SUPREME COURT OF NOVA SCOTIA
Citation: ***MacDonald v Loblaws***, 2021 NSSC 267

Date: 2021-03-18
Docket: Syd. No. 483012
Registry: Sydney

Between:

David MacDonald

Plaintiff/Applicant

v.

Loblaws Inc. c.o.b. Super Valu Supermarket

Defendant/Respondent

Decision on Application in Chambers

Judge:	The Honourable Justice Robin C. Gogan
Heard:	November 2, 2020 in Sydney, Nova Scotia
Post Hearing Submissions:	November 10, 2020
Counsel:	John Rafferty, for the Plaintiff/Applicant Matt Saunders, for the Defendant/Respondent

By the Court:

INTRODUCTION

[1] This is a decision on an Application in Chambers.

[2] David MacDonald ("**MacDonald**") was involved in a slip and fall accident on July 26, 2016. He alleges injuries after slipping on a patch of oil in the parking lot of a Loblaws' Super Valu grocery store ("**Loblaws**").

[3] MacDonald brought his claim against Loblaws on December 4, 2018. The claim was amended on September 16, 2019. Loblaws defended the claim on September 30, 2019. At paragraph 12 of its Statement of Defence, Loblaws plead the limitation period and said that MacDonald's claim was out of time.

[4] MacDonald now seeks an Order pursuant to s. 12 of the *Limitations of Actions Act*, S.N.S. 2014, c. 35, as amended. He asks for an order disallowing the limitation period defence and permitting his claim to proceed.

[5] What follows is a decision on the application. For that reasons that follow, I am prepared to grant the relief sought.

BACKGROUND AND EVIDENCE

[6] This proceeding involves a slip and fall accident on July 26, 2016. MacDonald's claims are based in negligence and under the provisions of the *Occupiers Liability Act*, S.N.S. 1996, c. 27, as amended. Loblaws denies negligence and, alternatively, says that any injuries were the result of MacDonald's negligence or contributory negligence.

[7] MacDonald gave evidence on the motion. He described the events of July 26, 2016, and the basis for his claim against Loblaws. He said that he took photos of the scene of his accident before leaving and then returned to take more photos later the same day. Some of these photos are in evidence. When he took the second set of photos, he observed that the area was being cleaned and surrounded by pylons. MacDonald went to the local hospital the same day, had x-rays the following day, and has had further medical treatment since. He believes all of his medical records are available.

[8] MacDonald says that he was unable to work in the year following this accident. He says he lost a business as a result. He then tried a number of physically demanding jobs that he found too difficult. He says that he has had reduced employment income since the accident and he believes his prospects are limited.

[9] MacDonald hired a lawyer to bring a claim against Loblaws. He first met his lawyer "a few weeks" after his fall. He was told that his lawyer contacted the store where his fall occurred and gave them notice of a claim. MacDonald followed up with the law firm and spoke to his lawyer about six times between August 2016 and the fall of 2018. He always intended to pursue his claim and was surprised when advised that it had been filed after the limitation period. He wants to pursue his claim.

[10] Brogan McKeough was the firm retained by MacDonald on or about August 16, 2016. Nash Brogan said that his firm was hired to bring a claim for injuries resulting from MacDonald's fall. Brogan relied on lawyer T.J. McKeough to handle the file. McKeough wrote to MacDonald's doctor, and to the Loblaws store notifying them of a claim on August 18, 2016. Loblaws subsequently hired Claimspro to investigate the claim.

[11] As part of the Loblaws' investigation, two store employees provided statements. These statements indicate that store staff dumped an unknown liquid in the area adjacent to the store entrance in the morning on July 26, 2016. The area of the spill migrated and was covered with absorbent material in the afternoon. A degreasing agent was applied and pylons used to keep cars and pedestrians away

from the area. The area became slippery again after a rainfall and a professional cleaning company was then hired for a further clean up of the site.

[12] McKeough spoke with the Claimspro adjuster on September 2, 2016. The adjuster confirmed this conversation in an email of the same day. Almost a year later, Claimspro followed up seeking information on the claim. In the absence of a response, Claimspro followed up again on September 27, 2017. McKeough responded the same day saying he expected a meeting with MacDonald the following week. Claimspro followed up again on November 14, 2017, seeking disclosure. There was no response.

