# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Barry v. Halifax (Regional Municipality)*, 2018 NSCA 79

**Date:** 20181011
**Docket:** CA 469410
**Registry:** Halifax

**Between:**

Mary Paula Barry

Appellant

v.

Halifax Regional Municipality

Respondent

and

Royal & Sun Alliance Insurance Company of Canada

Respondent/Appellant by Cross-Appeal

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**Judge:** The Honourable Justice Cindy A. Bourgeois

**Appeal Heard:** June 13, 2018

**Subject:** Addition of party – Rules 35.08 and 83.04; Disallowance of limitation defence – s. 12 of *Limitation of Actions Act*, S.N.S. 2014, c. 35

**Summary:** Ms. Barry alleges she was injured on a Halifax transit bus. She says the bus driver unexpectedly slammed on the brakes due to being cut off by an unidentified motorist, causing her to be flung from her seat.

In 2015, Ms. Barry brought an action against the Halifax Regional Municipality (HRM). In November 2016, Ms. Barry brought a motion seeking to add HRM's transit insurer, Royal & Sun Alliance Insurance Company of Canada (RSA) as a defendant.

The motions judge concluded that Rule 35.08 precluded the addition of a party if a limitation period was expired. She further concluded that she was unable to consider disallowing

RSA's limitation defence under s. 12 of the *Limitation of Actions Act*, S.N.S. 2014, c. 35. The motion was dismissed.

Ms. Barry appeals. RSA cross-appeals in relation to the motions judge's interpretation of s. 12 of the *Limitation of Actions Act*.

**Issues:**

(1) Did the motions judge err in conducting a limitation analysis, as opposed to leaving that for the trial judge?
(2) Did the motions judge err in her discoverability analysis?
(3) Did the motions judge err in her interpretation of s. 12(1) of the *Act*? and
(4) In provisionally disallowing RSA's limitation defence, did the motions judge err in her application of s. 12(3) and (5) of the *Act*?

**Result:**

The motions judge did not err in conducting a limitation analysis. Rule 35.08 prohibits the addition of a party if a limitation period has expired, therefore she was required to consider it.

The motions judge did not err in her discoverability analysis, in particular, her conclusion that HRM had no obligation to advise Ms. Barry of the existence of Section D coverage.

The motions judge did not err in her interpretation of s. 12(1) of the *Limitation of Actions Act*. Her determination that the limitation period proscribed by the Standard Automobile Policy was not established "by enactment" was incorrect. The appeal was allowed on this ground.

On the cross-appeal, the motions judge failed to consider all of the factors contained in s. 12(5) of the *Limitation of Actions Act*. The cross-appeal was allowed.

Notwithstanding the appeal being allowed in part and the cross-appeal allowed, the motions judge's conclusion remained intact. RSA was not joined as a defendant.

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| | |
|---|---|
| **Judges:** | Bryson, Saunders and Bourgeois, JJ.A. |
| **Appeal Heard:** | June 13, 2018, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed in part, and Cross-appeal allowed, per reasons for judgment of Bourgeois, J.A.; Bryson and Saunders, JJ.A. concurring |
| **Counsel:** | Ali Imran Raja, for the appellant<br>Andrew Gough, for the respondent Halifax Regional Municipality<br>Wayne Francis, for the respondent Royal & Sun Alliance |

**Reasons for judgment:**

[1] The appellant Mary Paula Barry alleges that in March 2013, she was injured on a Halifax transit bus. She says the bus driver unexpectedly slammed on the brakes due to being cut off by an unidentified motorist, causing her to be flung from her seat.

[2] In October 2015, Ms. Barry brought a claim against the Halifax Regional Municipality (HRM). Over a year later, in November 2016, she brought a motion seeking to add Royal & Sun Alliance Insurance Company of Canada (RSA) as a defendant to the claim. RSA was the insurer of the HRM transit fleet at the time of the alleged incident. The policy in place complied with the mandatory *Standard Automobile Policy for Nova Scotia*, thus providing Section D coverage for passengers injured by the negligent actions of unidentified motorists.

[3] The motion was heard by the Honourable Justice Ann E. Smith. After considering the *Civil Procedure Rules* governing the motion, Justice Smith concluded Ms. Barry was prohibited from joining a party if the limitation period for the proposed claim had expired. She further determined that the limitation period for bringing a claim against RSA was as set out in the *Standard Automobile Policy* (two years) and that the period had expired. Central to the appeal, the motions judge also determined she was precluded by s. 12 of the *Limitation of Actions Act*, S.N.S. 2014, c. 35, as amended (the *Act*) from considering a disallowance of RSA's potential limitation defence. As such, Ms. Barry's motion to add RSA as a defendant was dismissed.

[4] The motions judge then proceeded to consider, if not precluded from doing so by the *Act*, whether she would have disallowed RSA's defence based on the circumstances before her. She provisionally concluded that, if not statutorily prevented from doing so, she would have disallowed RSA's limitation defence and added it as a defendant.

[5] Ms. Barry now challenges the outcome of the motion on several grounds, submitting RSA should have been joined as a defendant. RSA brings a cross-appeal relating to the provisional finding made by the motions judge. For its part, HRM maintained a watching brief, putting forward a position on only one issue raised in oral argument.

[6] For the reasons that follow, I would allow the appeal in part, and also allow the cross-appeal. For different reasons, I reach the same conclusion as the motions judge – RSA should not be joined as a defendant to the action.

