SUPREME COURT OF NOVA SCOTIA
Citation: *Williams v. Halifax (Regional Municipality)*, 2015 NSSC 228

Date: 2015-07-30
Docket: *Hfx*, No. 126561
Registry: Halifax

Between:
Rosella Williams, Mildred Denise Allen, Donald Brown, Shirley Brown, April Carvery, Blenn Edward Carvery, David Bruce Carvery, Dean Carvery, Edward Carvery, Edward Bayfield Carvery, John Edward Carvery, Nelson Carvery, Rose Charlene Carvery, Victor W. Carvery, Yvonne Carvery, Marleen Bernice Cassidy, Donna Darlene Dixon, Leonard James Dixon, Debra Lee Emerson-DeLeon, Bernice Flint, Idella Marie Flint, Olive Flint, Raymond Patterson Flint, Sheila Flint, Warren Grant, Ronald W. Howe, Marie Louise Izzard-Carvery, Marjorie Carrie-Ann Izzard, Martina Izzard, Phillip Daniel Izzard, Shawn Izzard, Alfreda Peters, Roger Leslie Thomas, Craig Vemb, Fleming Vemb, Jean Vemb, Leo Vemb, Isabel Wareham, Teresa Patricia Williams (Carvery), Clarence Brown (deceased), Wennison Byers (deceased), Vera Carter (deceased), Bernadine Carvery (deceased), Rosalyn Carvery (deceased), Doramae Clayton (deceased), Wayne S. Dixon (deceased), Ernest Flint (deceased), Dr. Ruth B. Johnson (deceased), Jack Carvery (deceased), Morton Flint (deceased), Gerald J. Johnson (deceased), Irene Izzard (deceased), and Albert Kenneth Sparks (deceased)

Applicant

v.

The City of Halifax, a body corporate

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	February 25, 2015, in Halifax, Nova Scotia
Final Written Submissions:	July 27, 2015
Counsel:	Robert Pineo, Jeremy Smith and Michael Scott for the Applicants Karen MacDonald and Martin Ward Q.C., for the Respondent

By the Court:

Background

[1] The Africville Genealogy Society (the Society), is incorporated pursuant to the **Societies Act** R.S.N.S. 1989 c. 435. Upon its application, Justice Hall, then of this Court, issued an order dated February 28, 1996 that named the Society as the representative of the estates of 48 named persons who had been residents of a community known as Africville. The order also named the Society as the representative of:

> …former residents of Africville and their descendants, presently unascertained, who may be affected by the intended proceeding by the Africville Genealogy Society and others against the city of Halifax.

[2] On March 28, 1996, an originating notice (Action) and statement of claim was filed by 129 plaintiffs against the then City of Halifax (Halifax), which is now part of the amalgamated community known as the Halifax Regional Municipality. The plaintiffs included the Society in its own right, and as representative of the unknown residents and descendants. The estates of 48 deceased individuals were listed as plaintiffs with the Society as their representative. There were also 79 named individual plaintiffs, a number of whom have subsequently died.

[3] The claim asserts that Africville was settled and established as a community in the early 1800s, by refugee slaves and settlers and also by residents of other local black communities from within Nova Scotia. The community was located on the shores of the Bedford Basin at the northern tip of the Halifax peninsula.

[4] In the period 1962 to 1970, Halifax purchased the homes and lands of the residents, who were then relocated.

[5] The claim alleges that Halifax is liable to the former residents and their descendants for a broad array of tortious conduct and breaches of contract over the span of the community's existence. The action seeks court orders to set aside the

conveyances of the land to Halifax, together with damages for the loss and injury claimed to have been suffered in consequence of Halifax's actions.

[6] During the 14 years following the filing of the claim, the action before this Court was largely dormant while the parties attempted to negotiate a settlement. By consent, the plaintiffs did not respond to the defendant's 1996 Demand for Particulars; the pleadings were not closed, discoveries did not take place, nor were any other steps taken to advance the case. The Prothonotary made numerous inquiries of the parties with respect to the failure to prosecute the claim and in 2003 issued an Appearance Day Notice seeking the dismissal of the action for this reason.

[7] In 2010 a Settlement Agreement was reached that had eight terms. The defendant agreed to:

1. Acknowledge a loss and to make an apology;
2. Contribute $3.0 million to the Africville Heritage Trust for the planning and reconstruction of the Seaview United Baptist Church replica and an Africville Interpretive Centre;
3. Convey 2.5 acres of land adjacent to and west of Seaview Park;
4. Enter into an agreement for the ongoing maintenance of Seaview Park;
5. Rename Seaview Park as Africville; and
6. Establish an African Nova Scotian Affairs Office or function within HRM to enable better engagement with the African HRM community.

