SUPREME COURT OF NOVA SCOTIA

Citation: *Conrad v. A.F.L. Manufacturing Limited*, 2018 NSSC 52

Date: 20180312
Docket: Hfx No. 331744
Registry: Halifax

Between:

Leslie J. Conrad, Edwin Conrad, Dan Merzetti, Sherri Merzetti

Plaintiffs as Respondents

v.

A.F.L. Manufacturing Limited, Kirk Anthony's Heating Service

Defendant (Anthony's) as Applicant

and

Crane Canada Co.

Third Party

Judge: The Honourable Justice Ann E. Smith

Heard: February 20, 2018, in Halifax, Nova Scotia

Counsel: Shelley Wood, for the Plaintiffs
David Coles, Q.C., for the Defendant, Anthony's Heating Service
Michael P. Blades, for Third Party, Crane Canada Co.

By the Court:

INTRODUCTION

[1] There are two sets of Plaintiffs in the proceedings before the Court. The Plaintiffs Edwin and Leslie Conrad live in West LaHave, Nova Scotia. The Plaintiffs Dan and Sherri Merzetti live in Halifax, Nova Scotia.

[2] The Statement of Claim filed by the Conrads and the Merzettis in 2010 alleges that in 2003 the Merzettis purchased a new, above-ground oil storage tank which was installed at their residence by the defendant Kirk Anthony's Heating Services ("Kirk Anthony").

[3] The Claim alleges that in 2005 the Conrads purchased a new, above-ground oil storage tank which was also installed at their residence by the defendant Kirk Anthony.

[4] The Plaintiffs say that each of these oil tanks was manufactured by the defendant A.F.L. Tank Manufacturing Limited ("AFL"), a Nova Scotia company with registered offices in Arichat, Nova Scotia.

[5] The Statement of Claim alleges that in December 2008 the oil tank installed at the Conrad residence leaked approximately 200 litres of fuel oil onto the Conrad property, causing significant damage.

[6] The Statement of Claim alleges that in September 2009, the oil tank installed at the Merzetti residence leaked a substantial amount of fuel oil onto their property, causing significant damage.

[7] The Statement of Claim also alleges, among other matters, that the oil tanks leaked from holes in the bottom of the tanks caused by rust and corrosion.

[8] The Plaintiffs claim that AFL was negligent in the design and/or manufacture of the tanks. They claim that that negligence resulted in the tanks failing and the resulting damage to their properties.

[9] The Plaintiffs' claim against Kirk Anthony is in negligence as well as alleged breaches of the *Sale of Goods Act*.

[10] AFL filed a defence and cross-claim against Kirk Anthony. Kirk Anthony filed a defence and cross-claim against AFL. Kirk Anthony filed a third party action against Crane Canada Co. ("Crane") which alleges that the oil tank it installed at the Conrad residence was sold by Crane. Crane filed a defence to the third party claim and cross-claimed against AFL. Crane claims in negligence and breach of the *Sale of Goods Act*. Defences were filed to each of these cross-claims.

[11] The trial in this matter is scheduled to begin on April 9, 2018 and run for eleven (11) days, concluding on April 25, 2018.

[12] On December 15, 2017, the Defendant Kirk Anthony filed a motion pursuant to *Civil Procedure Rule* 55 to exclude the following documents:

(1) An expert report filed by the Plaintiffs on September 15, 2017; and

(2) The amended witness list filed by the Plaintiffs on October 31, 2017.

[13] The motion was scheduled to be heard in special time chambers before me on February 20, 2018.

[14] The Defendant AFL had filed a virtually identical motion to that filed by Kirk Anthony on December 13, 2017. However, on February 13, 2018, before the hearing of the within motion, AFL consented to judgment (the Plaintiffs' claims and the cross-claims of Kirk Anthony and Crane), with damages to be assessed or remedy to be determined. Its counsel, Mr. Gary Richard, did not participate in the motion which was heard by this Court on February 20, 2018.

[15] The Affidavit evidence of Mr. Gary Richard, counsel to AFL, of Gregory Boucher, president of AFL, Marina Mackie, claims director of Crane's insurer and Kirk Anthony, owner and operator of Kirk Anthony was filed in support of the motion. Also filed was the Affidavit of Mr. Jeff Waugh, associate counsel to Ms. Shelley Wood, the Plaintiffs' counsel.

