

SUPREME COURT OF NOVA SCOTIA

Citation: *Hart v. Allstate Insurance Company of Canada*, 2023 NSSC 273

Date: 20230901

Docket: Hfx No. 511493

Registry: Halifax

Between:

Shawn Hart

Plaintiff

and

Allstate Insurance Company of Canada,
an Extra-Provincial Corporation

Defendant

DECISION ON SUMMARY JUDGMENT MOTION

Judge: The Honourable Justice Ann E. Smith

Heard: April 5 and May 23, 2023, in Halifax, Nova Scotia

Counsel: Michael Dull and Basia Sowinski-Banfield, for the Plaintiff
Michelle M. Kelly, K.C., and Meaghan Kells, for the Defendant

By the Court:**Introduction**

[1] This is a motion for summary judgment on evidence brought by Allstate Insurance Company of Canada (“Allstate”). Allstate says this Action was filed after the prescribed limitation period contained within the Standard Automobile Policy for Nova Scotia and the *Automobile Insurance Contract Mandatory Conditions Regulations* (the “*Regulations*”). Allstate also relies on the *Limitation of Actions Act*, N.S., 2014 c. 35 (the “*LAA*”). Each provides for a two-year limitation period for alleged breach of a contract of indemnity.

[2] Mr. Hart opposes the motion on the basis that there are genuine issues at play which should be heard on their merits at trial. While Mr. Hart agrees that there is a two-year limitation period by which he needed to start his Action, he says that a material fact is at issue as to when that limitation period began to run.

[3] The background, in short, is that the vehicle Mr. Hart was driving was involved in a collision with a third-party motorist on August 15, 2019 (the “Collision”). The third party succumbed to injuries he sustained in the Collision and passed away in hospital shortly thereafter. Mr. Hart was charged at the scene with

driving under the influence and dangerous driving causing bodily harm or death. Mr. Hart's vehicle also sustained damage in the Collision.

[4] Mr. Hart had automobile insurance with Allstate. Section C of that contract of insurance provided for indemnification against direct and accidental loss to Mr. Hart's automobile, i.e., property damage coverage.

[5] Allstate says that it denied Mr. Hart coverage in a Denial Letter to him dated August 22, 2019. Allstate said in this letter that it was relying upon exclusions or Statutory Conditions under the contract. Those exclusions apply in circumstances where the insured was driving while under the influence of alcohol, or "while in a condition for which he is convicted" of a *Criminal Code* offence related to impaired driving or breathalyzer offences. The latter exclusion allows an insured to establish that impairment by alcohol was not the proximate cause of the accident.

[6] The real dispute in this matter is when the limitation period began to run. Allstate says that the two-year limitation period started on August 15, 2019, when Mr. Hart knew that his car had been damaged as a result of a motor vehicle accident. Allstate says at the latest, the limitation period began to run by the time Mr. Hart received Allstate's Denial Letter, on September 13, 2019.

[7] Mr. Hart says that the two-year limitation period only began to run when Allstate finished its “investigation” of his claim, and clearly denied him property damage coverage. Mr. Hart says that the issue of “discoverability” applies in the circumstances, and that he did not “discover” he had a claim until he received a clear denial of coverage at some point after January 2020.

[8] Mr. Hart says that the issue of when the limitation period began to run raises material issues of fact, which cannot be resolved on summary judgment, but which require a trial.

Issue

[9] Does Mr. Hart’s argument that the limitation period did not begin to run until 2020, or later, raise a genuine dispute? Of course, Allstate bears the onus of establishing that there are no genuine issues of material fact or law which require a trial. If there is no genuine dispute requiring a trial, then summary judgment must be granted to Allstate.

Evidence

[10] Allstate relies on the Affidavit of Scott Johnson, a national property claim consultant with Allstate.

[11] Mr. Hart relies on the solicitor’s Affidavit of Michael Dull, Plaintiff’s counsel. Mr. Hart did not file his own Affidavit.

Background

[12] In 2019, Shawn Hart held a valid Standard Automobile Policy for Nova Scotia (NSF No. 1) (the “Policy”) with Allstate.

[13] On August 22, 2019, Mr. Hart reported to Allstate that he was involved in a motor vehicle collision on August 15, 2019 while driving his Ford F-150 (the “Collision”). Allstate adjuster Ashley Matte made the following notes on August 22, 2019, after speaking with Mr. Hart:

Spoke with Shawn

Driver Shawn

...

Coverages explained – no cover at this time until investigation

Coll: \$300

LOU: \$1800

Loss Details – Ins was driving down English Mountain Road in Cold Brook when TP pulled out from his driveway going across the road to his other property. Ins thought he was just turning on to road but TP drove over to ins lane trying to cross street. Police RCMP from New Minas, fire department, and ambulance responded to the scene. Ins was given breathalyzer and it registered at 100 mg (over the 80 mg per 100 ml limit) and ins was charged with DUI and causing bodily injury, insured doesn’t think he was wearing a seat belt. The TP was rushed to the hospital and transported to Valley Regional Hospital in Kentville with injuries. Ins veh was on fire and TP truck was towed from the scene.

Damages – Our Truck was on fire and a TL impact to front but insured does not know if air bags went off – TP truck was towed away – impacted to passengers side of truck.

Liability – not determined

Injuries – TP is in hospital with injuries

Fire – truck was on fire

Police – RCMP New Minas detachment

Repairer – truck burnt – TL

Rental – not offered as investigation on going.

VCH – Not attempted - TL

[Emphasis added]

[14] On August 22, 2019, Mr. Hart also gave a statement to an Allstate adjuster.

This statement reads as follows:

Statement:

I was travelling on the road, slight curve in road, I seen the other guy from a distance and thought he was going to turn right. I proceeded and before I could even do anything he crossed the road in front of me. He was going to a house across the street.

Incident time 6:45 pm on August 15th 2019 on English Mountain Road. Driving 80-90 km/hr maybe. Conditions sunny and clear.

Driver Shawn was arrested and charged for DUI and dangerous driving causing bodily harm and death. Later released pending court date October 8th 2019. Insured is looking for a lawyer but has not yet found one.

Blood Alcohol 1.10/1st offence/license suspended

Vehicle impounded Lindsay Milnes Towing. Insd not sure if hold or not on vehicle by police

Vehicle damages front end from impact and fire damage as his vehicle caught fire after loss

TP damages pass side

Airbags deployed in both vehicles

Vehicle: 2014 Rod F1504...

Reg Owner Shawn Hart only

[15] As a result of the Collision, Mr. Hart was charged under s. 320.14 of the *Criminal Code*, RS 1985, c. C-34, with offences relating to impaired driving.

[16] The third-party motorist passed away in hospital from the injuries he received in the Collision.