[8] The parties jointly agreed that:

1. The settlement did not amount to an admission of liability;
2. No personal compensation would be paid to the plaintiffs; and
3. The action would be dismissed.

[9] To give legal effect to the last point, the parties appeared before the court on July 7, 2010, apparently expecting that the claims of the plaintiffs would be dismissed. At the conclusion of the hearing, I granted a consent order dismissing, without costs to any party, the claims of 30 named individual plaintiffs, the

Society, the Society as representative of the unascertained former residents and their descendants, and the estates of the 48 deceased persons represented by the Society.

[10] During that hearing of July 2010 a number of named plaintiffs rose in court to indicate that they did not agree with the settlement and that then counsel for the plaintiffs were not acting on their instructions. Some suggested that they had not been consulted and had not given instructions to counsel to advance the settlement. Others rose to indicate that they wanted to be joined as plaintiffs and to pursue the action.

[11] A motion was presented by then legal counsel Paul L. Walter Q.C., Randall P.H. Balcome, John R. Bishop, and their law firm, (collectively referred to as "counsel") to withdraw as the solicitors for those persons who were plaintiffs and did not agree to the dismissal of their claims.

[12] Confronted with this division in the position of the plaintiffs, submissions were received and hearings held to determine how to deal with those persons who were already named plaintiffs, and those who wanted to be joined as plaintiffs. The following is a brief summary of those proceedings:

1. *Williams v. Halifax* 2010 NSSC 467 (heard October 8, 2010):
    - The claims of 6 individuals were dismissed by consent, (para. 20);
    - The claims of 7 named individual plaintiffs who had subsequently died were dismissed by consent. (para. 21);
    - The claims of 8 other named individual plaintiffs who had subsequently died were stayed pursuant to **Civil Procedure Rule 35.11**. (paras. 22-29);
    - Counsel were permitted to withdraw as the solicitors for 18 individual plaintiffs. (paras. 84-85);
    - A further hearing was ordered in relation to a motion that counsel be permitted to withdraw as solicitors for 7 other named individual plaintiffs. (para. 86)

2. *Williams v. Halifax* 2011 NSSC 84 (heard February 17, 2011)

   - The motion of counsel to withdraw for all remaining plaintiffs was granted. (para. 24);
   - The action of one more named individual plaintiff, who had subsequently died, was stayed pursuant to **Rule 35.11**. (para. 25);
   - The style of cause was amended to show only those plaintiffs whose claims had not been dismissed or withdrawn.

3. *Williams v. Halifax* (heard November 23, 2011, unreported)

   - Motions pursuant to **Rule 35.08** were granted to add 7 persons as plaintiffs and to amend the style of cause accordingly;
   - One motion pursuant to **Rule 35.08** was denied.

4. *Williams v. Halifax* 2011 NSSC 481 (December 23, 2011 by correspondence)

   - Motions pursuant to **Rule 35.08** were granted to add 2 persons as plaintiffs and to amend the style of cause accordingly;
   - Motions were granted for 2 plaintiffs to participate by assistant in a pending motion brought by the Prothonotary to dismiss the action pursuant to **Rule 4.22**, and which was scheduled for hearing on January 4, 2012.

5. *Williams v. Halifax* (heard January 4, 2012, unreported)

   - The Prothonotary's motion brought pursuant to **Rule 4.22** to dismiss the action for failure to prosecute was heard;
   - The claims of 11 plaintiffs were dismissed pursuant to **Rule 4.22**;
   - The hearing of the motion as it related to the claims of 5 plaintiffs was adjourned for further submissions, to be heard on February 3, 2012;
   - The Prothonotary's motion in relation to the other plaintiffs was dismissed;
   - Motions brought by 4 persons seeking to be added as plaintiffs were set for hearing on February 3;

- The defendant was ordered to file a statement of defence by March 31, 2012; and affidavits disclosing documents were directed to be delivered by September 27, 2012;
- The style of cause was ordered to be amended to reflect the remaining plaintiffs.

6. *Williams v. Halifax* (heard February 3, 2012, unreported)

- The Prothonotary's motion pursuant to **Rule 4.22** was dismissed in relation to 3 of the 5 plaintiffs for whom the motion had been adjourned for further submissions;
- The Prothonotary's motion was granted in relation to 2 of the plaintiffs and their claims were dismissed;
- The motions of 6 persons to be added as plaintiffs were granted;
- The motions of 7 persons to be added as plaintiffs were denied;
- The motion of 1 person to be added as a plaintiff was adjourned without day, pending receipt of further supporting evidence.

