Federal Court  Cour fédérale

Date: 20250908

Docket: T-2312-23

Citation: 2025 FC 1471

Ottawa, Ontario, September 8, 2025

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ELITE INSURANCE COMPANY, DOING BUSINESS AS AVIVA

Plaintiff

and

THE ESTATE OF NEIL BORGATTI (ALSO KNOWN AS RICHARD NEIL BORGATTI), DECEASED
JANET KATHLEEN BORGATTI, AS ADMINISTRATOR OF THE ESTATE OF THE DECEASED RICHARD NEIL BORGATTI

Defendants

JUDGMENT AND REASONS

I. Overview

[1] This Judgment and Reasons addresses a motion brought by the Plaintiff, Elite Insurance Company, doing business as Aviva [Aviva], seeking summary judgment in the underlying action

[the Action] against the Defendants, Neil Borgatti (also known as Richard Neil Borgatti), now deceased, the estate of Neil Borgatti [the Estate], and Janet Kathleen Borgatti (the mother of Neil Borgatti) as the administrator of the Estate.

[2] Neil Borgatti was the owner of a pleasure vessel described as a 1999 Triton TR21 Mercury Watercraft [the Borgatti Vessel]. As explained in greater detail below, Aviva insured the Borgatti Vessel on or around February 4, 2019, under Watercraft Insurance Policy Number P39608136PWP [the Policy]. On the evening of August 24, 2019, the Borgatti Vessel collided with another vessel, described as a 2008 Tracker Pro Team 190TX, owned by David Koch [the Koch Vessel]. As a result of this collision [the Collision], passengers on board both the Borgatti Vessel and the Koch Vessel were injured, and Mr. Borgatti and another passenger on board the Borgatti Vessel were killed.

[3] In the Action, Aviva seeks, among other things, declarations that losses and claims asserted in various pieces of litigation (in the Federal Court and in the Ontario Supreme Court of Justice) against the Estate relating to the Collision are not covered by the Policy and that Aviva owes no contractual indemnity to the Defendants under the Policy's terms and conditions. Aviva submits that insurance coverage under the Policy had ceased at the time of the Collision, because Mr. Borgatti was in breach of a warranty under the Policy entitled "Safety Equipment Warranty" that required the Borgatti Vessel to be equipped with safety equipment required by law, kept in good and efficient working order at all times [the Safety Equipment Warranty].

[4] By Notice of Motion dated March 24, 2025, Aviva brings the present motion, seeking summary judgment in the Action [the Motion]. The Defendants agree that the issues raised in the Motion are suitable for adjudication by summary judgment but argue that those issues should be decided, and summary judgment granted, in favour of the Defendants instead.

[5] While the Defendants have not brought a cross-motion seeking summary judgment, Aviva's counsel confirmed at a trial management conference held on May 28, 2025 [the TMC], that Aviva does not consider the lack of a formal cross-motion to represent an impediment to the Court granting summary judgment on the issues raised in this motion in favour of either of the parties. I accept the parties' position on this procedural point, as this Court has found that it is within its power to grant summary judgment in favour of the party responding to a summary judgment motion, where the order sought is within the scope of the motion, even where the responding party does not bring a formal cross-motion (*Sea Tow Services International, Inc v C-Tow Marine Assistance Ltd*, 2025 FC 27 [*Sea Tow*] at paras 219, 222).

[6] The Defendants argue that Aviva should be prohibited from denying coverage under the Policy due to the operation of the doctrines of waiver, estoppel, and laches. The Defendants also argue that the Safety Equipment Warranty does not apply to navigation lights, the equipment at issue in Aviva's reliance on that warranty. In the event it is found that the Safety Equipment Warranty does apply to navigation lights, the Defendants submit that subsections 39(3) and 39(4) of the *Marine Insurance Act*, SC 1993, c 22 [*Marine Insurance Act*], the effect of which will be explained later in these Reasons, apply to preclude Aviva from denying coverage due to the warranty.

[7] For the reasons explained in greater detail below, I am granting summary judgment in favour of the Defendants, as I find that Aviva is estopped from denying the Defendants coverage under the Policy, including Aviva's duty to defend the Defendants and Aviva's obligation to provide contractual indemnity to the Defendants under the Policy.

II. **Background**

A. ***The Policy***

[8] Aviva is an Ontario corporation that carries on business as an insurer in various lines of insurance including hull and liability protection coverage for watercraft. On or around February 4, 2019, Aviva issued the Policy to Mr. Borgatti for the Borgatti Vessel. The Policy provided coverage for, among other things, physical damage, liability, and accidental death benefits.

[9] The Policy contains suspensive conditions and warranties, defined in the Policy as follows:

> **"Suspensive Condition"** refers to a specific condition of this policy that must be strictly complied with, and if it is not the insurance cover will cease from the date of the breach of the condition until the end of the breach.
>
> **"Warranty" or "Warranted"** refers to a specific condition of this policy that must be strictly complied with, and if it is not the insurance cover will cease as from the date of the breach of warranty. Once the insurance cover ceases, the insurance cannot be reinstated even if the violation is corrected or cured. **Warranties** are not **suspensive conditions**.
>
> [Emphasis in original.]

[10] Section G of the Policy identifies warranties (and suspensive conditions) applicable under the Policy, including the Safety Equipment Warranty, which reads as follows:

> **Safety Equipment Warranty**
>
> **Warranted** that the **insured watercraft** is equipped with all of the safety equipment, including fire extinguishers, required by law and that all of the equipment is kept in good and efficient working order at all times.
>
> [Emphasis in original.]

B. *The Collision and Investigative Efforts by Aviva*

[11] On the evening of August 24, 2019, Neil Borgatti was operating the Borgatti Vessel on Stoney Lake in the county of Peterborough, Ontario, with Charles McCrie and Kristian Brudek as passengers on board.

[12] At approximately 9:15 pm, the Borgatti Vessel collided with the Koch Vessel. At the time of the Collision, Kevin Koch was operating the Koch Vessel with Foster Matthews and Damian de la Guardia as passengers on board. As a result of the Collision, Neil Borgatti and Kristian Brudek were killed, and Kevin Koch, Foster Matthews, Damian de la Guardia, and Charles McCrie were injured.

[13] On or about August 30, 2019, the Collision was reported to Aviva. On September 3, 2019, Aviva assigned Deborah Canute as an adjuster to handle the liability claim, following which Aviva began to investigate the circumstances surrounding the Collision. That investigation included efforts to obtain information and documentation from witnesses, police and other government officials.

[14] Aviva argues that, despite these efforts, it did not obtain any concrete information regarding the circumstances of the Collision until November 24, 2020, when it received an Ontario Provincial Police Reconstruction Collision Report [the OPP Report]. Shortly thereafter, Aviva also received a Coroner's Investigation Statement and Report of Postmortem Examination and Toxicology for Neil Borgatti [the Coroner's Report] on November 27, 2020.

C. ***Litigation Relating to the Collision***

[15] Beginning in November 2020, the following actions were commenced in the Ontario Superior Court of Justice against the Estate in relation to the Collision:

A. Damian de la Guardia commenced an action on November 2, 2020, against the Estate (Court File No. CV-20-00000200-0000) [the de la Guardia Action];

B. Kevin Koch commenced an action on November 6, 2020, against the Estate (Court File No. CV-20-00000207-0000) [the Kevin Koch Action];

C. Anna Skotnicka and Estera Lawrence (the mother and sister, respectively, of Kristian Brudek) commenced an action on December 9, 2020, against Kevin Koch, David Koch, and the Estate (Court File No. CV-20-00652817-0000) [the Skotnicka/Lawrence Action];

D. Charles McCrie commenced an action on March 12, 2021, against David Koch, Kevin Koch, and the Estate (Court File No. CV-21-00658696-0000) [the McCrie Action]; and

E. David Koch commenced an action on June 21, 2021, against the Estate (Court File No. CV-21-00000163-0000) [the David Koch Action].

[16] On December 11, 2020, Ms. Canute informed the Defendants that Aviva would be appointing defence counsel early in 2021 to defend the actions that had by then been commenced against the Estate and that it had obtained a waiver of defence until the end of January 2021. On or about February 19, 2021, Aviva appointed counsel to defend those actions [Defence Counsel].

[17] On February 2, 2021, Kevin Koch and David Koch brought an action in the Federal Court (Court File No. T-198-21), seeking a declaration that their liability in relation to the Collision be limited to $1,000,000, pursuant to provisions of the *Marine Liability Act*, SC 2001, c 6 [the Koch Limitation Action]. On March 31, 2021, Janet Borgatti, as administrator of the Estate, brought an action in the Federal Court (Court File No. T-558-21), similarly seeking a declaration that the Estate's liability in relation to the Collision be limited to $1,000,000 [the Borgatti Limitation Action]. On July 21, 2021, the Court issued Orders providing, among other things, a process and deadline for claims to be filed in the Koch Limitation Action and the Borgatti Limitation Action [together, the Limitation Actions] and staying all other proceedings in respect of the Collision.

[18] Subsequently, Ireneusz Brudek (the father of Kristian Brudek), Janet Borgatti, Richard Borgatti (the father of Neil Borgatti), Robin Dawson (the sister of Neil Borgatti), Craig McCrie, Anna Skotnicka, and Estera Lawrence made claims against the limitation fund in the Koch Limitation Action, and Craig McCrie, Damian de la Guardia, Ireneusz Brudek, Kevin Koch,

Anna Skotnicka, and Estera Lawrence made claims against the limitation fund in the Borgatti Limitation Action.

