CITATION NO.: Krug et al. v. McMorrow et al., 2026 ONSC 1003
COURT FILE NO.: CV-18-66673
DATE: February 17, 2026

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jason Robert Krug and Stephanie Lynn Burbridge, Plaintiffs

-and-

John McMorrow, Shauna Colleen Dorothy McMorrow, Shawn MacDonald, Re/Max Twin City Realty Inc., and The Corporation of Norfolk County, Defendants

BEFORE: MacNeil J.

COUNSEL: *Mordy Mednick and Stephanie Grad (SAL)* – Lawyers for the Plaintiffs

Rovena Hajdëri and Grace Murdoch **–** Lawyers for the Defendant, The Corporation of Norfolk County

No one else appearing

HEARD: September 18, 2025

REASONS FOR DECISION ON MOTION

[1] On October 10, 2025, I released an endorsement ruling that the plaintiffs' motion for an adjournment of the trial that had been scheduled for the November 17, 2025 sittings was granted, and that written reasons would follow. These are those written reasons.

BACKGROUND

[2] The plaintiffs sought an adjournment of the trial to permit a Phase II Environmental Site Assessment (ESA) to be undertaken to study the quality of the groundwater below the subject property and a report finalized. The plaintiffs advise that they expect the trial can proceed in the April 2026 trial sitting.

[3] The defendants, Shawn MacDonald, Re/Max Twin City Realty Inc., John McMorrow and Shauna McMorrow, did not oppose the motion.

[4] The defendant, The Corporation of Norfolk County ("the County"), did oppose the granting of the requested adjournment.

[5] The action itself centres around the plaintiffs' purchase of the subject property located on Halyk Crescent in the County of Norfolk, Ontario, which was supplied by well water ("the Property").

[6] On September 4, 2017, the plaintiffs entered into an agreement of purchase and sale to buy the Property from the sellers, the McMorrow defendants, for $469,900.00 ("the Agreement"). The defendant, Shawn MacDonald, was the realtor who assisted the plaintiffs in purchasing the Property; he is employed by the defendant Re/Max Twin City Realty Inc.

[7] The Agreement was not conditional on the plaintiffs obtaining a water certificate from the local Ministry of Health confirming the potability of the well water.

[8] Soon after closing, the plaintiffs noticed that the well water had a petroleum odour and appeared to be discoloured.

[9] In March 2018, the plaintiffs retained a company, Watters Environmental Group Inc., that specializes in site assessment and remediation services to conduct water testing at the Property. On April 11, 2018, Watters delivered a report confirming:

(a) the well water contained high concentrations of petroleum hydrocarbons;

(b) the contamination was consistent with waste typically generated by service garages; and

(c) the water failed to meet the standards set out under Ontario Drinking Water Quality Standards, O. Reg. 373/15 and the *Safe Drinking Water Act, 2002*.

[10] The plaintiffs also arranged for a separate water test and submitted the samples for analysis. That certificate of analysis, dated March 23, 2018, showed high concentrations of petroleum hydrocarbons in the water.

[11] After receiving the results of the water testing, the plaintiffs investigated the history of the Property. Their evidence is that they discovered the following:

(a) A motor garage had been previously situated on the Property, including a gas station and pump island, that appeared to be in operation from or about 1951 to 1977.

(b) In 1976, the then owners of the Property, the Halyks, applied to rezone the Property, along with eleven other parcels, from commercial use to a 12-parcel residential subdivision, and this was approved by the County.

(c) The Halyks' rezoning application stated that: (i) the existing dwelling on the Property would remain; (ii) most of the land was vacant, except for a dwelling, service garage, and gas pumps; and (iii) the service garage and gas pumps would be removed.

(d) On March 12, 2012, the Property was sold to the defendant McMorrows. By that time, the garage, gas station and pump island had been demolished.

(e) After purchasing the Property, the McMorrows installed a well and applied for a building permit from the County.

(f) In 2013, the building permit was issued and the McMorrows then constructed the residence on the Property where the plaintiffs now reside.

[12] It is the plaintiffs' position that, based on Part I, section 2 of O. Reg. 153/04 made under the *Environmental Protection Act*, the County had a statutory obligation to obtain a Record of Site Condition from the McMorrows before issuing the building permit in 2013 because the Property's last actual use had been commercial and the McMorrows' application proposed a residential use.

