IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Johnston v. Wawanesa Mutual Insurance Company, 2013 NSSM 47

Claim: SCCH No. 418441
Registry: Halifax

Between:

Wendy Johnston

Claimant

– and –

Wawanesa Mutual Insurance Company

Defendant

Adjudicator: Augustus Richardson, QC

Heard: November 7, 2013

Appearances: Wendy Johnston, claimant, for herself
Christine Nault, for the defendant

By the Court:

[1] This matter raises an important question regarding this court's jurisdiction to hear matters arising out of claims for income replacement benefits payable periodically under insurance contracts, such as those found in long term disability ("LTD") insurance policies and under the Weekly Indemnity ("WI") provisions of Section B of the standard motor vehicle insurance policy.

[2] The defendant says that this court lacks jurisdiction to hear such claims, and says that they should be heard instead in the Nova Scotia Supreme Court. The claimant, on the other hand, says that this court does have jurisdiction. For reasons that follow I have decided that the claimant is correct.

The Hearing

[3] This matter came on before me on November 7, 2013. At that time I heard the testimony and submissions of the claimant on her own behalf. I also heard the evidence of Laura Leahey, a Senior Section B claims examiner working for the defendant Wawanesa Mutual Insurance Company ("Wawanesa" or "the defendant"). She testified under subpoena issued by the claimant. I also heard the submissions of counsel for Wawanesa.

[4] There was little or no dispute between the parties over the facts. The dispute lay with characterization of those facts, and the impact of those facts on the jurisdiction of this court.

Factual Background

[5] The claimant commenced working for the Boys and Girls Club of Canada (the "Club") as a Regional Director in August 2009: Ex. D4. She testified that she worked out of a home office in Tatamagouche, Nova Scotia. She also testified that on August 31, 2012 she was "dismissed without cause." As she explained it, on that day her superior and a co-employee showed up at her door, handed her a letter dated August 29, 2012, and advised her that she was "dismissed without cause" effective immediately. She was also told that the Club was prepared to pay her four months salary in lieu of notice. She was handed a Release and Non-Disclosure Agreement (the "Release") on that same day, but was given some time to consider the offer and whether she would sign the Release. In cross examination she said she received her last pay (that is, the pay up until August 31st) on September 6th. She also testified that she received the payment with respect to the four month's notice by direct payment into her bank account on September 18th. She agreed she did eventually sign the Release: see Ex. D3. She was not sure of the date, but thought that it was before the payment that was made into her bank account on September 18, 2012. She agreed that her execution of the Release had been a pre-condition of the payment with respect to notice on September 18th.

[6] The claimant agreed in her testimony that she performed no further work or services of any kind for the Club after August 31, 2012. She said that she might have done a few "wrap up" things, such as returning her phone card, her credit card and supplies to the Club, but no work or services. Nor did she have any expectation of being called back to work. She did not agree, however, that she ceased to be an employee or employed by the Club. She testified that in her view she continued to have "a relationship" with the Club because "the severance package was

four months pay in lieu of notice ... so I had a relationship with the Club until the severance ran out." She agreed, however, that after August 31st she received no benefits from the Club, performed no services for it, and had no contact (other than that associated with "wrapping up loose ends") after August 31st.

[7] The claimant testified that after the shock of her dismissal she "sat around for a few months" and then started to look for work. She applied for Employment Insurance ("EI"), but was told she had to wait until her severance package ran out. Once that happened she started to receive EI in January 2013. She continued to look for work.

[8] On March 21, 2013 she was involved in a motor vehicle accident. She suffered fractures in both legs and in her right wrist. She needed operations to support bone growth. She was a patient in different hospitals, and in rehabilitation, between March 21st and July 15th, 2013.

[9] As a result of this accident the claimant applied for Section B WI payments under her motor vehicle policy with Wawanesa. The claim was denied on the grounds that she had not been employed for six of the 12 months prior to the accident.

[10] The claimant eventually found part time employment some time in the summer of 2013. She continued to have difficulty arising from her injuries, including a bone infection in her right leg that required surgery in August 2013. She was not allowed to bear weight while she recovered, and was confined to a wheelchair or the use of two canes as of mid September.