D. ***Reservation of Rights Letters***

[19] Before its February 19, 2021 appointment of counsel to defend the actions against the Estate, Aviva sent a letter dated February 12, 2021 [the February 2021 Letter] to the Estate regarding the de la Guardia Action, the Kevin Koch Action, and the Skotnicka/Lawrence Action, raising the possibility of a breach by Neil Borgatti of the Safety Equipment Warranty and informing the Estate that Aviva reserved its rights under the Policy. The February 2021 Letter identified certain allegations advanced in the de la Guardia Action, the Kevin Koch Action, and the Skotnicka/Lawrence Action, including in relation to the navigational lights of the Borgatti Vessel, and stated as follows:

> ….
>
> Neil Borgatti's Watercraft Insurance Policy includes liability insurance coverage in Section B. The 'Basis of Settlement -Section B' under 'Conditions for Payment' states: "*No liability shall exist under Section B unless all the terms, conditions and warranties of this policy have been fully complied with...*"
>
> The Watercraft Insurance Policy in Section G includes a 'Safety Equipment Warranty' which states: "*Warranted that the insured watercraft is equipped with all of the safety equipment, including fire extinguishers, required by law and that all of the equipment is kept in good and efficient working order at all times*."
>
> A warranty must be strictly complied with and if a court determines the 'Safety Equipment Warranty' was not complied there would be no coverage available to respond to the claims being made against the Estate.
>
> [Aviva] reserves its rights under the Policy and does not waive any of its rights by investigating the accident and the circumstances surrounding the accident, or by defending any claims or actions, or

> by negotiating any settlement of any claims or actions, or by making any payments, in respect of the accident
>
> Subject to the potential coverage issues, [Aviva] will retain counsel to defend the Estate and will inform you about the particulars in the coming days. However, the defence of the lawsuits should not be construed as a waiver of the terms and conditions of the Policy. [Aviva's] position is subject to further evaluation as more information becomes available. [Aviva] reserves the right to assert additional terms and provisions contained in the Policy, which may become applicable as new information is learned, including the right to deny coverage.
>
> ….
>
> [Emphasis in original.]

[20] Following the commencement of the McCrie Action and the David Koch Action, Aviva sent the Estate additional letters dated March 31, 2021 [the March 2021 Letter] and August 5, 2021 [the August 2021 Letter], respectively, reiterating Aviva's position in the February 2021 Letter on the potential breach of the Safety Equipment Warranty and the reservation of Aviva's rights under the Policy. (In these Reasons, I will refer to the February 2021 Letter, the March 2021 Letter, and the August 2021 Letter collectively as the Reservation of Rights Letters.)

[21] By email sent May 11, 2021, Jonathan Barker, a senior claims analyst at Aviva, informed Janet Borgatti that he was handling the file moving forward, that Aviva was continuing its investigation, and that it was defending the various lawsuits according to the terms of the Reservation of Rights Letters that had been sent by that date.

[22] At present, Aviva continues to direct and fund Defence Counsel.

E. ***The Action***

[23] On September 11, 2023, Janet Borgatti sent an email to Aviva, requesting the status of Aviva's position on coverage. On September 26, 2023, Jonathan Barker responded to Ms. Borgatti by email, advising that Aviva would be proceeding with an action in the Federal Court seeking a declaration of no coverage. (As will be explained later in these Reasons, the record before the Court in this Motion does not include a copy of Mr. Barker's email, but nothing turns on this deficiency.)

[24] On November 1, 2023, Aviva commenced the Action to which this Motion for summary judgment relates. The Statement of Claim in the Action asserts that there is no coverage under the Policy for claims resulting from the Collision because Neil Borgatti breached the Safety Equipment Warranty, by operating the Borgatti Vessel without any requisite lights or with lights that were not in a fit and proper working condition, including by using illumination from a fish finder and cell phone(s) as navigation lights. In the Action, Aviva seeks:

A. a declaration that the losses and claims made in Koch Limitation Action, any claims made in response to the Borgatti Limitation Action, any claims made in the de la Guardia Action, any claims made in the Skotnicka/Lawrence Action, any claims made in the McCrie Action, and any other claim in relation to the Collision are not covered by the Policy; and

B. a declaration that Aviva owes no contractual indemnity to the Defendants under the Policy's terms and conditions.

[25] The Defendants filed a Statement of Defence on April 16, 2024, denying that the Collision occurred because of any fault or neglect by the Defendants and asserting that Mr. Borgatti at all times complied with the warranties, terms and conditions of the Policy. In the alternative, the Defendants asserted that subsections 39(3) and 39(4) of the *Marine Insurance Act* apply to prohibit Aviva from denying coverage based on the Safety Equipment Warranty. In the further alternative, the Defendants pleaded that Aviva should be prohibited from denying coverage under the Policy due to the application of the doctrines of waiver, estoppel, delay and laches.

F. *The Motion for Summary Judgment*

(1) Aviva's Position and Evidence

[26] On March 24, 2025, Aviva brought this Motion, seeking summary judgment in its favour in the Action.

[27] As noted above, Aviva asserts in the Action that, at the time of the Collision, Neil Borgatti was in breach of the Safety Equipment Warranty, by operating the Borgatti Vessel without the required lighting. In this Motion, Aviva argues in particular that Mr. Borgatti was not in compliance with applicable regulations made under the *Canada Shipping Act*, 2001, c 26, including the *Small Vessel Regulations*, SOR/2010-91 [*Small Vessel Regulations*] and the *Collision Regulations*, CRC, c 1416 [*Collision Regulations*].

[28] Aviva seeks to support its position with evidence contained in two affidavits included in its motion record. The first is an affidavit affirmed by Aviva's senior claims analyst, Jonathan

Barker, on March 24, 2025 [the Barker Affidavit]. In his affidavit, Mr. Barker recounts events surrounding the reporting of the Collision to Aviva; Aviva's subsequent efforts to investigate the circumstances of the Collision; the timing of information and documentation becoming available to Aviva in the course of its investigation; the litigation involving the Estate resulting from the Collision; Aviva's issuance of the Reservation of Rights Letters; Aviva's retention of Defence Counsel; and Aviva's subsequent retention of an expert, Mr. Frans Schouffoer, to opine on whether the lights displayed by the Borgatti Vessel at the time of the Collision complied with the relevant regulations.

[29] The Barker Affidavit attaches as exhibits much of the documentation that Mr. Barker references in recounting these events, including the OPP Report, the Coroner's Report, and a transcript of the discovery examination of Charles McCrie in the Limitation Actions [the McCrie Transcript]. That discovery was conducted on March 1, 2022, but was obtained by Aviva on November 1, 2024.

[30] The Barker Affidavit describes the OPP Report as indicating that, at the time of the Collision, the Borgatti Vessel had no navigational light poles attached. Rather, the navigational light poles were located within the port side storage locker of the Borgatti Vessel. Mr. Barker further describes the Coroner's Report as indicating (based on witness statements) that Mr. Borgatti had attempted to turn on the Borgatti Vessel's navigation lights but could not get them to work. In an effort to make the vessel visible, Mr. Borgatti turned the illuminated screen of the fish finder at the bow of the boat outwards and his two passengers held up their lighted cellphones.

[31] The Barker Affidavit also references testimony by Mr. McCrie in the McCrie Transcript consistent with the information provided in the OPP Report and the Coroner's Report. Mr. Barker further describes McCrie as testifying that the occupants of the Borgatti Vessel did not plan to return before dark and that they did not check that the navigation lights on the Borgatti Vessel were working before disembarking (which I understand Aviva to interpret as a reference to departing from the dock at Mr. Borgatti's cottage).

[32] The Defendants' counsel cross-examined Mr. Barker on his affidavit, and the transcript of that cross-examination [the Barker Transcript] was included in a supplementary motion record filed by Aviva in this Motion.

[33] Aviva's second affidavit was affirmed by Mr. Schouffoer on March 21, 2025, and attaches his report dated March 20, 2025 [the Schouffoer Report]. In his report, Mr. Schouffoer opines that Mr. Borgatti was not in compliance with relevant boating regulations identified in the report as: he failed to display the required navigation lights for a small craft (power boat), such as the Borgatti Vessel, after sunset; he failed to verify that the navigation lights were correctly mounted; and he failed to maintain a safe speed. Mr. Schouffoer further opines that the cellphones and fish finders used by the occupants of the Borgatti Vessel at the time of the Collision would not be sufficient for other vessels to see the Borgatti Vessel.

[34] Significant to Aviva's position as to the timeliness of its issuance of the Reservation of Rights Letters, it asserts that, notwithstanding efforts made to obtain relevant documentation and information, it was only when Aviva received the OPP Report on November 24, 2020, and the Coroner's Report on November 27, 2020, that it had the benefit of concrete information

regarding the circumstances surrounding the Collision, in particular confirmation that the Borgatti Vessel had no navigation light poles attached at the time of the Collision, which occurred after sunset, and that the occupants of the Borgatti Vessel used cellphones and fish finders for illumination at the time of the Collision.

(2) The Defendants' Position and Evidence

[35] The Defendants assert in this Motion that Aviva should be barred from denying coverage under the Policy pursuant to the doctrines of waiver, estoppel, and laches. Specifically, the Defendants argue that Aviva was aware as of September 17, 2019, of evidence provided by Charles McCrie that the navigation lights on the Borgatti Vessel were not functioning, and that in February 2020 Aviva received additional information resulting from the investigations of -30-Forensic Engineering [Forensic], a company retained by Aviva to inspect the Vessel and investigate the circumstances surrounding the Collision, that the lights on the Borgatti Vessel were off and stowed before the Collision. The Defendants argue that, despite having this information, as well as the information in the OPP Report and the Coroner's Report that Aviva obtained in November 2020, Aviva did not inform the Estate of its concern regarding a possible breach of the Safety Equipment Warranty until it issued the first Reservation of Rights Letter in February 2021.

[36] Among their arguments in support of their position that the doctrines of waiver, estoppel, and/or laches apply, the Defendants emphasize that Aviva made payments to the Estate under the Policy, in relation to physical damage to the Borgatti Vessel and accidental death benefits, on May 11, 2020, and June 30, 2020, respectively, and then advised the Estate on December 11,

2020, that Defence Counsel would be appointed, all without raising concern about the navigation lights or communicating a reservation of rights. As explained in further detail below, the Defendants assert that they suffered prejudice as a result.

[37] The Defendants further argue that the Safety Equipment Warranty does not apply to navigation lights and that even if it does, subsections 39(3) and 39(4) of the *Marine Insurance Act* operate to prohibit Aviva from denying coverage based on the Safety Equipment Warranty. As will be explained in more detail later in these Reasons, those provisions operate in certain circumstances to protect an insured from the effect of what would otherwise be a breach of a warranty in a marine insurance policy.