[17] On the same day as Mr. Hart reported the Collision, i.e., August 22, 2019, Allstate adjuster Ashley Matte sent an email message to Mr. Hart advising him that there was “no claim coverages for your vehicle...due to the DUI charges...” and that he was being sent a “Denial Letter.” That email message states, in full, as follows:

Good afternoon Shawn,

Thank you for speaking with me this afternoon pertaining to your accident occurring on August 15th 2019.

Please be advised the forms we discussed today including the proof of loss, consent and non-waiver agreement are being sent today or tomorrow to you by Purolator and you should receive them early next week. This will also include the Denial Letter showing the exclusion applicable under your Nova Scotia Insurance Policy.

At this time based on the information provided, there will be no claim coverages for your vehicle the 2014 Ford F150 damages due to the DUI charges causing bodily Injury or Death and confirmation of alcohol consumed prior to accident occurring.

Please be advised this also means any towing or storage fees are the responsibility of yourself on the policy.

We are sending an appraiser to inspect the vehicle prior to having the vehicle removed from Lindsay Milnes Towing. Once we have inspected for the investigation of liability and charges we will advise you for removal of the vehicle to another secure location of your choice.

If you have any questions or concerns please let me know I am happy to assist.

[Emphasis added]

[18] On August 26, 2019, the package of materials referred to by Ashley Matte in her August 22 email to Mr. Hart was sent to him by courier. However, on September 6, 2019, that package was returned to Allstate.

[19] The adjusters' file, attached to the Affidavit of Scott Johnson, indicates that on August 29, 2019 Ashley Matte was advised by the insurer adjuster of the deceased third party that they had "held our driver at fault for the accident."

[20] The Affidavit of Shawn Scott states that on September 13, 2019 Ashley Matte and Mr. Hart spoke by phone and Shawn Hart told Ms. Matte that he had not received the package. As a result, that same day Ms. Matte re-sent Mr. Hart, by email, her August 22 email message and an email attaching the documents in the package which had not reached him by courier. The documents in the package included a Proof of Loss form and Denial Letter.

[21] The August 22, 2019 "Denial Letter" sent to Mr. Hart, acknowledges "your claim for damages to your vehicle, 2014 Ford F-150 XL SUPERCAB 4WD" and states as follows:

Dear Shawn Hart:

We acknowledge your claim for damages to your vehicle...on 08/15/2019.

There are certain restrictions, limitations and exclusions found within the contract that specify what is and what is not covered. Unfortunately, we regret to inform you that we cannot provide coverage for your claim because of the following

“Exclusion” or “Statutory Condition” found in your Nova Scotia Automobile Policy.

Section C – Loss or Damage to Insured Automobile

Exclusions:

The insurer shall not be liable,

Under any subsection of section C for loss or damage

(g) where the insured drives or operates the automobile

(1) while under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile; or

(2) while in a condition for which he is convicted of an offence under section 253(a) (impaired driving) or paragraph 153(b)(breathalyzer offence) or under or in connection with circumstances for which he is convicted of an offence under subsection 254(3)(refusing road-side test) or subsection 254(3)(refusing breathalyzer) or section 255 (impaired driving causing bodily harm) or of the Criminal Code (Canada), unless he establishes that impairment by alcohol or drugs was not the proximate cause of the accident.

... [dealing with exclusions related to the insured allowing any person to use the insured vehicle contrary to the provisions of (g)]

Please note that you will be responsible for any and all costs incurred with respect to the property damage to your vehicle. This will include any towing and/or storage charges.

[Emphasis added]

[22] On January 24, 2020, Ashley Matte sent an email message to Mr. Hart’s criminal lawyer, Joel Pink, asking whether Mr. Hart had gone to court yet on the charges arising from the Collision:

Good morning Mr. Park [sic],

My name is Ashley Matte and I am the Property Damage Adjuster for Shawn Harts claim motor vehicle accident occurring on 08/15/2019.

It is my understanding you are representing Mr. Hart pertaining to charges under the motor vehicle act for driving while under the influence DUI in conjunction with the motor vehicle accident occurring.

On 09/13/2019 Allstate insurance emailed and mailed by Purolator the Denial on loss and a blank proof of loss form should Mr. Hart wish to contest claims file decision as non-recoverable due to DUI Criminal Code Charge and Driver's License suspension.

Has Mr. Hart gone to court pertaining these charges and has there been a final outcome to date on charge/conviction status?

If there are nay questions or concerns please let me know I am happy to assist.

[23] On January 24, 2020, Mr. Pink responded to Ms. Matte's email by saying, "This [*sic*] criminal charges will be dealt with on April 22th [*sic*]." Ms. Matte replied immediately, asking Mr. Pink if there had been a "Plea provided at this time." Mr. Pink immediately responded "no." A few minutes later Ashley Matte sent another email message to Mr. Pink advising that she would be "suspending review of this file pending the court date in April", but also noting that the file was "closed as denial at this time for all...damages" to Mr. Hart's vehicle, and saying Mr. Hart could contest "this decision":

Good morning Joel,

I will be suspending review of this file pending the court date in April.

To date, Mr. Hart has not sent me back the proof of loss form regarding the Denial on loss – Please note that the file is closed as Denial at this time for all costs, charges and damages to insured vehicle. This includes towing and storage fees as well.

If Shawn wish [*sic*] to contest this decision he would have to complete the forms and return them back in a reasonable time frame as possible.

[Emphasis added]

[24] On April 20, 2021, Ashley Matte received an email from solicitor Mike Dull indicating he was retained by Mr. Hart in relation to property damage to Mr. Hart's truck. In this email Mr. Dull also states:

By letter dated September 22, 2019 (attached for your convenience), you denied coverage of this property damage. You rely on an exclusionary provision to deny coverage in the event an insured is convicted of an impaired driving offence (as was the case here).

Of course the provision allows an insured to "establish that the impairment by alcohol was not the proximate cause of the accident".

My understanding is that you have been provided with an accident reconstruction report dated January 20, 2020. It is attached for your convenience. This report establishes that the impairment by alcohol was not the proximate cause of the accident.

Your insured has not received a response from you since delivering the attached report.

Can you please state your position? If you are maintaining a denial, please be clear with your reason.

[Emphasis added]

[25] It appears that another Allstate adjuster, Sarah Jamieson, took over Mr. Hart's file around this time. Ms. Jamieson responded to Mr. Dull's email of April 20, 2021 on April 26, 2021, advising that Allstate had not received the "required legal document to present the claim" at that point, and attached those documents to her email:

Mr. Dull:

I left you a VM this morning as I am the adjuster that the claim was transferred to, as Ashley is working in another department.