[11] The claimant filed this claim against Wawanesa on August 9th, 2013. She claimed $4,750.00 in respect of WI benefits she said were payable to her under the Section B provisions of her motor vehicle policy of insurance with Wawanesa. On August 23rd Wawanesa filed its defence. It stated that this court lacked jurisdiction to hear the claim "as the total value of the claim exceeds $25,000.00." It also pleaded that if the court did have jurisdiction the claim nevertheless failed because the claimant had not worked for six of the 12 months prior to the accident, which was a requirement of entitlement under the WI provisions of Section B.

The Issues

[12] As presented by the parties at the hearing, this claim gave rise to three issues:

a. Did this court have jurisdiction to hear the claim at all;

b. If it did, was the claimant employed for six of the 12 months prior to the accident so as to entitle her to make a claim for WI benefits in the first place; and, if so,

c. Was she disabled within the terms of Section B so as to entitle her to WI benefits?

[13] With respect to the third issue, the defendant did not vigorously contest the suggestion that given the claimant's injuries there was a serious possibility that she would be considered to have been disabled within the scope of coverage provided by Section B. However, because of its objection to this court's jurisdiction it had not considered whether or not it should concede the point–or whether it should insist, as was no doubt its right, on medical evidence to support such a concession. I eventually decided that in fairness to the parties I would consider only the first two issues. If I determined that this court did have jurisdiction ***and*** further decided that the claimant had worked for six of the 12 months prior to the accident then I would re-convene the hearing to hear evidence and submissions with respect to whether the claimant was disabled within the meaning of the Section B WI provisions.

Issue 1: Does This Court Have Jurisdiction to Hear this Claim

[14] Section 9(a) of the *Small Claims Court Act*, RSNS 1989, c.430, as amended (the "Act") provides that a person "may make a claim under this Act (a) seeking a money award in respect of a matter arising under a contract or tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest."

[15] The claimant submitted that her claim was only for $4,750.00 for the period between her accident and when she found part-time employment. Given that WI under Section B is now set at $250.00 per week, her claim works out to a period of about 19 weeks. She refused to waive any potential claim for future WI benefits that might otherwise be available to her. She emphasized, however, that the claim was clearly within the monetary jurisdiction of this court established by s.9(a). She also submitted that the claim could most easily, inexpensively and expeditiously dealt with in this court rather than in the Supreme Court.

[16] Counsel for the defendant submitted on the other hand that the claim was not really for $4,750.00. She noted that if the claimant's claim did fall within the provisions of Section B, and

if the claimant remained disabled for the rest of her life within its terms, the potential claim (assuming the claimant lived for another 20 years) could total $260,000.00. Given the size of the potential claim counsel submitted that the case "is deserving of the protection of the procedures uniquely available in superior court, especially discovery (for example, of a representative of Ms Johnston's former employer) and full documentary disclosure:" written submissions dated November 5, 2013 at p.6.

[17] Counsel relied strongly on four superior court decisions–two from Nova Scotia and two from New Brunswick–in which declarations had been issued to the effect that claims for LTD or WI benefits should be heard in those courts rather than in Small Claims Courts: see *Paul Revere Life Insurance Co. v. Harbin* (1996) 149 NSR (2d) 200 (SC); *Imperial Life Financial v. Langille* (1997) 166 NSR (2d) 46 (SC); *Hayes v. Maritime Life Assurance Co.* (2000) 225 NBR (2d) 133 (QB), and *CGU Insurance Co. of Canada v. Mulrooney* (2002) NBQB 384.

[18] *Paul Revere Life Insurance Co. v. Harbin* (1996) 149 NSR (2d) 200 (SC) was a 1996 decision. Mr Harbin had a claim for long term disability ("LTD") insurance benefits that he alleged were payable under his LTD policy with Paul Revere Life Insurance. Payments had apparently been made under the LTD policy until July 12, 1995, when they were discontinued. Mr Harbin commenced a claim in Small Claims Court for benefits he said to be owing between July 12 and November 24, 1995, when he filed his claim. The total of those benefits said to be payable for that time period were $5,593.40. He waived the portion over $5,000.00, which at that time was the financial limit of the Small Claims Court's monetary jurisdiction.

[19] The insurer commenced an action in the Supreme Court, seeking a declaration that the Supreme Court was the proper forum to consider Mr Harbin's claim; and an order staying the Small Claims Court action.