**Background**

[7] A review of the facts and procedural history is helpful to put the issues in context:

- On March 3, 2013, Ms. Barry was a passenger on a Halifax transit bus;
- Ms. Barry claims she was injured when the bus stopped suddenly due to being cut off by an unidentified motorist;
- Ms. Barry contacted HRM on April 12, 2013, to advise of the incident and her alleged injuries. HRM provided medical benefits to Ms. Barry including the cost of physiotherapy treatments;
- Ms. Barry met with a representative of HRM on April 30, 2013, and provided a statement;
- Over two years later, Ms. Barry retained legal counsel on June 24, 2015;
- On August 31, 2015, Ms. Barry's counsel served a Notice of Intended Action on HRM;
- On October 7, 2015, Ms. Barry's counsel filed a Notice of Action against HRM claiming damages for personal injuries sustained due to its negligence and that of the bus driver. The pleadings did not reference the involvement of an unidentified motorist;
- On December 1, 2015, HRM filed a Notice of Defence denying Ms. Barry's allegations of negligence and injury;
- On July 28, 2016, Ms. Barry and her counsel became aware of the policy of insurance between HRM and RSA, which included mandatory Section D coverage;
- On September 27, 2016, HRM, at Ms. Barry's request, provided her with the identity of its insurer;

- On September 29, 2016, Ms. Barry's counsel sent correspondence to RSA's registered agent advising of her intention to file a motion to add RSA as a defendant to the existing action. RSA had no knowledge of the March 3, 2013 incident prior to that time; and

- The contract of insurance between RSA and HRM was in the form of the *Standard Automobile Policy*.

[8] Ms. Barry filed a motion on November 8, 2016 seeking to "amend the Notice of Action and Statement of Claim and add a party to the claim". She specifically noted reliance on *Civil Procedure Rules* 35.08, 83.02 and 83.04.

[9] After an adjournment to permit Ms. Barry to file additional affidavit evidence, the motion was heard on March 14, 2017.

**The Decision Under Appeal**

[10] In her reasons (2017 NSSC 180), the motions judge set out the issues before her as follows:

1. What is the test for adding a party after the close of pleadings?
2. Which, if any, limitation of action legislation applies, the 1989 statute, or the 2014 statute?
3. Has the limitation period expired in relation to an action against RSA?
4. If the limitation legislation applies, can and should RSA's limitation defence be disallowed?

[11] With respect to the first issue, the motions judge considered *Civil Procedure Rules* 35.08 and 83.04, both of which she found relevant to the joining of a party to a proceeding.

[12] The motions judge adopted the reasoning in *Sweeney-Cunningham v. IBG Canada Ltd.*, 2013 NSSC 415. That decision interpreted the *Rules* as requiring a judge on a motion to add a party, to consider whether the limitation period for bringing a claim against that proposed party had expired. If it had, the court had no discretion to grant the motion.

[13] Following the above reasoning, the motions judge undertook an analysis as to whether the limitation period to bring a claim against RSA had expired. If it had, and could not be extended, she concluded she could not grant the motion to

join. The motions judge first considered which statute, if any, applied to Ms. Barry's claim. RSA's position was that neither the 1989 or 2014 Acts applied. Rather, the limitation period was solely determined by the contract of insurance. The motions judge rejected this argument, finding that the matter was not solely contractual and thus limitation legislation was applicable. She wrote:

> [22] In my view, s. 145 of the *Insurance Act* dictates that a limitation period in a contract of insurance cannot be less than one year (section 139 or 140 actions). As such, we are not dealing with a purely contractual limitation period and I find that limitation of actions legislation applies.

The above determination has not been appealed.

[14] With respect to which legislation applied, the motions judge found that the "new" *Act* applied to Ms. Barry's claim. Neither party has challenged this finding on appeal.

[15] The motions judge then turned her mind to whether the limitation period for bringing an action against RSA had expired. There was no issue that the limitation period, as set out in the *Standard Automobile Policy*, was two years from when the cause of action arose. Pinpointing the date when the limitation clock began to run was a central issue in dispute.

[16] Both parties submitted the discoverability principle favoured their respective positions. Ms. Barry argued that she was not aware HRM had insurance coverage permitting a Section D claim until July 28, 2016. She submitted HRM had a duty to advise her of the existence of its insurance coverage and the availability of a claim under Section D of the policy. Because of HRM's failure to do so, Ms. Barry argued the time limitation only began to run when she was finally advised of that fact. Based on that, she argued the two-year limitation had yet to expire, and there was nothing preventing RSA from being joined as a defendant.

[17] RSA argued that there was no duty on HRM to advise Ms. Barry of the particulars of its insurance or provide direction with respect to other claims she may have in relation to the events of March 3, 2013. RSA further submitted that Ms. Barry knew or, with the exercise of reasonable diligence, could have known about the potential for a Section D claim on March 3, 2013. Accordingly, the limitation period started running on that date and had expired at the time of the motion.

[18] With respect to the arguments advanced, the motions judge first concluded:

> [41] I find no basis in law for the suggestion that HRM had a positive duty to advise the Plaintiff that she might have Section D coverage through the insurer of its buses. HRM is obviously a separate entity than RSA. RSA adduced affidavit evidence that it was not aware of a potential claim against it until September 29, 2016. HRM was defending a tort claim brought against it alleging negligence causing injuries occasioned by its bus driver. I cannot find a legal basis for saying that HRM was required to notify its liability insurer of a potential Section D claim or that it had a positive obligation to advise the Plaintiff of the potential for such a claim.