[38] The Defendants' motion record includes an affidavit affirmed on May 26, 2025, by Robin Dawson (the sister of Neil Borgatti and daughter of Janet Borgatti, the administrator of the Estate) [the Dawson Affidavit]. Ms. Dawson explains that she has been actively involved in assisting her mother with matters related to the Estate. The Dawson Affidavit describes Mr. Borgatti's experience and care as a boater, communications with Aviva (including attaching copies thereof as exhibits), and communications with legal counsel retained by the Estate to pursue a claim against the operator of the Koch Vessel. Ms. Dawson provides evidence of Aviva's payments to the Estate in relation to physical damage to the Borgatti Vessel and accidental death benefits. She also describes the efforts of Defence Counsel on behalf of the Estate following their appointment by Aviva.

[39] In support of the Defendants' assertion of prejudice resulting from Aviva's alleged failure to give them timely notice of its concerns about the breach of the Safety Equipment Warranty,

Ms. Dawson refers to a heavy emotional and financial toll upon her mother and the Estate being deprived of information that would have prompted them to hire legal counsel to bring an earlier application to determine whether the Estate was entitled to coverage under the Policy.

[40] While not referenced in the Dawson Affidavit, the Defendants also assert in this Motion that they suffered prejudice as a result of Aviva disposing of the Vessel (of which it had possession) in late August 2020, thereby depriving the Defendants of an opportunity to obtain physical evidence that might have assisted them to respond to Aviva's assertion that Mr. Borgatti breached the Safety Equipment Warranty.

[41] Aviva's counsel cross-examined Ms. Dawson on her affidavit, and the transcript of that cross-examination [the Dawson Transcript] was included in Aviva's supplementary motion record.

[42] Based on the record described above, the Court heard oral submissions from the parties in this Motion on July 23, 2025.

III. **Issues**

[43] While the parties' written submissions articulate the list of issues for the Court's determination somewhat differently, their respective lists of issues are materially the same. I would formulate the issues as follows:

1. Are the issues raised in this Motion appropriate for disposition by summary judgment?

2. Did Neil Borgatti breach the Safety Equipment Warranty such that, subject to the other issues raised in this Motion, Aviva is relieved of its obligation to provide a contractual indemnity to the Defendants under the terms and conditions of the Policy?

3. Does subsection 39(3) and/or 39(4) of the *Marine Insurance Act* operate to prevent Aviva from relying on the Safety Equipment Warranty?

4. Is Aviva barred from relying on the Safety Equipment Warranty by the operation of waiver, estoppel, and/or laches?

[44] At the hearing of this Motion, the Court also raised with counsel evidentiary issues related to certain components of the record before the Court, and a dispute developed between the parties surrounding a request by Aviva to introduce into evidence a document that had inadvertently been omitted from an exhibit to the Barker Affidavit (Exhibit JJ). I will address these evidentiary issues before turning to the substantive issues in this Motion.

IV. **Law**

A. ***Summary Judgment***

[45] A party may bring a motion for summary judgment on all or some of the issues raised in the pleadings any time after the defendant has filed a defence but before the trial has been fixed (Rule 213(1) of the *Federal Courts Rules*, SOR/98-106 [FCR]). Pursuant to r 215(1) of the FCR, the Court shall grant summary judgment if the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence.

[46] A conclusion that there is no genuine issue for trial results if there is no legal basis for the claim or defence, or if the Court has the evidence required to fairly and justly adjudicate the dispute (*Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 [*Milano Pizza*] at para 31, citing *Hryniak v Mauldin*, 2014 SCC 7 at para 66).

[47] The test on a motion for summary judgment is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial. Summary judgment is not restricted to the clearest of cases, and the moving party does not need to establish that a claim or defence cannot possibly succeed at trial (*Milano Pizza* at para 33).

[48] Summary judgment should not be granted where the necessary facts cannot be found to resolve the dispute, or where it would be unjust to do so. The existence of conflicting evidence does not necessarily preclude summary judgment if the Court finds the issues can be decided notwithstanding the conflicting evidence; however, issues of credibility should not be decided on motions for summary judgment (*Milano Pizza* at paras 36–39).

[49] In response to a motion for summary judgment, a responding party cannot rely on what may be adduced as evidence at a later stage. A responding party must set out specific facts and adduce the evidence showing that there is a genuine issue for trial (FCR, r 214; *Milano Pizza* at paras 34–35; *Gupta v Canada*, 2021 FCA 31 at para 29).

B. *Marine Insurance Act*

[50] Section 39 of the *Marine Insurance Act*, portions of which are relied on by the Defendants, provides as follows:

Compliance with warranty

39 (1) Subject to this section, a warranty must be exactly complied with, whether or not it is material to the risk.

Effect of breach of warranty

(2) Subject to any express provision in the marine policy or any waiver by the insurer, where a warranty is not exactly complied with, the breach of the warranty discharges the insurer from liability for any loss occurring on or after the date of the breach, but does not affect any liability incurred by the insurer before that date.

Breach of warranty of good safety

(3) A warranty that the subject-matter insured is "well" or "in good safety" on a particular day is not breached if the subject-matter is safe at any time during that day.

When breach of warranty excused

(4) A breach of a warranty is excused if, because of a change of circumstances, the warranty ceases to be applicable to the

Respect de l'engagement

39 (1) Sous réserve des autres dispositions du présent article, l'engagement doit être observé à la lettre, qu'il soit pertinent ou non à l'égard du risque.

Effet du manquement

(2) Sauf stipulation contraire de la police maritime ou renonciation de l'assureur, tout manquement à l'engagement dégage l'assureur de sa responsabilité à l'égard de toutes pertes qui surviennent à la date du manquement ou subséquemment, sans pour autant porter atteinte à sa responsabilité avant cette date.

Engagement de bon état

(3) L'engagement quant au fait que la chose assurée est en bon état ou en sécurité pour un jour donné est observé si la chose est dans cet état à n'importe quel moment de la journée.

Exception

(4) Le manquement à l'engagement est cependant excusé si, en raison d'un changement de circonstances,

circumstances contemplated by the contract or if compliance with the warranty is rendered unlawful by any subsequent law.	l'engagement cesse d'être applicable aux circonstances envisagées par le contrat ou si une règle de droit ultérieure en rend l'observation illicite.
Limit on defence to breach of warranty	**Moyen de défense irrecevable**
(5) It is no defence to a breach of a warranty that the breach was remedied and the warranty complied with before any loss was incurred.	**(5)** En cas de manquement à l'engagement, l'assuré ne peut invoquer en défense le fait qu'il y a été remédié et que l'engagement a été observé avant toute perte.

C. *Small Vessel Regulations and Collision Regulations*

[51] Aviva relies on section 207 of the *Small Vessel Regulations*, which states that a pleasure craft of a length not more than 9 metres shall carry on board navigation lights that meet the requirements of the *Collision Regulations* if the pleasure craft is operated after sunset or before sunrise or in periods of restricted visibility. (It is undisputed that the Borgatti Vessel was less than 9 metres in length and that the Collision occurred after sunset.)

[52] Rule 23 of Schedule 1 of the *Collision Regulations* applies to a power-driven vessel underway, meaning a vessel propelled by machinery that is not at anchor, or made fast to the shore, or aground (Rules 3(b), 3(i)), and imposes the following requirements:

Rule 23	**Règle 23**
Power-driven Vessels Underway — International	**Navires à propulsion mécanique faisant route — International**
(a) A power-driven vessel	**a)** Un navire à propulsion

underway shall exhibit:

(i) a masthead light forward,

(ii) a second masthead light abaft of and higher than the forward one; except that a vessel of less than 50 metres in length shall not be obliged to exhibit such light but may do so,

(iii) sidelights,

(iv) a sternlight.

(b) An air cushion vessel when operating in the non-displacement mode shall, in addition to the lights prescribed in paragraph (a) of this Rule, exhibit an all-round flashing yellow light.

(c) A WIG craft only when taking off, landing and in flight near the surface shall, in addition to the lights prescribed in paragraph (a) of this Rule, exhibit a high intensity all-round flashing red light.

(d) (i) A power-driven vessel of less than 12 metres in length may in lieu of the lights prescribed in paragraph (a) of

mécanique faisant route doit montrer :

(i) un feu de tête de mât à l'avant;

(ii) un second feu de tête de mât à l'arrière du premier et plus haut que celui-ci; toutefois, les navires de longueur inférieure à 50 mètres ne sont pas tenus de montrer ce feu, mais peuvent le faire;

(iii) des feux de côté;

(iv) un feu de poupe.

b) Un aéroglisseur exploité sans tirant d'eau doit, outre les feux prescrits au paragraphe a) de la présente règle, montrer un feu jaune à éclats visible sur tout l'horizon.

c) Lorsqu'il décolle, atterrit ou vole près de la surface, un navion doit montrer, outre les feux prescrits à l'alinéa a) de la présente règle, un feu rouge à éclats de forte intensité, visible sur tout l'horizon.

d) (i) Un navire à propulsion mécanique de longueur inférieure à 12 mètres peut, au

this Rule exhibit an all-round white light and sidelights.

(ii) A power-driven vessel of less than seven metres in length whose maximum speed does not exceed seven knots may in lieu of the lights prescribed in paragraph (a) of this Rule exhibit an all-round white light and shall, if practicable, also exhibit sidelights.

(iii) The masthead light or all-round white light on a power-driven vessel of less than 12 metres in length may be displaced from the fore and aft centreline of the vessel if centreline fitting is not practicable, provided that the sidelights are combined in one lantern which shall be carried on the fore and aft centreline of the vessel or located as nearly as practicable in the same fore and aft line as the masthead light or the all-round white light.

Power-driven Vessels Underway — Canadian Modifications

(e) Rule 23(d)(ii) does not apply to a Canadian power-driven vessel in any waters or to a non-Canadian power-driven vessel in the Canadian waters of a roadstead, harbour, river, lake or inland waterway.

lieu des feux prescrits à l'alinéa a) de la présente règle, montrer un feu blanc visible sur tout l'horizon et des feux de côté.

(ii) Un navire à propulsion mécanique de longueur inférieure à sept mètres et dont la vitesse maximale ne dépasse pas sept nœuds peut, au lieu des feux prescrits à l'alinéa a) de la présente règle, montrer un feu blanc visible sur tout l'horizon; il doit, si possible, montrer en outre des feux de côté.