[13] The plaintiffs submit that, if the County had fulfilled its duty to obtain a Record of Site Condition, the McMorrows would have been required to conduct both a Phase I and Phase II ESA as part of its Record of Site Condition.

[14] The plaintiffs' statement of claim was issued on September 5, 2018.

[15] The McMorrows delivered their statement of defence and crossclaim on November 6, 2018. On November 8, 2018, the McMorrows issued a Third Party Claim against Rhys Reeves and Re/Max Erie Shores Realty Inc.

[16] On November 19, 2018, the County delivered its statement of defence and crossclaim.

[17] The Third Parties delivered their statement of defence on February 8, 2019. Following the receipt of that pleading, the McMorrows discontinued their Third Party Claim.

[18] Between 2018 and 2021, the parties exchanged affidavits of documents, conducted examinations for discovery, and answered undertakings. The plaintiffs and the County subsequently agreed to re-examinations for discovery to be held on December 13, 2022. However, those ended up being completed in May 2023.

[19] On February 8, 2023, counsel for the County, with the consent of all parties, made a motion for the action to be case managed. The plaintiffs' evidence is that, at the time, they believed the case management would help facilitate settlement discussions, which would include the ability to secure funding from the defendants to cover the costs of a Phase I and Phase II ESA.

[20] On June 7, 2023, the plaintiffs set the action down for trial.

[21] It is the plaintiffs' evidence that, on July 24 and August 3, 2023, they contacted the court regarding the scheduling of pre-trial and trial dates but did not receive a response.

[22] On February 9, 2024, the plaintiffs contacted the court again and were advised that the action had been struck from the trial list in August 2023 due to the failure to attend at a trial scheduling court date. The plaintiffs subsequently made a consent motion to reinstate the action to the trial list, which motion was granted on April 2, 2024.

[23] On June 28, 2024, an order was made by the court that the action would be case managed, pursuant to the County's February 8, 2023 motion. However, it turned out that that order had been

issued in error and, on January 23, 2025, the parties were advised by the court that the action would not be case managed.

[24] The plaintiffs' evidence is that, once it was learned that no case management judge would be assigned, they then requested private mediation in an effort to resolve the dispute and, "at a minimum, to try and secure funding from the defendants for the ESA".

[25] The plaintiffs submit that the ESA is expensive and is estimated to range between $65,000.00 to more than $100,000.00.

[26] All parties agreed to attend mediation and it was held on June 27, 2025. The mediation was unsuccessful.

[27] It is the plaintiffs' evidence that, after the unsuccessful mediation, it became clear to them that no settlement would be reached and the defendants would not contribute to the cost of the ESA. Accordingly, the plaintiffs decided to pay for the ESA themselves and engaged an environmental consulting and engineering firm to conduct same; they sold personal assets to cover the costs of the ESA.

[28] On July 14, 2025, the plaintiffs asked the other parties to consent to an adjournment of the trial in order to complete the Phase I and Phase II ESA.

[29] On July 30, 2025, the County advised that it would not consent to an adjournment of the trial.

[30] On July 31, 2025, the other defendants confirmed that they would not oppose the plaintiffs' adjournment request.

[31] A pre-trial conference was held on August 13, 2025.

ISSUES

[32] The following issues will be determined on this motion:

(a) Should the plaintiffs be granted leave to bring this motion?

(b) Should the court grant an adjournment of the trial date?

POSITION OF THE PLAINTIFFS

[33] It is the position of the plaintiffs that the ESA is necessary for the purposes of this litigation. They submit that a Phase I and Phase II ESA is the "most reliable, objective and credible method to confirm the presence of petroleum hydrocarbons in the well, determine the source of contamination, assess the extent of environmental damage, and quantify resulting losses".

[34] As of the time of the hearing of the motion before me, the Phase I ESA was complete. Five areas of potential environment concern were identified, and it was intended that seven exterior

boreholes and one interior borehole would be drilled as part of the Phase II ESA, with drilling expected to commence on September 15, 2025. It was anticipated that the report from Phase II would take 4-6 months to complete.

[35] The plaintiffs sought an order adjourning the trial of the action until the Phase II ESA was completed and a corresponding report was finalized.

POSITION OF THE COUNTY

[36] It is the County's position that the plaintiffs request for an adjournment is based on their *desire* to obtain an environmental site assessment report for use at trial. However, they have already had ample time – approximately 5 years – to retain experts and deliver reports concerning the Property. The plaintiffs are the ones who set the matter down for trial, which is a serious step. Pursuant to Rule 48.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, parties who set a matter down for trial are prevented from bringing motions or engaging in steps to file further evidence like the plaintiffs are attempting to do here.

