CITATION: Linton v. Tholos Restaurant Inc., 2016 ONSC 4167
COURT FILE NO.: CV-10-396907
DATE: 20160920

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Matthew Linton and Stephanie Linton, Plaintiffs

AND:

Tholos Restaurant Inc., Kaytoo Restaurant and Bar Limited, Michael Smitiuch, Litigation Administrator for the Estate of Harvey Kerry Goldmintz, deceased, and Blue Mountain Chalets, Defendants

BEFORE: Pollak J.

COUNSEL: *Dale Orlando and Joseph A. Cescon*, for the Plaintiffs

Robert Barrett, for the Defendant Tholos Restaurant

Vincent Burns, for the Defendant Kaytoo Restaurant and Bar Limited

Neil Searles, for the Defendants Michael Smitiuch, Litigation Administrator for the Estate of Harvey Kerry Goldmintz, deceased, and Blue Mountain Chalets

HEARD: June 21, 2016

ENDORSEMENT

Claim

[1] The Plaintiff, Matthew Linton, and some of his friends were in the Blue Mountain resort in the Town of Collingwood for the bachelor party for David Wismer. This group rented a Chalet for several days.

[2] The Claim of the Plaintiff, Stephanie Linton, was discontinued on September 21, 2015.

[3] Mr. Linton's Claim is based on facts which can be generally summarized as follows:

- On May 22, 2009 between between 12:30 p.m. and 1:50 p.m., Mr. Linton played golf with David Wismer, Kristopher Rams and Michael Carter. They drank alcohol.

- Between 5:00 p.m. and 6:00 p.m., Mr. Linton checked in to the Chalet.

- The group, including Mr. Linton, was served dinner and alcohol at Tholos Restaurant Inc. ("Tholos"), one of the Moving Defendants. The dinner reservation was for 8:00 p.m. In its defence, Tholos does not admit that the Plaintiff was served alcohol.

- Between 10:31 p.m. and 11:00 p.m. Mr. Linton arrived at Kaytoo Restaurant and Bar Limited ("Kaytoo"), one of the Moving Defendants. Kaytoo admits that Mr. Linton was served alcohol.

- Between 12:00 a.m. and 1:00 a.m. on May 23, 2009, Mr. Linton, Mr. Wismer, and Jordan Black left Kaytoo and walked to the Chalet.

- Between 1:00 a.m. and 1:30 a.m. Mr. Linton fell down an exterior set of steps at the chalet and suffered a severe traumatic brain injury.

[4] This is a motion for summary judgment brought by Defendants Tholos and Kaytoo to dismiss Mr. Linton's action against them and to dismiss all of their crossclaims against the other Defendants.

[5] Defendants Michael Smitiuch, Litigation Administrator for the Estate of Harvey Kerry Goldmintz, deceased, and Blue Mountain Chalets (the "Estate of Goldmintz and Blue Mountain Chalets"), oppose the motion of the Moving Party Defendants. They are proceeding to trial.

[6] The Plaintiff relies on the report of the expert forensic alcohol toxicologist, Mr. Wigmore. His opinion is that:

> **"Calculation of Volume of Alcohol Consumed**
>
> Given Mr. Linton's physical description, he would have to consume approximately **13 to 21 bottles of beer (12 fld oz bottles, 5% ABV)** or equivalent between 6:00 p.m. and the time of his fall for his BAC to be consistent with the hospital result of 235 mg/100ml at 4:00 a.m. [Note: One bottle of beer (5% ABV) is equivalent to 1.5 fld oz of liquor (40% ABV).]
>
> This calculated volume is also based on the known human alcohol pharmacokinetics and a rate of alcohol elimination of between 10 and 30 mg/100mL/h.
>
> **Effects of Alcohol**
>
> **a) General and Physical**
>
> Alcohol is a depressant drug and some of the impairing effects of alcohol would include a decrease in alertness, an increase in choice reaction time, impairment of visual tracking, judgement, decision making and of divided attention tasks.