(iii) Le feu de tête de mât ou le feu blanc visible sur tout l'horizon à bord d'un navire à propulsion mécanique de longueur inférieure à 12 mètres peut ne pas se trouver dans l'axe longitudinal du navire s'il n'est pas possible de l'installer sur cet axe à condition que les feux de côté soient combinés en un seul fanal qui soit disposé dans l'axe longitudinal du navire ou situé aussi près que possible de l'axe longitudinal sur lequel se trouve le feu de tête de mât ou le feu blanc visible sur tout l'horizon.

Navires à propulsion mécanique faisant route — Modifications canadiennes

e) La règle 23d)(ii) ne s'applique pas à un navire canadien à propulsion mécanique, quelles que soient les eaux où il se trouve, ni à un navire étranger à propulsion mécanique qui se trouve dans les eaux canadiennes d'une rade, d'un port, d'un cours

(f) In the waters of the Great Lakes Basin, a power-driven vessel when underway may, instead of the second masthead light and sternlight prescribed in paragraph (a), carry, in the position of the second masthead light, a single all-round white light or two such lights placed not over 800 millimetres apart horizontally, one on either side of the keel and so arranged that one or the other or both shall be visible from any angle of approach and for the same minimum range as the masthead lights.

d'eau, d'un lac ou d'une voie navigable intérieure.

f) Un navire à propulsion mécanique faisant route dans les eaux du bassin des Grands Lacs peut porter, au lieu du deuxième feu de tête de mât et du feu de poupe prescrits à l'alinéa a), un seul feu blanc visible sur tout l'horizon ou deux feux du même genre placés l'un près de l'autre à une distance horizontale ne dépassant pas 800 millimètres, un sur chaque côté de la quille, et disposés de façon que l'un ou l'autre, ou les deux, soient visibles par tous les angles d'approche et pour la même distance minimale que les feux de tête de mât.

[53] Aviva also relies on Rule 20 of Schedule 1 of the *Collision Regulations*, which states:

Rule 20

Application

(a) Rules in this Part shall be complied with in all weathers.

(b) The Rules concerning lights shall be complied with from sunset to sunrise, and during such times no other lights shall be exhibited, except such lights as cannot be mistaken for the lights specified in these Rules or do not impair their visibility or distinctive character, or interfere with the keeping of a proper look-out.

Règle 20

Champ d'application

a) Les règles de la présente partie doivent être observées par tous les temps.

b) Les règles concernant les feux doivent être observées du coucher au lever du soleil. Pendant cet intervalle, on ne doit montrer aucun autre feu pouvant être confondu avec les feux prescrits par les présentes règles et pouvant gêner la visibilité ou le caractère distinctif de ceux-ci ou pouvant empêcher d'exercer une veille

satisfaisante.

(c) The lights prescribed by these Rules shall, if carried, also be exhibited from sunrise to sunset in restricted visibility and may be exhibited in all other circumstances when it is deemed necessary.

c) Les feux prescrits par les présentes règles, lorsqu'ils existent, doivent également être montrés du lever au coucher du soleil par visibilité réduite et peuvent être montrés dans toutes les autres circonstances où cette mesure est jugée nécessaire.

(d) The Rules concerning shapes shall be complied with by day.

d) Les règles concernant les marques doivent être observées de jour.

(e) The lights and shapes specified in these Rules shall comply with the provisions of Annex I to these Regulations.

e) Les feux et les marques prescrits par les présentes règles doivent être conformes aux dispositions de l'appendice I du présent règlement.

D. *Waiver, Estoppel, and Laches*

[54] The issues in this Motion engage legal principles surrounding the application of the doctrines of waiver, estoppel, and laches. Those principles will be set out in the course of the Court's analysis of those issues.

V. **Analysis**

A. *Evidentiary issues*

(1) Hearsay

[55] At the hearing of this Motion, the Court raised with counsel the question whether some of the evidence in the record before the Court is being introduced for a hearsay purpose that would

raise concern about the admissibility of that evidence. At the hearing, counsel spoke to this concern in relation to the OPP Report, the Coroner's Report, and the McCrie Transcript.

[56] The OPP Report and the Coroner's Report both represent out-of-court statements by the authors of those reports. Indeed, as noted by Aviva's counsel, the Coroner's Report might be characterized as double hearsay, as it represents the report's author recounting statements received from witnesses to the Collision. However, both parties submit that both reports are admissible for a non-hearsay purpose, i.e., demonstrating when Aviva received certain information related to the circumstances of the Collision. I agree that this non-hearsay purpose is relevant to the potential application of the doctrines of waiver, estoppel, and laches and that both the OPP Report and the Coroner's Report are therefore admissible evidence.

[57] However, it is clear that Aviva also seeks to rely on the OPP Report and the Coroner's Report for a hearsay purpose, to establish certain facts asserted therein related to the circumstances of the Collision. In support of its position that Mr. Borgatti was in breach of the Safety Equipment Warranty at the time of the Collision, Aviva relies on this evidence to establish that the Borgatti Vessel was not displaying required navigation lights, and that the navigation light poles were stowed, at the time of the Collision.

[58] Significantly, the Defendants do not object to Aviva's reliance on this evidence for the hearsay purpose. As the Defendants state in their Memorandum of Fact and Law, there is no dispute that the lights on the Borgatti Vessel were inoperable at the time of the Collision. Moreover, it is clear from the parties' submissions both at the TMC and at the hearing of this Motion that the parties are aligned in their interest in having the coverage dispute resolved

through this Motion rather than incurring the costs and additional effort of proceeding to a trial of the Action.

[59] It may have been preferable for the parties to have developed an agreed statement of facts for this purpose, rather than relying on evidence that would potentially be inadmissible for a hearsay purpose. However, the parties and their counsel are to be applauded for their efforts to adjudicate their dispute through a summary proceeding, which approach is obviously in the interests of the efficient administration of justice. Moreover, as I will explain shortly, these Reasons will adjudicate the coverage dispute without making findings of fact relevant to a determination of whether Mr. Borgatti breached the Safety Equipment Warranty. Therefore, notwithstanding the concerns raised by the Court at the hearing, I decline to make any findings of inadmissibility in relation to the OPP Report or the Coroner's Report.

[60] The above analysis surrounding the parties' alignment in pursuing efficient adjudication of their dispute also applies to the McCrie Transcript, which is attached as an exhibit to the Barker Affidavit included in Aviva's motion record.

[61] Moreover, I note counsel's explanation at the hearing of this Motion that, to support the parties' reliance on this evidence, counsel for parties in this Action and in the Limitation Actions executed a document providing such parties' consent to the production and use of the transcripts of certain examinations for discovery, including the McCrie Transcript, by Aviva and their counsel in the Action [the Consent]. Counsel provided the Court with executed copies of the Consent, which were marked as an exhibit at the hearing of this Motion.

[62] The McCrie Transcript is potentially relevant to the issues in the Action for a non-hearsay purpose as, like the OPP Report and the Coroner's Report, the combination of the transcript and Mr. Barker's evidence that Aviva obtained the transcript on November 1, 2024, speaks to when Aviva obtained certain information related to the circumstances of the Collision.

[63] However, both parties also seek to rely on the McCrie Transcript for a hearsay purpose. Aviva relies on Mr. McCrie's testimony that the occupants of the Borgatti Vessel did not plan to return to Mr. Borgatti's cottage before dark and that they did not check that the navigation lights on the Borgatti Vessel were working before departing. The Defendants rely on Mr. McCrie's testimony to support their position that the Borgatti Vessel was launched and operated without any issues prior to the Collision and that there is no evidence that it was unsafe when it departed from the cottage.

[64] The Consent does not expressly state the particular use that the parties to the Consent were agreeing that Aviva could make of the McCrie Transcript in the Action. However, as both parties seek to rely on the transcript for a hearsay purpose, and given the lack of objection from the Defendants, I am prepared to interpret the Consent as extending to hearsay use.

(2) Expert evidence

[65] As previously noted, Aviva's motion record includes the Schouffoer Report, upon which Aviva seeks to rely as expert opinion evidence. While Aviva's Memorandum of Fact and Law does not include submissions on the qualification of Mr. Schouffoer as an expert, Aviva's counsel articulated at the hearing its intention to have Mr. Schouffoer qualified as an expert in

the navigation and operation of marine vessels, to give opinion evidence on the navigation lights required to be displayed by marine vessels.

[66] The Defendants argue that it was highly inappropriate for Aviva, as Mr. Borgatti's liability insurer, to file in this Motion expert evidence that is supportive of a conclusion that Mr. Borgatti is liable for the Collision. I will turn to this argument later in these Reasons. However, the Defendants raise that argument as part of their submissions on detrimental reliance or prejudice relevant to the issue of estoppel. The Defendants have not raised objections to Mr. Schouffoer's qualification as an expert.

[67] As previously noted, I will explain shortly that these Reasons will adjudicate the coverage dispute without making findings of fact relevant to the issue to which the Schouffoer Report is relevant, i.e., whether Mr. Borgatti breached the Safety Equipment Warranty. However, for the sake of good order, based on the qualifications and experience explained in the Schouffoer Report, including the biographical information attached thereto, I find Mr. Schouffoer qualified to provide expert evidence within the scope proposed by Aviva.

(3) Exhibit JJ to the Barker Affidavit

[68] At the beginning of the hearing of this Motion, Aviva's counsel sought to add to its record a copy of an email from Jonathan Barker to Janet Borgatti dated September 26, 2023 [the Barker Email]. Aviva explained that this email had been inadvertently omitted from a chain of email correspondence attached as Exhibit JJ to the Barker Affidavit. Aviva noted that, in paragraph 45 of the Barker Affidavit, Mr. Barker expressly deposed that on September 26, 2023,

he advised Ms. Borgatti by email that Aviva would be proceeding with an action in the Federal Court seeking a declaration that there is no coverage under the Policy for the losses and claims made in relation to the Collision. Mr. Barker then referenced Exhibit JJ as a copy of the email exchange between him and Ms. Borgatti.

[69] The Defendants' counsel objected to the addition of the Barker Email to the record before the Court, as he had not seen the document prior to Aviva's effort to introduce it at the hearing and therefore had not had an opportunity to take it into account in his cross-examination of Mr. Barker.