And then:

> [44] I find that it is not "setting the bar too high" to expect the Plaintiff to make inquiries of a professional, such as a lawyer or insurance broker, to ascertain rights she might have against persons arising out of an accident. Other than report the incident to HRM, the Plaintiff took no steps to inform herself of her rights until she retained counsel in June, 2015. Another year passed before the Plaintiff became aware she had a potential Section D claim against RSA.
>
> [45] I find that had the Plaintiff exercised due diligence, she would have been able to ascertain that she had a potential claim against HRM's Section D insurer.
>
> …
>
> [58] For all of the above reasons, I find that the cause of action arose on March 3, 2013, the date of the accident, and expired on March 2, 2015.

[19] Given the expiry of the limitation period, the motions judge next addressed whether she could consider disallowing RSA's limitation defence. This triggered a consideration of s. 12 of the *Act* (Note: s. 12(2) states this section only applies to claims brought to recover damages in respect of personal injuries). Ms. Barry argued s. 12 provided a mechanism by which RSA's limitation defence could and should be set aside. RSA submitted that s. 12 was intended to disallow limitation periods in very narrow circumstances and did not apply to the limitation period in the present case. As such, the limitation expiry could not be challenged.

[20] In addressing these submissions, the motions judge was required to interpret s. 12(1) of the *Act*. That section serves to confine the possibility of disallowing a limitation defence to specifically identified limitation periods. It provides:

> 12(1) In this Section, "limitation period" means the limitation period established by

> (a) clause 8(1)(a); or
>
> (b) any enactment other than this Act.

[21] Section 8(1)(a) provides:

> (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) Two years from the day on which the claim is discovered;

[22] The motions judge concluded that the two-year limitation period set out in the *Standard Automobile Policy* did not meet the definition in s. 12(1) because it was not established by "enactment". Therefore, she could not consider disallowing the defence. Given that Rule 35.08(5) precluded the motions judge from adding a party if a limitation period had expired, she had no choice but to dismiss Ms. Barry's motion to add RSA as a party.

[23] This did not end the motions judge's analysis. She then considered, in the alternative, if s. 12 were found to apply to the limitation period in the *Standard Automobile Policy*, whether she would have disallowed the defence. That required her to consider the remaining provisions of s. 12.

[24] The motions judge considered the evidence before her and determined that if she were not statutorily precluded from doing so, she would have disallowed RSA's limitation defence, and added it as a defendant. It is this provisional determination which gives rise to RSA's cross-appeal.

**Issues**

[25] In her Amended Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) Ms. Barry set out the following grounds of appeal:

1. The lower court erred in law with respect to the interpretation of the *Limitation of Actions Act*, S.N.S. 2014, c. 35;
2. The lower court erred in law with respect to the applicability of the limitation period and the extension provided therein;
3. The lower court erred in the factual assessment of the evidence with respect to the relationship of the parties; in particular, the contract of insurance between the Defendant and Royal Sun Alliance to which the Plaintiff is not a party.

[26] These grounds were repeated in Ms. Barry's factum, although, as will be discussed later, her argument, in my view, strayed outside of them.

[27] In its Notice of Cross-Appeal (Interlocutory) RSA sets out a single ground:

> 1. The Justice erred in law in her provisional ruling with respect to Sections 12(3) and 12(5) of the *Limitation of Actions Act*, S.N.S. 2014, c. 35.

[28] This is an interlocutory appeal and cross-appeal. Leave is required and is typically the first issue addressed by the parties on appeal. Here, the parties did not address leave in their written submissions. However, upon questioning by the Court, it was conceded that leave ought to be granted. I agree and, as such, it need not be addressed further.

[29] After having heard from the parties, I would frame the issues on appeal as follows:

1. Did the motions judge err in conducting a limitation analysis, as opposed to leaving that for the trial judge?
2. Did the motions judge err in her discoverability analysis? and
3. Did the motions judge err in her interpretation of s. 12(1) of the *Act*?

[30] If any of the above issues result in the appeal being allowed, the Court must consider the following on the cross-appeal:

1. In provisionally disallowing RSA's limitation defence, did the motions judge err in her application of s. 12(3) and (5) of the *Act*?

**Standard of Review**

[31] With interlocutory appeals, there is often confusion respecting the proper standard of review. To clarify, the fact that an appeal is from an interlocutory decision does not dictate the standard. Whether the decision was discretionary or not, does.

[32] The standard for discretionary decisions is well-established. This Court will only intervene if the court below clearly erred in law, or the outcome results in a patent injustice (*Nova Scotia v. Roué*, 2013 NSCA 94 at 13).

[33] As noted by Fichaud, J.A. in *Innocente v. Canada (Attorney General)*, 2012 NSCA 36 at 22, non-discretionary rulings, including those that are interlocutory, are subject to the normal standard of review: correctness for extractable issues of law, and palpable and overriding error for issues of either fact or mixed fact and law with no extractable legal error.

[34] The first three issues to be addressed by this Court involve non-discretionary decisions. The fourth issue, involving the provisional determination of the motions judge, engages the balancing of various factors and is discretionary in nature.