[13] McKeough left Brogan Law in November 2018. Brogan reviewed MacDonald's file the same month and discovered the limitation period had expired. He tried to reach MacDonald without success and filed a Notice of Action and Statement of Claim on his behalf on December 4, 2018. The claim was served on January 11, 2019. Brogan was contacted by defence counsel on January 23, 2019, and, when asked, granted a waiver of time to file a defence. The Statement of Defence was filed on September 30, 2019. Brogan began disclosure of medical information in December, 2019, and disclosure has been ongoing.

[14] Brogan testified that he was never notified by the defendant of the impending expiry of the limitation period on MacDonald's claim.

ISSUE

[15] The sole issue on this motion is whether the court should exercise its discretion and grant the order sought under s. 12 of the *Limitations of Actions Act*.

POSITION OF THE PARTIES

[16] More will be said about the positions of the parties later in these reasons. What follows here is a brief summary.

David MacDonald

[17] MacDonald submits that the relief sought should be granted. He did not sleep on his rights. He hired counsel and inquired with them on multiple occasions. He notified Loblaws of his claim in a timely way that should have permitted the company to investigate liability and preserve evidence. Loblaws was advised to expect a claim from MacDonald and should have governed themselves accordingly. Considering all of the circumstances, the hardship assessment favors disallowing the limitation period defence and allowing the claim to proceed.

Loblaws

[18] Loblaws asks for the motion to be dismissed. It submits that the hardship assessment favors the Defendant when the following is considered: (a) the lack of evidence on the motion, (b) the reasons for the delay, (c) MacDonald's lack of incapacity, and (d) the availability of an alternative remedy.

[19] Loblaws says that its prejudice clearly outweighs that of MacDonald given that the limitation period was missed by inadvertence, MacDonald failed to disclose documentation when requested early in the litigation, incapacity does not explain or excuse the inactivity, and that MacDonald sought advice and retained counsel who missed the limitation period. Loblaws says MacDonald's remedy is now against his lawyer.

MacDonald's Reply

[20] In reply, MacDonald relies on authorities to say that it is unjust to unjust to visit the consequences of a lawyer's inaction on a client who otherwise has a cause of action. Moreover, pursuing a claim against a lawyer as an alternative remedy is a proposition that has been repeatedly rejected. Much of the medical documentation has been disclosed and there is no reason to believe that any remaining documentation is not available. When the evidence is properly assessed,

it is MacDonald's submission that Loblaws has not demonstrated any actual prejudice.

[21] At this point, I pause to note that following the hearing of the motion, both parties requested an opportunity to review and consider the decision of Hunt, J. in ***Morrisey v. Bulmer***, 2020 NSSC 29. Both parties were permitted to supplement their positions and filed brief post hearing written submissions.

ANALYSIS

[22] This is a motion to disallow a limitation period defence. There is no contest that the limitation period in this proceeding expired on July 26, 2018. MacDonald did not file his Notice of Action and Statement of Claim until December 4, 2018. The delay is less than four and a half months.

The Limitation Provisions for Personal Injury Claims

[23] The authority for this application is found in s. 12 of the *Limitations of Actions Act* which provides:

> **Disallowance or invocation of limitation period**
>
> 12(1) In this Section, "limitation period" means the limitation period established by
>
> (a) Clause 8(1)(a);

(b) Any enactment other than this Act.

(2) This Section applies only to claims brought to recover damages in respect of personal injuries.

(3) Where a claim is brought without regard to the limitation period applicable to the claim, and an order has not been made under subsection (4), the court in which the claim is brought, upon application, may disallow a defence based upon the limitation period and allow the claim to proceed if it appears to the court to be just having regard to the degree to which

(a) the limitation period creates a hardship on the claimant or any person whom the claimant represents; and

(b) any decision of the court under this section would create a hardship to the defendant or any person whom the defendant represents, or any other person.

(4) Where a limitation period has expired, a person who wishes to invoke the limitation period, upon giving at least 30 days notice to any person who may have a claim, may apply to a court for an order terminating the right of a person to whom such notice is given from commencing a claim and the court may issue such order or may authorize the commencement of the claim only if it is commenced on or before a day determined by the court.