Background

[16] The record shows that the Plaintiffs filed a "Request for Date Assignment Conference" on October 9, 2015.

[17] On February 5, 2016 a Date Assignment Conference was conducted by Justice G. McDougall with counsel for the parties. His Lordship assigned trial

dates for a judge alone trial commencing on February 21, 2017 and ending on March 9, 2017 (11 days).

[18] McDougall, J. set the Finish Date as November 9, 2016. The Plaintiffs indicated that they anticipated having one expert witness – a metallurgist. The Defendant AFL indicated that it was undecided as to whether it would call expert evidence as did the Third Party, Crane. The Defendant Kirk Anthony indicated that it did not intend to have an expert witness.

[19] A Date Assignment Conference Memorandum was prepared by Justice McDougall and sent to counsel. McDougall, J. recorded on the Memorandum as follows under the question, "Have any reports been exchanged?"

> Preliminary reports have been disclosed. The formal **Rule** 55 Expert's reports (2) will be filed and provided to opposing counsel by April 29, 2016.

[20] It is noted that April 29, 2016 is a few days more than six months before the Finish Date set by Justice McDougall (November 9, 2016).

[21] On December 9, 2016, LeBlanc, J. (as he then was) conducted a Trial Readiness Conference with counsel for the parties. The Memorandum confirming the matters reviewed during the Trial Readiness Conference records that the parties had exchanged Witness Lists, that all pre-trial procedures had been completed by the Finish Date and the parties were ready for trial.

[22] The Witness List filed by the Plaintiffs on November 9, 2016 includes Dr. Herbert Hancock. Dr. Hancock is an expert in the field of metallurgy. Dr. Hancock's Report was filed on May 2, 2016.

[23] I note that the Plaintiffs' counsel, in her brief on the within motion, states that Dr. Hancock's Report was filed on May 2, 2016 "in accordance with the time lines initially set at the Date Assignment Conference held before the Honourable Justice Patrick Duncan."

[24] As noted earlier in this decision, Justice McDougall conducted the Date Assignment Conference, and the date set for the filing of expert's reports was set at April 29, 2016. The Hancock Report was therefore filed late, but opposing counsel did not object to this either at the time, or on this motion. Accordingly, I consider the Hancock Report as being filed on time.

[25] None of the defending parties filed any expert evidence.

[26] On February 3, 2017, the Court's Scheduling Manager, Ms. Janet Hawes, sent a letter to counsel advising that there was a possibility that the parties would not have a judge to hear the upcoming trial, which at that point was due to commence in less than three weeks.

[27] Specifically, Ms. Hawes advised as follows:

> As you may be aware, we triple book trials in Halifax in recognition of the fact that most cases settle prior to the trial and in order to maintain early and reasonable trial dates for counsel. Due to the Supreme Court of Canada decision in *R. v. Jordan* and due to a number of vacancies in the court, we find ourselves in a situation where we have more cases than judges and some cases are going to have to be adjourned.

[28] Ms. Hawes also explained in her letter that the parties had the option of moving the trial to a date certain early in 2018, in which case the trial would not be "bumped", provided all counsel agreed to proceed in that fashion. The second option Ms. Hawes presented was for the parties to maintain their present trial dates with the hope that a judge would become available to hear the matter. With this option came the risk that a judge would not become available and the trial would need to be rescheduled.

[29] All of the parties chose option one, i.e., to have dates certain for trial early in 2018.

[30] In mid-February, 2018, Ms. Hawes offered January, 2018 trial dates to counsel, but these dates were not available for all counsel. There were ongoing attempts by Ms. Hawes and counsel to schedule the trial at a time when all counsel and their witnesses were free. Dates in April, 2018 were offered by Ms. Hawes. On April 11, 2017, Ms. Hawes sent an email to counsel indicating that the dates that had been "on hold" for the trial were April 9, 10, 11, 12; 16, 17, 18, 19; 23, 24 and 25, 2018. Counsel satisfied me at the hearing of this motion, that the trial dates at that point in time were agreed to and confirmed.

[31] On October 3, 2017 Ms. Hawes sent two letters to counsel. One confirmed the new trial dates and the other advised of the fixing of a Trial Readiness Conference for February 2, 2018 at 2 p.m.