**Analysis**

*Did the motions judge err in conducting a limitation analysis, as opposed to leaving that for the trial judge?*

[35] This issue was not clearly articulated by Ms. Barry in either her grounds of appeal, or written submissions. Rather, it was a criticism raised in the course of counsel's oral submissions.

[36] This Court does not routinely consider issues which were not properly framed in the pleadings before it. There may be exceptions, such as when addressing the issue may prove helpful and its late introduction does not cause prejudice to the other parties. This is such an instance.

[37] Counsel for Ms. Barry asserts that the motions judge should not have undertaken any limitation analysis. He says RSA ought to have been joined as a party and the limitation defence and related arguments as to discoverability ought to have been left to the trial judge. He says this Court has directed such an approach in *Burt v. LeLacheur*, 2000 NSCA 90.

[38] In *Burt*, a widow brought a claim under the *Fatal Injuries Act* in 1996. Her husband had been killed in a single motor vehicle accident in 1972. She had only learned in 1996 that the defendant LeLacheur had been the driver of the vehicle, not, as she had always believed, her husband. She commenced a claim.

[39] LeLacheur responded by filing a defence pleading the legislated one-year limitation period. Mrs. Burt brought a motion to strike the defence, or, alternatively, to disallow the defence under the former *Limitation of Actions Act*. Identifying when the limitation period commenced and the principle of discoverability were central issues on the motion. The motions judge dismissed

the application to strike and dismissed Burt's action on the basis that it was statute barred.

[40] In upholding the motions judge's refusal to strike the limitation defence, this Court observed:

> [52] A motion such as was brought before Wright, J. is appropriate where a court is asked to exercise its jurisdiction under s. 3, and can exercise it, in a summary manner. The application of the discoverability rule here requires findings of fact relating to when the claimants knew or ought to have known the key facts respecting the remedy sought. **Summary procedure is inappropriate here because the issues of knowledge and due diligence can only be properly resolved after a trial.** (Emphasis added)

[41] Further, in determining the motions judge erred in dismissing the claim in its entirety, the Court said:

> [57] **The picture is clearly incomplete, and can only be resolved following a trial.** The fragmentary material before Wright, J. was inadequate upon which to make a determination either of the application of the discoverability rule or of the principle of fraudulent concealment. Such an application as was before Wright, J. is not a substitute for a trial when there are issues to be tried … . (Emphasis added)

[42] Ms. Barry's counsel says that the above passages clearly direct that limitation determinations ought not be made in chambers, rather, at the conclusion of trial. He says the motions judge erred in principle by undertaking a limitation analysis.

[43] With respect, I disagree. In relying on *Burt*, counsel overlooks that it was decided under the 1972 *Civil Procedure Rules*, not those introduced in 2009. This is significant.

[44] The 2009 *Rules* contemplate the addition of a party to an existing proceeding. Rule 35.05 provides:

> 35.05 A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 – Amendment.

[45] Rule 35.08 provides further direction. It says:

35.08(1) A judge may join a person as a party in a proceeding at any stage of the proceeding.

(2) **It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.**

(3) The presumption is rebutted if a judge is satisfied on each of the following:

> (a) joining a person as a party would cause serious prejudice to that person, or a party;
>
> (b) the prejudice cannot be compensated in costs;
>
> (c) the prejudice would not have been suffered had the party been joined originally, or would have been suffered in any case.

(4) Despite Rule 35.08(1), a judge may not join a person as a plaintiff, applicant, applicant for judicial review, or appellant, unless the person consents.

(5) Despite Rule 35,08(1), **a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party**, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

(6) A judge who joins a person as a party to a proceeding may give directions for the party's participation in the proceeding, including any of the following:

> (a) an amendment to the heading;
>
> (b) a process by which the party may give notice of a claim, defence, or ground;
>
> (c) a process by which each other party may respond to the notice;
>
> (d) requirements for the new party to make disclosure and be discovered.

(Emphasis added)

[46] The purpose of the above Rule is informed by Rule 83.04:

83.04(1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).

(2) A judge **must set aside** an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:

> (a) **a legislated limitation period, or extended limitation period, applicable to the claim has expired;**
>
> (b) **the expiry precludes the claim;**
>
> (c) **the person protected by the limitation period is entitled to enforce it.**

> (3) A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief.
>
> (Emphasis added)

[47] The motions judge appropriately applied the relevant Rules. Rule 35.08(5) is clear and unambiguous. A motions judge "may not" join a party if a limitation period has expired. The same sentiment exists in Rule 83.04. It is clear that a limitation analysis cannot be deferred to the trial judge; it is undertaken at the time a motion is brought to join a party. (See also *Automattic Inc. v. Trout Point Lodge Ltd.*, 2017 NSCA 52 at 34-42). Although preventing a potential party from being brought before the court initially seems to be contrary to the presumption set out in Rule 35.08(2), closer scrutiny refutes that.

[48] Litigation has become lengthy, complex and expensive. If there is a valid limitation defence, it makes sense to have it addressed early. In adopting the 2009 *Rules*, the Supreme Court of Nova Scotia signalled a desire and expectation that matters be dealt with more efficiently and expeditiously than in the past. Rule 35.08(5) is entirely consistent with that goal and serves to enhance the effective administration of justice.

[49] The motions judge did not err in her interpretation of the relevant Rules, nor err in principle by failing to defer a limitation analysis to the trial judge.