In review of the claim, the required legal document to present the claim has not been received to date. I have attached the documents required per the Nova Scotia

Policy, can you please have Mr. Hart complete fully, have them notarized and send them to my attention.

I am also including the ATIP Police Consent form, that does require Mr. Hart's signature and a copy of his license.

[26] Mr. Dull responded to this email message on May 14, 2021:

Hi Sarah-

I left you a VM on this matter a few weeks ago, and again today. I would appreciate a call back. I am attaching the documents which I believe you are asking your insured to complete. I observe that I have no record of his being asked to complete any forms previously. Could you please send me prior correspondence where these were sent to your insured?

Here's what Shawn can provide you at this point:

1. ATIP Police Consent Form (blank attached)
2. Personal Information Consent Form (blank attached)
3. A Proof of Loss Form (blank attached).

So I'm clear, and these three items what you say are the legally required documents?

[27] In further email messages between Ms. Jamieson and Mr. Dull, Ms. Jamieson said that "in order to open the claim for investigation, we need these forms completed." Mr. Dull responded on May 26, 2021 by sending Ms. Jamieson the completed forms. In his email attaching the completed forms Mr. Dull stated, "Please find attached the three completed forms you need to open the claim for investigation. I trust that this claim will be adjusted promptly given the amount of time which has already lapsed."

[28] On June 14, 2021 another Allstate adjuster, Sylvia Poirier sent an email message to Joel Pink asking about the status of the charges against Shawn Hart:

Good morning Joel:

I am just following up on this file. Back in January 2020, we exchanged emails on this matter. Are you able to confirm the status of the charge outline below – was our insured found guilty or did he plead guilty? If you have the date and supporting document, that would be helpful.

[29] Mr. Pink responded that same day advising that Mr. Hart had plead guilty to a breathalyzer charge and the other charges had been withdrawn:

On July 21 2020 a plea of guilty was entered on a charge of 320.14(1)(b) breathalyser, reading 110.

Charges under 320.14(3) impaired driving causing death and 320.14(1)(a) impaired driving were withdrawn by the crown.

[Emphasis added]

[30] On June 16, 2021, Mr. Dull provided a sworn Proof of Loss Form via email to Allstate adjuster Sarah Jamieson. In the Proof of Loss form Mr. Hart says that his loss to his truck in the Collision was \$30,000.

[31] Mr. Dull states in his Affidavit that on August 19, 2021 he called “the Defendant’s adjuster” and left a voicemail asking about the status of the claim. Mr. Dull states that “at no point did I ever receive a return communication to this voicemail.”

[32] On September 7, 2021, Mr. Dull sent an email to Allstate adjuster Sarah Jamieson asking whether there were “any updates on this property damage claim”, advising that he was still not in receipt of the file that he requested on June 16 and asking that he be advised when he could expect to receive the file.

[33] Mr. Dull states in his Affidavit that on September 28, 2021 he called “the Defendant’s adjuster and left a voicemail asking about the status of the claim.” Mr. Dull states that “at no point did I ever receive a return communication to this email.”

[34] On November 8, 2021, Mr. Dull sent an email to Allstate adjuster Sarah Jamieson stating, “Sarah – Can you please get back to me?”.

[35] On November 10, 2021, Allstate claims manager, Denise Babin, emailed a letter to Mr. Dull advising, *inter alia*, that the two-year limitation period had lapsed and Allstate would not consider payment of Mr. Hart’s claim:

Mr. Dull,

This is further to your inquiry call to our claims’ office on November 10, 2021.

You recently contacted us for an update on the status of your clients claim. Your client failed to participate in the claims process.

The NS auto insurance policy provides for a two-year limitation to initiate an action against us for recovery of your clients claim. We are beyond that two-year limitation period and will not consider payment of this claim.

Our reasons for the refusal to pay your clients claim are not necessarily limited to those contained herein and we reserve our right to rely on all other defenses which are available under the policy or otherwise in law.

[36] The Plaintiff’s counsel filed the Notice of Action and Statement of Claim in this matter on December 17, 2021. The Action was amended on January 26, 2022.

[37] In the Action, Mr. Hart claims, among other remedies, a declaration that he is entitled to collision damage indemnity benefits under Section “C” of the Policy. Mr.

Hart claims that Allstate denied him coverage without merit and in a “malicious manner.” He claims damages for “bad faith” in that he says Allstate denied coverage “without proper justification.” In particular, Mr. Hart says (at para. 8):

8 In particular, the Plaintiff states that the Defendant denied the Plaintiff’s property damage benefits based on an incorrect interpretation of the insurance contract, and arbitrarily rejected and/or disregarded evidence of entitlement to benefits. The Plaintiff further states that the Defendant failed to actively participate in the adjusting of the claim, which has resulted in their refusal to grant property damage benefits based on a provision in the insurance contract which provides the Plaintiff two years to initiate an action against the Defendant.

[38] Allstate’s Notice and Statement of Defence was filed on October 7, 2022. In its Defence, Allstate pleads and relies upon the *Insurance Act*, R.S.N.S., 1989, c. 231, and regulations made under its s. 5, the *Automobile Insurance Contract Mandatory Conditions Regulations*, N.S. Reg. 181/2003, the *Standard Automobile Policy*, NSPF No. 1, and the provisions of the Policy.

[39] Allstate further pleads the *LAA* and says that Mr. Hart’s claims are barred by operation of s.8(1) of the *Act*.

Positions of the Parties

Allstate

[40] Allstate says that Mr. Hart’s Action is statute-barred, and as such, there is no genuine issue of material fact and no legal question to be determined at trial.

[41] Allstate advances two separate arguments in relation to the Action being barred:

- (a) The Action is statute barred under the Standard Automobile Policy and the applicable *Automobile Insurance Contract Mandatory Conditions Regulations*, having been commenced more than two years after the accident occurred;
- (b) The Action is statute-barred under the *Limitation of Actions Act* having been commenced more than two years after the accident occurred and the loss/damage was “discovered”.

Shawn Hart

[42] Mr. Hart opposes summary judgment on the basis that a genuine dispute exists, and that dispute should be determined by the trial judge on the basis of a full record.

[43] Mr. Hart’s position will be detailed below, but at this stage the Court notes that it is based on the premise that Mr. Hart applied for indemnity benefits from Allstate well within the limitation period. Mr. Hart says that Allstate ignored this application. He claims that for a half year, Allstate ignored his counsel’s repeated emails and phone calls asking for a position on the application, and in fact “stayed silent on the Plaintiff’s application until such time as when the Defendant says the limitation period against them expired.”

[44] The Plaintiff’s counsel submits that “at that time, the Plaintiff’s application was denied – not the merits of the application but rather on the basis of a time

deadline unilaterally imposed by the Defendant (but never expressed to the Plaintiff before the passage of this unilateral deadline).”

