SUPREME COURT OF NOVA SCOTIA

Citation: *MacIntyre v. 2166439 Nova Scotia Limited (Halliburton House Inn*)
2025 NSSC 77

Date: 20250227
Docket: Hfx No. 452669
Registry: Halifax

Between:

Jacqueline MacIntyre

Plaintiff/Applicant

v.

2166439 Nova Scotia Limited, carrying on business as
The Halliburton House Inn

Defendant/Respondent

D E C I S I O N - Motion for Adjournment of Trial Dates

Judge:	The Honourable Justice James L. Chipman
Heard:	February 18, 2025 in Halifax, Nova Scotia
Written Decision:	February 27, 2025
Counsel:	Julian Shephard, for the Plaintiff/Applicant Robert Mroz and Jane Soucy, for the Defendant/Respondent

By the Court (orally):

INTRODUCTION AND BACKGROUND

[1] The Plaintiff moves to adjourn her jury trial scheduled to take place April 7 – 10 and 14 – 17, 2025 in Halifax. In terms of evidence I have the uncontested affidavit of the Plaintiff sworn February 13 and filed February 14, 2025. The Defendant filed two affidavits of counsel, Robert Mroz, the first sworn and filed February 14, 2025 and the next sworn and filed February 18, 2025. Mr. Mroz's initial affidavit provides 17 exhibits detailing much of the history of the lawsuit.

[2] The Notice of Action and Statement of Claim was filed June 21, 2016 by Lisa Wagner of Wagners "acting as agent for Barrister and Solicitor" for Daniel Balena of Ajax, Ontario. The Plaintiff is an Ontario resident. In her lawsuit she alleges personal injuries and resultant damages arising from a slip and fall at the Defendant's Inn on July 18, 2014.

[3] The Date Assignment Conference (DAC) occurred on September 16, 2022. In addition to assigning requested jury trial dates, among other milestones, Justice Smith established a Finish Date of January 3, 2025.

[4] On October 26, 2024, Justice Smith issued a production Order. On November 6, 2024, Mr. Balena wrote Mr. Mroz a letter with enclosures partially responsive to the production Order.

[5] On November 28, 2024, Toronto lawyer Ian Perry provided Mr. Mroz with a Notice of New Counsel. The Notice of New Counsel was filed December 2, 2024. An Appearance Day Notice was filed by the Defendant on January 2, 2025 and Justice Lynch presided over the Appearance Day on January 24, 2025. During the Appearance Day Mr. Shephard, on behalf of Mr. Perry, advised the Court that his client would make the within adjournment motion.

GOVERNING LAW

[6] Adjournment of trial after the Finish Date is governed by Civil Procedure Rule 4.20:

> **4.20 Adjournment of trial dates**

> (1) A judge may adjourn trial dates before the finish date, if all parties agree the party seeking the adjournment would suffer a greater prejudice in proceeding with the trial than other parties would suffer by losing the trial dates.
>
> (2) A motion for an adjournment after the finish date must be made to the trial judge, unless a judge has not been assigned or the trial judge is not available.
>
> (3) A judge hearing a motion for an adjournment after the finish date must consider each of the following:
>
> (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to trial;
>
> (b) the prejudice to other parties, if they lose the trial dates;
>
> (c) the public interest in making the best use of court facilities, judges' time, and the time of court staff.
>
> (4) The judge who hears a motion for an adjournment after the finish date must presume both of the following, unless the contrary is established:
>
> (a) losing trial dates adversely affects a party's tangible and intangible interests;
>
> (b) a late adjournment adversely affects the efficient scheduling of facilities and time.

[7] Since the Plaintiff's motion was made after the Finish Date, the above-noted additional considerations regarding the use of court resources in Civil Procedure Rule 4.20 (3) and (4) apply.

[8] In *Caterpillar Inc. v. Secunda Marine Services Ltd*., 2010 NSCA 105, Justice Fichaud stated that the chambers judge had correctly identified the three prejudices which must be considered for a post-Finish Date motion under Rule 4.20(3), namely:

> (i) prejudice to the moving party, if the party is required to proceed to trial;
>
> (ii) prejudice to the other parties, if they lose the trial dates; and,
>
> (iii) prejudice to the public.