[37] There has been no "sudden or unexpected change" in circumstance here that warrants the granting of leave to the plaintiffs to make this motion to adjourn the trial. Such leave should only be granted in exceptional cases. The purpose of Rule 48.04 is to: (a) ensure that parties comply with their discovery and disclosure obligations; and (b) prevent parties from delaying the trial: *Hill v. Ortho Pharmaceutical (Canada) Ltd.*, [1992] O.J. No. 1740, 11 C.P.C. (3d) 236 (Ont.Ct.(Gen.Div.)), at paras. 10-12; *Boivin (Litigation Guardian of) v. Slack*, [2009] O.J. No. 4984, 84 C.P.C. (6th) 118 (ON SC), at para. 7.

[38] The County submits that the "true purpose" of the plaintiffs' adjournment request is "to further investigate their case in hopes of rectifying previous faults in their evidence". While the plaintiffs' evidence is that they did not want to incur the costs associated with obtaining the ESA reports themselves, the purported evidence respecting their financial hardship is lacking.

[39] The County submits that Rule 31.07 – Failure to Answer on Discovery applies to the plaintiffs' attempt to introduce Mr. Krug's affidavit evidence on this motion given that he refused to answer questions during his examinations for discovery respecting his employment. It is contrary to the intention of the discovery process to permit a party who refused to answer pertinent questions on discovery to then present that evidence in a "tailored affidavit" on a motion. The plaintiffs did not raise the issue of financial hardship until mid-June 2025. While the plaintiffs recently committed to obtaining the ESA reports, this was "last minute" and does not constitute a substantial or unexpected change in circumstances. Leave to bring this motion should be denied.

[40] The County argues that, when an adjournment request is made near the eve of trial, it will typically be fairer, more proportionate, faster and less expensive for the parties to proceed to trial as scheduled: *Letang v. Hertz*, 2015 ONSC 72, at paras. 18-19; *Dorion v. 7853742 Canada Inc.*, 2023 ONSC 929; *Labelle v. Lewis Motor Sales (North Bay) Inc.*, [2007] O.J. No. 1432, 2007 CarswellOnt 2306 (ON SC), at paras. 29-32.

[41] There are two competing interests in the administration of justice: the first, the just determination of the real matters in dispute; and the second, the efficient and orderly determination

of disputes. Adjournments lead to inefficient use of court time: *Talbot v. Nourse*, 2018 ONSC 1061, at paras. 32-35.

[42] Counsel for the County also submits that the plaintiffs are now attempting to advance a "fresh new claim dressed up as an adjournment request". The examinations for discovery have already taken place and were based on the allegations in the current claim. The tendering of new Phase I and Phase II reports would "give rise to a new fresh piece of litigation" and would require the defendants to file new expert reports as well. The plaintiffs have not taken any steps to amend their statement of claim. In this regard, paragraphs 36-37 of the County's factum read:

> 36. This is an action that the Plaintiffs have claimed is about the potability of their *well water*. The Plaintiffs have only and repeatedly advanced in their Statement of Claim allegations with respect to water portability [*sic*], such as whether the "well water located on the Property was potable," whether the "well water should be tested," and that the "well water […] was an immediate risk to Plaintiffs." The Defendants defended these claims.
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> 37. The *claimed* Reports sought by the Plaintiffs speak to alternate theories of liability and damages that are only now being advanced. [Citations omitted.]

[43] It is the position of the County that an adjournment of the trial should not be granted to the plaintiffs in the circumstances.

ANALYSIS

[44] On June 7, 2023, the plaintiffs set the action down for trial. Rule 48.04 provides that any party who has placed a matter on the trial list is precluded from initiating or continuing any motion or form of discovery without leave of the court.

[45] The County submits that Rule 48.04 applies in this instance. It relies on the line of authority found in *Hill v. Ortho Pharmaceutical (Canada) Ltd.* which suggests that, before vacating a trial date and allowing further discoveries or interlocutory proceedings, there must be a substantial or unexpected change in circumstances such that a refusal to grant leave would be unjust.