[70] I accept that Aviva's omission of the Barker Email from Exhibit JJ to the Barker Affidavit was inadvertent. However, while the Defendants have not identified any specific prejudice resulting from their inability to cross-examine Mr. Barker on this document, I appreciate that Aviva's effort to introduce it into evidence at the commencement of the hearing of this Motion is very much last minute.

[71] Moreover, having reviewed the content of the Barker Email, I conclude that it adds little to the evidentiary foundation for the Motion, other than to corroborate the assertion in the Barker Affidavit as to the position that Mr. Barker communicated to Ms. Borgatti on September 26, 2023. I do not understand the Defendants to be challenging that assertion.

[72] I therefore decline to add the Barker Email to the record before the Court.

B. ***Are the issues raised in this Motion appropriate for disposition by summary judgment?***

[73] As explained earlier in these Reasons, the parties agree that the issues raised in the Motion are suitable for adjudication by summary judgment. While the Court is not bound by that agreement, I accept the parties' position. The facts necessary to resolve the dispute are available from the record before the Court, and there are no credibility issues to be decided (*Milano Pizza* at paras 36–39). I find that the issues raised in this Motion can be disposed of by summary judgment.

C. ***Did Neil Borgatti breach the Safety Equipment Warranty such that, subject to the other issues raised in this Motion, Aviva is relieved of its obligation to provide a contractual indemnity to the Defendants under the terms and conditions of the Policy?***

[74] These Reasons have already referenced factual evidence upon which Aviva relies to establish its allegation that, at the time of the Collision, the Borgatti Vessel was not displaying its navigation lights. Indeed, as previously noted, the Defendants do not dispute this allegation. However, Aviva's arguments in support of its position that Mr. Borgatti was therefore in breach of the Safety Equipment Warranty extend beyond offering this evidence and necessarily focus upon the language of the Safety Equipment Warranty and potentially relevant provisions of the *Small Vessel Regulations* and *Collision Regulations* that impose regulatory requirements that the Borgatti Vessel's equipment was required to meet.

[75] The language of the Safety Equipment Warranty required the Borgatti Vessel to have been "equipped with all of the safety equipment, including fire extinguishers, required by law and that all of the equipment is kept in good and efficient working order at all times" [my

emphasis]. Aviva argues that “safety equipment”, within the meaning of the warranty, includes navigation lights and other navigation equipment prescribed by section 207 of the *Small Vessel Regulations*. In contrast, the Defendants argue that navigation lights are properly characterized as navigation equipment but not as safety equipment.

[76] Both parties advance arguments based on the text and structure of potentially relevant portions of the *Small Vessel Regulations*. By way of example, Aviva relies upon headings in the relevant portion of the *Small Vessel Regulations*. While section 207 falls under the heading “Navigation Equipment”, Aviva emphasizes that section 207 falls within Part 2 of the *Small Vessel Regulations* and that Part 2 bears the heading “Safety Equipment for Pleasure Craft”. In contrast, the Defendants emphasize that section 206, which imposes requirements to carry equipment such as a manual propelling device, an anchor, a bailer, or a manual bilge pump (but makes no mention of navigation lights) bears the heading “Vessel Safety Equipment”.

[77] Aviva also relies on the expert opinion evidence contained in the Schouffoer Report. In his affidavit to which the report is attached and in the report itself, Mr. Schouffoer explains that he was retained to provide an opinion on: (a) whether Mr. Borgatti was in compliance with the relevant regulations at the time of the Collision; (b) whether the lighting from fish finders and cell phones employed at the time of the Collision would be sufficient for other vessels to see the Borgatti Vessel; and (c) what the standard is for checking navigation lights before and during the voyage. The Schouffoer Report explains Mr. Schouffoer’s opinions that: (a) Mr. Borgatti was not in compliance with the relevant regulations; (b) the lighting employed at the time of the collision would not be sufficient for other vessels to see the Borgatti Vessel; and (c) the operator of a

vessel should check that its navigation lights are in good working order before undertaking a voyage.

[78] As observed earlier in these Reasons, the Defendants take issue with the propriety of Aviva filing an expert report that expresses opinions that are arguably supportive of liability on the part of Mr. Borgatti for the Collision, particularly while Aviva continues to defend the Estate in the underlying tort litigation. The Defendants advance this submission in the context of their estoppel arguments, to which I will turn later in these Reasons. However, in my view, this submission and the authorities that the parties have provided to the Court in this Motion give rise to a broader concern about the Court making findings of fact in this Motion, at the request of the Defendants' liability insurer, that could operate to the detriment of the Defendants in the tort litigation in which the Defendants remain engaged.

[79] This concern is illustrated by the analysis in *Monenco Ltd v Commonwealth Insurance Co*, 2001 SCC 49 [*Monenco*], which examined the extent to which extrinsic evidence (beyond the pleadings in an action against an alleged tortfeasor) could be considered in assessing whether the tortfeasor's liability insurer had a duty to defend the action against its insured.

[80] *Monenco* reviewed the general principle that the duty to defend arises when the pleadings raise claims that would be payable under the agreement to indemnify in the insurance contract. *Monenco* also explains that, where it is clear from the pleadings that a claim falls outside policy coverage by reason of an exclusion in the policy, the duty to defend does not arise. However, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the

duty to defend. In this sense, the insurer's duty to defend is broader that the duty to indemnify (at para 29).

[81] Against the backdrop of those principles, although concluding that it was permissible to consider extrinsic evidence that had been explicitly referred to in the pleadings (at para 36), the Supreme Court cautioned against considering "premature" evidence, which would require findings to be made before trial that would affect the underlying tort litigation against the insured (at para 37).

[82] My concern about an insurer seeking such findings is consistent with the observations in *Unique Labeling Inc v Gerline Canada Insurance Co*, 2008 CarswellOnt 6098, 2008 171 ACWS (3d) 182 (OSCJ) [*Unique Labeling*], in which the Ontario Superior Court of Justice addressed an action under subsection 132(1) of the Ontario *Insurance Act*, RSO 1990, c I.8, by a claimant that had received a judgment against a number of tortfeasors, seeking recovery against the tortfeasors' liability insurers. The insurers defended based on exclusions in the relevant policies, and ultimately the Court dismissed the action (at para 229).

[83] In the course of its analysis, the Court referenced the requirement to assess the duty to defend based on the pleadings in an action against an insured and then stated that, regardless of whether coverage is conceded or denied in respect of a particular claim, the insurer must endeavour not to compromise the position of the insured in the underlying action (at para 219). While I read that statement as *obiter* in the context of the decision in *Unique Labeling*, I agree with the conclusion that it is problematic for an insurer, which has assumed obligations of good faith pursuant to a contract of liability insurance (see *Marine Insurance Act*, s 20; *Fidler v Sun*

Life Assurance Co of Canada, 2006 SCC 30 [*Fidler*] at para 63) to take steps that prejudice its insured's position in litigation against the insured, even if the insurer concludes that its coverage is not engaged.

[84] I appreciate that the present Action relates to Aviva's obligation to provide an indemnity under the Policy, not to its duty to defend the Estate in the underlying tort litigation. However, logically the reasoning underlying the concerns expressed in the above authorities also apply if a court is being asked, in litigation intended to adjudicate whether coverage exists under a liability policy, to make findings of fact that are relevant to the liability of the insured in the tort litigation to which the insured wishes its insurer to respond.

[85] I read the reasoning in *Slough Estates Canada Ltd v Federal Pioneer Ltd*, 1994 CanLII 7313 (ONSC) [*Slough*] as consistent with that conclusion. In *Slough*, a defendant to an environmental claim brought a third party claim against its liability insurers and moved for an order declaring that its insurers were obliged to defend the action. The insurers moved for summary judgment dismissing the third party claim against them on various bases, pursuant to which the insurers argued that the policy as a whole was void. Applying the principles that govern assessment of the duty to defend, the Court was prepared to grant the insured's motion and order that the insurers defend the environmental claim, subject only to the possibility of the insurers succeeding in having the policy declared void through its summary judgment motion.

[86] In adjudicating the insurer's summary judgment motion seeking to void the policy, *Slough* relied on American jurisprudence to the effect that an insurer seeking summary judgment

must demonstrate an absence of coverage without engaging in litigation that could prejudice the insured's interests in the underlying tort litigation against it. The Court concluded that the insurers were attempting to prove facts that were in dispute between the insured and the claimant in the tort litigation, which would prejudice the insured, and (on that basis and others) dismissed the insurers' motion.

[87] Later in these Reasons, I will return to the Defendants' argument that Aviva's generation of the Schouffoer Report results in prejudice or detrimental reliance relevant to the Defendants' efforts to invoke the doctrine of estoppel. For present purposes, I rely on the jurisprudence canvassed above to support a decision to decline to adjudicate the question whether Mr. Borgatti breached the Safety Equipment Warranty. Regardless of whether Aviva's generation of the Schouffoer Report supports the Defendants' estoppel arguments or any other theory on the basis of which Aviva should be precluded from relying on the Safety Equipment Warranty, I am satisfied that it would not be in the interest of justice for the Court to make findings in this Motion that, if such findings should favour Aviva, could operate to the Defendants' detriment in the underlying tort litigation.

[88] In so deciding, I have considered the fact that the Defendants concede that the navigation lights on the Borgatti Vessel were inoperable at the time of the Collision. However, it is also clear from the pleadings in the Borgatti Limitation Action that the Defendants deny that Mr. Borgatti has liability for the Collision. Adjudication of the arguments advanced by Aviva in support of their position that Mr. Borgatti breached the Safety Equipment Warranty, in particular

in reliance on the Schouffoer Report, would require the Court to make findings beyond the operability of the lights on the Borgatti Vessel, which could be relevant to liability.

[89] Moreover, whether Mr. Borgatti breached the Safety Equipment Warranty is not determinative of the outcome of this Motion. As will be explained below, my decision in this Motion turns on a conclusion that Aviva is estopped from relying on the Safety Equipment Warranty. That is, even if the Court were to conclude that Mr. Borgatti breached the warranty, my decision on the estoppel issue would preclude Aviva relying on that breach.

[90] I will therefore analyse the remaining issues in this Motion as if Aviva had succeeded in establishing that Mr. Borgatti breached the Safety Equipment Warranty, although I make no finding in that regard.