[45] The Plaintiff’s counsel submits that a summary dismissal of Mr. Hart’s claim is wholly inappropriate in the circumstances.

Issues

[46] The parties agree on the law which applies to summary judgment on evidence. Summary judgment is not appropriate, and must not be granted, when a “genuine issue of material fact” or an “outstanding question of law” exists. Those matters require a trial with a full record.

[47] However, if Shawn Hart’s Action is statute-barred, as claimed by Allstate, then, based on the evidence before the Court there is no genuine issue of material fact or law that requires a trial and this Court must grant summary judgment pursuant to *Civil Procedure Rule* 13.04.

Law and Analysis

Is Shawn Hart’s Action Statute Barred under the Standard Automobile Policy and the applicable Automobile Insurance Contract Mandatory Conditions Regulations?

[48] The *LAA* provides a standard two-year limitation period for actions which begins to run “from the day on which the claim is discovered” (s. 8(1)(a)).

[49] Section 6 of the *LAA* provides that “where there is a conflict between this Act and any other enactment, the other enactment prevails.”

[50] In *Barry v. Halifax (Regional Municipality)*, 2018 NSCA 79 (“*Barry*”) the Nova Scotia Court of Appeal confirmed that the limitation period prescribed by the *Uninsured Automobile and Unidentified Automobile Coverage Regulations*, made pursuant to the *Insurance Act*, and incorporated into the Standard Automobile Policy, was a limitation period created by an “enactment” as per the *LAA* (paras. 59-68). Accordingly, it was the limitation period contained in the Standard Automobile Policy that governed the dispute in *Barry*.

[51] The *Regulations* before this Court are the *Automobile Insurance Contract Mandatory Conditions Regulations*. Those *Regulations* are also made pursuant to the *Insurance Act* and are incorporated into the Standard Automobile Policy. Accordingly, the Court of Appeal’s reasoning in *Barry* applies and the relevant limitation period outlined in the Standard Automobile Policy applies.

[52] The Policy and the *Regulations* both state (the wording is identical) under “Mandatory Conditions”:

Limitation of actions – every action or proceeding under the contract against the insurer in respect of a claim for indemnification for liability of the insured for loss or damage to property of another person or for personal injury to or death of another person shall be commenced within two years after the liability of the insured is

established by a court of competent jurisdiction and not afterwards. Every other action or proceeding against the insurer under the contract in respect of loss or damage to the automobile shall be commenced **within two years from the time the loss or damage was sustained and not afterwards.**

[Emphasis added]

[53] Allstate submits that the limitation period applicable to Mr. Hart's claim for damages to his Ford F-150, which he brought pursuant to Section C of his Policy, is two years from the time the damages were sustained on August 15, 2019 and that on August 16, 2021, any claim by Mr. Hart under Section C of his Policy was out of time for coverage to apply. Mr. Hart's Action against Allstate was filed on December 17, 2021.

[54] In *Chiasson v. Century Insurance Co. of Canada*, 1978 CanLII 2116 (NBCA), Bugold, J.A., speaking for the New Brunswick Court of Appeal, stated that when dealing with a certain statutory condition, (*...every action...by virtue of this contract shall be absolutely barred unless commenced within one year next after the loss or damage occurs*) it is the date of the occurrence of the loss or damage and not the date that such loss or damage comes to the insured's knowledge that determines the time from which the limitation period begins to run.

[55] Accordingly, in *Chiasson*, the date of loss relating to a flood causing damage occurred on the date of the flood, July 17, 1975, rather than the date the plaintiff was made aware of the flood. Mr. Chiasson began an action against his insurer on July

19, 1976, one year and two days after the flood occurred. The defendant insurer brought a motion relying upon the statutory condition of the insurance policy to bar the action because it had not been commenced within one year “after the loss or damage occurred.”

[56] The New Brunswick Court of Appeal allowed the motion, finding that Mr. Chiasson’s claim was statute-barred.

[57] Mr. Hart’s defence of this motion largely focuses on the argument that the limitation period in the *Automobile Insurance Contract Mandatory Condition Regulations* starts on the date of “discoverability”, and not unassailably on the date of the Collision.

[58] In that regard, Mr. Hart’s counsel says that the New Brunswick Court of Appeal decision in *Chiasson* is “no longer good law.” Counsel says that *Chiasson* was reversed by the New Brunswick Court of Appeal in *Callaghan Contracting Ltd. v. Royal Insurance Co. of Canada*, 1989 CanLII 5191 (NBCA). Plaintiff’s counsel refers to the following from *Callaghan*, where the Court stated:

...in the *Chiasson* case the Court adopted the reasoning of the Ontario Court of Appeal in *Schwebel v Telekes*, [1967] 1 O.R. 541, 61 D.L.R. (2d) 470. The latter decision was overruled by the decision of the Supreme Court of Canada in *Kamloops (City) v. Nielsen*...and was not followed by this Court in *John Maryon International Ltd. v. N.B. Telephone Co.*...Chiasson must therefore be taken to have been overruled by more recent higher authority.

[Emphasis added]

[59] However, this Court notes that the start of the above quote from *Callaghan* is as follows:

26 Nor do I see the decision of this Court in *Chiasson*...as an obstacle to concluding that in contracts of indemnity the discoverability rule applies. First, the *Chiasson* decision is distinguishable on its facts. In that case, the insured discovered the loss the day after it happened although his solicitor did not commence an action until 1 year later. But the insured had actual notice of the loss for a full year. Second, in the *Chiasson* case the Court adopted... [remainder of quote above].

[Emphasis added]

[60] Accordingly, the Court of Appeal in *Callaghan* distinguished *Chiasson*, both on its facts, as well as on the law with respect to applying discoverability principles to limitations in a claim of indemnity.

[61] Allstate also refers to *Barry*, where the motions judge considered whether a claim brought against the Halifax Regional Municipality was started too late. In that case, Ms. Barry was a passenger on municipal transit bus when the bus stopped suddenly to avoid an unidentified vehicle. Ms. Barry commenced an action against HRM in October 2015 for damages in negligence. After discovery examinations in July 2016, Ms. Barry learned that she had a possible claim against HRM's insurer, Royal and SunAlliance Insurance ("RSA"). Ms. Barry brought a motion to add RSA as a defendant.

[62] The motions judge dismissed the motion on the basis that the limitation period outlined in the policy (two years) had passed. The case was successfully appealed on other grounds, with the Court of Appeal finding that s. 12 of the *LAA* applied (the saving provision).

[63] The parties agree that in the case before this Court, s. 12 of the *LAA* does not apply.