7. *Williams v. Halifax* (heard June 8, 2012, unreported)

- The motions of 18 persons to be added as plaintiffs were granted;
- The motion of 1 person to be added as a plaintiff was denied.

[13] As at this point in time there are 36 named individual living plaintiffs, stayed claims of 9 deceased plaintiffs, and 5 deceased plaintiffs whose claims have not been stayed. (Note: Some original plaintiffs discontinued claims and subsequently were reinstated prior to the current motions. Therefore the actual current number of plaintiffs will not equal the number that previous decisions might otherwise suggest.)

Current Motions

[14] In 2014 Robert Pineo filed a notice of change of counsel indicating that he was now acting as the solicitor for the plaintiffs. A letter to the court sought a case management conference, which was held by telephone on November 18, 2014. A

memorandum of the conference is on file. Mr. Pineo advised that he was instructed to:

> (i) Seek an order to name Personal Representatives for the estates of some of the deceased plaintiffs and to have the stays of proceedings in those cases lifted;
>
> (ii) Seek an order amending the claim by eliminating all previously pleaded causes of action and instead advancing the claim on the basis of the Municipality's alleged failure to comply with the statutory requirements for expropriation of the Africville lands; and
>
> (iii) Seek an order to amend the list of named plaintiffs and to seek certification of the action under the **Class Proceedings Act**, S.N.S 2007, c.1.

[15] A schedule for filings was set and the hearing, originally to be held on January 21, 2015, was heard on February 25, 2015. (The hearing was re-scheduled to accommodate a conflict in the schedule of plaintiffs' counsel).

[16] In addition to the issues identified by Mr. Pineo I directed him to confirm his retainer to act on behalf of every named plaintiff. My reasons for this, and how Mr. Pineo resolved my concerns, are discussed below.

[17] In the result, the following motions have been presented to the Court:

1. To appoint personal representatives for the Estates of:

    (i) Clarence Brown
    (ii) Wennison Byers
    (iii) Vera Carter
    (iv) Bernadine Carvery
    (v) Jack Carvery
    (vi) Rosalyn Carvery
    (vii) Doramae Carvery
    (viii) Wayne S. Dixon
    (ix) Ernest Flint
    (x) Morton Flint

(xi) Irene Izzard
(xii) Gerald J. Johnson
(xiii) Dr. Ruth B. Johnson
(xiv) Albert Kenneth Sparks

2. To lift the stays of proceedings for each of these Estates;

3. To confirm Robert H. Pineo as counsel for those persons intended to be named as the personal representatives;

4. To amend the pleadings "…by striking the Originating Notice and Statement of Claim in their entirety and substituting them with the Notice of Action and Statement of Claim filed with the Notice of Motion";

5. To amend the style of cause by deleting the names of all currently named plaintiffs except Rosella Williams and Nelson Carvery, and to add as parties Ada Adams and Lyle Grant;

6. To set a date for a motion for directions for the proposed certification of the amended claim under the **Class Proceedings Act**; and

7. Costs to the plaintiffs.

Motions 1, 2 and 3

Legal Representation of Named Plaintiffs

[18] During the case management conference, Mr. Pineo advised that his firm was acting on the instructions of Nelson Carvery (joined as a plaintiff on November 24, 2011), Coleman Howe (who is not a plaintiff at this time), Lyle Grant (claim dismissed with consent October 8, 2010) and Ada Adams (claim dismissed with consent July 7, 2010). These persons form a committee appointed by the plaintiffs to give instructions on their behalf. The committee is called the "Steering Committee of the Justice for the Families of Africville Society. (The "Steering Committee")

[19] I sought assurances that counsel had confirmed his retainer and instructions with each of the named plaintiffs, not just the proposed Representative Plaintiffs or

Steering Committee members. I required this because of the problems that lead to the withdrawal of Mr. Walter and his firm as counsel in 2010. Mr. Walter relied upon the instructions of persons he believed to speak for all of the then plaintiffs. Once division arose among the plaintiffs as to the proposed settlement, some of the dissatisfied plaintiffs advanced arguments in support of being able to continue their actions that rested on the lack of personal contact and instructions between themselves and Mr. Walter. I did not want that situation to repeat itself.