> The obvious physical effects of alcohol depend not only on the BAC but whether the BAC is rising or declining and the rate of increase of BAC. The effects of alcohol are more obvious on the rising phase of the BAC (while Mr. Linton was drinking). This is referred to as acute tolerance. **I would expect in an experienced drinker (and hence with an average tolerance to alcohol), that the physical condition would deteriorate markedly over the time as this large amount of alcohol was consumed. Since alcohol is a depressant drug, it would be expected that he would show marked inco-ordination (clumsy, slow movements), decreased inhibitions, slower talking with slurring of words, difficulty in walking showing deliberate concentrated walking, having difficulty in maintaining balance (with feet further apart) and bumping into people and objects. All the physical effects would markedly deteriorate over the time he was consuming alcohol to achieve a highly intoxicating BAC of between 240 and 325 mg/100mL**." [Emphasis added.]

[7] The Plaintiff submits that based on this opinion, his blood alcohol concentration at the time of his fall was significantly elevated, being 3-4 times the legal limit. To reach the level of intoxication attained by the time of the fall, Mr. Wigmore concludes that Mr. Linton would have had to have consumed 13 to 21 bottles of beer or their equivalent. At that level of intoxication he would have been exhibiting obvious signs of intoxication. He argues that this opinion supports a finding that these signs of intoxication would have been readily visible to an employee trained in observing the signs of intoxication if they were paying due care and attention. The argument is that because of the number of drinks Mr. Linton must have been served at either Tholos or Kaytoo or both, they should have known that he was significantly intoxicated.

[8] The Plaintiff relies on the case of *McIntyre v. Grigg*, (2006) 274 D.L.R. (4^{th}) 28 (Ont. C.A.) where the jury preferred the evidence of the expert toxicologist who stated that there was no conceivable way that the Defendant would exhibit no signs of intoxication with such an elevated blood alcohol reading (a blood alcohol concentration of 218 mg/100mL).

[9] The Plaintiff's Claim against the Moving Defendants is supported by the expert opinion evidence. Mr. Linton has no memory of the event. The Plaintiff also relies on the statements of the other bachelor party guests to reconstruct the order of events in question. This "evidence", which is relied on by both the Plaintiff and the Moving Party Defendants, is overwhelmingly that Mr. Linton did not appear intoxicated at any time during the day.

[10] The Plaintiff's argument to oppose these motions for summary judgment is that the witness "evidence" relied on by the Moving Defendants is in direct conflict with the expert evidence. He submits that it would only be possible to make the necessary findings of fact in this Claim with the benefit of a full trial record so that the evidence and credibility of the bachelor party guests can be properly assessed and weighed. As well, it is submitted that this Court should not use its discretion to hear such extensive oral evidence as it is submitted it would not be in the interests of justice.

[11] The Moving Defendants submit that the central factual issues in this motion involving their liability are straightforward and are not disputed by the parties. They submit that an assessment of witnesses' credibility, as is being urged by the Plaintiff because of different recollections of events, is not needed.

[12] Mr. Linton submits that much of the relevant timeline with respect to when he was at Tholos and Kaytoo and how much and what he had to drink is disputed. In contrast, the Moving Defendants' main submission is that the dispute over their liability in this action turns largely on legal issues. They argue that the relevant legal principles are well-established and based on decisions of the Supreme Court of Canada.

[13] The Moving Defendants argue that the Plaintiff's claim against them is based on principles of commercial host liability. These principles are different than those of occupiers' liability that affect the non-moving Defendants and, as a result, the number of witnesses will be reduced if the summary judgment motion is granted. The Defendants submit that this will reduce the length of the trial.

[14] The Moving Defendants agree that as commercial hosts they owe a duty of care to a customer who is served alcohol, becomes intoxicated, and cannot take care of himself or herself as a result of the intoxication.

[15] However, they submit that even if a duty of care can be established, such duty of care is at an end when the patron makes it safely to his destination. In support of this position, the Defendants rely on the Supreme Court of Canada's decision in *Menow v. Honsberger*, [1974] S.C.R. 239 [*Menow*] and a number of subsequent decisions. Specifically, they urge this court to apply the reasoning of the court in *Schryer (Litigation Guardian of) v. 1232215 Ontario Ltd.*, [2009] 179 ACWS (3d) 1226 (Ont. S.C.J.), where it was held at para. 79 that "[o]nce a patron arrives at his or her final destination, the tavern's duty is discharged, irrespective of whether the bar took active steps to ensure that the person arrives safely." The Defendants emphasize that Mr. Linton arrived at the Chalet safely before his fall. It is therefore submitted that any duty of care that they owed to Mr. Linton was "discharged" once he returned to the Chalet. On that basis alone, they argue, the action against them should be dismissed.