[64] The Court of Appeal in *Barry* found that the limitation period barred the action against RSA, even after an assessment of s. 12 of the *LAA*. The motion judge's conclusion that the limitation period began to run on the day of the incident on the transit bus, pursuant to the statutory requirements of the Standard Automobile Policy, therefore, was not itself overturned by the Court of Appeal.

[65] Allstate also refers to the decision of Carver, J., in *Dempsey v. Dominion of Canada General Insurance Company* (1996), 1996 CanLII 5384 (NSSC). In *Dempsey*, the plaintiff motorist suffered personal injuries when the car he was driving left the highway, hit an abutment and went down into a ditch. The plaintiff's leg was broken and his motor vehicle suffered damages. In fact, when the vehicle was being towed from the ditch it struck a bridge and caught fire. This accident occurred on November 26, 1989. While in hospital being treated for his injuries, an

insurance adjuster for the defendant took a statement from Mr. Dempsey. The adjuster explained to Mr. Dempsey, based on the information he had provided, that he did not qualify for Section “B” benefits. The adjuster also advised Mr. Dempsey that he was not covered under the policy since the damage was caused by collision and the policy did not provide that coverage, but only comprehensive coverage. Mr. Dempsey filed an action against the defendant insurer in 1995.

[66] The Court determined that the statutory condition in the *Insurance Act* applied to Mr. Dempsey’s property damage claim. That section provided, under the heading, “Limitation of Actions”:

Every other action or proceeding against the insurer under the contract in respect of loss or damage to the automobile shall be commenced within two years from the time the loss of [sic] **damage was sustained** and not afterwards.

[Emphasis added]

[67] Carver, J., stated (at para. 21) that “the plaintiff was required to commence his action for damages to his motor vehicle within two years from the date of the accident, being November 16, 1989, to be within the limitation period for a property damage claim he had to commence his action against the insurer by November 16, 1991. He commenced his action October 16, 1995.”

[68] The Court in *Dempsey* considered whether an exception to the limitations rule (under the old *Limitation of Actions Act*) should apply. In considering the degree of

prejudice to the parties, the Court determined that the limitation should be upheld in the circumstances. Of course, those exceptions to the limitations rule do not apply in the within case.

[69] The evidence before this Court establishes that the Collision occurred on August 15, 2019. Mr. Hart certainly knew on that date that his truck was damaged. On August 22, 2019 he reported the Collision to Allstate and advised that his truck was damaged – it lit on fire and was towed from the scene.

[70] The Notice of Action was filed on December 17, 2021, two years and four months after the Collision.

[71] As such, Mr. Hart’s Action was filed four months past the expiry of the limitation period as per the Policy and *Regulations*.

[72] Accordingly, the Court finds that Mr. Hart’s claim is statute-barred.

[73] If a “discoverability” analysis is required, the Court will go on to determine whether Mr. Hart’s claim is statute-barred under the *LAA* and the discoverability assessment.

Is Shawn Hart’s Action Statute Barred under the LAA and the Discoverability Analysis?

[74] Section 8 of the *LAA* provides that “unless otherwise provided in this *Act*, a claim may not be provided after (a) two years from the day on which the claim is discovered; and (b) fifteen years from the day on which the act or omission on which the claim is based occurred.”

[75] The statutory test for discoverability is set out at s. 8(2) of the *LAA*:

8(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

- (a) that the injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the defendant; and
- (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[76] Allstate says that Mr. Hart was informed of the denial of coverage by September 13, 2019, at the latest, via email, telephone and the Denial Letter. Counsel for Allstate points to Mr. Hart’s counsel’s email to Allstate adjuster Ashley Matte dated April 20, 2021, where Mr. Dull states, in part:

By letter dated September 22, 2019 (attached for your convenience), you denied coverage of this property damage. You rely on an exclusionary provision to deny coverage in the event an insured is convicted of an impaired driving offence (as was the case here).

[Emphasis added]

[77] Mr. Dull goes on in this email to state that the provision relied upon by Allstate allows an insured to “establish that the impairment by alcohol was not the proximate cause of the accident.” Mr. Dull refers to an accident reconstruction report dated January 20, 2020 (a copy of which he attaches to his email), stating that “this report establishes that the impairment by alcohol as not the proximate cause of the accident.” Mr. Dull requests that Allstate provide its position vis-à-vis this report. Mr. Dull then states, “If you are maintaining a denial, please be clear with your reason.”

[78] Counsel for Allstate says that despite this acknowledgement by Mr. Hart’s counsel that Allstate had denied coverage for his property damage claim in April, 2021, while still within the limitation period, the Action was not commenced until December 2021, approximately eight months later.

[79] Allstate says that Mr. Hart knew, or ought to have known, that he had a potential claim against Allstate on or before September 13, 2019. On that date, he spoke with an Allstate adjuster on the phone and indicated that he had not received the August 22, 2019 package Allstate had sent to him. The package included the Denial Letter.

[80] On September 13, 2019, Allstate sent the Denial Letter to Mr. Hart again, by email. That email stated that there was no “claim coverage for [Mr. Hart’s] vehicle...due to the DUI charges...”. The Court also notes that the evidence establishes that Allstate adjuster Ashley Matte recorded notes on August 22, 2019, the day that Mr. Hart reported the Collision to Allstate, which read that she spoke with Mr. Hart and, “Coverages explained – no cover at this time until investigation.” In an email message Ashley Matte sent to Mr. Hart on August 22, 2019, she stated, “At this time based on the information provided, there will be no claim coverages for your vehicle...due to the DUI charges causing bodily Injury or Death and confirmation of alcohol consumed prior to accident occurring.”

[81] Allstate says that the language of the Denial Letter and surrounding emails was clear and unambiguous. Counsel says that by September 13, 2019, Mr. Hart knew or ought to have known that the loss, i.e., the denial of coverage, occurred and therefore his limitation period of two years began to run and expired on September 13, 2021.

[82] Mr. Hart’s counsel says that on the day after the accident, Allstate “made a preemptive, ‘knee jerk’ denial of any property damage claim the Plaintiff may wish to advance – citing the fact that the Plaintiff had been charged for causing the collision.” Counsel goes on to argue that Allstate advised its insured that this

“denial” was conditional, by explaining to Mr. Hart that the denial was based on information available “at this time.” Counsel says that this makes sense since the exclusionary clause raised by Allstate required a conviction. Counsel argues that there was no conviction in 2019, or “ever”.

[83] Mr. Hart’s counsel also says that the evidence shows that Mr. Hart had not applied for indemnity benefits in 2019. Counsel argues that this makes sense since Mr. Hart had to wait until the result of his criminal charges were known or he would need to demonstrate that his impaired driving was not the proximate cause of the accident. Counsel says that it was not until 2020 that Mr. Hart and Allstate knew that Mr. Hart would not be convicted of dangerous driving causing bodily harm. At that point, says counsel, the parties were in receipt of the accident reconstruction report. At that point it became known that Mr. Hart’s actions were not a proximate cause of the accident.