D. *Does subsection 39(3) and/or 39(4) of the Marine Insurance Act operate to prevent Aviva from relying on the Safety Equipment Warranty?*

[91] The provisions of section 39 of the *Marine Insurance Act*, and in particular subsections 39(3) and 39(4) upon which the Defendants rely, have been reproduced earlier in these Reasons. The Defendants describe subsections 39(3) and 39(4) as saving provisions that operate, in certain circumstances, to protect an insured against the effect of a breach of the warranty in an insurance policy.

[92] Subsection 39(3) provides that a warranty of good safety is not breached if the subject matter insured was safe at any point during the day. The Defendants argue that evidence in the McCrie Transcript establishes that the Borgatti Vessel (being the subject matter insured under

the Policy) was safe on the day of the Collision, as Mr. McCrie testified that the Vessel was launched and operated without any issues prior to the Collision. The Defendants assert that there is no evidence that the Vessel was unsafe when it left the Borgatti cottage.

[93] The Defendants also rely on evidence in the Dawson Transcript that the Vessel's lights worked in the days before the Collision. The Defendants acknowledge Mr. McCrie's evidence that he did not observe any safety checks prior to the vessel departing from the Borgatti cottage but argue that that evidence alone is not determinative.

[94] Subsection 39(4) excuses a breach of a warranty if, because of a change in circumstances, the warranty ceases to be applicable to the circumstances contemplated by the insurance contract. The Defendants argue that sudden equipment failure at night in the middle of the lake would qualify as a change in circumstances, making compliance with the Safety Equipment Warranty impracticable.

[95] Aviva argues that neither of these subsections has any application to the matter at hand. Aviva acknowledges Ms. Dawson's evidence in her affidavit that she believed that Mr. Borgatti would not leave the shore on his boat without functional navigational lights and that, if the lights malfunctioned on the day of the Collision, that would have been unexpected and a significant change of circumstances. However, Aviva emphasizes that Ms. Dawson conceded in cross-examination that she was not present on the day of the Collision. Moreover, Mr. McCrie, the sole survivor of the Borgatti Vessel, testified that they had not checked to see that the lights were working prior to departing the dock.

[96] As with the question whether Mr. Borgatti breached the Safety Equipment Warranty, the question whether the circumstances on the day of the Collision may excuse such a breach under either subsection 39(3) or 39(4) would require the Court to engage with the above-referenced evidence and make findings of fact, related to Mr. Borgatti's conduct on the day of the Collision, which would potentially be relevant to his liability in the underlying tort litigation. I appreciate that the application of section 39 is an issue raised by the Defendants, not by Aviva. However, having declined to adjudicate Aviva's issue whether the Safety Equipment Warranty was Breached, I conclude that I must similarly decline to adjudicate the *Marine Insurance Act* issue raised by the Defendants in response.

[97] Moreover, the potential application of subsection 39(3) or 39(4) is not determinative of the outcome of this Motion which, as previously noted, turns on the application of the doctrine of estoppel with which these Reasons will shortly engage.

[98] As such, the Court declines to adjudicate whether any breach of the Safety Equipment Warranty is saved by subsection 39(3) or 39(4) of the *Marine Insurance Act*.

E. *Is Aviva barred from relying on the Safety Equipment Warranty by the operation of waiver, estoppel, and/or laches?*

(1) Waiver

[99] Subsection 39(2) of the *Marine Insurance Act* provides that, subject to any waiver by the insurer, where a warranty is not exactly complied with, the breach of the warranty discharges the insurer from liability for any loss occurring on or after the date of the breach [my emphasis]. As

such, the potential for waiver to excuse the breach of a warranty in an insurance policy is expressly recognized in the statute that governs marine insurance in Canada. However, the principles governing when waiver has occurred are found in applicable jurisprudence.

[100] Waiver occurs where one party to a contract takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party (*Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490, 1994 CanLII 100 (SCC) [*Saskatchewan River Bungalows*] at 499). Waiver will be found where the evidence demonstrates that the party waiving had: (a) full knowledge of its rights; and (b) an unequivocal and conscious intention to abandon them. This test is a stringent one, because no consideration moves from the party in whose favour waiver operates (*Saskatchewan River Bungalows* at 500). However, unlike the doctrine of estoppel, waiver does not require evidence of detrimental reliance by the party seeking to invoke it (*Bradfield v Royal Sun Alliance Insurance Company of Canada*, 2019 ONCA 800 [*Bradfield*] at para 42). I do not understand these principles to be in dispute between the parties.

[101] The Defendants' efforts to invoke the doctrine of waiver rely on steps taken by Aviva under the Policy between the time of the Collision and the time that the first of the Reservation of Rights Letters was sent in February 2021. The Defendants emphasize in particular that Aviva made payments to the Estate under the Policy, in relation to physical damage to the Borgatti Vessel and accidental death benefits, on May 11, 2020, and June 30, 2020, respectively, and advised the Estate on December 11, 2020, that Defence Counsel would be appointed.

[102] Consistent with the principle that a party seeking to establish waiver by a contractual counterparty must establish that the latter had knowledge of its rights, waiver by an insurer of a breach of the policy by its insured can be found only when the insurer had knowledge of the facts giving rise to the policy breach (*Bradfield* at para 31). To satisfy this requirement, the Defendants rely on evidence that: (a) Aviva first became aware of an issue with the Borgatti Vessel's navigation lights on September 17, 2019 (less than a month after the Collision), through communications with Mr. McCrie; (b) in February 2020, Aviva received further information related to the lighting issue from its contractor, Forensic, following Forensic's inspection of the Borgatti Vessel in the company of Mr. McCrie; and (c) in November 2020, Aviva received the information related to the lighting issue contained in the OPP Report and the Coroner's Report.

[103] Based on this evidence, the Defendants submit that the requirements to establish waiver were met long before Aviva sent its first Reservation of Rights Letter in February 2021. The Defendants further submit that an insurer's issuance of a reservation of rights letter, after a waiver has occurred, does not reinstate the insurer's authority to reserve previously waived rights or to deny coverage under the applicable policy.

[104] In connection with this latter submission, related to the ability of an insurer to rescind a waiver, the Court questioned the parties at the hearing on whether the case law cited in their materials demonstrates a jurisprudential divergence on this point.

[105] Consistent with the Defendants' position that waiver of a policy breach cannot be rescinded, in *The Commonwell Mutual Assurance Group v Campbell*, 2018 ONSC 5899 [*Commonwell*], the Ontario Superior Court of Justice stated at paragraph 30 that an insurer may

elect to disregard a policy breach or waive reliance on an exclusion but, where a breach has been waived, the insurer cannot later resile from such waiver. However, in *Saskatchewan River Bungalows*, the Supreme Court of Canada stated at page 502 that waiver can be retracted if reasonable notice is given to the party in whose favour it operates. Indeed, the Supreme Court found that the insurer in that case had retracted its waiver, such that the waiver was no longer in effect when the insured sought to rely on it (at 503).

[106] Neither party offered a principled basis to reconcile *Commonwell* and *Saskatchewan River Bungalows*, although the Defendants point out that *Saskatchewan River Bungalows* involved unpaid insurance premiums rather than a policy breach or exclusion. Aviva emphasizes that, in the event these authorities are not reconcilable, the decision of the Supreme Court of Canada in *Saskatchewan River Bungalows* is the weightier authority.

[107] It may be that an effort to reconcile these cases is assisted by focusing upon the Supreme Court's explanation in *Saskatchewan River Bungalows* that reasonable notice must be provided in order to retract a waiver. Presumably, the significance of giving reasonable notice of retraction is to preclude the insured relying upon the earlier waiver. As such, while detrimental reliance or prejudice is not typically an element that must be established in order to invoke the doctrine of waiver (*Bradfield* at para 42), consideration of reliance perhaps enters the analysis in the context of an insurer attempting to retract a waiver.

[108] I also note the Defendants' observation at the hearing that *Commonwell* referenced subsection 131(1)(b) of the Ontario *Insurance Act*, RSO 1990, c I.8, which provides that the obligation of an insured to comply with a requirement under a policy of insurance is excused to

the extent that the insurer's conduct reasonably causes the insured to believe that compliance is excused in whole or in part and the insured acts on such belief to his or her detriment. *Commonwell* described this subsection as partially codifying the principle of waiver. Given its focus upon detrimental reliance, it may be more accurate to describe subsection 131(1)(b) as codifying the principle of estoppel. However, this reference in *Commonwell* to reliance forming part of the principle of waiver may suggest that (at least implicitly) reliance formed part of the Court's reasoning underlying the statement (at para 30) upon which the Defendants rely.

[109] As such, although the Court does not have the benefit of meaningful submissions from the parties on this point, I am inclined to the view that, in a situation where the evidence is consistent with an insurer having retracted an earlier waiver, the Court must examine whether the insured has already relied on the waiver to its detriment.

[110] Analysing the case at hand in that manner, even if Aviva's earlier payments and appointment of counsel represented waiver of a breach of the Safety Equipment Warranty, Aviva clearly intended to retract such waiver when it sent the first Reservation of Rights Letter on February 12, 2021. The doctrine of waiver therefore could not assist the Defendants at that stage, other than potentially if they were able to establish that they had already detrimentally relied on the communications or conduct by Aviva that represented the waiver. However, such an analysis effectively duplicates the analysis required under the doctrine of estoppel (requiring assessment of detrimental reliance or prejudice), to which I will turn in the next section of these Reasons. I prefer to analyze the Defendants' arguments through the estoppel framework that is more

conventionally employed when an insured seeks to argue that it has been prejudiced by its insurer.

(2) Estoppel

(a) *General principles*

[111] Promissory estoppel is an equitable defence that requires that: (a) the parties are in a legal relationship at the time of a promise or assurance giving rise to the estoppel; (b) the promise or assurance be intended to affect that relationship and acted on; and (c) the other party relied on the promise or assurance to their detriment (*Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company*, 2021 SCC 47 [*Trial Lawyers Association*] at para 15).