[16] The Moving Defendants also submit that, where harm is not foreseeable, no action is required from the commercial host. They note that the law establishes that a host must take "affirmative action" to prevent a foreseeable harm from occurring based on the recognition of the "special relationship" existing between a commercial host and its patrons. In terms of the affirmative steps required, the Supreme Court of Canada, in *Stewart v. Pettie*, [1995] 1 S.C.R. 131, referred to *Menow*'s conclusion that a host discharges its duty by either "taking the intoxicated patron under its charge" or by "putting him under the charge of a responsible person."

[17] Tholos argues that it was not required to take any action for Mr. Linton's safety when he left the restaurant because it was not reasonably foreseeable at that time that he was at risk of suffering harm. Even if he appeared intoxicated, it was unforeseeable that he would suffer injury.

Tholos notes that there was no chance that he would drive when leaving, as guests normally left on foot. Tholos submits that any potential duty to take action could have been discharged by placing the Plaintiff in the care of his friends, who escorted him back to the Chalet.

[18] The Plaintiff, however, submits that while his arrival at the chalet may satisfy the duty of care owed by a commercial host to its patron in some circumstances, it is not an established principle of law that the duty ends when he arrives at his final destination – it depends on the facts of each case.

[19] The Plaintiff emphasizes that the duty of the commercial host arises from the fact that the patron became intoxicated or became further intoxicated by the host, which exposes the patron, by reason of his intoxication, to injury. It is submitted that such duty should logically end only when the patron is no longer exposed to injury by reason of his intoxication. This, they argue, will not necessarily occur just because he had arrived at the chalet.

Evidence Adduced by the Parties

[20] There are several issues in dispute in this action, with the major ones being how much alcohol Mr. Linton consumed and when and where it was consumed.

[21] As he has no recollection of the events before his fall, the Plaintiff refers to the "statements" of other bachelor party guests to establish that he was at the restaurants of the Moving Defendants and was served alcohol there. The only direct evidence in this motion is the expert report by the Plaintiff's forensic alcohol toxicologist.

[22] The Moving Defendants argue that Mr. Linton relies on speculation through his expert's evidence to support an inference that employees of Tholos and Kaytoo were aware or should have been aware that he was intoxicated. They argue that there is no direct evidence to support an inference that their staff knew that he was intoxicated.

[23] The Moving Defendants submit that the Plaintiff must, through objective facts, show that there was wrongful conduct to support the negligence claim. They urge the court not to draw any inferences from the evidence of the expert, because to do so would be speculative. In this regard, they rely on the case of *Kern v. Steele*, 2003 NSCA 147, 220 N.S.R. (2d) 51.

[24] Further, they rely on this court's finding in the case of *Rudderham v. Folkes*, 2011 CarswellOnt 15979 (Ont. S.C.), **where there was no direct evidence that the Plaintiff was served by the Defendant or that their employees knew or ought to have known that he was intoxicated**. The court rejected the submission that it could be inferred that he was served alcohol by the commercial host and stated, at paras. 41-43:

> "41 The Plaintiffs have no evidence to suggest that TJ's served alcohol to Mr. Rudderham to a point that TJ's knew or ought to have known that he was at risk of harm due to his intoxication as a result of their service to him. The Plaintiff, therefore, has no evidence to link Mr. Rudderham's level of intoxication at the time of the accident to TJ's.