[32] No new Finish Date was set. No party, including the Plaintiffs, sought to obtain a new Finish Date.

[33] On September 15, 2017, the Plaintiffs' counsel, Ms. Shelley Wood, filed a Notice of Filing of Expert Report with attached *Rule* 55 expert's report of Mr. Jim Roberts with attached *curriculum vitae*. I will refer to this report as the "Roberts' Report."

[34] A letter attached as an exhibit to the Affidavit of Mr. Richard from him to Ms. Wood dated October 3, 2017 shows that each of the defending parties quickly objected to the filing of the Roberts' Report. Mr. Richard's letter to Ms. Wood states, in part, as follows:

> I have conferred with counsel for Kirk Anthony's Heating Services and for Crane Canada Co. They concur with the position I set out herein.
>
> AFL Manufacturing Limited hereby objects to the Report pursuant to *Rule* 55.10. We take the position that the Report does not conform to *Rule* 55, for the following reasons:
>
> 1. The Report was filed ten (10) months after the Finish Date, this is sixteen (16) months after the deadline for filing experts' reports under *Rule* 55.
> 2. The burden is on the proponent of the Report to establish that admission of the late Report is necessary in the interest of justice, and that there are exceptional circumstances excusing the delay.
> 3. Given that it is the obligation of all counsel to have their cases trial-ready by the Finish Date, and given that there is nothing in the Report to ground an argument that it could not have been filed in compliance with the time requirements in *Rule* 55.03(1), I see no basis to claim exceptional circumstances.
> 4. Defendants' and Third Party counsel agree that, had the matter even come up when the established trial dates were adjourned in late 2016, counsel would not have agreed to push back the Finish Date in any event. This is especially so, given we were faced with the necessity of the fourteen (14) months' adjournment from the original trial dates.
> 5. This proposed expert witness was not accounted for when the parties agreed to witness lists or the length of the trial; both of which would have to be revisited if this expert evidence is admitted. The Report could predictably lead to further discoveries, and filings of rebuttal reports. This would surely result in a further and costly delay of a trial that has already been delayed by over a year at no fault of the parties.
> 6. The Report consists primarily of Mr. Roberts' opinions, simply based upon his inferences from reading non-technical instruction manuals and his opinions respecting "industry practice". With respect, it does not aid the trier of fact in any factual understanding of complex technical issues, and evinces little or no special or peculiar knowledge beyond reading

> straightforward installation instructions and making inferences from those materials. The Report's probative value is far outweighed by its prejudicial effect on this proceeding.

[35] Mr. Richard's letter to Ms. Wood ends by demanding that she withdraw the Roberts' Report and advising that if she did not do so, the defending counsel would make a motion to have the Report excluded.

[36] In an email response to Mr. Richard dated approximately three weeks later on October 30, 2017, Ms. Wood advised that she would not be withdrawing the Roberts' Report and stated that if it was Mr. Richard's intention to have the Report struck, "please go ahead and make your motion to do so." She attached an Amended Witness List on behalf of the Plaintiffs which includes Dr. Jim Roberts as a Witness for the Conrad Plaintiffs.

[37] Ms. Wood made the following comments:

> 1. We disagree with your statement that the report was filed 10 months after the Finish Date and 16 months after the deadline for filling experts' reports under Rule 55. This matter was adjourned to April of 2018 and, accordingly, the report is filed within the timeframe set out in the Rules of Court.
> 2. With regards to exceptional circumstances, there is nothing in the Rule which prohibits my clients from continuing to develop their case where there has been an adjournment that was not requested by them and not occasioned as a result of any actions taken by my clients.
> 3. I attach a revised Witness List. Your suggestion that the length of the trial will have to be revisited if this expert evidence is admitted is misplaced. This matter has been set for a three week trial and there is plenty of time within the days allotted to complete Mr. Roberts' evidence.
> 4. With regards to further discoveries, you do not have any right to discover Mr. Roberts and I know of no authority which would allow you to conduct updated discoveries of the Parties based on information contained in an <u>expert report</u>.
> 5. You have plenty of time to respond to the report with your own rebuttal reports if that is what your clients wish to do.
>
> (emphasis of counsel)

[38] In light of Ms. Wood's response, the defending parties filed the motions referred to earlier which were scheduled to be heard, and were heard (Kirk Anthony's motion) on February 20, 2018.

