or less efficient [s.7(2)(d)]***

[151] For the reasons already discussed, other reasonably available means of resolving the claims would be less practical and less efficient.

***Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means [s.7(2)(e)]***

[152] In my view, and having adopted a practical cost-benefit approach, the administration of the class proceedings would not create greater difficulties than those likely to be experienced if individual class members pursued individual claims or if an individual class member pursued a test case and then individual class members pursued individual claims for damages based on a successful test case.

***Conclusion re: Preferability***

[153] Having considered the goals of access to justice, behaviour modification and judicial economy, I conclude that the Plaintiff has met the “some basis in fact” standard for establishing that a class action is the preferable procedure for resolving the issue of the deductibility of EI Disability Benefits from Weekly Indemnity Payments. There is some basis in fact for concluding that a class proceeding would be a fair, efficient and manageable method of advancing the claim and that it would be preferable to any other reasonably available means of resolving the class members’ claims.

**Appropriate Litigation Plan and Proposed Representative Plaintiff [s.7(1)(e) of the *Act*]**

***Litigation Plan***

[154] The proposed Litigation Plan is attached to the Affidavit of Mr. Ford. The proposed Litigation Plan meets the “some basis in fact” standard for the requirement that the plan set out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, but must be modified as follows:

- The wording of the common issues must be amended to reflect this decision.

- Any reference to the assessment of aggregate and punitive damages as common issues will be removed.
- Paragraph 3 of the proposed Litigation Plan must be deleted, as the costs of the providing the Notice of Certification shall be borne by the Plaintiff at this time, subject to recovery at the end of the litigation if the Plaintiff is successful: see the decision of Justice Norton in *Surette* at para.89.
- The proposed Litigation Plan, including the deadline set out in paragraph 4 (for the Defendants to provide a list of all known class members, including their last known address and contact information) and the deadline set out in paragraph 10 (for the filing of any amended pleadings) will be subject to modification by the court during case management throughout the course of the proceeding.

***Appropriate Representative Plaintiff***

[155] Ms. Bowman cannot adequately represent the interests of the class, as refined in these reasons. Ms. Bowman’s insurer deducted her LTD Benefits in calculating the amount of her Weekly Indemnity Benefits. She did not experience a deduction of EI Disability Benefits.

## **Conclusion**

[156] But for my conclusion that Ms. Bowman is not an appropriate representative plaintiff, I would have been prepared to allow the certification motion in part, defining the class as follows and approving the following five common issues:

### ***Class Definition***

1. all persons who carried a policy of automobile insurance with one of the the Defendants in Nova Scotia, and
2. who have received weekly payments for loss of income (“Weekly Indemnity Payments”) under *Section B – Mandatory Accident Benefits* of the *Standard Automobile Policy (S.P.F. No.1)* for Nova Scotia (“the Section B Contract”) with the Defendants since April 2007, and
3. who have had their Weekly Indemnity Payments reduced due to the receipt of Employment Insurance Disability Benefits, and
4. whose Weekly Indemnity Benefits fell below \$250/week due to the deduction of Employment Insurance Disability Benefits.

### ***Common Issue #1***

1. Are EI Disability Benefits received by Class Members

“payments for loss of income from employment received by or available to such person under ... wage or salary continuation plans available to the person by reason of his employment” within the meaning of the Section B policy of insurance?

***Common Issue #2***

2. If the answer to Question #1 is no, are EI Disability Benefits

“payments for loss of income from employment received by or available to such person under ... the laws of any jurisdiction” within the meaning of the Section B policy of insurance?

***Common Issue #3***

3. If the answers to question #1 and question #2 are both no, do

such deductions constitute a breach of the insurance policy?

***Common Issue #4***

4. If the answers to Question #1 and Question #2 are both no, did

the Defendants have a uniform policy or practice of deducting EI Disability Benefits from weekly indemnity insurance payments payable to Class Members?

***Common Issue #5***

5. If the answers to Question #1 and Question #2 are both no, and the answer to Question #4 is yes, did the Defendants thereby breach the duty of good faith?

[157] Before making my final determination, I will give class counsel one month from the date of this decision to notify the court and the Defendants in writing whether they wish to amend the motion to name someone else as the representative plaintiff. If the answer to that question is yes, I will reconvene the hearing to hear submissions from the parties as to whether class counsel should be permitted that opportunity, and if so, whether the alternative proposed representative plaintiff would fairly and adequately represent the interests of the class and whether they do not have, with respect to the common issues, an interest that is in conflict with the interests of the other class members. The issue of costs of this motion also remains to be determined.

Gatchalian, J.