> 42 Mr. Doan asks me to infer that the plaintiff's consumption of alcohol that led to his state of intoxication at 11:41 p.m. was the result of being over-served at TJ's. I do not think that there is any basis whatsoever for that inference to be drawn. … The facts upon which Mr. Doan relies do no more than permit speculation that the plaintiff was over-served alcohol at TJ's in the period leading up to his accident. … The evidence could not support an inference that TJ's conduct was sufficient to impose a duty on Ms. Grimes [the server] to take steps to prevent the plaintiff from leaving on foot. The conclusions that Mr. Doan asks me to infer are not such as to acquire the status of anything even remotely approaching probability. …
>
> 43 There are no positive, proven facts from which the inferences the plaintiff seeks can be made. What is left is, in my view, therefore, mere speculation or conjecture."

[25] While Kaytoo has admitted at this hearing that it served Mr. Linton some alcohol, Tholos has not made such an admission. However, the evidence relied on by both Mr. Linton and the Moving Defendants provides some support to the finding that Mr. Linton was served some alcohol at Tholos. Tholos relied on the legal argument I have referred to above, and did not argue this point at the hearing.

[26] The Moving Defendants rely on the "evidence" of the other guests of the bachelor party to prove that Mr. Linton showed no signs of intoxication. Although the evidence was not objected to by the Plaintiff, who also relied on some of it to reconstruct the sequence of events and to support his claim that he was served alcohol at Tholos, it must be noted that all these witnesses gave the evidence in the context of a third party claim for contribution and indemnity filed against them by the Moving Defendants on October 6, 2011. The third party claim was dismissed on June 4, 2014, after all the statements relied upon by the Moving Defendants had been made. The Amended Third Party Claim alleged that the other guests of the bachelor party contributed to the injuries of Mr. Linton by: encouraging the Plaintiff to ambulate and walk around the chalet when they knew or ought to have known he was impaired and it was dangerous for him; failing to take reasonable care to avoid the accident which they saw or should have seen was likely because of his extreme state of intoxication; and being themselves so severely intoxicated that they became a "menace to themselves and the plaintiff."

[27] Specifically, Tholos relies on the Affidavit of Andrew Wismer (the "Wismer Affidavit") given in support of a motion to dismiss the third party claim against him, to establish that:

- no one in the group appeared grossly intoxicated and that at no time during the evening did the Plaintiff appear to be visibly impaired; and

- Mr. Wismer himself was not intoxicated when Tholos placed Mr. Linton in his care.

[28] Kaytoo relies on the affidavit of John Garbe, the restaurant's owner and general manager (the "Garbe Affidavit"), to establish the sequence of events in question. The Garbe Affidavit

relies exclusively on Mr. Wismer's Affidavit, as well as on the transcript of Mr. Wismer's interview with a representative of Aviva Canada and the recorded statement of Mr. Black, another member of the bachelor party and also a third party to the claim.

[29] Like Mr. Wismer's Affidavit, Mr. Black's statement says that Mr. Linton appeared sober to him. However, it is the transcript of Mr. Wismer's interview with Aviva representative that highlights the problems with the evidence relied on by the Moving Defendants. The interview was conducted as a follow up to Mr. Wismer's filing an insurance claim with Aviva shortly after being served with a third party claim. Many passages relied on by Mr. Garbe in his affidavit are taken from the part of the interview where the insurance representative and Mr. Wismer go through each allegation in the third party claim and Mr. Wismer denies each one of them.

[30] The evidence I refer to above, relied on by the Moving Defendants on this motion must be contrasted and evaluated against that of the Plaintiff's expert. It should be noted that there was no cross-examination of the Plaintiff's expert and no expert evidence was introduced by the Moving Defendants. The expert's evidence is the only direct and unchallenged evidence on this motion.

[31] All of the witnesses' statements place Mr. Linton at Tholos restaurant between approximately 7:00 pm and 10:30 pm.

[32] Sean Fleming, one of the bachelor party participants, has stated that he was at Tholos restaurant with Mr. Linton, and while he did not see him specifically consuming alcohol because he was sitting at the other end of the table, he surmised that Mr. Linton did consume alcohol because they all did.

[33] Mr. Wismer has stated in his interview that while at Tholos, the group "[a]te, had some drinks, all of us, thirteen or fifteen people." In addition, in his affidavit Mr. Wismer states that there were rounds of tequila shots ordered for the group.