[20] Justice Saunders, as he then was, granted the insurer's application. He reached his decision for a number of reasons. First, he was concerned that the claim before him would not be Mr Harbin's last. He would in all likelihood advance other claims for subsequent periods. Second, the nature, existence and extent of the condition Mr Harbin suffered from–fibromyalgia–was "vigorously contested" by the insurer. There would "undoubtedly be a call for discoveries and productions and experts:" para.13. His Lordship was concerned that each side should have the right "to fully and fairly canvass those issues so that all relevant evidence is put before a court of record to find the truth and decide the case on its merits:" para. 14. These "protections" would not be available in the Small Claims Court.

[21] Third, Saunders, J was concerned about the risk that the potential for multiple claims (calculated at as many as 69 separate applications) could "lead to contradictory decisions from different adjudicators on what would arguable be the same material evidence, to say nothing of the added and continuing expense of having to relitigate the same issues, with perhaps the same testimony, repeated by the same witnesses, including experts every time the matter was heard in the Small Claims Court:" para.18.

[22] For these reasons Saunders, J decided that it would be an abuse of process to allow the claim to remain in the Small Claims Court. He accepted the insurer's submission that the underlying rationale of the Small Claims Court, as reflected in s.2 of the *Small Claims Court Act*, "was that *small claims* would be quickly and inexpensively adjudicated:" para.20 (emphasis in the original). Such claims could be heard without the usual pre-trial procedures, productions, discovery of parties and discovery of experts, as would be the case in the Supreme Court: para.20. His Lordship went on to add that by way of contrast, "[t]his case is anything but a *small claim*:" para.21 (emphasis in original). There was in His Lordship's view "a real potential for this claim to lead to repeated and identically issue-based claims approaching half a million dollars," and such a case "could hardly have [been] intended [by] the statute to apply to cases such as this:" para.21.

[23] His Lordship added a concern that Mr Harbin was splitting his claim, something that was prohibited by s.13 of the *Small Claims Court Act*. Then too there was the concern that the doctrine of *res judicata* might be used against the insurer by Mr Harbin in the event that he was successful on his initial claim, for if an adjudicator found that he was totally disabled Mr Harbin might then argue in subsequent proceedings that the issue had already been determined: see para.24.

[24] *Imperial Life Financial v. Langille* (1997) 166 NSR (2d) 46 (SC) was a case to roughly the same effect. There Mr Langille was insured under an LTD policy with Imperial Life. Benefits of $796.00 monthly were paid for the first two years, and then discontinued by the insurer on the grounds that he was no longer disabled within the terms of the policy. He brought a claim in the Small Claims Court. The insurer started an action in the Supreme Court, asserting that Mr Langille's claim in the Small Claims Court was an abuse of process. The insurer argued that while the monthly benefits might be small, and within the jurisdiction of the Small Claims Court, if calculated over time it would be well in excess of that jurisdiction: para.3. In view of that potential liability the insurer wanted, in the words of its counsel, "to exercise its rights under the

Nova Scotia Civil Procedure Rules including the Rules with respect to discovery of documents, discovery of witnesses, the opportunity for further independent medical examination if deemed necessary ... as well as all other Rules which may apply to this type of action:" para.3.

[25] Mr Justice Macdonald interpreted the word "claim" in s.9(a) of the Act to refer "to 'claim' in the global sense:" para.11. It did not apply when "the amount at stake is not modest but very high" with a potential value over the life of the claim under the policy that was "not modest but very high:" para.12. His Lordship was persuaded too by the reasoning of Saunders, J in *Paul Revere, ibid*. His Lordship concluded that it would be an abuse of process to let the claim proceed in the Small Claims Court, and granted the insurer's request for relief.

[26] Decisions to the same effect, and based on essentially the same reasoning, are found in New Brunswick, where the jurisdiction of the Small Claims Court at the material time was $6,000: see *Hayes v. Maritime Life Assurance Co.* (2000) 225 NBR (2d) 133 (QB), and *CGU Insurance Co. of Canada v. Mulrooney* (2002) NBQB 384.