[20] This point is particularly important because the current motions propose to substantially change the contents of the statement of claim, and in a way that appears to be at odds with some of the representations made to the court by the dissatisfied plaintiffs who spoke out against the settlement in 2010. Certain of them, during the submissions as to the status of Mr. Walter, advanced reasons for their disagreement with his advice. These appeared to include a strong desire to have the existing causes of action adjudicated. Mr. Pineo's motions, if granted, will remove those same causes of action that I perceived some persons felt strongly about.

[21] Mr. Pineo filed an affidavit indicating that he or his associate, Michael P. Scott, met with or spoke to all of the individuals listed below. Persons who reside in Nova Scotia and were met in person have executed affidavits that confirm Mr. Pineo's retainer, that they are fully aware of the currently proposed motions and that the motions are consistent with their instructions given personally to counsel for the plaintiffs. Each has also personally signed a notice of new counsel naming Mr. Pineo as counsel. Those persons are:

(i) Mildred Denise Allen
(ii) Donald Brown
(iii) Shirley Brown
(iv) David Bruce Carvery
(v) Edward Bayfield Carvery
(vi) Edward Carvery
(vii) Nelson Carvery
(viii) Victor W. Carvery
(ix) Yvonne Carvery
(x) Marlene Bernice Cassidy
(xi) Debra Lee Emmerson-DeLeon
(xii) Leonard James Dixon

(xiii) Donna Darlene Dixon
(xiv) Olive Flint
(xv) Warren Grant
(xvi) Ronald W. Howe
(xvii) Marjorie Carrie-Ann Izzard
(xviii) Martina Izzard
(xix) Phillip Daniel Izzard
(xx) Roger Leslie Thomas
(xxi) Craig Vemb
(xxii) Fleming Vemb
(xxiii) Teresa Patricia Williams (Carvery)

[22] Persons living outside of Nova Scotia were spoken to in person or by telephone. Mr. Pineo attests to the fact that each was given the same information as those who gave instructions in person. Each confirmed their instructions. Based upon this, Mr. Pineo has filed notices of new counsel under his own signature for the following persons:

(i) April Carvery
(ii) Blenn Edward Carvery
(iii) Dean Carvery
(iv) John Edward Carvery
(v) Rose Charlene Carvery
(vi) Bernice Flint
(vii) Idella Marie Flint
(viii) Raymond Patterson Flint
(ix) Sheila Flint
(x) Marie Louise Izzard-Carvery
(xi) Shawn Izzard
(xii) Alfreda Peters
(xiii) Leo Vemb

[23] Mr. Pineo, acting on information received, has determined that the following plaintiffs have died:

(i) Bernadine Carvery
(ii) Doramae Clayton
(iii) Wayne S. Dixon
(iv) Ernest Flint
(v) Albert Kenneth Sparks

[24] As indicated above, motions have been presented to name personal representatives for their estates.

Analysis

[25] Going into the current motion hearing, there are 50 named plaintiffs. The name of Rosella Williams is in the style of cause, however she is no longer a party. (Dismissed pursuant to **Rule 4.22** on January 4, 2012). Her name has remained as the first named plaintiff in the style of cause solely for the purpose of ensuring consistency for case administration and citation purposes.

[26] Of the 50 plaintiffs, I am satisfied that Mr. Pineo has authority to act for the 36 living named plaintiffs.

[27] As for the 14 persons now understood to be deceased (9 stayed and 5 who are now deceased but whose claims have not been stayed), I was provided with a draft order listing the proposed personal representatives and their relationship to the deceased persons. Five of the proposed representatives are also plaintiffs in their own right. Three of the deceased, being Dr. Ruth Johnson, Gerald Johnson and Wennison Byers, are being "represented" by an Executor or Power of Attorney.

[28] The authority to appoint a representative is set out in **Rule 36.12** which provides:

> (1) A judge may appoint a person to be a party representing the estate of a deceased person whose estate has no executor, administrator, or other personal representative.
>
> (2) An order in the proceeding binds the estate to the same extent as it would do so had an executor, administrator or other personal representative been a party.
>
> (3) A judge may replace a representative party with an executor, administrator, or other personal representative who is appointed, or whose appointment becomes known, after the representative party is appointed.
>
> (4) A failure to name a representative of an estate, or a failure to secure the appointment of a representative and name that party, may be corrected under Rule 35.08, of Rule 35 - Parties.