*Did the motions judge err in her discoverability analysis?*

[50] Ms. Barry does not allege that the motions judge applied the wrong legal principles relating to the discoverability of her claim against RSA. Rather, it is alleged that she failed to appreciate the significance of HRM's failure to advise her of the existence of an insurance policy providing for Section D coverage. As noted earlier, the motions judge rejected the existence of any such duty (as set out in [18] above).

[51] On appeal, Ms. Barry continues to assert that such a duty exists. In his oral arguments, counsel for Ms. Barry asserts it is a "standard practice" for defendants to provide claimants with their insurance particulars and direction with respect to other potential claims they may have. He further argues that as a public transportation provider, it was reasonable for Ms. Barry (and her counsel) to assume HRM was self-insured. Because Ms. Barry notified HRM of the incident and provided a statement, she exercised due diligence and was unreasonably deprived of notice of a potential Section D claim through no fault of her own.

This, Ms. Barry asserts, supports her argument that the limitation only began to run when she was finally advised of the existence of a policy with RSA. Ms. Barry submits the motions judge did not appreciate the significance of HRM's failure when undertaking her discoverability analysis.

[52] Because Ms. Barry's stated grounds of appeal did not clearly articulate her reliance on HRM's alleged failures, the Court permitted its counsel to make oral submissions in response. Mr. Gough submits that it is no secret that HRM carries liability insurance on its fleet of buses, and its requirement to do so is part of the public record. Section 230 of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, as amended, requires all motor vehicles to carry liability insurance. Section 2(d) of that legislation defines "bus" as a motor vehicle. Counsel further submits that the existence of insurance on HRM buses has been noted by this Court in *Garth v. Metro Transit*, 2006 NSCA 89, also a case where a passenger sought to add a Section D insurer as a party to a tort claim after expiry of the limitation period. Mr. Gough submits that Ms. Barry's failure, or that of her counsel, to realize that HRM had liability insurance does not rest at his client's feet.

[53] I cannot agree with the allegation of error advanced by Ms. Barry. She has presented no legal authority to establish that HRM had a duty to disclose insurance particulars to her, or to inform her of the potential of a Section D claim. Further, the assertions of her counsel as to the usual practice of HRM or other defendants have no evidentiary support in the record before us. I am not prepared to conclude the motions judge erred in principle by rejecting the existence of a duty on HRM to disclose, or that this served to undermine her finding that the cause of action was discoverable by Ms. Barry on March 3, 2013.

*Did the motions judge err in her interpretation of s.12(1) of the Act?*

[54] Before the motions judge, Ms. Barry had argued that if the limitation period were found to have expired, s.12 of the *Act* permitted the disallowance of a limitation defence by RSA. This, in turn, would permit the addition of RSA as a defendant.

[55] As noted earlier, the motions judge was of the view that the definition of "limitation" in s. 12(1) precluded the application of that section to the matter at hand. For ease of reference, I will set out s. 12(1) again:

> 12(1) In this Section, "limitation period" means the limitation period established by

(a) clause 8(1)(a); or

(b) any enactment other than this Act.

[56] In her reasons, the motions judge wrote:

> [69] However, I find that the within limitation period as set forth in the *Standard Automobile Policy* does not fall within the definition of "limitation period" set forth in s. 12. The two-year limitation period was not established under the 2015 [*sic*] *Act*; nor was it established by the 1989 *Act*, **or by another "enactment"**.
>
> [70] For that reason, I conclude that the Court cannot consider the disallowance of the limitation defence in this case. (Emphasis added)

The motions judge did not explain her rationale for the above conclusion.

[57] On appeal, there is no issue taken with the motions judge's determination that the limitation period was not established by virtue of s. 8(1)(a) of the *Act*. Rather, it is her conclusion that the limitation period contained in the *Standard Automobile Policy* was not established by way of "enactment", which is central to the appeal.

[58] In short, Ms. Barry says the *Standard Automobile Policy* is an "enactment" and the motions judge erred in concluding otherwise. RSA, while recognizing the statutory genesis of the *Standard Automobile Policy*, says the two-year limitation period for Ms. Barry to bring an action was not "established" until a contract of insurance was put into existence. This argument is set out in its factum:

> 28. This ground of appeal boils down to a narrow point: is the limitation period in the Policy established by "an enactment"? We acknowledge that the wording of the provisions of Section D of the Policy are set out in the *Insurance Act Regulations*; however, the regulations did not "establish" the limitation period.
>
> 29. The limitation period in Section 9(2) is not established until there is a valid insurance policy in place that incorporates the wordings from the regulations. Up until that time, the regulations are merely wordings; they do not have any force or effect and the parties are strangers. It is the formation of the contract itself that establishes the relationship between the parties and the terms and conditions of that relationship – including the time limitation to commence an action.
>
> 30. RSA submits that the Court below did not err in its interpretation of section 12 of the *Act*. The limitation period in question was established by the Policy, not by "an enactment". Accordingly, the *Act* does not provide a basis to disallow RSA's limitation defence to this action.

[59] As this ground concerns the motions judge's interpretation of a statutory provision, her determination must be correct. In my respectful view, the motions judge was wrong when she summarily concluded that the limitation period contained in the *Standard Automobile Policy* was not established by way of "enactment".