Analysis and Decision With Respect to Issue 1 (Jurisdiction)

[27] Having reviewed the submissions of the parties and, in particular, the authorities relied upon by the defendant, I am satisfied that this court ***does*** have jurisdiction to hear this claim; and that in the circumstances of this case it would not be fit or proper for it to refuse to accept jurisdiction in the absence of an order to the contrary from the Supreme Court. I came to this conclusion for a number of reasons.

A: What is the "Claim"?

[28] First, the total amount of the claim being advanced is well within the monetary jurisdiction of this court. The fact that there is a potential *liability* on the part of the defendant, *if* it pays benefits over the life of the policy, of $260,000.00 is not the same as saying that *the claim* is for $260,000.00. I come to this conclusion because of the nature of claims for ongoing benefits under LTD and Section B policies of insurance. Although the matter may not have been definitively resolved in Nova Scotia: *Welsh v. Wawanesa Mutual Insurance Co.* [2002] NSJ No. 168, I consider the law with respect to claims for income loss indemnity under contracts of insurance to be reasonably clear. A claim–and hence a cause of action–arises each time an insurer

denies a periodic payment that is payable under a weekly indemnity contract of insurance. It is, in other words, a "rolling cause of action:" *Zigouras v. Royal Insurance of Co. of Canada* [1987] OJ No. 1173; *LeBlanc v. Zurich Insurance Co.* [2000] NBJ No. 411 (QB); *Thornton v. Economical Insurance Group* [2010] NSJ No. 495 (SC) at para.9*ff*.

[29] In effect then each period of payment–whether monthly or weekly–constitutes a separate claim for benefits under such policies of insurance. The fact that an insurer has paid for the previous month or week does not mean that it is liable to pay for the next. The insured must establish that he or she was disabled within the meaning of that policy, not only for the initial denial but for each week or month thereafter.

[30] What this means then is that the claimant's claim here is in fact a combination of, in effect, 19 separate claims, each in the amount of $250.00, for a total of $4,750.00. Both amounts are within the monetary jurisdiction established by s.9(a) of the Act.

B: The Authorities Do Not Negative This Conclusion

[31] In my opinion the authorities relied upon by the defendant do not negative this conclusion and, in particular, do not actually say that this court lacks jurisdiction. What they actually say is that, at the time they were decided, the Supreme Court was the better or preferable forum in which to hear claims for disability benefits.

[32] In both *Paul Revere* and *Imperial Life* the claimants had brought claims in this court. The defendants then commenced separate proceedings in the Supreme Court for a declaration that the claims should be heard instead in that court. But the fact that the Supreme Court might at the time of those decisions and in the circumstances of those cases have been the better place to hear such claims does not mean that this court lacked jurisdiction. It means only that the Supreme Court chose to exercise its concurrent jurisdiction and, in so doing, ousted this court's jurisdiction. In this regard I note that s.15 of the Act makes quite clear that this court "does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with Section 19." (Section 19 deals with the circumstances under which a matter commenced in the Supreme Court can be transferred to this court.) Indeed, the very act of commencing an action in the Supreme Court in both cases was, by virtue of s.15, sufficient to oust the jurisdiction of this

court. That being the case one might even venture to suggest that much of what was said was in fact *obiter*.

C: The Issue of Convenience and Procedural Justice: Should This Court Refuse to Exercise Jurisdiction?

[33] The review of the authorities relied upon by the defendant suggests that the Supreme Court was there and then concerned with various procedural rights–such as discovery or disclosure–available in that court but not in this. The absence of such procedural rights was thought to work an injustice to both parties (though more particularly to the defending insurance companies)–and to justify a decision to require the claims to be heard in the Supreme Court.

[34] In my respectful view the concern for procedural justice, while perhaps valid at the time, has less weight under current circumstances. The balance between access to justice and the procedure thought necessary to guarantee a fair hearing on the merits has shifted, a shift reflected in the increasing interest in–and application of–principles of proportionality. And in my opinion that shift makes it more rather than less likely that claims such as the one before this court ought to be heard by this court. I come to this conclusion for a number of reasons.