[112] The majority decision in *Trial Lawyers Association* described promissory estoppel in the insurance context as follows (at para 16):

> … In the insurance context, estoppel arises most commonly where an insurer, having initially taken steps consistent with coverage, then denies coverage because of the insured's breach of a policy term or its ineligibility for insurance in the first place. To prevent the insurer from denying coverage, the insured will attempt to show that the insurer is estopped from changing its coverage position based on its prior words or conduct.

[113] The majority in *Trial Lawyers Association* confirmed that what the promising party knows is relevant to determining the promisor's intention to alter the legal relationship (at paras 21–23). However, the majority clarified that what matters is knowledge of the facts, rather than

appreciation of the legal significance that such facts constituted breach of a policy (at para 24). Specifically, the majority held (at para 30):

> In sum, where an insurer is shown to be in possession of the facts demonstrating a breach, an inference may be drawn that the insurer, by its conduct, intended to alter its legal relationship with the insured — notwithstanding the fact that the insurer did not realize the legal significance of the facts or otherwise failed to appreciate the terms of its policy with the insured.

[114] *Trial Lawyers Association* also described another species of estoppel, estoppel by representation, which prevents the promisor from denying the truth of a prior representation (at para 17). To establish estoppel by representation, it must be established that there is: (a) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (b) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and (c) detriment to such person as a consequence of the act or omission. Such representation must be unambiguous and unequivocal (*Vallelunga v Canada*, 2016 FC 1329 at paras 9–10).

[115] The Defendants' submissions do not identify with precision whether it is promissory estoppel or estoppel by representation upon which they rely. However, as noted at paragraph 17 of *Trial Lawyers Association*, the two species of the doctrine are similar. As in that case, I will apply the principles of promissory estoppel but note that similar reasoning would apply if analyzing the Defendants' arguments under estoppel by representation.

(b) *Payment of physical damage and accidental death benefits*

[116] The Defendants advance a number of arguments in support of their position that Aviva is estopped from denying coverage under the Policy. In relation to the period of time prior to Aviva's issuance of the first Reservation of Rights Letter in February 2021, the Defendants do not assert that Aviva's defence of the claim against the Estate gives rise to estoppel, as the Defendants do not assert that prejudice accrued between Aviva's December 11, 2020 letter, advising that Defence Counsel would be appointed, and the issuance of the Reservation of Rights Letter. However, as with their waiver argument, the Defendants advance an estoppel argument arising from Aviva's payment of physical damage and accidental benefit claims under the Policy and prejudice that they assert resulted therefrom.

[117] Those payments are explained in the Dawson Affidavit. In addition to Section B of the Policy, which sets out the liability insurance coverage, Section A of the Policy provides coverage for physical damage to the Borgatti Vessel, and Section D of the Policy provides coverage for medical/funeral expenses and accidental death benefits. Ms. Dawson explains that on May 11, 2020, Aviva paid the Estate $27,120.00 under Section A for the physical damage to the Borgatti Vessel, and on June 30, 2020, Aviva paid the Estate a $25,000.00 accidental death benefit contemplated by Section D. (On October 29, 2020, Aviva paid the Estate an additional $2880.00 for physical damage to the boat but, because of its timing in relation to the alleged detrimental reliance to be canvassed shortly, this payment is less relevant to the estoppel argument.)

[118] Ms. Dawson deposes, and the Defendants argue, that by making these payments under Sections A and D of the Policy, Aviva led the Defendants to believe that it was treating the

Collision as a covered loss and would therefore continue to cover all claims under the Policy, including pursuant to the liability coverage in Section B.

[119] In relation to the elements of promissory estoppel, Aviva concedes that the Policy created a legal relationship between the parties. However, Aviva disputes the Defendants' contention that, either directly or by inference, it made a promise to provide coverage under the Policy.

[120] In response to the Defendants' argument that Aviva's payment of the Section A and D claims represents or implies such a promise in relation to the liability coverage under Section B, Aviva relies on the following term of Section B of the Policy [the Conditions of Payment Term]:

> **Conditions of Payment**
>
> No liability shall exist under Section B unless all the terms, conditions and **warranties** of this policy have been fully complied with, and not until the fact and amount of the **insured's** obligation to pay has been determined either by judgment against the **insured** after actual trial or by written agreement between the **insured**, the claimant and **us**.
>
> [Emphasis in original.]

[121] Aviva submits that this term applies solely to Section B and that neither Section A nor Section D of the Policy contains comparable language as to when and under what conditions payment will be made. However, as the Defendants emphasize, the Safety Equipment Warranty is found in a separate section of the Policy (Section G), which expressly states that the warranties and suspensive conditions contained in Section G apply to all aspects of the Policy. I therefore find no merit to Aviva's argument that the Conditions of Payment Term in Section B precludes Aviva's decision to make payments under Sections A and D from being construed as an

acknowledgement that the Defendants were covered under the Policy for claims arising from the Collision.

[122] Aviva also argues that the payments it made to the Defendants in May and June 2020 should not be treated as an acknowledgement of coverage because, at the time of those payments, Aviva did not yet have clear information supporting a conclusion that Mr. Borgatti had breached the Safety Equipment Warranty. Aviva relies on Mr. Barker's evidence that, despite its efforts including requests of the Defendants, it could not procure copies of the OPP Report or the Coroner's Report until November 2020, and it was unable to obtain a formal statement from Mr. McCrie until it received the McCrie Transcript in November 2024. Mr. Barker states that the receipt of the OPP Report on November 24, 2020, was the first time Aviva received any concrete information describing the circumstances of the Collision.

[123] In response to this argument, the Defendants rely on Aviva's claims notes, a copy of which is attached as an exhibit to the Dawson Affidavit [the Claims Notes] and related evidence in the Barker Transcript, identifying information that Aviva obtained related to the circumstances of the Collision, in particular the lighting of the Borgatti Vessel, at earlier stages of its investigation. In cross-examination, Mr. Barker, identified the Claims Notes as a digital notepad related to the Borgatti claim, which was employed by and accessible to all adjusters who were working on the claim.

[124] The Claims Notes include an entry dated September 17, 2019 (24 days following the Collision), in which Jolene Barker, Aviva's accidental benefits adjuster, captured the contents of a telephone call she received from Mr. McCrie. This entry includes the following: "He said that

some of the navigation lights were broken, the beacon light worked, and that they were holding flashlights."

[125] When referred to this entry in cross-examination, Mr. Barker agreed that, as early as the date of this note, there was some indication in the file that some of the navigation lights on the Bogatti Vessel were broken, and he agreed that at this point Aviva had no reason to believe that this was not the case.

[126] A later entry in the Claims Notes dated February 10, 2020, appears to capture a telephone discussion between Aviva's adjuster, Deborah Canute, and a representative of Forensic, which includes the following: "The information is the lights on our insured's boat were OFF 30 FE had also met with Charles McCrie as he wanted to see the boat (controlled / supervised attendance) the lights were removable; the rear light had previous damage" and, immediately thereafter, "Both lights had been stowed".

[127] In cross-examination on this entry, Mr. Barker again agreed that as of the date of these notes, Ms. Canute had some information that there was something not right with the lights on the Borgatti Vessel. He also agreed that Ms. Canute could have sent a reservation of rights letter at that point, but that she did not do so.

[128] As explained in *Trial Lawyers Association*, an estoppel argument, advanced based on an insurer's communication or conduct argued to represent a promise or implication that a claim is covered notwithstanding a policy breach, will fail unless, at the time of the communication or conduct, the insurer had knowledge of the facts giving rise to the breach (at para 18). Aviva

argues that the information surrounding the Borgatti Vessel's navigation lights, that was available to it in September 2019 and February 2020, was not sufficiently clear to afford the knowledge necessary for the Defendants to invoke the doctrine of promissory estoppel based on Aviva's subsequent payment of the Section A and D claims in May and June 2020. Aviva submits that, while the information reflected in the Claims Notes reflects some issue with the lighting of the Borgatti Vessel, it is not clear from that information, for instance, as to which lights were not operating or when they failed.

[129] I appreciate that there was less information available to Aviva in September 2019 and February 2020 than when it subsequently obtained the OPP Report in November 2020, and that it continued to investigate the circumstances of the Collision up to issuance of the Reservation of Rights Letters and indeed subsequently (as it did not obtain a copy of the McCrie Transcript until November 2024). However, I agree with the Defendants that the information that Aviva had in September 2019 and February 2020 clearly indicated that the Borgatti Vessel was inadequately lit, because at least some of its navigation lights were broken or damaged (and indeed stowed) at the time of the Collision. I would not fault Aviva for continuing to investigate, to obtain greater detail surrounding the circumstances. However, as Mr. Barker acknowledged in cross-examination, there was nothing precluding Aviva from issuing to the Defendants a reservation of rights letter at that juncture and then pursuing their investigation with the benefits of that reservation.

[130] As explained in *Rosenblood Estate v Law Society of Upper Canada*, 1989 CarswellOnt 642, 1989 CanLII 10413 (ONSC) at page 157, when a claim is presented to an insurer and its investigation of the facts giving rise to the claim indicates that coverage is questionable, the

insurer should advise the insured at once and, in the absence of a non-waiver agreement or an adequate reservation of rights letter, the insurer defends the claim at risk of being estopped from denying coverage.

[131] In my view, payment of the Section A and D claims, notwithstanding Aviva's knowledge of facts indicating that coverage was questionable, satisfies the second element of the test for establishing promissory estoppel. However, it remains necessary to consider whether the Defendants can also satisfy the third element of the test, the requirement to demonstrate that they relied on their insurer's promise or assurance to their detriment.

[132] Among the Defendants' arguments related to detrimental reliance is a submission that Aviva's shifting position on coverage has taken a profound emotional toll on Janet Borgatti, Neil Borgatti's mother and the administrator of the Estate. Ms. Dawson testified that Ms. Borgatti retired in June 2019, just weeks before her son's death and that, rather than being able to move forward with her retirement plans, she has lived under the weight of unresolved legal issues tied to the Estate, including not knowing whether she would have to call upon her own assets to fund the Estate's litigation or liability.

[133] The Court is sympathetic to the circumstances described in this submission. However, as Aviva submits, there is little evidentiary support for this submission in the record before the Court. There is no first-hand evidence before the Court from Ms. Borgatti and no evidentiary support for a conclusion that the emotional toll resulting from the denial of coverage would have been mitigated if Aviva had issued an earlier reservation of rights letter or taken an earlier off-coverage position.