(5) In making a determination under subsection (3), the court shall have regard to all the circumstances of the case and, in particular, to

(a) the length of and the reasons for the delay on the part of the claimant;

(b) any information or notice given by the defendant to the claimant respecting the limitation period;

(c) the effect of the passage of time on

(i) the ability of the defendant to defend the claim, and

(ii) the cogency of any evidence adduced or likely to be adduced by the claimant or the defendant;

(d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim;

> (e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered;
>
> (f) the extent to which the claimant acted promptly and reasonably once the claimant knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to a claim;
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> (g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received;
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> (h) the strength of the claimant's case;
>
> (i) any alternative remedy or compensation available to the claimant.
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> (6) A court may not exercise the jurisdiction conferred by the Section if the claim is brought more than two years after the expiry of the limitation period applicable to that claim.
>
> (7) This Section does not apply to a claim for which the limitation period is 10 years of more.
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> (Emphasis Added)

[24] In ***MacDonald v. Jamieson***, 2019 NSSC 345, I granted a termination order pursuant to s. 12(4) of the ***Act*** extinguishing the ability of two potential plaintiffs to commence an action for personal injuries after the limitation period had expired. At paras. 20 - 29, consideration was given to the general scheme established in s. 12:

> [20] The current limitations regime came into force on September 1, 2015. It was the product of consultation and heralded as a modern and uniform approach consistent with other Canadian jurisdictions. The hallmark of the new approach was a consolidation and shortening of limitation periods. The changes from the

earlier regime signalled a stricter approach to limitations with some increased focus on timeliness, certainly, and finality.

[21] Section 12 of existing *Act* applies specifically to personal injury claims. The limitation periods are determined by s. 12(1). Section 12(1)(a) incorporates s. 8(1)(a) which requires claims to be brought within two years of discovery. After the expiration of that period, a person who seeks to rely upon a limitation period may apply for a termination order on thirty days notice. If a termination order has not been granted, a claimant may bring a claim and apply to disallow any limitation period defence. The considerations on such an application are found in ss. 12(3) and (5).

[22] Once a limitation period in s. 8(1)(a) has been expired for more than two years, there is no need for a termination order. At that point, the court no longer has jurisdiction to disallow the limitation period defence. Section 12(6) essentially creates an absolute limitation. Prior to the absolute limitation, a court may exercise its discretion in several ways: (1) a claim may proceed by disallowing a limitation period defence (s. 12(3)); (2) a claim may proceed by a deadline (s.12(4)); or a claim may be terminated (s. 12(4)). After the absolute limitation date, no form of discretionary relief is available (s.12(6)).

Interpretive Guidance

[23] … There has been consideration of s. 12 of the *Act*, and several cases on the interpretation of ss. 12(3) and (5) …

[24] In ***Barry v. Halifax (Regional Municipality)***, 2018 NSCA 70, Bourgeois, J.A. considered s. 12 of the *Act* and cautioned claimants seeking relief to put their best foot forward at paras. 77 -78:

> [77] Before undertaking a consideration of the various factors, a preliminary observation is in order. Although s. 12(3) requires a court to consider the degree of hardship to both claimant and defendant, it should not be forgotten that this exercise is triggered due to a claimant having missed a limitation period created by virtue of the *Act* or other enactment. As such, the burden rests on the claimant to establish that any defence arising from the lapsing of that period ought to be disallowed.
>
> [78] It is incumbent on a claimant to adduce evidence which addresses the factors contained in s. 12(5), in order to inform the assessment. Although s. 12(5) mandates a judge to "have regard to all the circumstances of the case", those who fail to provide an evidentiary foundation do so at their peril. Similarly, in response, a defendant (or proposed defendant) is well-advised to provide sufficient foundation to

> permit a comprehensive consideration of the factors in s. 12(5) in order to better inform the hardship assessment. …

[25] …

[26] In ***M.(K.) v. M.(H).***, 1992 SCC 31 at paras. 22-24, the Supreme Court of Canada identified three rationales that underlie limitations legislation. They have been described as the certainty, evidentiary and diligence rationales:

> [22] Statutes of limitations have long been said to be statutes of repose. … The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. …
>
> [23] The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim. …
>
> [24] Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. …

[27] Interpretive direction is also found in the reasons of Bryson, J.A. in ***Willson v. Bond Estate***, 2019 NSCA 24. In that case, the court of appeal was called upon to review a decision disallowing a limitation defence under s. 12. In response to a submission that the interests of the parties be balanced, Justice Bryson imposed interpretive guardrails:

> [15] Care must be taken to read cases in context. Many limitation issues arise in different settings. The appellants rely upon these comments in ***Novak***:
>
> > [67] The result of this legislative and interpretive evolution is that most limitation statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. ***To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a***

> ***limitations statute seeks to give effect to each of these characteristics.***
>
> [Emphasis added in original]
>
> [16] …
>
> [17] …
>
> [28] In the absence of any decisions on point, I am left with an exercise in statutory interpretation. The modern principle of statutory interpretation requires that the words of an *Act* be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, object of the *Act*, and the intention of Parliament.
>
> [29] All of this in mind, it seems that the statutory scheme encapsulated in s. 12 was intended to balance the interests of parties to personal injury litigation. On one hand, claimants were given a two year period within which to bring a claim (or longer if s. 12(1)(b) applied or if subject to discovery) and an ability to set aside a limitation defence in certain equitable circumstances. On the other hand, defendants were given more certainty and finality in a shortened time frame.