[84] The position of Plaintiff’s counsel is that before these material facts became known, it was impossible for Mr. Hart to know whether Allstate’s reliance on the exclusionary clause was contractually valid. Counsel says that it follows that in 2019 Mr. Hart had no facts within his knowledge to support a breach of contract claim against Allstate.

[85] Plaintiff's counsel says that in 2020 Allstate became aware that Mr. Hart had not been convicted and that the expert opinion indicated that his actions were not the proximate cause of the accident. Counsel says, that despite this, Allstate chose not to indemnify Mr. Hart when he first applied for indemnity benefits in 2021.

[86] Counsel says that it was only after the parties had knowledge that there was no conviction and that Mr. Hart's actions were not the proximate cause of the Collision that reliance on an exclusionary clause was no longer contractually valid.

[87] Mr. Hart's counsel says that continued reliance on an exclusionary clause in the face of no conviction is when Mr. Hart had sufficient awareness of the facts to be able to bring an action against Allstate. Counsel says that it is at least arguable that such is a genuine issue for trial determination and not appropriate for summary dismissal.

[88] If the discoverability principle applies, the Court must determine when Mr. Hart discovered that he had a property damage claim against Allstate.

[89] In *Jagosky v. Corporation of the Town of Huntsville*, 2010 ONSC 4590, (appeal dismissed 2011 ONCA 324), Quinlan, J., stated:

Discoverability

25 Time should not begin to run against a plaintiff until he knows of the defect or could, with reasonable diligence, have discovered it. In other words, for a person

to have an actionable loss, he must be aware of it or must reasonably be taken to be aware of it, and the limitation period will not start to run until such time.

26 A plaintiff does not need to know the precise cause of injury before the limitation period starts to run, or the full extent of the loss suffered. Such a threshold for the commencement of a limitation period “places the bar too high”. Instead, a plaintiff need only know enough facts to base its allegation against the defendant.

[Emphasis added]

[90] The plaintiff in *Smith v. Parkland Investments Limited*, 2019 NSSC 74, Jamieson, J., relied upon the decision in *Jagosky*:

76 Dr. Smith says at paragraph 19 of her affidavit: "I did not know the extent of potential liability of the Town with respect to the subsurface flooding until I reviewed the Giovannetti Report." [emphasis added] It is not necessary for Dr. Smith to know the "extent" of potential liability for determining the discoverability date. The Giovannetti Report is evidence Dr. Smith garnered to support her claim. It was not the means of discovering the claim. Dr. Smith had knowledge of the facts giving rise to the claim long before the report was received in September of 2012 and more particularly by January 7, 2009.

77 Dr. Smith says this case is similar to *Jagosky v. Corporation of the Town of Huntsville*, 2010 ONSC 4590 (appeal dismissed 2011 ONCA 324) where the Court found the date of discoverability to be the day Mr. Jagosky was served with a soil engineering report. The Court found that, as a result of receipt of that report, Mr. Jagosky knew of the latent defect being a lack of integrity in the foundation whereby the footings had not been installed on undisturbed soil. In that case the Court was dealing with the *Ontario Limitation of Actions Act* provisions relating to discoverability. Mr. Jagosky argued that the date of discoverability was in 2009 when an expert report he commissioned was received. The Court found that, from receipt of the 2004 soil engineering report, Mr. Jagosky took no steps to investigate or do any independent testing until 2009 despite having met with an inspection company in 2004. The date of discoverability was found to be when the initial report was received in 2004.

78 There is no magic to receipt of an expert report. The receipt of an expert report may, in some circumstances, represent the date of discoverability. However, it is simply part of the overall factual inquiry and the date of discoverability depends on the facts of the matter in issue.

79 The inquiry is when did the plaintiff have or ought to have had knowledge of the potential claim. In the present case I find the date of discoverability to be well

before receipt of the Giovannetti Report. It is noteworthy that the Court in *Jagosky* stated at para. 26:

26 a plaintiff does not need to know the precise cause of injury before the limitation period starts to run, or the full extent of the loss suffered. Such a threshold for the commencement of a limitation period “places the bar too high”. Instead, a plaintiff need only know enough facts to base its allegation against the defendant.

[Emphasis added]

[91] Further, the Court refers to the recent statement of the Supreme Court of Canada of the discoverability doctrine in the context of limitations periods: *Pioneer Corporation. v. Godfrey*, 2019 SCC 42 (S.C.C.) (“*Pioneer*”).

[92] In *Pioneer*, the majority of the Court affirmed that limitation periods may be subject to a rule of discoverability, such that a cause of action will not accrue for the purpose of the running of a limitation period until the material facts on which the cause of action is based have been discovered, or ought to have been discovered by the exercise of reasonable diligence. The discoverability rule is a rule of construction to aid in the interpretation of statutory limitation periods. (*Pioneer*, paras. 31-32).

[93] The rule of discoverability does not apply to every limitation period, *Pioneer*, at para. 33:

33 Absent legislative intervention, the discoverability rule applies only where the limitation period in question runs from the accrual of the cause of action, or from some other event that occurs when the plaintiff has knowledge of the injury sustained.

[Emphasis added]

[94] In *Pioneer*, the Court referred in this regard to the decision of the Manitoba Court of Appeal in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.) at para. 22:

22 In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specific time from the happening of a specific event, the statutory language must be construed. When time runs from “the accrual of the cause of action” or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party’s knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

[Emphasis of the Court in *Pioneer*]

[95] In *Pioneer*, the Court explained that two points flow from the statements of the Manitoba Court of Appeal in *Fehr v. Jacob*:

34 ...First, where the running of a limitation period is contingent upon the accrual of a cause of action or some other event that can occur only when the plaintiff has knowledge of his or her injury, the discoverability principle applies in order to ensure that the plaintiff had knowledge of the existence of his or her legal rights before such rights expire (*Peixeiro [Peixeiro v. Haberman]*, [1997] 3 S.C.R. 549), at para. 39.

Secondly (and conversely), where a statutory limitation period runs from an event unrelated to the accrual of the cause of action or which does not require the plaintiff’s knowledge of his or her injury, the rule of discoverability will not apply. In *Ryan*, [*Ryan v. Moore*, 2005 SCC 38] for example, this Court held that discoverability did not apply to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, which stated that an action against a deceased could not be brought after one year from the date of death. As the Court explained (para. 24):

The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party’s knowledge or the basis of the cause of action.