[34] Additional evidence relied on by Tholos consists of hearsay statements by Candice Graydon, a Tholos server who served the group, and Peggy Koskimas, a Tholos hostess on duty on the day in question which were referred to in the affidavit of the restaurant's co-owner and manager, Bill Vomvolakis. Both Moving Defendants also adduce evidence in support of their claim that their staff is properly trained in recognizing signs of patron intoxication. This evidence consists of affidavits by the owners and staff training manuals.

[35] It is emphasized by the Moving Defendants that evidence that they were aware that Mr. Linton was intoxicated must be adduced before a duty of care is found. They submit that Mr. Linton cannot establish that they owed him a duty of care. The Supreme Court of Canada held in *Menow* at para. 14, that a duty exists if "it [the host] was aware, through its employees, of his [the patron's] intoxicated condition" when he left the premises. The duty to prevent intoxication requires the commercial host to monitor the service of alcoholic beverages to ensure that the patron does not consume alcohol to the point of intoxication or further intoxication.

[36] The Defendants also rely on the court's findings in *Whitlow v. 572008 Ontario Ltd.*, (1995) 52 A.C.W.S. (3d) 1032 (O.C.J. Gen. Div.), wherein the court stated, at para. 51:

> In my view, the courts have not been prepared to go so far as to impose a duty on every tavern owner to act as a guardian or protector of all patrons who enter his or her place of business and drink to excess. *Jordan House v. Menow* provides guidance on these issues. A great deal turns on the knowledge of the owner of the tavern and the staff, of the patron and his or her condition when the issue is liability in negligence for injuries suffered as a consequence of the impaired condition of the patron.

[37] The Defendants do not challenge the blood alcohol readings which were taken of Mr. Linton's blood after the accident. They submit, however, that these readings and the expert opinion cannot be relied upon to prove either how much alcohol was served and when, or where it was served, or that their staff was aware, or should reasonably have been aware, that the Plaintiff was intoxicated at the time the alcohol was served.

The Test for Summary Judgment

[38] Both parties rely on the case of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] S.C.R. 87, wherein the Supreme Court of Canada gave us a roadmap of the approach to follow on a motion for summary judgment. At paragraph 66 of the decision, the court states:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a).
>
> If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[39] Applying the Supreme Court of Canada's roadmap referred to above, I must ask myself the following: 1) Just on the basis of the evidentiary record alone, are there genuine issues that require a trial? 2) Does the evidentiary record in front of me provide me with the evidence I need to "fairly and justly adjudicate the dispute"?

[40] I am of the view that this is an extremely difficult decision to make. Is the expert evidence led by the Plaintiff, which is the only direct evidence and unchallenged through cross-examination, enough to satisfy the Plaintiff's burden of proving that there is a genuine issue that requires a trial? The "evidence", which I have referred to above, that Mr. Linton was not

showing any signs of intoxication is inconsistent with the expert's estimation that he must have had between 13 and 21 drinks after 6:00 p.m. and further that at that level of intoxication he must have shown some signs of intoxication. The "evidence" however, was given by witnesses who had an interest in the third party claim brought against them.

[41] On this motion, I do not think the evidentiary record before me provides me with the necessary evidence to fairly and justly adjudicate the issue. There is no satisfactory evidence with respect to how much alcohol Mr. Linton had to drink before 6:00 p.m. The issue of when and how much Mr. Linton had to drink is a major issue, which will have to be adjudicated on at the trial for the non-moving Defendants, even if this motion for summary judgment is granted. Even though the law with respect to the liability of the Defendants may be different, all findings of fact that are relevant to the liability issues will have to be made before the issues of liability of the non-moving Defendants can be decided.

[42] As the Ontario Court of Appeal stated in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438 at paras. 35 and 37, the advisability of a staged summary judgment process should be assessed in the context of the litigation as a whole. The Court noted that in a staged summary judgment process there was a risk that a trial judge would develop a fuller appreciation of the relationships and the transactional context than the motion judge, which can force a trial decision that would be implicitly inconsistent with the motion judge's finding, even though the parties would be bound by that finding. This process, in such context, would risk inconsistent findings and substantive injustice.