[29] Before granting an order that deals with the interests of deceased persons whose claims are extant, I required that each proposed Personal Representative provide an affidavit confirming their status with respect to the deceased's estate, giving consent to act as the Personal Representative, and confirming Mr. Pineo as counsel on behalf of the estate of the person for whom the proposed Personal Representative is acting.

[30] Counsel filed that information subsequent to the hearing. I have reviewed it and am prepared to sign an order naming the following persons as Personal Representatives for the estates:

(i) Shirley Brown, as Personal Representative for the Estate of Clarence Brown;
(ii) Carol Toussaint, as Personal Representative for the Estate of Wennison Byers;
(iii) Melvin Carter, as Personal Representative for the Estate of Vera Carter;
(iv) Edward Bayfield Carvery, as Personal Representative for the Estate of Bernadine Carvery;
(v) Yvonne Carvery, as Personal Representative for the Estate of Jack Carvery;
(vi) Jason Regan, as Personal Representative for the Estate of Roslyn Carvery;
(vii) Cleveland Farrell, as Personal Representative for the Estate of Dora Mae Clayton;
(viii) Sherry Anne Crowe, as Personal Representative for the Estate of Wayne S. Dixon;
(ix) Bernice Flint, as Personal Representative for the Estate of Ernest Flint;
(x) The Steering Committee of the Justice for the families of Africville Society, represented by Nelson Carvery, as Personal Representative for the Estate of Morton Flint;
(xi) Martina Izzard, as Personal Representative for the Estate of Irene Izzard;
(xii) Lisa Sparks, as Personal Representative for the Estate of Albert Kenneth Sparks;
(xiii) Coleman Howe, as Personal Representative for the Estate of Gerald Johnson; and
(xiv) Coleman Howe, as Personal Representative for the Estate of Dr. Ruth Johnson.

Summary as to Motions 1, 2 and 3

[31] The following is a summary of my conclusions in relation to Motions 1, 2, and 3:

1. I am satisfied and confirm that Mr. Pineo has been retained by 36 named and living plaintiffs;

2. I am prepared to appoint Personal Representatives for the estates of the 14 deceased plaintiffs listed above.

3. I order that the Stays of Proceedings that have been previously ordered in relation to those deceased plaintiffs be lifted.

Motion 4: *To amend the Pleadings "...by striking the Originating Notice and Statement of Claim in their entirety and substituting them with the Notice of Action and Statement of Claim filed with the Notice of Motion"*.

Motion 5: *To amend the style of cause by deleting the names of all currently named plaintiffs except Rosella Williams and Nelson Carvery; and to add as parties Ada Adams and Lyle Grant.*

Plaintiffs' Position

[32] Counsel submits that the plaintiffs have only recently learned that the defendant expropriated the subject lands. Having formed the opinion that the expropriation was not compliant with empowering legislation, the plaintiffs seek to re-frame the action as a class proceeding and to found the claim on this "new" information.

[33] The proposal limits the plaintiffs to Representative Plaintiffs, representing two proposed sub-classes of claimant. The proposed amended statement of claim removes all plaintiffs other than the intended Representative Plaintiffs. Those plaintiffs who are to be removed as parties are intended to be compensated as members of the class.

[34] The plaintiffs also seek to remove the pleaded causes of action from the claim. The amendments propose to advance the claim on the basis of what is alleged to be a failure of the defendant to comply with substantive and procedural requirements of expropriation, which the plaintiffs allege the defendant was bound by. The plaintiffs seek relief in the form of compensation for property rights and interests taken from them by the defendant, damages for injurious affection and disturbance, together with prejudgment interest and costs.

[35] The plaintiffs also seek, by the amendments creating the sub-classes, to bring back into the action those persons whose claims have been previously dismissed, discontinued or withdrawn.

[36] These changes, counsel submits, will result in "substantially fewer and more focused claims, which should vastly improve the advancement and manageability of the action."

[37] The revised amended claim filed on January 13, 2015 is the one that I am asked to rule upon. It is different from one filed December 15, 2014 in that it differentiates the membership of the class by creating 2 sub-classes. This is a summary of the proposed amended claim:

1. Proposed Paragraph 1: as described above

2. Proposed Paragraph 3 states:

> 3. The Plaintiffs bring the present action as a class action pursuant to the **Class Proceedings Act** SNS 2007, c. 28 on their own behalf and also on behalf of the Class Members.