Law and Analysis

[39] The starting point for the Court's analysis of the issues on this motion is *Civil Procedure Rule* 55.03(1) which requires experts' reports to be filed no less than six months before the Finish Date, or by a deadline set by a judge.

[40] In Ms. Wood's brief to the Court on this motion, she took the same position as she had in response to the defending parties' initial reaction to receiving the Roberts' Report – that it was not filed late. Ms. Wood submitted in her motion brief that at the time the Roberts' Report was filed, there were no fixed trial dates. Counsel for Kirk Anthony objected to that representation in writing to her, noting that trial dates had in fact been confirmed in April, 2017, some five months before the Roberts' Report was filed. Ms. Wood agreed that what she had said in her brief (and similar statements sworn to by Mr. Waugh in his Affidavit) were in error.

[41] I do not attribute any bad faith or attempt to mislead the Court on either the part of Ms. Wood or Mr. Waugh in this regard. I accept that they were simply mistaken when they said that no trial dates were fixed at the time the Roberts' Report was filed.

[42] In the alternative, Ms. Wood says, in essence, that she was entitled to calculate a new Finish Date once the February 2017 trial dates were rescheduled. She says that *Rule* 4.16(6)(c) provides that the Finish Date is calculated 20 clear days before February 2, 2018 (the first day of the rescheduled trial dates) and that the new Finish Date is January 4, 2018. On that basis, she says, *Rule* 55.03(1) would impose a filing deadline for experts' reports of July 4, 2017. She admits that under that time calculation, the Roberts' Report was still late, being filed approximately ten (10) weeks after her imputed *Rule* 55.03(1) deadline.

[43] I find that the Plaintiffs' counsel is simply wrong in her assumption that she could impute a new Finish Date when the trial was rescheduled. A Finish Date is not set by a litigant or by counsel. Rather, it is the Date Assignment Judge who assigns a Finish Date at a Date Assignment Conference. This is made clear by *Rule* 4.16(6):

> Date Assignment Conference
>
> **4.16**
>
> ....

> (6) The judge who is able to forecast trial readiness and estimate the length of a trial may give directions about the course of the proceeding and the conduct of the trial, and must do each of the following:
>
> (a) set the dates for trial;
>
> (b) set a trial readiness conference date no less than forty days before the first day of trial;
>
> (c) fix a finish date at no less than twenty days before the day set for the trial readiness conference, as the date when all pretrial procedures are to be finished;
>
> (emphasis added)

[44] The only Finish Date ever fixed in this matter was fixed by McDougall, J. during the February 5, 2016 Date Assignment Conference. That Finish Date was November 9, 2016.

[45] As noted earlier in this decision, Justice McDougall also recorded on the Memorandum that "The formal *Rule* 55 Expert's reports (2) will be filed and provided to opposing counsel by April 29, 2016." No Judge changed that deadline for the filing of expert reports.

[46] Finish Dates are not to be "imputed" by counsel or litigants should a trial be rescheduled, as was the trial involving these parties. The Finish Date in this matter continued to be November 9, 2016, as set by McDougall, J. during the Date Assignment Conference. That is not to say that counsel, in circumstances such as these, could not request a new Date Assignment Conference for the purpose of requesting a new Finish Date be set. The Judge could then determine, after hearing from counsel to all parties, whether it would be appropriate, or not, to set a new Finish Date. However, that is not what happened in this case.

[47] I note that in *Hayward v. Young*, 2013 NSCA 65, the Nova Scotia Court of Appeal upheld the trial judge's setting of a deemed Finish Date. However, this was necessary because the Date Assignment Judge had inadvertently not set a Finish Date. A settlement offer had been advanced by the defendant. When the trial judge set costs, she imputed a Finish Date for the purpose of considering the application of *Civil Procedure Rule* 10.09.

[48] In *Hayward v. Young*, no Finish Date had been set. It was imputed and set by the Trial Judge in the context of settling costs. Both of those facts are easily distinguishable from the facts before this Court.

[49] Based on all of the reasons above, I find that the Roberts' Report was filed late because it was filed on September 15, 2017, approximately sixteen (16) months after the April 29, 2016 deadline for the filing of expert's reports set by Justice McDougall.

