

IN THE SUPREME COURT OF NOVA SCOTIA

[CITE: Clarke v. Sherman., 2002 NSSC 27]

BETWEEN:

STEPHEN CLARKE

PLAINTIFF

- and -

**ALEXANDER SHERMAN, RAHEEM ISMAILY,
KAREEN ISMAILY, LILLIAN ISMAILY and
SAFAR ALI ISMAILY**

DEFENDANTS

Justice C. Richard Coughlan

Halifax, Nova Scotia

S.H. 119302

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HEARD: At Halifax, Nova Scotia, in Chambers, before the Honourable
Justice C. Richard Coughlan, on August 29th, 2001

DECISION: August 31st, 2001 (Orally)

WRITTEN RELEASE

OF DECISION: January 31st, 2002

SUBJECT: Practice - Dismissal of Action - Grounds - General and Want of
Prosecution

SUMMARY: A motor vehicle collision took place on July 9th, 1989. An
originating notice (action) and statement of claim were issued on
July 9, 1991. An order to extend time for service of the originating
notice and amending the document was issued July 13th, 1995.

The defence on behalf of three of the defendants was filed January 15th, 1996. A list of documents on behalf of the three defendants who filed a defence was filed on November 13th, 1996. An order for the plaintiff to file a supplementary list of documents by November 15th, 1997 was issued. An order disallowing the limitation defence was issued March 12th, 1997. A notice of discontinuance against a defendant was dated January 7th, 1998. An order adding a defendant was issued December 18th, 1998. The defence and cross-claim of the added defendant was filed on June 2nd, 1999. In June and August, 1999 the solicitor for one of the defendants wrote the plaintiff's solicitor stating the passage of time had prejudiced his client and stated an application to strike on the basis of delay would be made. A list of documents of the added defendant was dated June 3rd, 1999. Counsel corresponded about disclosure of documentation. A management conference was held on March 1st, 2001 with discoveries to be held before the end of July, 2001. Responses to inquiries showed an inability to obtain records.

ISSUE: Should the action be dismissed for want of prosecution?

RESULT: The motor vehicle accident took place over twelve years ago. Requested information is not available. The affidavits filed in support of the plaintiff's position do not contain adequate explanation for the delay in the conduct of the action. There is not only the presumption of prejudice, but actual material that is not available. The defendants have not conducted themselves so as to be estopped or waived their right to bring the application. The application to dismiss is allowed.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.
QUOTES MUST BE FROM THE DECISION, NOT THIS COVER SHEET.***