[Emphasis by the Court in *Pioneer*]

By tying, then, the limitation period to an event unrelated to the cause of action, and which did not necessitate the plaintiff’s knowledge of any injury, the legislature had clearly displaced the discoverability rule. (*Ryan*, at para. 27).

[96] In *Pioneer*, the Court applied the discoverability principle to extend the two-year limitation period in the *Competition Act*:

36 In determining whether a limitation period runs from the accrual of action or knowledge of the injury, such that discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from “the accrual of the cause of action”, discoverability will apply if it is evident that the operation of a limitation period is, in substance, conditioned upon accrual of a cause of action or knowledge of an injury. Indeed, clear statutory text is necessary to oust its application. In *Peixeiro*, for example, this Court applied the discoverability rule to s. 206(1) of the *Highway Traffic Act, R.S.O. 1990, c. H.8.*, which stated that an action must be commenced within two years of the time when “damages were sustained” (para. 2). The use of the phrase “damages were sustained” rather than “when the cause of action arose” was a “distinction without a difference”, as it was unlikely that the legislature intended that the limitation period should run without the plaintiff’s knowledge (para. 38).

37 It is therefore clear that the “the judge-made discoverability rule will apply when the requisite limitation statute indicates that time starts to run from when the cause of action arose (or other wording to that effect)” (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (3rd ed. 2016), at p. 103, emphasis added). And, while my colleague Côté J. claims to disagree with my analysis, I am fortified by the endorsement in her reasons of this formulation of discoverability (paras. 140 and 149).

[Emphasis added]

[97] In *Tomec v. Economical Mutual Insurance Company* 2019 ONCA 882 (Ont.C.A.), the Ontario Court of Appeal determined that a two-year limitation period in the *Ontario Insurance Act* and a *Schedule* to that *Act*, were subject to discoverability.

[98] The Court of Appeal stated that “the analysis is not focused on whether a limitation period is tied to a fixed event [...] Rather, the question is whether the limitation period is related to the cause of action or the plaintiff’s knowledge.” (Para. 32). The Court of Appeal rejected the insurer’s argument that a refusal to pay a benefit is a specific event that is not tied to a cause of action, finding that the applicable limitation period “is tied to the accrual of the cause of action.” (Para. 37). The Court of Appeal stated that “[T]he refusal to pay a benefit and the ability to make a claim are inextricably intertwined in the cause of action. The refusal cannot be stripped out of the cause of action and treated as if it is independent of it.” (Para. 36).

[99] This Court finds that Mr. Hart “discovered”, or should have discovered, that he had a claim for damage to his insured vehicle on August 19, 2019. He so advised Allstate on August 22, 2019. Mr. Hart did not need to know that he would have a successful claim in order to commence action against Allstate. Nor did he need to marshal all of the possible evidence he might have as to why a policy exclusion did not apply. Mr. Hart received a Denial Letter from Allstate on September 13, 2019. This letter clearly advises Mr. Hart that he, not Allstate, was responsible for damages to his vehicle.

[100] Mr. Hart had civil legal counsel in April 2021, well within the two-year limitation period. He also had criminal legal counsel who advised Allstate in July 2021 that he had plead guilty to a criminal charge laid against him at the scene of the collision.

The Claim in Bad Faith

[101] Mr. Hart claims that Allstate denied him coverage without merit and in a “malicious manner.” He claims damages for “bad faith” in that he says Allstate denied coverage “without proper justification.”

[102] In particular, Mr. Hart says that the Allstate denied his property damage benefits based on an incorrect interpretation of the insurance contract, and arbitrarily rejected and/or disregarded evidence of entitlement to benefits. Mr. Hart further states that Allstate failed to actively participate in the adjusting of the claim, which resulted in its refusal to grant property damage benefits based on a provision in the insurance contract which provides a claimant two years to initiate an action against the Defendant.

[103] Mr. Hart asserts that the material facts underpinning his claim of “bad faith” only occurred at some point in time after the Denial Letter was sent to him by Allstate thereby extending the applicable limitation period.

[104] The Court finds that this argument is not supported on the law or evidence before this Court. I will explain.

[105] Typically, any case where an insured seeks damages over and above policy benefits can be referred to as a bad faith claim. The term “bad faith” can refer to a cause of action under either tort or contract.

[106] Gordon Hilliker’s *Insurance Bad Faith*, 3rd ed., provides instructive commentary on the law of bad faith in the context of insurance, and applicable limitation periods. Limitation periods in this context may differ if the claim is brought in tort or in contract.

[107] As per *Hilliker*, the starting point to determine the applicable limitation period in a first party insurance bad faith claim is precisely determining the cause of action.

Hilliker frames the options as:

- a. A claim for consequential damages resulting from a failure to pay benefits;
- b. A claim for breach of the duty of good faith and fair dealing; or
- c. A claim in respect of a separate tort, such as intentional infliction of mental distress.

[108] A review of the pleadings is helpful. Mr. Hart pleads (para 8):

8 In particular, the Plaintiff states that the Defendant denied the Plaintiff’s property damage benefits based on an incorrect interpretation of the insurance contract, and

arbitrarily rejected and/or disregarded evidence of entitlement to benefits. The Plaintiff further states that the Defendant failed to actively participate in the adjusting of the claim, which has resulted in their refusal to grant property damage benefits based on a provision in the insurance contract which provides the Plaintiff two years to initiate an action against the Defendant.

[109] This Court finds that Mr. Hart’s claim can only be characterized as a claim for consequential damages resulting from a failure to pay benefits.

[110] There is no reference in the pleadings to an independent tort of bad faith. If Mr. Hart intended a separate cause of action, it would be explicit in the pleadings.

[111] The Amended Statement of Claim does not explicitly allege a breach of Allstate’s duty of good faith.

[112] The plain language of the claim makes it clear Mr. Hart’s claim is for damages resulting from the denial of coverage, or as stated by *Hilliker* – a claim for consequential damages that results from a failure to pay property damages in relation to the Ford F-150.

[113] Per *Hilliker*, if the bad faith claim is based in contract, it will be governed by the same limitation period as applies to the contractual claim.

[114] A bad faith claim based in a “wrongful” denial of coverage is clearly included in the wording of the contractual limitation period. The applicable portion of the Policy and *Regulations* state:

Every other action or proceeding against the insurer under the contract in respect of loss or damage to the automobile shall be commenced within two years from the time the loss or damage was sustained and not afterwards.

[Emphasis added]

[115] The Court finds that the wording “every other action or proceeding” is broad enough to encompass any claims brought for consequential damages resulting from a failure to pay benefits.

[116] Moreover, resting Mr. Hart’s claim of bad faith in contract is supported by case law.