[46] Granting leave under Rule 48.04 is a discretionary remedy. The discretion must be exercised having regard to the general principle set out in Rule 1.04, namely that the rules "shall be construed liberally to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

[47] As the Ontario Court of Appeal held in *Horani v. Manulife Financial Corporation*, 2023 ONCA 51, at paras. 16-18:

> 16 The proper test for granting leave to bring a motion under Rule 48.04(1) after an action has been set down for trial is subject to some disagreement among Ontario courts.

> 17 Some courts have required the moving party to show "a substantial or unexpected change in circumstances such that a refusal to make an order under Section 48.04(1) would be manifestly unjust": see, *Hill v. Ortho Pharmaceutical (Canada) Ltd*., [1992] O.J. No. 1740, 11 C.P.C. (3d) 236 (Gen. Div.); for cases adopting *Hill*, see *LML Investments Inc. v Choi* (2007), 2007 CanLII 8926 (ON SC), 85 O.R. (3d) 351 (S.C.), at para. 10; *Jetport v Jones Brown Inc.*, 2013 ONSC 2740, 115 O.R. (3d) 772, at paras. 68, 70 and 71; *Lugen Corporation v Starbucks Coffee Canada Inc*., 2014 ONSC 7141, at paras. 12, 30, 31; *Denis v Lalonde*, 2016 ONSC 5960, at para. 11; *Secure Solutions Inc. v. Smiths Detection Toronto Ltd*., 2017 ONSC 2401, at paras. 42-46.
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> 18 Others have determined that leave be granted if the moving party can demonstrate that "the interlocutory step is necessary in the interests of justice" even in the absence of a substantial or unexpected change in circumstances: see, *A.G.C. Mechanical Structural Security Inc. v. Rizzo*, 2013 ONSC 1316 (CanLII), at paras. 21-23; *BNL Entertainment Inc. v. Ricketts*, 2015 ONSC 1737, 126, O.R. (3d) 154 (Mast.), at paras. 12, 14; *Fruitland Juices Inc. v. Custom Farm Service Inc. et al*., 2012 ONSC 4902, at para. 28; and *Cromb v. Bouwmeester*, 2014 ONSC 5318, at para. 35.

[48] On this motion, I accept and adopt the line of cases that hold that the court may grant leave where the interlocutory step is necessary in the interests of justice. Accordingly, I do not require the plaintiffs to prove that there has been a substantial or unexpected change of circumstances. As discussed below, I am satisfied that it is in the interests of justice to grant the plaintiffs leave to proceed with the motion.

[49] Rule 48.07 provides that, where an action is placed on a trial list, (a) all parties shall be deemed to be ready for trial; and (c) the trial shall proceed when the action is reached on the trial list *unless a judge orders otherwise* (emphasis added).

[50] Rule 52.02 of the *Rules of Civil Procedure* provides that a judge may postpone or adjourn a trial to such time and place, and on such terms, as are just. There is broad discretion to grant or deny a request to adjourn a trial that has been scheduled. The judge must balance the interests of the parties and the broader interest of the administration of justice in ensuring that civil trials proceed in an orderly manner and are determined on their merits: *Bhimji Khimji v. Dhanani*, 2004 CanLII 12037 (ON CA), at para. 14.

[51] In *Bhimji Khimji*, at paras. 18-23, the Court of Appeal identified the following as being relevant factors a court should consider when deciding whether to grant an adjournment of a trial:

(a) the overarching objective of civil proceedings is the just determination of the real matters in dispute;
(b) the prejudice that may result to the plaintiff if the adjournment is refused;
(c) the prejudice that may result to the defendant if the adjournment is granted;
(d) the length of the adjournment sought and the degree of disruption to the court's trial schedule; and

(e) the adequacy of the plaintiff's explanation for seeking the adjournment.

[52] In my view, the determination of this motion comes down to an issue of fairness and balance at trial. I accept the plaintiffs' submission that they require the ESA reports in order to prosecute their action in the best manner possible, by putting the best evidence before the court.

[53] I find that the plaintiffs will be seriously prejudiced if they are forced to proceed to trial without a Phase I and Phase II ESA report. I accept that these reports will provide useful and relevant information for the purpose of the trial and will enable a just determination of a real matter in dispute to be made, based on fulsome evidence.

[54] I find that there is no evidence that the County will suffer any prejudice that cannot be compensated by costs or a further adjournment if the plaintiffs' motion is granted.