[35] First, the decisions relied upon by the defendant were all rendered at a time when the monetary jurisdiction of this court was much lower than it is now. The decisions above-noted all come from a time or place that restricted claims to limits of $5,000 (or, in the case of New Brunswick, $6,000.00). But the jurisdiction in Nova Scotia has since then been raised in stages until the early 2000s when it was fixed at $25,000.00. This is a significant amount. In 2006 it was a little under the average earnings of all adult Nova Scotians and perhaps half the average earnings of those with some post-secondary education: see *Kemp v. Prescesky* 2006 NSSC 122 at para.13. Stats Canada reports that the average hourly wage in October 2013 in Nova Scotia was $21.52: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labr69d-eng.htm. Assuming a 40-hour work week, and 52-weeks of employment a year, that wage works out to $44,761.60 gross income. Another site reports the median hourly wage in Nova Scotia in 2010 as being $16.92, and the average hourly wage as $19.90, both of which would result in even lower net incomes: http://www.novascotiasvitalsigns.ca/index.php?option=com_content&view=article&id=11&Itemid=118. One suspects that the net amount available to those earning such wages, after taxes,

food, shelter and other necessities are deducted, would be substantially less than the court's $25,000.00 jurisdiction.

[36] In short, claims in the Small Claims Court of Nova Scotia are no longer "*small claims*," to use the words and emphasis of Justice Saunders in *Paul Revere*. The importance of the fact that the monetary jurisdiction of this court has been raised to $25,000.00 cannot in my view be overstated. It ought also to inform how this court views its jurisdiction and whether or when to assert it. Justice Warner in *Kemp v. Prescesky* 2006 NSSC 122 at para.13 made the following comments:

> "The rules of procedure in the court may have been appropriate, and met the threshold requirements of natural justice, at a time when the monetary limit was $3,000.00. However, according to Statistics Canada, the average annual earnings for all adult Nova Scotians, as of the 2001 census, is $26,632.00. Of those, the average for people with some university education is $41,146.00. This means that everyone who does not have a university education - which is most Nova Scotians - has an average annual income far less than the monetary jurisdiction of the Small Claims Court, which court can enter a judgment against that person for more than his or her gross annual income. This fact, in my view, informs the requirements of natural justice, one of the bases for appeal in section 32(1) of the Act."

[37] Just as the increased monetary jurisdiction informed Warner, J's analysis of the practice in this court, so too should it inform the court's willingness to accept jurisdiction in a case like this in the absence of a superior court order (or an action in that court) to the contrary.

[38] The fact that the Legislature has chosen to raise this court's jurisdiction to a level equal to if not greater than the average annual net disposable income of most Nova Scotians sends an important signal. It indicates a legislative intent to increase access to justice by providing the citizens of this province with an alternate forum for the resolution of disputes that, for them, represent major financial obligations or entitlements. It responds to the concerns that have long been voiced by no less an authority than the Chief Justice of Canada that access to justice has been put beyond the range of most because of the cost and delay associated with proceedings in the superior courts of this country:

> "Hardest hit [by the cost of litigation] are average middle-class Canadians. … Their options are grim: use up the family assets in litigation; become their own lawyers; or give up:" McLachlin, CJC, "The Challenges We Face," March 8, 2007
>
> "Do we have adequate access to justice? It seems to me that the answer is no. We have wonderful justice for … the wealthy. But the middle class and the poor may not be able to access our justice system:" McLachlin, CJC, U of T, Feb 2010.

[39] The importance of this court in asserting its jurisdiction in a proper case, rather than in deferring (as the defendant here would have me do) to that of the Supreme Court, cannot in my opinion be overstated, at least in the case of income replacement insurance. LTD policies of insurance, and WI benefits under Section B, are designed and intended to provide income replacement when an injured insured needs it most. An insured who has become disabled–and so unemployed–has an immediate and pressing need for income–income to pay for food, for shelter, for clothes, for debts. To say to those insureds that they should wait the two or three or four years necessary to have their claim heard in Supreme Court is to say that they should go deeply into debt, or into bankruptcy, or deny themselves and their dependents the necessities of civilized life. To tell them that they would have "more perfect" procedural justice by having their claim decided in Supreme Court is cold comfort indeed.