[43] The Court of Appeal in *Baywood* also discussed the problem arising at a staged summary judgment process in an action where credibility is important, at paras. 44-45:

> Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.
>
> Judges are aware that the process of preparing summary judgment motion materials and cross-examinations, with or without a mini-trial, will not necessarily provide savings over an ordinary discovery and trial process, and might not "serve the goals of timeliness, affordability and proportionality" (*Hryniak* at para. 66). Lawyer time is expensive, whether it is spent in court or in lengthy and nuanced drafting sessions. I note that sometimes, as in this case, it will simply not be possible to salvage something dispositive from an expensive and time-consuming, but eventually abortive, summary judgment process. That is the risk, and is consequently the difficult nettle that motion judges must be prepared to grasp, if the summary judgment process is to operate fairly.

[44] A consideration of these principles as they apply in this case leads me to conclude that this motion for summary judgment should not be granted.

[45] The Supreme Court of Canada in *Hryniak v. Mauldin* has attempted to give parties a procedure which is designed to be expeditious and affordable, but it must be emphasized and remembered that the process must also ensure that the dispute is resolved fairly and justly.

[46] Mr. Wismer and Mr. Black were interested witnesses at the time they gave their statements. The fact that they had a direct interest in the result of the third party claim is relevant to the probative value of the evidence. As well, the expert evidence does not, in my view, prove that the Moving Defendants had, or should have had, knowledge of Mr. Linton's intoxicated state. There is no evidence as to how much alcohol Mr. Linton was served by either Moving Party Defendant or how "intoxicated" he was when he was served.

[47] I am of the view that the evidence relied upon by the parties should not be used as a basis for making the necessary findings of fact on this motion. The Moving Party Defendants could have cross-examined the Plaintiff's expert to challenge his findings but they did not do so. My answer to the question the Supreme Court of Canada asks the Court to consider on these motions, namely – do I have the evidence required to fairly and justly adjudicate the dispute in a timely, affordable and proportionate procedure, under Rule 20.04(2)(a)(2). The answer is no. As it appears to me that there may be at least one issue which requires a trial (namely the level of alcohol consumed and the resulting effects of intoxication), I must ask if I should use my discretion to determine if the need for a trial on these issues can be avoided by the use of my fact-finding powers. I have to ask myself, would it be in the interest of justice to do so? Will the use of these powers lead to a "fair and just result" that will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole? I do not think that it would be in the interests of justice to use my expanded fact finding powers on this motion because of the effect it would have on the trial which will proceed against the non-moving defendants. To resolve the issues on this motion justly and fairly, it would be necessary for me to use my fact-finding powers to conduct a large portion of the trial with respect to the issue of liability of these Moving Defendants. This, in my view, is against the interests of justice as the trial against the non-moving defendants will continue with the adjudication of the major issues I have referred to above.

[48] As I have already stated, this is a very difficult decision to make, as the evidence before the court is, in my view, inadequate. Most importantly, the findings of this Court with respect to the levels of Mr. Linton's intoxication at different times of the evening in question will be necessary findings for the trial judge to make with respect to the issues as they relate to the liability of the remaining non-moving defendants. There is a risk of contradictory findings of this Court.

[49] I therefore find that for all of those reasons I have referred to, this motion for summary judgment should be denied.

[50] There is one further practical issue. The Supreme Court of Canada in *Hryniak* also held, at para. 78, that:

> Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

[51] In my view, this is an appropriate case for me to follow the Supreme Court's direction. I must, however, qualify this to recognize the practical reality of our court's ability to schedule trials in a timely and expeditious manner. I will not be seized of this trial if the effect of my unavailability would be to delay the hearing of the trial between the parties. If it is possible to do so without adverse delay or consequences to the parties, I seize myself of the trial of this matter as directed by the Supreme Court of Canada.

Costs

[52] If the parties are unable to agree on costs, they may make brief written submissions to me no longer than three pages in length. The Defendants' submissions are to be delivered by 12:00

noon on September 30, 2016, and the Plaintiff's submissions are to be delivered by 12:00 noon on October 10, 2016. Any reply submissions are to be delivered by 12:00 noon on October 17, 2016.

Pollak J.

Date: September 20, 2016