[55] I do not accept the County's submission that the obtaining of the Phase I and Phase II ESA reports will require the County to effectively change its litigation strategy late in the proceeding and that this is non-compensable prejudice. The issue of the alleged contamination of the Property's well water and the purported damage ensuing has always been a live issue in the action, as is made clear from a review of the pleadings. At paragraph 35 of the plaintiffs' statement of claim it is alleged that the County knew or ought to have known that, since a garage had operated on the Property for several decades, it was readily foreseeable that contaminants would leach into the soil and water table and harm the well water. At paragraph 36 of the claim, it is alleged that the County was negligent by approving a demolition permit for removal of the garage and pump station and by approving a building permit for the construction of the residence at the Property without requiring environmental assessments. And, at paragraphs 38 through 40 of the statement of claim, the plaintiffs plead that they have been damaged, and the Property's value has been diminished due to the contamination of the well water. Finally, in its statement of defence, the County denied that the plaintiffs' well water is contaminated and denied that the plaintiffs have sustained damages and put the plaintiffs to the strict proof thereof.

[56] While the County may need to have a further responding report prepared, after receipt of the plaintiffs' Phase II ESA report, the County has previously retained an expert, BlueFrog Environmental Consulting Inc., to conduct a review of the environmental reports and documents completed for the Property respecting the groundwater quality of the existing water well supply and prepare a report of same. Section 4.0 of the BlueFrog report, dated April 30, 2025, indicates that they were retained to, among other things, "opine whether or not the groundwater quality in the existing water supply well has been impacted with petroleum hydrocarbons". BlueFrog concluded that, in its opinion, "the water supply well at the Site has not been contaminated with petroleum hydrocarbons". In light of this, I do not see how the County's litigation strategy will change with the delivery of the plaintiffs' Phase II ESA report. Accordingly, I find that there is no non-compensable prejudice to the County if the plaintiffs' motion is granted.

[57] The length of the requested adjournment is not great. The plaintiffs submit that an adjournment is needed only until the Phase II ESA report is prepared, and the work on that assessment was scheduled to begin on September 15, 2025. Other than the County, the other parties do not oppose the adjournment request. The adjournment request was not made on the eve of trial

and so there will be no inefficient use of court time resulting from the granting of an adjournment. There are other trials that can be heard during the November 2025 sitting in lieu of this one.

[58] The County argues that the plaintiffs ought not to have waited as long as they did before taking steps to obtain the ESA reports and that any request or discussion about the payment or contribution by the defendants to the cost of the ESA reports ought to have been undertaken much sooner than they were. While it appears that this is a fair argument to make, hindsight is often 20/20. I accept the submissions of the plaintiffs that it only became clear to them after the failed mediation that the defendants would not contribute at all to the obtaining of a Phase I or Phase II ESA report. From that point on, the plaintiffs acted quickly to retain an environmental assessment firm to prepare the reports and to take steps to fund same. I accept the evidence of Mr. Krug that the plaintiffs are not wealthy and that it was a significant decision for them to pay for the ESA reports.

[59] There is no evidence to support that the plaintiffs are seeking the adjournment so as to not to comply with any of their discovery and disclosure obligations or to otherwise delay the trial. I also do not see any evidence that the plaintiffs are seeking to "unilaterally control" the trial date or gain any advantage by adjourning the trial in this case.

[60] Based on the foregoing, I have decided to exercise my discretion to grant the plaintiffs' request to adjourn the trial that has been scheduled for the week of November 17 to December 12, 2025, to permit a Phase II ESA to be undertaken and a report finalized.

DISPOSITION

[61] The plaintiff's motion for an order adjourning the trial of this action is granted.

COSTS

[62] Although the plaintiffs were successful on this motion, the relief sought was an indulgence that benefited only them. Given this, I am inclined not to award costs to the plaintiffs as the successful party. However, there may be some information to which I have not been privy. So, I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows and, in addition to being filed, submitted to the Sopinka Judicial Assistants to my attention:

(a) By March 10, 2026, the plaintiffs shall serve and file their written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and

(b) The County shall serve and file its responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by March 24, 2026; and

(c) The plaintiffs' reply submissions, if any, are to be served and filed by March 31, 2026 and are not to exceed two pages.

(d) If no submissions are received by March 31, 2026, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

[63] If the parties are able to settle the question of costs or if a party does not intend to deliver submissions, counsel are requested to advise the court accordingly.

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MacNEIL J.

Released: February 17, 2026