[40] By increasing the monetary jurisdiction of this court the Legislature furthered "the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction ... are adjudicated informally and inexpensively but in accordance with established principles of law and nature justice:" s.2. The Act accomplishes that purpose by loosening the rules of evidence so as to enable lay parties to present their evidence without tripping over the strict rules of evidence that prevail in the superior courts: see s.28(1). There is no pre-hearing discovery. There is no pre-hearing disclosure, in the sense understood in the superior court, although the subpoena power (if intelligently used) provides a similar process: see s.27. All of these measures expedite the hearing of claims. As well, by stripping out much of the interlocutory wrangling over procedure they significantly reduce the cost of litigation, either by reducing the time spent by a party's lawyer (if her or she has one) or by making it possible for litigants to represent themselves.

[41] The insurers in the cases relied upon by the defendant here, and the defendant itself, assert that the absence of these procedures leads to an injustice. Here again I think the submission is overstated. I venture to suggest that as a practical matter most disability insurers in most cases *will* have all the information they need in order to defend a case. Disability insurers as a rule are not vicious or mean. They operate in good faith. They deny claims when they do not because they are unreasonable. Rather, they have looked at the evidence they have–evidence in the form of reports from doctors (both family and specialist), rehabilitation consultants and functional capacity reports, information from employers and from the insured him- or herself–and have decided that the insured no longer satisfies the terms of coverage. In such a case what more information could an insurer require to defend its position? Why would it need discovery of the insured or of his or her doctors, for example, when, assuming it was acting in good faith, it already had such information.

[42] The other point of course is that a Section B insurer always has the right to examine the insured and be kept up to date with respect to his or her condition–"[t]his continuing flow of information is a safeguard against abuse of the benefits by either party:" *Smith v. Commercial Union Assurance Co. of Canada* [1995] NSJ No. 301 (SC), per Grant, J at para.181; see also *Smith v. ICBC* [1992] BCJ No. 2332 (CA). It does not, in other words, require the Civil Procedure Rules to obtain what it in good faith might need from the insured to evaluate his or her claim.

[43] All of this is not to say that procedural protections are not available or followed in this court. For example, the complaint is often made that disclosure of documents is not available in this court. This complaint overstates if not mistakes what actually takes place.

Disclosure of Documents

[44] The process and procedure in this court in many ways mirrors that employed in labour arbitrations or, indeed, under the *Commercial Arbitration Act*. Parties in those types of proceedings gain pre-hearing access to documents by request or by subpoena. That is the case in this court. Parties in those proceedings routinely acquiesce to–or at least come to accommodations with respect to–such requests because they know that if they force the issue before the arbitrator he or she may order the documents produced and then adjourn the hearing to provide time to consider the documents. That same process is as a rule followed in this court, since a party who refuses to produce documents prior to the hearing will be subject to a subpoena

and consequent adjournment to permit the requesting party to study the documents so subpoenaed.

[45] In short, it is something of a myth that disclosure is not available in this court. Production of relevant documents can always be obtained under subpoena. And most adjudicators will adjourn a hearing in the event that documents under a subpoena are not produced until the hearing "in accordance with established principles of law and nature justice."

Pre-Hearing Discovery of Witnesses and Parties

[46] Much is often made of the value of pre-hearing discovery, but it is often done without any context. For the fact is that pre-hearing discovery is not crucial to the adjudication of disputes on their merits. There is no pre-hearing discovery in labour arbitrations or in arbitrations under the *Commercial Arbitration Act* (at least as of right), and yet such arbitrations often involve important issues of financial significance to the parties.

[47] Nor is discovery inherently necessary to procedural justice in the Supreme Court of Nova Scotia. For many years there was no pre-hearing discovery at all of parties or witnesses in Nova Scotia. This was in sharp contrast with jurisdictions like Ontario, where discovery of parties, but only parties, existed since the early 1900s (if not before). No one suggests that justice in Nova Scotia in those days was hampered or denied by the lack of discovery, or that it suffered in contrast to the system in jurisdictions where it did exist. The Nova Scotia Supreme Court then swung to the opposite end of the spectrum, adopting an American approach to discovery that allowed for the discovery of *any* witness, *any* expert relied upon by a party, as well as of the parties themselves. But that experiment in the end served to restrict–or at least significantly increase the financial burden of–access to justice. The cost and delay associated with endless discovery, the undertakings they generated, and the further discovery attendant upon such undertakings, rendered increasingly problematic a decision to commence or defend an action in the superior court. Indeed, it was precisely this concern over the cost of such an open-ended discovery process that led to the decision of the Supreme Court–reflected in the new *Civil Procedure Rules*–to limit discovery to the parties.