[50] I will now address whether there are exceptional circumstances in this case which dictate that, nonetheless, in the interests of justice, the late-filed Roberts' Report should not be struck.

[51] Ms. Wood identifies the "exceptional circumstances" as the fact that the trial was rescheduled.

[52] The phrase, "exceptional circumstances" comes from the decision of Saunders, J. (as he then was) in *Corkum v. Sawatsky*, 1993 CanLII 4687 (NSSC), rev'd on other grounds in *Corkum v. Sawatsky*, 1993 NSCA 201.

[53] In that case, Saunders, J. refused to allow a plaintiff to introduce an expert report which was late pursuant to the *1972 Rules*. At pages 9 and 10 of that decision, Justice Saunders stated:

> It is not enough for the plaintiff to urge that leave be granted because defence counsel is sufficiently skilled, prepared and experienced to deal with its late introduction. The time prescribed by the *Rule* is there for a reason. *Margaret E. Miller v. Prest Brothers Limited* (unreported, S.H. No. 82796, November 6, 1992). Fairness and predictability demand that the Rule be applied strictly and fairly to all sides, save in exceptional circumstances.
>
> There is a burden of persuasion upon the defaulting party to show that the interests of justice would merit its late reception. I heard no such submission during argument. Rather, Mr. Newton explained that it was a decision come by lately and that Ms. Gmeiner's report might be "helpful to the court". That is not reason to grant leave to waive the clear requirement of CPR 31.08. The Rule is intended to avoid surprise or costly delay brought on by a request for an adjournment. Adherence to the Rule should promote settlement by giving each side sufficient time to address the content of an expert's report and obtain reasoned instructions which might lead to an early resolution. It was after all the plaintiff who pressed for trial during the term of the Supreme Court in Kentville. While much of the docket was taken with criminal jury trials I assigned the last days available to this case. In his Notice of Trial, Mr. Corkum certified his readiness and certified that all interlocutory steps had been taken. It was for all of these reasons that I rejected Ms. Gmeiner's report.
>
> (emphasis added)

[54] More recently, in *Wareham v. Ross*, 2010 NSSC 140 Hood, J. held that there were no exceptional circumstances before her which warranted the late filing of a *Rule* 55 expert's report. Hood, J. confirmed that the reasoning of Saunders, J. in *Corkum* continued to be relevant within the context of *Rule* 55. She held, in part, as follows at paragraphs 3-4:

> In my view, the cases with respect to late experts' reports are still of application. The specific time limits mentioned of course in those cases are under the old *Rule 31.08* but it seems to me that the law with respect to when late experts' reports can be accepted would still be applicable. As Mr. Palov has pointed out in his brief, it is to allow for proper preparation time. The decision of Saunders, J (as he then was) in *Corkum v. Sawatsky* (cite omitted) talked about fairness and predictability demanding that the *Rule* be applied strictly save in exceptional circumstances. It seems to me that I have to determine, even under the new *Rule* whether there are exceptional circumstances why this should be done and why this late report should be allowed.
>
> I have to be satisfied that the interests of justice merit its late reception and that the issue of potential prejudice to the defendant about late reception has been met. In *Fowler v. Schneider National Carriers Ltd.*, [2000] N.S.J. No 116, Wright, J said the previous *Rule* conferred discretion about admitting late filed reports but that decision also went on to say that there was a burden of persuasion upon the defaulting party to address, among other things, the weighing of probative value against prejudicial effect. In my view, there has been very little evidence of how the probative value of this report outweighs the prejudicial effect and I see substantial prejudicial effect to the defendant in admitting this report late. In my view, there are no exceptional circumstances here.
>
> (emphasis added)

[55] The Plaintiffs' counsel referred this Court to the decision of Moir, J. in *Marshall (Litigation Guardian of) v. Annapolis (County)*, 2009 NSSC 203. In that case, the Court dealt with the issue of the timing of the delivery of an expert's rebuttal report in a situation in which the action was commenced before the new *Rules* were in force but an expert's report was delivered after the new *Rules* were in force. The Court determined that the *1972 Rules* applied to the timing of the delivery of the expert's report. The report was filed in time under the old *Rules*.

[56] Moir, J.'s decision, however, turned not on whether the report was filed in accordance with the *Rules*, but on whether it was filed in accordance with a deadline set by a Judge.