[25] Decisions under the predecessor legislation bearing on interpretation include: ***Anderson v. Co-op Fire & Casualty***, [1983] NSJ No. 428, ***Smith v. Clayton***, [1994] NSJ No. 328, ***MacCulloch v. McInnes, Cooper & Robertson***, [1995] NSJ No. 185, ***Butler v. Southam Inc***., [2011] NSJ No. 332 (NSCA), ***Chapin Estate v. Drum Head Estates Ltd.***, [2011] NSJ No. 543 (NSCA), ***VanTassel v. Dominion of Canada General Insurance Co.*** , [2015] NSJ No. 235, and ***Dyack v. Lincoln***, 2017 NSSC 187.

[26] The leading authority from our court of appeal continues to be ***Barry v. Halifax (Regional Municipality)***, 2018 NSCA 70. In that case, the plaintiff was injured while a passenger on a transit bus. She sued the defendant municipality and later sought leave to amend her pleadings and join the section D insurer. The insurer relied upon the limitation period.

[27] In declining to disallow the defence, Bourgeois, J.A. cautioned an even handed evidentiary assessment, considered the s. 12(5) ***Act,*** and directed the analysis at para. 73:

> [73] … s. 12(5) requires all of the enumerated factors to be considered. Although a judge has the discretion to weigh the significance of particular factors against the others, she does not have the discretion to exclude any factor from consideration.

[28] In the analysis that followed, an eighteen month delay after the expiry of the limitation period was "significant", was not accompanied by a compelling reason, and the failure to provide early notice had a negative impact on the ability of the insurer to defend the claim. There was no evidence offered on either the strength of the case (liability or damages) or alternative sources of recovery. The plaintiff had failed to adduce evidence on the relevant factors at her peril. The balancing of hardship required under s. 12(3) favoured the insurer and the limitation defence stood.

[29] More recently, I am guided by a number of decisions applying the direction in ***Barry***. In ***Bourque v. Morrison and Nova Scotia (Attorney General)***, 2019 NSSC 291, the delay was approximately nine weeks, was due to inadvertence, and the defendants "were not taken by surprise". The short delay had no impact on the cogency of evidence and was otherwise "inconsequential". The claim was not frivolous and deserved to be heard on the merits. The hardship analysis favoured disallowance of the limitation defence.

[30] In ***Nixon v. Chignecto-Central Regional School Board***, 2019 NSSC 272, the delay was about six months which was "not an extraordinary delay but still significant". However, in the period following the expiry of the limitation period, a key witness died and some records were destroyed. The delay impacted the defendant's ability to respond to some of the central allegations. Alternative sources of recovery were available but were not a complete replacement for the damages available from a successful claim. The hardship analysis favored the defence and the limitation defence stood.

[31] In ***Morrisey v. Bulmer***, *supra,* the claims arose from a series of ATV collisions and the plaintiff sought to add a section D insurer after the expiry of the limitation period. The period of delay was eight months. Significant here was that the insurer had been involved in related claims from "nearly the first day" and had

participated in discoveries just prior to the motion. Although all parties had counsel and were actively litigating existing claims, the insurer did not give notice to the claimant about the limitation period for the section D claim. This was not a case where the defendant had no notice of claim until it was served. To the contrary, the insurer was waiting for a claim that never came. The oversight was one of complacency given the insurer's level of participation in the existing litigation. The strength of the section D claim was not clear on the evidence presented. Alternate pathways to recovery existed but were complicated and speculative and defences were available. The hardship analysis favored discretionary relief and the disallowance of the limitation defence.