[134] The Defendants also argue that, had they been informed in a more timely way that Aviva would deny coverage under the Policy, they would have hired coverage counsel and brought an earlier action to seek to confirm coverage. Again, I agree with Aviva that the Defendants have not adduced any evidence, or provided meaningful submissions, identifying any advantage that would have accrued to them had adjudication of the coverage dispute been advanced at an earlier stage.

[135] However, I find more compelling the Defendants' argument that, between the time of the Section A and D payments and the time when Aviva sent the first Reservation of Rights Letter, Aviva disposed of the Borgatti Vessel in August 2020 and thereby deprived the Defendants of access to physical evidence that might have assisted them in responding to Aviva's denial of coverage.

[136] On cross-examination, Mr. Barker was referred to an August 21, 2020, entry made by Ms. Canute in the Claims Notes, which reflects Aviva deciding to dispose of the Borgatti Vessel after paying the physical damage claim. Mr. Barker confirmed that there is nothing in the Claims Notes indicating that Aviva had raised any coverage issues with the Defendants at this stage or prior to the issuance of the first Reservation of Rights Letter.

[137] The Defendants argue that, had they known at the time that Aviva was disposing of the Borgatti Vessel in late August 2020 that there was a potential issue surrounding coverage under the Policy, then the Defendants could have taken steps to preserve the Vessel at least long enough to determine whether the physical evidence available therefrom might have assisted them to respond to an allegation of breach of the Safety Equipment Warranty. In particular, they

submit that examination of the components of the navigational lighting system might have revealed evidence that would have assisted them in invoking the saving provisions contained in subsections 39(3) and (4) of the *Marine Insurance Act*.

[138] There is necessarily an element of speculation to this submission, as the Defendants are not in a position to identify with any precision what an inspection of the Borgatti Vessel's lighting system might have revealed. However, I accept that it is possible that a better understanding of why and when the lights failed, resulting from an opportunity to inspect the physical evidence, could have been relevant to an analysis under subsections 39(3) and (4). The point is that the Defendants were deprived of such an opportunity, as they had not been advised by Aviva as of August 2020 that the failure of the Vessel's navigational lights could result in Aviva denying coverage for the Collision. I accept the Defendants' position that these circumstances represent detrimental reliance sufficient to invoke the doctrine of promissory estoppel.

[139] The effect of the above findings is that, by the time Aviva issued the first of the Reservation of Rights Letters in February 2021, Aviva was already estopped from denying coverage. These findings are sufficient for Defendants to succeed in responding to Aviva's Motion and to support the Defendants' request for a declaration that the Estate has coverage under the Policy for the Collision. However, for the sake of good order, I will address below the Defendants' remaining estoppel arguments.

(c) *Issuance of Reservation of Rights Letters after concluding there was no coverage for the Collision*

[140] The Defendants note that, in Aviva's Memorandum of Fact and Law, it states that it concluded that the Safety Equipment Warranty acted to deny coverage under the Policy before sending the first Reservation of Rights Letter on February 12, 2021. The Defendants argue that Aviva was obliged at that point to advise them of that conclusion, take an off-coverage position, and cease all involvement with the Defendants' claim including the tort litigation, rather than advising the Defendants (as Aviva did in the Reservation of Rights Letters) that it was investigating potential coverage issues.

[141] The Defendants also argue that, when Aviva subsequently appointed Defence Counsel on February 19, 2021, under the reservation of its rights expressed in the first Reservation of Rights Letter, that counsel was immediately in a conflict of interest, because the coverage issue depended upon an aspect of the insured's own conduct that was an issue in the underlying tort litigation. As a result, the Defendants were taking legal advice in defence of the tort litigation from counsel who was being directed by an insurer that had already formed a view that there was no coverage for the loss being litigated.

[142] I have difficulty understanding how these arguments fit within the framework of promissory estoppel. Recall the need for the Defendants to demonstrate a promise by Aviva intended to affect the parties' relationship and the Defendants having relied on the promise to their detriment, such that Aviva should be held to its promise. I understand the Defendants' submission that they were misled into thinking that there was still a possibility that Aviva might conclude that the Collision was covered and acted to their detriment based on that information. However, it is difficult to identify the relevant promise to which the Defendants seek to hold Aviva. To the extent the Defendants are arguing that the promise was an assurance by Aviva that

it had not yet concluded whether the Collision was covered under the Policy, I struggle to understand how holding Aviva to that assurance (which was clearly not an assurance of coverage) can assist the Defendants.

[143] The Defendants also argue that, by the time Aviva sent the first Reservation of Rights Letter, Aviva was itself in a conflict of interest, which conflict subsequently manifested itself in Aviva's generation of the Schouffoer Report that, as explained earlier in these Reasons, includes evidence potentially operating to the detriment of the Defendants' liability position in the tort litigation.

[144] Again, it is difficult to fit this argument within the framework of promissory estoppel. I cannot identify a promise or assurance to which the Defendant seek to hold Aviva through the application of this doctrine. Nor, in the context of this particular argument, can I see how Aviva's generation of the Schouffoer Report, while admitted prejudicial to the Defendants, can be characterized as the product of detrimental reliance by the Defendants upon some promise by Aviva.

[145] However, before leaving this argument, I return to my observation earlier in these Reasons that the Defendants are correct in taking issue with the propriety of Aviva generating through the Schouffoer Report evidence that is potentially supportive of liability on the part of Mr. Borgatti for the Collision, particularly given the fact that Aviva generated this evidence while continuing to defend the Estate in the underlying tort litigation. Although these circumstances do not give rise to an estoppel, it may be that they could be impugned by invoking the insurer's contractual obligations to act in good faith. However, the Defendants have not

framed their argument in this manner, and the Court does not have the benefit of meaningful submissions from either party to support such an analysis. I therefore make no findings in this regard.

(3) Laches

[146] The Defendants advance only brief submissions in relation to the doctrine of laches (and, although pleaded in their Statement of Defence, they do not advance independent submissions based on delay). They argue that there has been a multi-year delay on the part of Aviva in denying coverage under the Policy. The Defendants submit that Aviva had all the information necessary to determine coverage as early as late 2019 and that, despite concluding in February 2021 that the Safety Equipment Warranty operated to eliminate coverage, Aviva nevertheless waited until 2024 to deny coverage by initiating this Action. The Defendants argue that, for the reasons advanced in their estoppel submissions, they were prejudiced by that delay.

[147] Aviva responds with the technical point that the defence of laches operates as a defence against equitable claims, not against legal claims (*M (K) v M (H)*, 1992 CanLII 31 (SCC), [1992] 3 SCR 6 at 77). On this point, the Defendants argue that the relationship between an insurer and its insured is governed by mutual duties of good faith (*Marine Insurance Act*, s 20; *Fidler* at para 63) and that, by its nature, good faith invokes equitable principles requiring the insurer to deal with its insured's claim fairly. The Defendants therefore submit that the doctrine of laches applies.

[148] The Defendants have not convinced me that the obligations of good faith inherent in a contract of insurance are a product of equity. *Fidler* describes the obligation to act in good faith as a contractual duty (at para 63). I therefore agree with Aviva that the doctrine of laches has no application. Regardless, as the Defendants acknowledge, their submissions in relation to this doctrine advance the same arguments that the Court has already considered under the doctrine of promissory estoppel above.

VI. **Remedies**

[149] In conclusion, for the reasons canvassed above and in particular the finding that Aviva is estopped from denying coverage under the Policy, the Court will grant summary judgment in favour of the Defendants, providing the Defendants with the principal remedy they seek, a declaration that the Estate has coverage under the Policy for the Collision and that Aviva is required to defend and indemnify the Estate pursuant to the terms of the Policy.

[150] I note that the Defendants also argue that, because of the conflicts of interest raised in their submissions, the Court should order Aviva to relinquish control of the Estate's defence and pay for independent counsel retained by the Estate to defend the underlying tort actions. The Defendants refer the Court to *Hoang v Vicentini*, 2015 ONCA 780 [*Hoang*], in which the Ontario Court of Appeal explained that such relief may be ordered if there is a reasonable apprehension of a conflict of interest on the part of counsel appointed by an insurer, such as where the insurer has reserved its rights in circumstances where coverage turns on the insured's conduct in the accident giving rise to the litigation (at para 14).

[151] I agree with the position expressed by Aviva at the hearing of this Motion, that the Defendants' request for this latter category of relief is not properly before the Court on this Motion. As previously observed, it is within the Court's power to grant summary judgment in favour of the party responding to a summary judgment motion, where the order sought is within the scope of the motion, even where the responding party does not bring a formal cross-motion (*Sea Tow* at paras 219, 222). However, I do not regard the Defendants' request for relief of the sort granted in *Honag* to be within the scope of the Motion.

VII. **Costs**

[152] At the hearing of this Motion, the Court requested that the parties consult following the hearing, with a view to attempting to agree upon a lump sum costs figure that they would jointly recommend to the Court for award to the successful party in the Motion.

[153] By letter dated July 28, 2025, Aviva's counsel advised the Court that the parties had agreed to a costs award of $15,000.00 inclusive of disbursements and HST. I consider this to be a reasonable amount, and my Judgment will award this amount to the Defendants as the successful party in this Motion.

JUDGMENT IN T-2312-23

THIS COURT'S JUDGMENT is that:

1. Pursuant to the Motion filed by Aviva, summary judgment is granted in favour of the Defendants and the Court hereby declares that the Estate has coverage under the Policy for the Collision and that Aviva is required to defend and indemnify the Estate pursuant to the terms of the Policy.

2. The Defendants are awarded costs of this motion in the lump-sum amount of $15,000.00, inclusive of disbursements and HST.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2312-23
STYLE OF CAUSE:	ELITE INSURANCE COMPANY, DOING BUSINESS AS AVIVA v THE ESTATE OF NEIL BORGATTI (ALSO KNOWN AS RICHARD NEIL BORGATTI), DECEASED, JANET KATHLEEN BORGATTI, AS ADMINISTRATOR OF THE ESTATE OF THE DECEASED RICHARD NEIL BORGATTI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 23, 2025
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	SEPTEMBER 8, 2025

APPEARANCES:

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