[57] Moir, J. was case-managing the case. During a case management conference with counsel, he set deadlines for various filings. However, no

deadline was set for the filing of expert rebuttal reports by the defendants. This was described by Moir, J. as an "oversight."

[58] Moir, J. dismissed the motion to exclude a defence expert's rebuttal report because no explicit date had been set for the filing of such reports. He also concluded that the timing of the delivery of the expert report gave sufficient time for the plaintiffs to prepare for his evidence at trial.

[59] The *Marshall* case is easily distinguished from the facts before this Court. An explicit date for the delivery of expert reports was set by Justice McDougall. Further, as I will discuss below, there may well be insufficient time for the defending parties to obtain rebuttal reports in the circumstances, a situation which was not before Justice Moir in the *Marshall* case.

[60] In terms of exceptional circumstances, it is to be remembered that the Plaintiffs' counsel in response to Mr. Richard's letter where he commented that he saw no basis for a claim of exceptional circumstances justifying the late filing of the Roberts' Report, responded that:

> …there is nothing in the Rule which prohibits my clients from continuing to develop their case where there has been an adjournment that was not requested by them and not occasioned as a result of any actions taken by my clients.

[61] With respect to the Plaintiffs' counsel, in fact the *Rules* did prohibit her clients from continuing to develop their case, in terms of *Rule* 55 experts. The rescheduling of the trial did not open the door for the parties to develop new expert evidence. Ms. Wood wrongly, in my view, concluded that the Finish Date and the deadline for filing *Rule* 55 expert reports no longer applied when the trial was rescheduled.

[62] While Ms. Wood argued that the rescheduling of the trial constituted exceptional circumstances which justified the late filing of the Roberts' Report, she did not provide this Court with any Nova Scotia case law supporting that proposition.

[63] I find that the rescheduling of the trial did not constitute exceptional circumstances within the meaning of the analysis of Justice Saunders in the *Corkum* decision. In my view, exceptional circumstances could be where facts come into the knowledge of a party which could not, with reasonable diligence, have been learned in time to be included in an expert's report. Another exceptional

circumstance could be where a plaintiff in a personal injury claim has a significant change in his or her health, such that new expert evidence would be needed to properly put the plaintiff's state of health before the trial judge. There may be many more circumstances which constitute exceptional circumstances, but the mere rescheduling of a trial, in my view, is not one of them.

[64] The Roberts' Report is a report on the standard of care in the context of a claim which pleads negligence. The Plaintiffs' counsel, in her written submissions, says that the Court does not always need expert evidence in order to determine the standard of care. However, she says that expert evidence regarding the standard of care is required in this case. Ms. Wood offers no explanation as to why she was ready to proceed to trial in February 2017 without an expert on the standard of care.

[65] The affidavit of Kirk Anthony provides that Mr. Anthony would not have agreed to the adjournment of the February trial dates had he known that additional expert evidence would be filed. Mr. Boucher, the affiant for AFL Manufacturing, says basically the same thing in his affidavit as does Ms. Mackie, the affiant for Crane.

[66] Counsel for Kirk Anthony, Mr. Coles, Q.C. told this Court that if the Court ruled that the Roberts' Report was admissible, he feared that he would not have time to retain a rebuttal expert and have a report prepared in time for the April, 2018 trial which is only one month away. That could mean a request for an adjournment of the trial dates. It is true that the defending parties have had the Roberts' Report since September 2017. That may mean that they have had an opportunity to digest it and obtain instructions as to whether to obtain a rebuttal expert should this Court rule that the report is admissible. However, it does not follow that the defending parties should have had to immediately retain experts in rebuttal in the circumstances. It was reasonable for them to wait for this Court's decision before spending the time and money to respond to an expert's report that was clearly late-filed. Further, they were put to the task of having to bring this motion so close to trial because of Plaintiffs' counsel refusal to concede that the Roberts' Report was filed late. She did so concede in her pre-hearing brief (as an alternative argument) and before this Court.

[67] I find that the Plaintiffs have not shown that any exceptional circumstances exist which justify the very late reception of the Roberts' Report. I am satisfied that the defending parties may well wish to provide rebuttal evidence in response

and that they may not be able to do so in time to preserve the April 2018 trial dates. There is a real risk that the trial will be adjourned. The prejudice to the defending parties outweighs the probative value of the Roberts' Report.