[60] I will begin with the meaning of "enactment". It is not defined in the *Act*. However, the *Interpretation Act*, R.S.N.S. 1989, c. 235 defines "enactment" as follows:

> Interpretation
>
> 7(1) In this Act and **in any other enactment**,
>
> …
>
> (e) "enactment" means an Act **or a regulation** or any portion of an Act or regulation and, as applied to a territory of Canada, includes an ordinance of the territory. (Emphasis added)

[61] There is no dispute that the limitation contained in the *Standard Automobile Policy* for bringing a Section D claim is a creature of regulation, made pursuant to the *Insurance Act*, R.S.N.S. 1989, c. 231. The *Uninsured Automobile and Unidentified Automobile Coverage Regulations*, N.S. Reg 94/96 include the following provisions:

> 10(1) No person shall commence an action to recover the amount of a claim provided for under the contract and under subsection 139(2) of the Act unless these regulations have been complied with.
>
> (2) Every action or other legal proceeding against an insurer for the recovery of an amount of damages **shall be commenced within two years** after the date on which the cause of action against the insurer arose and not afterward.
>
> . . .
>
> 13 The terms, conditions, provisions, exclusions and limits set out in these regulations apply to payments made under subsection 139(2) of the Act and **shall be included in every motor vehicle liability policy**.
>
> 14 The terms, conditions, provisions, exclusions and limits set out in these regulations **shall be deemed to be included in any motor vehicle liability policy** made or renewed on or after July 1, 1996 and in any motor vehicle liability policy that is subsisting on July 1, 1996. (Emphasis added)

(Note: The "Act" in the above provisions refers to the *Insurance Act*.)

[62] The language used in s. 14 of the Regulations is clear that the limitation period set out in s. 10(2) is a mandatory term for all motor vehicle policies in Nova Scotia. As such, it is not surprising that the wording of the limitation period as found in the *Standard Automobile Policy* (s. 9(2)), is identical to that found in s. 10(2) of the Regulation.

[63] In responding to inquiries from the Court, counsel for RSA concedes that parties to a policy of motor vehicle insurance could not negotiate terms that deviated from the *Standard Automobile Policy*, including the Section D limitation period set out therein. Counsel submits, however, that the statutory genesis of the limitation period is of no consequence. As set out earlier, he says the limitation period is not created until the parties enter into a contract of insurance, and therefore, it is not "established" by "enactment" as contemplated by s. 12(1) of the *Act*.

[64] A similar argument was rejected by the British Columbia Court of Appeal in *Copp v. Federation Insurance Co. of Canada* (1985), 28 BCLR (2d) 342. In that instance, an insurer was added as a defendant to a pre-existing action. The insurance policy contained a statutory condition barring an action unless it was brought within one year of the occurrence giving rise to the claim. As that period had lapsed prior to the insurer being added, it sought to be struck as a defendant.

[65] As in the present case, the relevant limitation legislation contained a provision permitting an action to proceed notwithstanding the expiry of a limitation period. The insurer argued, as RSA does here, that the limitation period was created by the contract of insurance and the legislation could not be used to disallow a defence. The motions judge, upheld by the Court of Appeal, described the argument as follows:

> 5. The defendant, on the other hand, argues that once the parties enter into the contract of insurance the condition becomes a term of the contract, a contractual term to which the parties have agreed. The limitation period which governs the action, it is said, now exists by virtue of the contract, and s. 4(1) of the Limitation Act, has no effect since it was meant to apply only to limitation periods created by statute.

[66] Rejecting that argument, the motions judge concluded:

> 9. Is the present action one to which an Act applies? By virtue of the Insurance Act, there is a one-year limitation period for bringing such an action. The means by which that is effected is by requiring that there be a term in the policy to that

> effect which is referred to as a "statutory condition". Regardless of whether or not it can be said that that term exists in the policy also by virtue of agreement between the parties, it seems to me that, in any event, the action is governed by the statutory requirement of a one-year limitation period. Therefore, it must be said that the Insurance Act applies to the action and that therefore the saving provision of s. 4(1)(d) of the Limitation Act also applies.

[67] The above reasoning is persuasive and equally applicable to the matter before this Court. Here, the two-year limitation period to bring a Section D claim was established by virtue of the *Uninsured Automobile and Unidentified Automobile Coverage Regulations*, made pursuant to the *Insurance Act*. That limitation period is incorporated, as the Regulations require, into the *Standard Automobile Policy for Nova Scotia*. Clearly, the limitation exists not due to the contractual intentions of the parties, but by virtue of the mandatory directive of the Legislature. The contract implements the limitation period between the parties, but does not establish it; that occurs by virtue of the Regulations.

[68] The limitation period for Ms. Barry to bring an action against RSA was created by way of "enactment". The motions judge erred in concluding otherwise and finding she was precluded from considering disallowing RSA's limitation defence.

[69] I would allow this ground of appeal. In doing so, it becomes necessary to consider RSA's cross-appeal challenging the motions judge's provisional ruling.

*In provisionally disallowing RSA's limitation defence, did the motions judge err in her application of s. 12(3) and (5) of the Act?*

[70] Section 12(3) permits a judge, notwithstanding the lapsing of a limitation period, to disallow a defence arising therefrom and permit a claim to proceed. It says:

> 12(3) Where a claim is brought without regard to the limitation period applicable to the claim, and an order has not been made under subsection (4), the court in which the claim is brought, upon application, may disallow a defence based on the limitation period and allow the claim to proceed if it appears to the court to be just having regard to the degree to which
>
> > (a) the limitation period creates a hardship to the claimant or any person whom the claimant represents; and

> (b) any decision of the court under this Section would create a hardship to the defendant or any person whom the defendant represents, or any other person.