DISCUSSION, ANALYSIS AND DISPOSITION

[9] With respect to the first identified prejudice, I have the affidavit evidence of Ms. MacIntyre. At para. 12 she deposes when she knew of the trial dates as Mr. Balena advised her of these "in or around October of 2022". Approximately two years later, Ms. MacIntyre received an email from Mr. Balena which she attached as

Exhibit "B" to her affidavit. The October 25, 2024 email sent to Ms. MacIntyre at 6:54 a.m. reads:

> We have been advised that your lawyer in Nova Scotia, Kallen Heenan [of the firm Nova Injury Law, which took over from Wagners as Mr. Balena's Nova Scotia agent], declines to act on your file any longer.
>
> To be clear, I am NOT your lawyer.
>
> I am not a member of the Nova Scotia bar and have no standing there.
>
> It is imperative, therefore, that you contact another law firm in the Halifax area and retain them immediately.
>
> I am certain Mr. Heenan would be happy to transfer the physical file to your new counsel.
>
> In light of the April 2025 trial date and the work that needs to be done leading up to same, you must retain someone else at once.

[10] Ms. MacIntyre next deposes that she knew that she "had to act quickly to find a new lawyer" and that she connected with Mr. Perry in late October, 2024. The Plaintiff then states in her affidavit:

> I have been advised by Mr. Perry and do verily believe that there are numerous outstanding matters that must be attended to before my trial can happen. Although it is my desire to have my trial take place as scheduled, I understand that without a rescheduling, I run the risk of taking part in a trial without proper preparation or the necessary evidence and materials to prove my claim.
>
> I do verily believe that my trial should be rescheduled to allow Mr. Perry to gather the necessary evidence and prepare for trial properly.

[11] During oral argument in response to questions from the Court it emerged that the Plaintiff's new lawyers have now received the entire file contents from Mr. Balena's office. Further, they are in a position to produce almost all of the remaining documents required pursuant to the October 26, 2024 production Order. As well, counsel indicate that they are available for the scheduled trial dates.

[12] The sole remaining prejudice should the Plaintiff have to proceed to trial in six weeks is the lack of an economic loss report. Mr. Shephard points out that an economic loss report was one of three expert reports noted to be filed by the Plaintiff in the DAC Outcome Report prepared by Justice Smith. He notes that whereas the two other expert reports were filed on December 13, 2023, an economic loss report was never commissioned. Plaintiff's counsel says that such a report is "crucial" to the Plaintiff's case and that to proceed to a jury trial absent this evidence would be

highly prejudicial to his client. He adds that realistically such a report could not be procured until June of this year, months after the scheduled start of trial. In the result, the Plaintiff submits that she is "wholly unprepared" for the fast-approaching jury trial.

[13] In response to further questioning from the Court, it emerged in a post-hearing submission filed by the Plaintiff that she is not prepared to forego her right to a jury trial. On this point, Defence counsel advised in a post-hearing letter that they would be prepared to go to a judge alone trial on the assigned dates. I will return to this issue towards the close of this decision.

[14] In the main, the Defendant counters the Plaintiff's motion by asserting that any prejudice the Plaintiff might experience if required to proceed to trial is of her own creation.

[15] The Defendant notes that current counsel for the Plaintiff will have had some five months to prepare for trial since the date they were retained in November, 2024. They add that previous counsel would have had some eight years to prepare for the impending Finish Date of January 3, 2025.

[16] The Defendant submits that the Plaintiff's failure to comply with the Rules, and failure to obtain expert evidence in the decade leading up to trial, comes nowhere close to the type of prejudice that warrants an adjournment. In the alternative the Defendant says that if the Court determines that there is a reasonable basis to adjourn the trial, then any adjournment should be of the trial dates only, and that no new Finish Date or expert filing deadlines ought to be permitted. The Defendant submits that the eventual hearing should proceed on the existing record so as not to reward the Plaintiff's lack of diligence, and to avoid prejudicing the Defendant by requiring it to incur further expense.

[17] The Defendant goes on to note that there will be prejudice to the Defendant if the matter is adjourned. They say that the delay will result in further expense, inconvenience for lay and expert witnesses, and further risk of memories eroding, recognizing that we will be more than a decade removed from the underlying events by the time of trial.

[18] The third factor to consider on this motion is prejudice to the public for lost trial time and wasted judicial resources. Rule 4.20(4)(b) creates a presumption that an adjournment after the Finish Date adversely affects the efficient scheduling of facilities and time.

[19] In *Langille v. Nova Scotia (Attorney General)*, 2016 NSSC 298, Justice Arnold stated at para. 63:

> [63] Civil Procedure Rule 4.20(4)(b) also creates a presumption that an adjournment after the Finish Date adversely affects the efficient scheduling of facilities and time. As Mr. Ryan, Q.C. states in his written arguments:
>
> > 22 Further, adjournment of trials granted before the commencement of the trial have a significant negative impact on the court system in the form of wasted judicial time and court dates. It is contrary to the public's interest to have such waste in a system that is already functioning with limited resources and in which parties are routinely waiting for a year or more for trial dates. Motions for adjournment brought so late in the trial preparation process ought to be strongly and uniformly discouraged by the courts, particularly when the stated need for an adjournment is caused by the inactivity of the party seeking the adjournment. The Plaintiff's own delay should not be rewarded with an adjournment.