Appendix "A"					
Decision on Motion to Strike Portions of Affidavit of Chuck Ford					
Page/	Content	Summary of Defendants' Position	Summary of Plaintiff's Position	Decision	Reasons

Para. of the Affidavit					
p.2, para.5	Valent Legal represents people injured in car accidents. Based on the number of lawyers employed at Valent Legal, the number of clients it represents, and my communications with lawyers at other law firms in Nova Scotia who also represent people injured in car accidents in Nova Scotia, I believe that we have less than 5% of the market share of clients who have brought a claim in Nova Scotia relating to a car accident.	Speculative, argument, hearsay.	Not relied on for its truth but to show some basis in fact that “there is an identifiable class that extends beyond those individuals who produced affidavits for certification.”	Not struck.	This evidence is relevant to the identifiable class criterion. It is not speculative or argument, but an estimate. The sources of the hearsay (lawyers at other law firms in Nova Scotia), though not named, are reliable and credible.
p.2, para.6	I am advised by Mike Dull and believe it to be true that Valent Legal has approximately two dozen clients who would fall within the class definition in this proceeding. I am further advised by Mike Dull that each of these clients have expressed an interest to Mr. Dull in becoming class members in this proposed class proceeding. Based on the information contained in	Speculative, argument, and improper for lawyer to appear as advocate where the lawyer is the source of the information on an important and contentious matter, even where the lawyer is not the deponent: see <i>Gutierrez v. The Watchtower</i>	Not relied on for its truth but to show some basis in fact that there is an identifiable class and that a class proceeding is the preferable procedure.	Not struck.	This evidence is relevant to the identifiable class and preferability criteria. Although the evidence is controversial, the Court is not required to resolve conflicting evidence on this certification motion. The standard to be met on a certification motion is low: some basis in fact. While the sources of the information (the approximately two dozen clients) are not named, several

	paragraph 5 above, I believe that the Valent Legal class members would represent a small percentage of the number of class members that exist in Nova Scotia.	<i>Bible and Tract Society of Canadas</i> , 2019 ONSC 3069 at para.37.			of Valent Legal's clients have filed affidavits in support of this certification motion, and are therefore known and were cross-examined.
Pages 2-3, para 7	Depending on timing, approximately 55-70% of my practice involves representing Nova Scotians injured in car accidents, inclusive of accident benefits claims. In my experience, it is standard for persons in receipt of weekly indemnity benefits from their Section B insurer to have those benefits reduced by collateral benefits the disabled person receives from other policies of insurance (such as LTD, CPP Disability and/or EI sickness benefits).	Speculative, argument.	Not relied on for its truth but to show that there is an identifiable class and that a class proceeding is preferable	Not struck.	This evidence is relevant to the identifiable class and preferability criteria. It is not speculative or argumentative. It is based on Mr. Ford's experience.
p.3, para.8	I am advised by Mike Dull, and believe it to be true, that: (1) action of this kind will likely be extremely expensive to pursue; (2) The documentary evidence will be extensive and time consuming to collect and review; (3) It is likely that litigating an individual case to trial will cost tens of thousands of	Speculative, argument, and improper for lawyer to appear as advocate where the lawyer is the source of the information on an important and contentious matter, even	Relevant to preferability.	Not struck.	This evidence is relevant to preferability. Although the evidence is controversial, the Court is not required to resolve conflicting evidence on this certification motion.

	dollars, and will result in expenses that are likely to be in excess of damages to be received by most class members; (4). This is a complex matter.	where the lawyer is not the deponent.			
p.3, para.9	I am advised by Mike Dull, and believe it to be true, that the cost of pursuing this action on an individual basis would not be economically viable for the vast majority of class members, and that spreading out the cost of litigation gives class members the best, if not only, chance to obtain redress.	Speculative, argument, and improper for lawyer to appear as advocate where the lawyer is the source of the information on an important and contentious matter, even where the lawyer is not the deponent	Relevant to preferability.	Not struck.	This evidence is relevant to preferability. Although the evidence is controversial, the Court is not required to resolve conflicting evidence on this certification motion.
pp.3-4, para. 12	I am advised by Mike Dull, and believe it to be true, that the proposed representative plaintiffs will fairly and adequately represent the interests of the class. I am further advised by Mike Dull, and believe it to be true, that he is not aware of Mr. Barnard and Ms. Bowman having any interests in conflict on the common issues or with the interests of other class members. I am further advised by Mike Dull, and believe it to be true, that Mr.	Speculative, argument, and improper for lawyer to appear as advocate where the lawyer is the source of the information on an important and contentious matter, even where the lawyer is not the deponent.	Not relied on for truth but to show the adequacy of the proposed representative plaintiffs.	First sentence struck.	The first sentence constitutes impermissible argument/opinion.  The rest of the paragraph is factual and is relevant to the adequacy of the proposed representative plaintiffs, which is to be determined on a "some basis in fact" standard.

	Barnard and Ms. Bowman are both resident in Nova Scotia pursuant to the <i>Class Proceedings Act</i> .				
p.4, para. 13	I am advised by Mike Dull, and believe it to be true, that a litigation plan has been developed which sets out a workable method of advancing a proceeding on behalf of the plaintiffs and class members as required by the <i>Class Proceedings Act</i> . I am further advised by Mike Dull, and believe it to be true, that the Litigation Plan is subject to review and ongoing modification by this Honourable Court, as well as input from the Defendants. A copy of the litigation plan is attached hereto and marked as Exhibit "A".	Speculative, argument, and improper for lawyer to appear as advocate where the lawyer is the source of the information on an important and contentious matter, even where the lawyer is not the deponent.	Relevant because shows the existence of a workable method.	The following phrase is struck: "which sets out a workable method of advancing a proceeding on behalf of the plaintiff and class members"	This phrase constitutes impermissible argument/opinion.  The rest of the paragraph is relevant to the existence of a workable method of advancing the proceeding, and is factual.