[32] Most recently, in ***Sears v. Top O' the Mountain Apartments Limited***, 2021 NSSC 80 the proceeding began with a slip and fall claim. The issue before Norton, J. was whether to disallow a third party limitation defence. The delay was almost two years. The third party did not provide evidence of hardship or prejudice caused by the delay and did not give notice of the limitation period to the defence. Significant here was that the third party had actual notice of the claim within the limitation period but did not investigate. There was no evidence that the cogency of the evidence had been impacted by the delay. There were arguable issues for the third party to answer at trial. There was no alternative remedy available to the

defendants. The limitation defence was set aside on the basis that the hardship analysis favored the defence:

> [81] The Court is required to assess and balance these considerations. The objective is to achieve a just outcome in all the circumstances, having regard to the respective hardships. I am mindful of the instruction from the Court of Appeal in *Barry* that it should not be forgotten that this exercise is triggered due to the Defendants having missed a limitation period. As such the burden rests on the defendants to establish that any defence arising form the lapsing of that limitation period ought to be disallowed.
>
> [82] Nonetheless, in the circumstances before the Court, I find that it is just to disallow the limitation defence of the Third Party. The Third Party was given notice in February of 2016 of the Plaintiff's injury and intent to bring a claim, and that the Defendants considered any such claim to the responsibility of the Third Party. The Third Party could have conducted an investigation at that time, informed the insurer, taken statements, and preserved documents. Although the Defendants cannot excuse their delay in filing a Third Party Notice on the basis that they chose to represent themselves without legal counsel, there is no evidence of any specific hardship or prejudice that the Third Party has or will have in mounting its defence resulting from that delay …

[33] The relief sought on this application requires an exercise of discretion. Discretion must be exercised judicially, and in accordance with the prescribed considerations. Section 12(3) of the ***Act*** embodies the exercise of balancing the hardship of the parties involved. Section 12(5) guides the exercise of discretion by mandating consideration of "all of the circumstances of the case" as well as nine specific criteria. I turn now to consideration of the criteria in this case.

Application to the Present Case and Determination

[34] I begin by considering the factors enumerated in s. 12(5)(a) to (i). As I assess each of these considerations, I remind myself that each of these criteria are considered in the context of assessing hardship to each of the parties under s. 12(3)(a) and (b), and ultimately determining whether it is just to disallow the limitation defence. The considerations in s. 12(5) are clearly intended to guide the exercise of discretionary authority provided in s. 12(3).

(a) the length of and reasons for the delay on the part of the claimant

[35] There is no contest that MacDonald's claim arose on July 26, 2016, the limitation period expired on July 26, 2018, and his Notice of Action and Statement of Claim was filed on December 4, 2018. The delay in this case is relatively short – a period of less than four and a half months. There is no evidence that MacDonald himself was responsible for any delay. The delay was caused by his lawyer's "inadvertence".

[36] MacDonald took "early" steps to hire counsel (as acknowledged by the defence in its post hearing submission) and retained the law firm of Brogan McKeough on or about August 16, 2016. On August 18, 2016 counsel wrote to the defendant store advising it had been retained in relation to injuries suffered on July

26, 2018. There is evidence that Loblaws recognized that a spill of a slippery liquid had taken place and took steps to contain and remediate even before receiving notice of the MacDonald claim. MacDonald followed up with his lawyer but was unaware of the limitation period. On the evidence, it appears that MacDonald acted diligently but his lawyer did not. The authorities express reticence to take away a claimant's substantive rights as a result of the failures of counsel.

[37] There is no evidence of actual prejudice or hardship to the defendant caused by the period of delay in this case. Loblaws argues that MacDonald was unresponsive prior to the expiration of the limitation period causing prejudice. While MacDonald's counsel was not diligent, there is no evidence that medical or other evidence became unavailable during the period of delay. To the contrary, much disclosure has taken place since.

(b) any information or notice given by the defendant to the claimant respecting the limitation period

[38] Loblaws did not bring the limitation period to MacDonald's attention.

[39] In my view, Loblaws' failure to provide clear notice in advance to MacDonald of the impending limitation period and its intention to rely upon it is

significant and favors MacDonald. The statutory considerations must be given meaning. Had Loblaws given clear notice of intention to rely on the limitation period in advance of its expiry, much more weight could be accorded to the desire to have certainty and alleviate against "ancient" obligations. But that is not the case here.

(c) the effect of the passage of time on (i) the ability of the defendant to defend the claim, and (ii) the cogency of any evidence adduced or likely to be adduced by the claimant or defendant

[40] The evidence offered indicates that Loblaws knew about the spill of liquid contemporaneously and became aware of a potential claim less than a month later. It was afforded a timely opportunity to investigate the claim and there is evidence that the investigation did take place. There is no suggestion that witnesses are not unavailable. Photographs exist, as do statements, medical records, and other records. There is no evidence that the delay has impaired the ability to defend the claim or impacted the cogency of evidence likely to be adduced. This case is clearly distinguishable from one where the defendant was not aware of the claim until served with a late notice.