[117] The Ontario Court of Appeal case of *Arsenault v. Dumfries Mutual Insurance Co.*, 2002 CarswellOnt 3, (“*Arsenault*”) is instructive. In that case, the plaintiff sued for damages arising from a denial of no-fault accident benefits. The applicable limitation clause stated an action “in respect of” no-fault benefits must be commenced within two years of the insurer’s refusal to pay the benefits claimed. The claim was commenced outside of that limitation period.

[118] The plaintiff argued that she was entitled to bring a separate action for damages resulting from the insurer’s bad faith conduct, and that the limitation period for such a cause of action was six years, and therefore not statute barred.

[119] The Court of Appeal held that the claim was statute barred. Justice Abella (as she then was), writing for the court, reviewed the language of the limitation clause:

16 In *Nowegijick v. R.* (1983), 144 D.L.R. (3d) 193 (S.C.C.), at 200, Dickson J. attributed the “widest possible scope” to the words “in respect of”:

The phrase “in respect of” is probably the widest of any expression intended to convey some connection between two related subject-matters.

17 Although Justice Dickson was dealing with language in the *Income Tax Act*, in my view, his observation is generic and equally applicable to the relevant *Insurance Act* provisions in this case. That means that any and all disputes about an insurer’s refusal to pay no-fault benefits, including disputes which allege the insurer’s bad faith in connection with that refusal, must be brought within two years of the refusal.

[120] The Court in *Arsenault* determined the claim for bad faith in refusing to pay benefits could not be distinguished from the claim for the benefits themselves. At para. 18, Justice Abella continued:

18 I am prepared to assume, without deciding, that there can be an independent claim for bad faith conduct in respect of the insurer’s refusal to pay or continue to pay no-fault benefits. **In order to establish such a claim, the appellant would first have to establish that the insurer’s termination of her benefits was improper. Such a claim must comply with the requirements outlined in ss. 280-284 of the *Insurance Act*, one of which is the two year limitation period for the institution of proceedings to determine this question. The appellant cannot, by the device of a claim for bad faith damages, extend threefold the length of that termination period.**

[Emphasis added]

[121] The above analysis is instructive of in the case before this Court. The bad faith claims asserted by Mr. Hart all flow from the denial of coverage. At their

essence, they amount to a claim that Mr. Hart was wrongly denied coverage which he believes he is entitled to receive.

[122] Like *Arsenault*, Mr. Hart cannot be entitled to extend the length of his limitation period merely by characterizing the claim as a breach of the duty of good faith rather than a breach of the duty to pay benefits.

Independent Cause of Action

[123] The case law makes it clear that it can be difficult to determine whether a claim of bad faith arises from breach of contract, or an independent tort. As noted, *Arsenault* reviewed a claim flowing from a breach of contract. A second line of authority has reviewed where the facts surrounding the claim support an independent tort.

[124] When a claim is for breach of the duty of good faith and fair dealing, (which is not pleaded in this case) the Court must examine two things: (i) whether the duty arises in contract or in tort, and (ii) whether the applicable limitation clause is broad enough to include claims for breach of the duty of good faith as well as claims for payment of benefits.

[125] In *Johnston v. Wawanesa Mutual Insurance Co.*, 2006 CarswellOnt 4528, (“*Johnston*”) an Ontario Small Claims Court determined a claim for bad faith arising from a denial of coverage for vehicle damage was an independent tort.

[126] In *Johnston*, the insured suffered property damage to a snowmobile in an accident on January 11, 2003. The insurer, Wawanesa, did not provide notice to the insured that his claim was denied until June 30, 2005, two and a half years later.

[127] By the time Wawanesa denied the claim, the one-year statutory limitation period that applied to claims brought “in respect of loss or damage to an automobile,” had already passed.

[128] However, the *Johnston* facts are contrasted from the uncontested evidence that Mr. Hart received a Denial Letter from Allstate within one month after the Collision.

[129] The insured in *Johnston* brought an action against Wawanesa for breach of his insurance policy. Mr. Johnston alleged Wawanesa breached the policy in two ways: (i) denying him compensation for damage to the snowmobile, and (ii) breaching their implied contractual duty of good faith by delaying the investigation and by not informing him of the applicable limitation period.

[130] Wawanesa brought a motion to dismiss the action, alleging the claim was barred due to the statutory one-year limitation period in the *Insurance Act* (Ontario). The court held that there were material facts in dispute requiring a trial on both the contractual and bad faith claims.

[131] The Small Claims Court reviewed the language of the limitation clause, which included the phrase “in respect of”, which was previously considered in *Arsenault*. The court determined that although *Arsenault* supported the view that the bad faith claim fell within the statutory luggage, the circumstances of the case would not allow it based on the judicial “discoverability” rule. Essentially, because the first inclination of any denial, came on June 30th, 2005 by way of a denial letter, the *independent claim for bad faith* could only have been discovered as of June 30th, 2005.

[132] The only evidence before this Court is that Mr. Dull, as counsel for Mr. Hart, contacted Allstate three times after a proof of loss was filed. A lack of response to a party who is represented by counsel is not sufficient on its own to support an independent cause of action grounded in bad faith. Further, this lack of response is predominately outside of the applicable limitation period.

[133] Moreover, Mr. Hart was represented by counsel throughout his dealings with Allstate. His counsel knew, or ought to have known, the applicable limitation period when dealing with a property damage claim under an insurance policy. Mr. Dull first contacted Allstate on April 20, 2021 – approximately four months before the two-year anniversary of the accident.

[134] The Court notes that Allstate should have responded to queries made by Mr. Dull as to the status of Mr. Hart’s claim in August, September and November 2021. However, Allstate’s lack of response does not reset or extend the limitation period.

[135] Nor does the claim of bad faith extend the limitation period.

[136] The words of the Policy and *Regulations* must be given meaning, i.e., “... proceeding against the insurer shall be commenced within two years from the time the loss or damage was sustained and not afterwards.”

[137] Even importing a discoverability analysis into a reading of these words, the result cannot be that the two years runs from the time Mr. Hart pleads guilty or not to relevant criminal charges, impairment by alcohol is confirmed, Mr. Hart has evidence in hand suggesting a defence against the operation of a Policy exclusion, or from the time he files a completed Proof of Loss form.

Conclusions

[138] There is no material dispute as to when the limitation period began to run. Mr. Hart’s claim is statute-barred, having been commenced more than two years “from the time the loss or damage was sustained and not afterwards” under both the Policy and the *Regulations*. This is the case even after applying a discoverability analysis.

[139] Summary judgment is granted to Allstate and Allstate is entitled to costs on this motion.

[140] If the parties cannot agree on costs, the Court will receive written submissions within 30 calendar days of the release of this decision.

Smith, J.