[68] Similar to Hood, J. in *Wareham v. Ross*, there was very little evidence before this Court of how the probative value of the Roberts' Report outweighs its prejudicial effect. I see substantial prejudicial effect to the defending parties in admitting this report late.

[69] I also find that it was the Plaintiffs who should have brought this motion. Instead, they sat back and required the defending parties to move for an order striking the Roberts' Report and the expert's name from the Plaintiffs' Witness List.

[70] I note that the Plaintiffs' counsel submitted to this Court that the trial could still be completed within the eleven (11) days allotted with the addition of Mr. Roberts as a witness. However, that is not just her decision to make. Mr. Richard had raised his concerns, and those of the other defending parties, about how the late-filed report might affect trial-readiness soon after the report was filed in his October 3, 2017 correspondence to Ms. Wood. In response, the Plaintiffs' counsel dismissed these concerns as "misplaced", and categorically stated "there is plenty of time within the days allotted (for trial) to complete Mr. Roberts' evidence."

[71] *Rule* 4.17 provides that a party who becomes aware, after the Date Assignment Conference, of information that materially affects the forecast of trial readiness or the estimate of the length of trial, must immediately request a conference to reconsider the trial dates. The adding of a new expert is a matter which might well affect the estimate of the length of trial. Plaintiffs' counsel should have considered that possibility and requested a conference with a Judge to ensure that all parties, not just her, were comfortable with the number of days scheduled for the trial.

[72] After all, it would be counsel for the defending parties who would be in a better position than Plaintiffs' counsel to estimate the likely length of their cross-examinations of the expert (if his report was admitted) and to advise whether they anticipated filing rebuttal reports.

[73] While it is true that AFL will not be participating in the trial and perhaps that will mean that the trial could be completed within the allotted days had

Mr. Roberts testified, AFL's withdrawal from the trial is a very recent development. At the time of filing the Roberts' Report the Plaintiffs' counsel could not have anticipated that AFL would not have participated in the trial.

[74] The onus is clearly on a party wishing to take a step in the proceeding after the Finish Date to make a motion. As noted by Associate Chief Justice Deborah K. Smith in *Garner v. Bank of Nova Scotia*, 2014 NSSC 63, a decision in which the Associate Chief Justice considered several pre-trial motions, she stated (paragraph 24):

> There will be occasions when an unexpected issue arises which may require a motion after the Finish Date and prior to the trial. Examples include a motion for an adjournment due to unexpected circumstances or a motion to amend a witness list. In my view, these motions should be the exception rather than the rule. Our present system is designed so that all pretrial procedures are completed by the Finish Date. When that date arrives, counsel should be ready for and prepared to proceed to trial without further pretrial motions.
>
> (emphasis added)

[75] The Plaintiffs did not bring a motion to allow for the late filing of the Roberts' Report. They did not, at any time, request a conference with a Judge to canvas the issue of whether, or not, a new Finish Date be established once the trial was rescheduled.

[76] The Supreme Court of Canada in *Hyrniak v. Mauldin*, 2014 SCC 7 at paragraph 1 affirms that access to justice, the single greatest issue faced by the civil process today, demands efficient, affordable, proportionate, fair resolution of civil cases. The Plaintiffs' actions in this case have resulted in the possibility that the trial dates could be lost if the Roberts' Report were admitted. I accept that as a real possibility. That possibility results in a civil process that would not be efficient, and certainly not fair to the defending parties.

Conclusion

[77] In all the circumstances of this matter, I grant the motion of Kirk Anthony and rule that the Roberts' Report is excluded and the amended witness list filed by the Plaintiffs on October 31, 2017 is struck. Costs are payable by the Plaintiffs to Kirk Anthony and Crane forthwith.

[78] While I determined that the Plaintiffs did not comply with the *Rules* either in terms of the late-filing of the Roberts' Report, by not requesting a conference with a Judge pursuant to *Rule* 4.17 and by failing to bring a motion for an order that would allow the Roberts' Report to form part of the record, I do not find, as argued by the defending parties, that any of these matters, individually or collectively constitutes an abuse of process, such that *Rule* 88 is engaged.

[79] I will receive written submissions on costs within ten (10) calendar days of this decision, if the parties are unable to agree on costs.

Smith, J.