(d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by

the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim

[41] There is no issue with the defendant's general conduct in this case. If anything, it must be said that the defendant was diligent in its response to the potential claim and did not get a like response.

(e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered

[42] The parties agree that this consideration is not relevant to the analysis is this case.

(f) the extent to which the claimant acted promptly and reasonably once the claimant knew a claim may arise against the defendant

[43] MacDonald acted promptly and reasonably in advancing his claim. He believed that he had a claim against Loblaws on July 26, 2016. He took photographs of the scene, he obtained medical attention, and he sought legal counsel who provided a notice to Loblaws less than a month after the potential claim arose. MacDonald was reasonable to rely on his legal counsel once retained.

He followed up with counsel to provide information and inquire about the status. The failure in this case must be attributed to lack of Counsel's lack of diligence.

(g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such evidence the claimant may have received

[44] The evidence supports that MacDonald took steps to obtain timely medical and legal advice.

(g) the strength of the claimant's case

[45] On this point, I rely on the evidentiary standard established in ***Barry***. It is incumbent on MacDonald to offer evidence on "liability together with the details of the nature, extent, duration and causation of the injuries". MacDonald has provided evidence that permits the required analysis to take place.

[46] The assessment required here is in the context of the relief sought. In other words, does the claim have enough merit to ground a claim for equitable relief. In my view, the evidence adduced establishes that the claim is not frivolous and has merit in the sense required. Norton, J. in ***Sears***, considered the nature of the claim advanced and found "arguable issues". Likewise, I find that sufficient evidence has been advanced to establish that MacDonald would suffer hardship if the

limitation period was not disallowed, in the sense that the claim deserves to be heard.

(h) any alternative remedy or compensation available to the claimant.

[47] MacDonald says that he has no alternative remedy. Loblaws distinguishes ***Bourque*** and says that the alternative is for MacDonald to sue his lawyer. In ***Morrisey***, Hunt, J. relied on ***Lord v. Smith***, 2013 NSCA 34 to the effect that it was speculative to weigh potential claims against professional advisors. In that case, I note that Justice Hunt recognized that the plaintiff had alternative remedies.

[48] The present case is distinguishable from ***Bourque***, ***Morrisey,*** and ***Sears*** on this point. MacDonald relied on his lawyer to advance his claim and his lawyer did not file the claim before the expiry of the limitation period. If the limitation period is not disallowed, it is open to MacDonald to advance a claim against his lawyer. Whether, or to what extent, that option would be a full alternative remedy is speculative and difficult to weigh. Regardless, it is but one of the factors to be considered in assessing hardship on this motion.

Conclusion

[49] Before concluding, I must deal with Loblaw's request to adjourn this motion *sine die*, or, in the alternative, until discoveries have been completed. It says that there are material facts in dispute which make this motion premature. I disagree. The motion has been brought and the law applicable to the motion is well settled. The onus is on MacDonald to establish that it is just to disallow the limitation period defence.

[50] In my view, it is not appropriate in the present circumstances to delay the disposition of the motion. It was open to Loblaw's to apply for a termination order under s. 12(4) of the ***Act*** on thirty days notice to MacDonald and it was open to them to give notice under s. 12(5)(b). It did not do either of these things. Neither has it applied for summary judgment. Even if it had moved for summary judgement, it is appropriate for the motion to disallow to be determined before considering the summary judgment motion (***Sears***, at para. 84).

[51] Returning to the motion to disallow, I have considered all of the circumstances presented, and specifically considered all of the factors in s. 12(5) as required. In my view, the hardship assessment favors MacDonald. He recognized

that he had a potential claim and took reasonable and timely steps thereafter to advance it. Those steps included relying on his lawyer.

[52] MacDonald's lawyer notified Loblaws of a claim less than a month after it arose. Unfortunately, his lawyer failed to file the claim before the limitation period expired. The claim was filed just over than four months late. There is no cogent evidence that Loblaws was prejudiced in its defence by the delay. Loblaws prodded MacDonald for information about his claim at regular intervals but did not raise the issue of the limitation period in advance of its expiry.

[53] I conclude that it is just to disallow the limitation defence in this case.

[54] I ask Mr. Rafferty, Q.C. to draft the Order. If the parties cannot agree on costs, I would ask for brief written submissions within thirty days.

Gogan, J.