

**Case No.**

**VOL.**

**VIRGINIA MERNER**

**PLAINTIFF**

- and -

**PATRICK FLINN, CAROLE DOWNEY, GREG  
BLANCHARD, IVANO ANDRIANI, JACK INGRAM,  
and DAVID CROXEN, THE TRUSTEES OF THE  
NOVA SCOTIA ASSOCIATION OF HEALTH  
ORGANIZATIONS LONG TERM DISABILITY PLAN  
TRUST FUND**

**DEFENDANTS**

**Justice Walter R. E. Goodfellow**

**Halifax, Nova Scotia**

**File No. S.H. 110146**

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**LIBRARY HEADING**

**Cite as: Merner v. Flinn, 2000 NSSC 89**

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**DATE HEARD:** November 7<sup>th</sup>, 2000 (Chambers)

**WRITTEN  
DECISION:** November 24<sup>th</sup>, 2000

**SUBJECT:** APPLICATION TO STRIKE TIME LIMITATION IN DEFENCE

**SUMMARY:** ISSUES AND CONCLUSIONS

**1. Does the Court have jurisdiction on an application pursuant to Rule 14.25 or Rule 25.01 to strike the claim because of the limitation period?**

Affirmative. *Hendsbee v. Khuber* (1995), 148 N.S.R. (2d) 270.

**2. Does the *Limitation of Actions Act*, Section 3(1)(2) apply to contractual limitation periods?**

Affirmative. "Time Limitation s.3(1)(c)(iii)" - The Provisions of an Agreement or Contract.

**3. Is this a proper case for this Honourable Court to strike out the Plaintiff's claim because it was commenced outside the limitation period?**

Affirmative. When dealing with a Long Term Disability claim arising from a contractual foundation, the time focus is narrower than in most tort actions. In this case, the denial of benefits was in September, 1994 and appeal period, which was not exercised by Ms. Merner, expired March, 1995, and no action until November the 3<sup>rd</sup>, 1998. LTD claim is a no fault, no causation, time focused claim and delay and after a *Smith v. Clayton, et al* (1995), 133 N.S.R. (2d) 157 review and analysis, court concluded on totality of considerations it would not be equitable to allow the claim to proceed and indeed, it would be inequitable to do so.

**4. If the Defendants are successful in invoking a limitation defence, does a new cause of action arise at the end of each payment period under the contract?**

There is a time focus whereby Ms. Merner has had an opportunity in March, 1995 to appeal the denial of total disability in accordance with her contract and if she was not totally disabled at the time of denial, the present claim would be at an end.

The Defendants also advanced that the contractual plan made no allowance for resurrection of LTD claims that were not pursued in accordance with the contractual time limits. While it is clear that if the time limitation of defence were struck, prejudice would fall to the fund. It was not necessary to attach any weight to this argument in concluding that it would be inequitable in the totality of the other circumstances to allow the claim to proceed.

Counsel to be heard on the issue of costs and disbursements, as the action is at an end.

**THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.  
QUOTES MUST BE FROM THE DECISION, NOT THIS COVER SHEET.**