Conclusion With Respect to Jurisdiction

[48] What all of this indicates to me that the concerns expressed by the courts in *Paul Revere* and *Imperial Life* are no longer as great, or no longer accorded as much weight, as they were in those cases. They are certainly not sufficient to cause this court to refrain from exercising a jurisdiction which, as discussed above, I believe it has. It of course remains open to the defendant in a case like this to apply to the Supreme Court for a declaration removing such a claim from this court (thereby triggering s.15 of the Act). But until that happens there is no reason for this court to shirk its responsibility and duty to assume the jurisdiction it has.

[49] For the reasons set out above I am satisfied that

a. The claimant's claim is within the jurisdiction of this court, and

b. There is no reason that this court should refuse to accept or exercise jurisdiction.

[50] I accordingly proceed to consider the second issue.

Analysis and Decision With Respect to Issue 2 (Employed in Six of the Past 12 Months)

[51] The onus is on the claimant to establish her entitlement to WI benefits under the Section B provisions of her policy with Wawanesa. Pursuant to SPF No. 1 of the Standard Automobile Policy (Owner's Form), Part II (Loss of Income) Wawanesa agreed to pay WI payments in respect of loss of income as follows:

> Subject to the provisions of this Part, a weekly payment for the loss of income from employment for the period during which the insured person suffers substantial inability to perform the essential duties of his occupation or employment, provided,
> (a) such person was employed at the date of the accident ...

[52] The policy goes on to define "employed" as follows:

> (3) a person shall be deemed to be employed,
> (a)if actively engaged in an occupation or employment for wages or profit at the date of the accident; or

> (b) if 18 years of age or over and under the age of 65 years, ***so engaged for any six months out of the preceding 12 months*** and in these circumstances shall be deemed to have suffered loss of income at a rate equal to that of his most recent employment earnings (emphasis added).

[53] The claimant was not employed at the time she suffered her injuries in the accident on March 21, 2013. The question then is whether she can be "deemed" to have been employed because she was "so engaged for any six months out of' the preceding 12 months."

[54] The answer to this question depends in part on when the claimant last worked prior to the accident. The defendant submits that on the evidence her last day of employment was August 31, 2012, when she was terminated without cause by her employer. The claimant, on the other hand, submits that she continued to be employed–or at least in an "employment relationship"–until the four month notice period ran out the end of December 2012. Alternatively, it ran until at least September 18, 2012, when the payment in lieu of notice was paid into her bank account.

[55] On this point I agree with the defendant's submissions.

[56] The operative phrase is "so engaged for any six months out of the preceding 12 months." The words "so engaged" refer back to clause 3(a) and the requirement that the insured be "***actively engaged in*** an occupation or ***employment for wages*** or profit" (emphasis added). The last date that the claimant was "actively engaged in ... employment for wages" was August 31, 2012.

[57] The other point is this. When an employer decides to terminate an employee without cause it has one of two options open to it. First, it can give working notice, in which case the employee continues to work for the employer (and receive regular wages) for the period of that notice. Second, it can terminate the employment relationship immediately, and pay the employee severance in lieu of notice. The first option continues the employment relationship until the end of the notice period. The second option terminates that relationship. In this case the employer chose the second option. August 31, 2012 was accordingly the last day of active employment prior to the accident.

[58] The next question is whether it can be said on these facts that the claimant worked for "any six months out of the preceding 12 months." The law on this point would appear to be clear:

under this wording an insured must have worked for any six months in the preceding 12: see *Proctor v. Guarantee Co. of North America* (1976) 13 OR (2d) 1 (CA); *Bissky v. Insurance Corp. of British Columbia* [1987] BCJ No. 174 (SC in Chambers); *Logan v. Pafco Insurance Co* 2000 NSCA 58. That is not the case here. The claimant at best had worked a little over five months, from March 22, 2012 up until August 31, 2012. As in *Proctor* on similar facts that is not sufficient; it does not amount to six months.

[59] I must accordingly dismiss the claimant's claim, and will make an order to that effect.

DATED at Halifax, Nova Scotia
this 3rd day of December, 2013

_____
Augustus Richardson, QC
Adjudicator