[71] In assessing the degree of hardship referenced above, a judge must consider the factors set out in s. 12(5):

> (5) In making a determination under subsection (3)**, the court shall have regard to all the circumstances of the case and, in particular, to**
>
> (a) the length of and the reasons for the delay on the part of the claimant;
>
> (b) any information or notice given by the defendant to the claimant respecting the limitation period;
>
> (c) the effect of the passage of time on
>
> (i) the ability of the defendant to defend the claim,
>
> and
>
> (ii) the cogency of any evidence adduced or likely to be adduced by the claimant or defendant;
>
> (d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim;
>
> (e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered;
>
> (f) the extent to which the claimant acted promptly and reasonably once the claimant knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to a claim;
>
> (g) the steps, if any, taken by the claimant to obtain medical, legal or other advice and the nature of any such advice the claimant may have received;
>
> (h) the strength of the claimant's case; and
>
> (i) any alternative remedy or compensation available to the claimant. (Emphasis added)

[72] When a judge is required to balance a number of factors, this Court will not, absent an error of law, interfere with their conclusion. In the present case, I am satisfied that the motions judge erred in two material ways.

[73] Firstly, s. 12(5) requires all of the enumerated factors to be considered. Although a judge has the discretion to weigh the significance of particular factors

against the others, she does not have the discretion to exclude any factor from consideration. I am satisfied the motions judge failed to consider s. 12(5)(h) – the strength of the claimant's case, and s. 12(5)(i) – the existence of any alternative remedy or compensation available to the claimant. Although her reasons show consideration of the other factors contained in s. 12(5), there is no mention of the above two. As such, her consideration of the degree of hardship mandated in s. 12(3) was flawed.

[74] Secondly, in assessing the degree of hardship, I am satisfied the motions judge held Ms. Barry and RSA to different evidentiary standards. In terms of evidence, Ms. Barry and her counsel filed affidavits with the Court in support of the motion. Both were silent as to the existence of hardship if the limitation defence were not set aside. RSA filed an affidavit sworn by a claims examiner, also silent as to what hardship would arise in the event the limitation defence were disallowed. In her reasons, the motions judge addressed only the evidence adduced by RSA. Critical of the nature of the evidence provided, she wrote:

> [76] The kind of evidence which might be expected could encompass an account of RSA's normal practice when it receives notice of a possible Section D claim, whether it has carried out that process to date and how it might have been hampered in its ability to engage that process by the passage of time. The Court cannot speculate on whether it is more difficult for RSA to attempt to find the unidentified motorist at this point in time, than it would have been the day after the incident.
>
> [77] I am not prepared to presume hardship in the absence of evidence.

[75] Given the outcome, the motions judge must have concluded that the degree of hardship advanced by each party favoured Ms. Barry. However, as noted earlier, there was no evidence adduced by her on this point, nor did the motions judge address how she concluded Ms. Barry would suffer any hardship at all. It would appear the motions judge was prepared to presume hardship in the absence of evidence from Ms. Barry, yet refused to do so for RSA. This constitutes an error in principle justifying appellate intervention.

[76] Based on the two errors identified, I would allow the cross-appeal and set aside the provisional ruling. As opposed to sending the matter back to the court below for re-consideration, I am satisfied this Court, with the full motion record, is in a position to undertake a s. 12 analysis. In doing so, I am mindful of the findings of the motions judge which have been left undisturbed on appeal.

[77] Before undertaking a consideration of the various factors, a preliminary observation is in order. Although s. 12(3) requires a court to consider the degree of hardship to both claimant and defendant, it should not be forgotten that this exercise is triggered due to a claimant having missed a limitation period created by virtue of the *Act* or other enactment. As such, the burden rests on the claimant to establish that any defence arising from the lapsing of that period ought to be disallowed.

[78] It is incumbent on a claimant to adduce evidence which addresses the factors contained in s. 12(5), in order to inform the s. 12(3) assessment. Although s. 12(5) mandates a judge to "have regard to all the circumstances of the case", those who fail to provide an evidentiary foundation do so at their peril. Similarly in response, a defendant (or proposed defendant) is well-advised to provide a sufficient foundation to permit a comprehensive consideration of the factors in s. 12(5) in order to better inform the hardship assessment. I turn now to consider the factors.

*Length of and reasons for the delay*

[79] The motions judge concluded the limitation period began to run on the day of the accident, expiring two years later. Ms. Barry did not notify RSA of her intent to join it as a defendant until September 29, 2016, some 18 months past the lapsing of the limitation period. In my view, this is a significant delay.

[80] Ms. Barry explains the delay by pleading ignorance of the existence of a policy of insurance covering HRM. She further relies on HRM's failure to advise her of the existence of insurance and the availability of a Section D claim. As determined by the motions judge, HRM has no such duty. Further, the existence of a policy of liability insurance was information in the public domain. In my view, Ms. Barry's reason for delay is not compelling.