[20] I have weighed the prejudice in the context of the relevant Rules, caselaw and evidence on this motion. While I am cognizant of the Defendant's argument surrounding potential prejudice to them and the public, I have determined that the prejudice to the Plaintiff – if the trial proceeds as scheduled – far outweighs the competing prejudices. In this regard, I am especially mindful of Ms. MacIntyre's sworn affidavit evidence. She honestly believed that Mr. Balena was acting on her behalf, taking the necessary steps to move her matter along. When she learned in October, 2022 that her trial was scheduled for two and one-half years later, she deposed that she "trusted that Mr. Balena would be available and continue to represent me through to trial". Accordingly, her uncontested evidence is that she understood that matters were moving along and that Mr. Balena was preparing for trial.

[21] Given Ms. MacIntyre's affidavit evidence, there were no signs of trouble with her lawyer until October 1, 2024 when Mr. Balena's Nova Scotia agent wrote her withdrawing as agent. Then on October 25, 2024, Ms. MacIntyre received the email where Mr. Balena curiously states, among other things, "To be clear, I am NOT your lawyer".

[22] Suffice it to say, I have very grave concerns about this email. In the main I do not understand how Mr. Balena could say that he was not Ms. MacIntyre's lawyer. Rather than going on about the representation or lack of representation provided by Mr. Balena, I must point out that he has not submitted any evidence on the motion. Given the evidence that I have, I must conclude that Ms. MacIntyre was severely let

down by Mr. Balena. His actions or lack of actions on her behalf prejudiced her to the point where I must conclude that her position is compromised such that she is not ready to properly proceed to the scheduled jury trial.

[23] I say this given the lack of an economic loss report. Ms. MacIntyre's lawyer has characterized this report as crucial to her lawsuit. He is her new counsel and presumably knows the case. Apparently, Ms. MacInytre's former counsel was of the same view because it was made clear at the DAC that such a report would be filed. As the record reflects, only two of the three enumerated reports were filed prior to the Finish Date.

[24] The Plaintiff is now in her late fifties and worked as a nurse. Although I do not have detailed evidence on why an economic loss report is required, I appreciate that if the Plaintiff proves that the Defendant was liable, quantification of damages will be critical. The Plaintiff's filed reports are from medical professionals. An economic loss report will no doubt provide an expert actuary's opinion regarding the Plaintiff's loss of past and future income. Without question the Plaintiff's alleged economic losses will form a large part of the pecuniary damages she claims (para. 8(i) of the Statement of Claim).

[25] I am of the view that the Plaintiff's characterization of the economic loss report as being crucial to her case cannot be second-guessed. This is particularly so given that the trial is scheduled to take place before a jury. Although the Defendant says that they are prepared to go to a judge alone trial, the Plaintiff does not consent to this. In the result, I am of the view that especially in the context of a jury as trier of fact, the Plaintiff must have the opportunity to file a Rule 55 compliant economic loss report.

[26] I should add that Plaintiff's counsel wrote the Court two days ago advising that his client would be prepared to bifurcate the trial and proceed with the upcoming jury trial on liability, only. This was met with a swift response from Defendant's counsel advising that his client opposes bifurcation. In this regard, the Defendant raised the issue of increased costs associated with two potential trials. In any case, although I encouraged counsel to attempt to resolve their issues, the totality of the post-hearing correspondence does nothing to change my exercise of discretion to adjourn the trial.

[27] Having made the determination that the trial must be adjourned, I am certainly mindful of the position the Defendant now finds itself in. Mr. Mroz has set forth the frustrations which undoubtedly are felt by his client. Nevertheless, returning to the

circumstances and authorities, I am confident that the prejudice to the Defendant can be compensated for by way of costs. In any event, the prejudices to the Defendant and public are outweighed by the prejudice to the Plaintiff.

[28] In the result, the trial is adjourned to the next available eight-day jury block; April 19, 20, 21, 22, 26, 27, 28 and 29, 2027. The Finish Date is February 26, 2027 and witness lists shall also be exchanged and filed by this date. The Trial Readiness Conference will take place on March 26, 2027. The Rules shall govern the filing of additional expert reports.

[29] In the circumstances, I exercise my discretion not to award costs on the motion. Given what I have said about frustration and prejudice to the Defendant, I specifically leave the door open for the Defendant to argue for the recovery of any costs related to the additional time and any expense associated with this unfortunate, but necessary two-year adjournment of trial dates.

Chipman, J.