*Any information or notice given by the defendant to the claimant respecting the limitation period*

[81] The motions judge accepted that RSA was unaware of Ms. Barry's potential claim until receipt of correspondence from her counsel on September 29, 2016, well after the expiry of the limitation period. There is nothing in the record to suggest that Ms. Barry was in any way detrimentally influenced by the actions of RSA.

*The effect of the passage of time on the ability of the defendant to defend the claim*

[82] The *Uninsured Automobile and Unidentified Automobile Coverage Regulations* highlight the importance of an insurer being made promptly aware of the potential of a Section D claim. Section 7(1) places early disclosure obligations on a claimant, and provides an insurer with the right to request information pertaining to the nature of the claim. It says:

> 7(1) A person claiming damages for bodily injury to or the death of a person resulting from an accident involving an uninsured automobile or unidentified automobile or a person acting on behalf of the claimant shall
>
> > (a) Within thirty days after the date of the accident or as soon after that period as practicable, give written notice of the claim to the insurer by delivering it personally or by sending it by registered mail to the chief agent or head office of the insurer in Nova Scotia;
> >
> > (b) Within ninety days after the date of the accident or as soon after that period as practicable, deliver to the insurer as fully detailed a proof of claim as is reasonably possible in the circumstances respecting the events surrounding the accident and the damages resulting from it;
> >
> > (c) Provide the insurer, at the insurer's request, with the certificate of a medical practitioner legally qualified to practice medicine, describing the cause and nature of the bodily injury or death to which the claim relates and the duration of any disability resulting from the accident; and
> >
> > (d) Provide the insurer with details of any policies of insurance, other than life insurance, to which the claimant may have recourse.

[83] I further note that s. 9(1)(a) provides:

> 9(1) The insurer has the right and the claimant shall afford the insurer an opportunity
>
> > (a) To conduct a physical or mental examination of any person insured under the contract to whom the claimant's claim relates at the time and so often as the insurer reasonably requires and while the claim is pending;

[84] It is clear that the intent of the above provisions is to provide an insurer with early notice of a claim. This provides an opportunity to understand and investigate its potential exposure. By asking to disallow the limitations defence, Ms. Barry is not only seeking to set aside her obligation to bring an action when required, but to excuse her other obligations. These provisions exist for a reason and I conclude

that depriving RSA of the early notice the Legislature directed would serve to negatively impact its ability to defend the claim.

*The conduct of the defendant after the claim was discovered*

[85] There is no indication that RSA, after being notified of the proposed claim, acted in any way which prejudiced Ms. Barry.

*The duration of any incapacity of the claimant arising after the date on which the claim was discovered*

[86] There is nothing in the record to suggest Ms. Barry was incapacitated at any time relevant to this matter.

*The extent to which the claimant acted promptly and reasonably once the claimant knew a claim may arise against the defendant*

[87] The motions judge found Ms. Barry ought to have known at the time of the incident that a potential Section D claim could be advanced and it was not reasonable for her to expect HRM to advise her of the existence of insurance coverage. With minimal inquiry, Ms. Barry ought to have been aware of not only the existence of Section D coverage, but her resulting obligations to inform RSA.

*The steps, if any, taken by the claimant to obtain medical, legal or other advice and the nature of any such advice*

[88] The record is scant regarding the nature and extent of medical advice received by Ms. Barry. As for legal advice, in her evidence, she described calling Dalhousie Legal Aid following the incident, but the details of what was discussed were vague. The limitation period had already expired by the time she retained legal counsel. Another year passed before her counsel notified RSA of a potential claim.

*The strength of the claimant's case*

[89] Ms. Barry provided no evidence with respect to the strength of her case against RSA. It must be remembered that as a Section D insurer, RSA is only obligated to respond as set out in s. 3 of the Regulations. Relevant here, s. 3(1)(a) provides:

> 3(1) The insurer shall pay all sums that
>
> > (a) A person insured under the contract **is legally entitled to recover** from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile; (Emphasis added)

[90] To successfully claim against RSA, Ms. Barry will be obligated to establish that she is "legally entitled" to damages from an unidentified driver. In this motion, she provided little evidence to establish a strong case for liability. Further, although it appears she undertook some physiotherapy following the accident, there is insufficient evidence adduced to advance a strong case regarding the nature, extent, duration or causation of any injuries being claimed as arising from the incident.

*Any alternative remedy or compensation available to the claimant*

[91] Ms. Barry did not address this factor in her motion materials. It would appear she received some treatment coverage; however, it is unclear what other sources of recovery she may have. This would not be information in the possession of RSA.

[92] I have considered the above factors and the degree of hardship to be incurred by Ms. Barry and RSA, respectively. I am satisfied that based upon the record before me, the degree of hardship analysis favours RSA. As such, the limitation defence should not be disallowed.

## Conclusion

[93] I would allow Ms. Barry's appeal on the basis the motions judge erred in her interpretation of s. 12(1) of the *Act*. I would allow RSA's cross-appeal and set aside the motions judge's provisional ruling. I find RSA's limitation defence ought not to be disallowed. As such, RSA cannot be added as a defendant to the proceedings.

[94] Notwithstanding Ms. Barry having success on one aspect of her appeal, given the result has remained the same as that determined by the motions judge, I decline to award her costs. I would, however, order costs on the appeal to HRM in the amount of $500.00, inclusive of disbursements, payable by Ms. Barry. On the cross-appeal, I would order costs payable by Ms. Barry to RSA in the amount of $1,500.00, inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Saunders, J.A.