3. Proposed Paragraph 4 states:

> 4. There are two Sub-Classes to this Action:
>
> (a) Sub-Class A: includes all former residents and the estates of deceased former residents of Africville who were removed from the physical community of Africville between 1962 and 1970 who have not signed Releases to this Action or had their claims otherwise dismissed or discontinued; and

> (b) Sub-Class B: includes all former residents and the estates of deceased former residents of Africville who were removed from the physical community of Africville between 1962 and 1970 who have signed Releases to this Action or had their claims otherwise dismissed or discontinued.

[38] Paragraphs 5 through 19 plead material facts and are organized under the following titles:

- Africville (5-13);
- The Relocation of the Former Residents (14-19).

[39] In Paragraphs 20-27, titled "The Purported Expropriation of the Physical Community of Africville", the plaintiffs plead points of law together with material facts in support of the claim.

[40] Paragraphs 28 to 30, titled "Sub-Class B" pleads facts and law in support of a claim that any releases of claim previously filed by the intended members of this sub-class should be declared null and void.

[41] Paragraph 31 seeks to reinstate the previously discontinued claims of Jean Vemb and Isabella Wareham.

[42] Finally, Paragraphs 32 and 33 set out the relief sought.

Defendant's Position

[43] The defendant does not contest amendments to the substantive provisions of the statement of claim that will focus the cause of action on the lawfulness of the expropriation. i.e., paragraphs 5 to 27 of the proposed amended claim.

[44] The defendant does not oppose the amendments proposing to create a class consisting of the currently living individual plaintiffs who have not had their claims dismissed and have not signed releases. Further the defendant does not

oppose the inclusion of the estates of deceased plaintiffs whose claims have not been dismissed and have not signed releases. Finally, the defendant does not contest the re-instatement of the plaintiffs who previously withdrew or discontinued their claims.

[45] However, the defendant asserts that the proposed amendments to the style of cause and to paragraphs 1, 3 and 4 of the claim:

> … should not be permitted in so far as they will amend the action to include individuals who have already executed Releases in this matter and whose actions have been dismissed by this Honorable Court. HRM submits that what has been characterized as a motion to amend in order to simplify the causes of action is an attempt, in part, to revive the actions of those individuals whose claims have been dismissed.

[46] Counsel for the defendant submits that:

> (i) Orders dismissing claims of a number of individual plaintiffs and estates of deceased plaintiffs have been issued and any attempt to re-join them in this claim is prohibited by the principle of *res judicata*. This includes the proposed Representative Plaintiffs, Rosella Williams, Ada Adams and Lyle Grant;
>
> (ii) Previously executed Releases bar former plaintiffs from further action against the defendant arising from this claim. This exclusion would apply to the proposed Representative Plaintiffs, Ada Adams and Lyle Grant;
>
> (iii) **Rule 35.08(5)** precludes the court from joining new parties because their claims are statute barred, having come forward after the expiration of the relevant limitation period.

Plaintiffs' Reply

[47] Counsel for the plaintiffs submits that the defendant's objections to the creation of sub-class B are premature. He says that these persons, and others in the same sub-class, who gave their releases and consented to dismissal of their claims did so not knowing that they had a potential claim in expropriation. They claim that the defendant is guilty of fraud for not disclosing to them, until after they

agreed to release their claims and dismiss their actions against the defendant, that the Municipality had expropriated the Africville lands

[48] Mr. Pineo submits that the first two arguments, that their claims are barred as being *res judicata* and by their releases, are defences to be adjudicated "in the liability phase" of the action once these individuals are named as plaintiffs. As to the limitation defence, counsel submits that there are triable issues and that it would be inappropriate for a court to consider the merits of the defence at the motion to amend pleadings stage.

Analysis

[49] If the plaintiffs' motions succeed the result will be:

1. To join persons as plaintiffs who have discontinued or withdrawn from this action, and have not signed releases or had their claims dismissed;

2. To join persons as plaintiffs who have had their claims dismissed upon the Prothonotary's motion brought under **Rule 4.22**;

3. To join persons (or estates of deceased former plaintiffs) as plaintiffs who have had their claims dismissed by consent order;

4. To permit these various persons whose claims have been dismissed to pursue their claims as members of sub-class B defined in proposed paragraph 4(b) at issue in this motion.

5. To name as representative plaintiffs persons who fall under proposed sub-classes A and B, that is, to name them although the claims of some may have been previously dismissed, withdrawn or discontinued.

[50] The authority to amend a pleading is found in **Rule 83**. At this stage of the proceedings, and in the absence of consent of the defendant, the plaintiffs require the court's permission to amend the claim. see, **R. 83.02(2)**.

[51] The provisions that are relevant to the current motions are:

> Rule 83 - Amendment
>
> Amendment to add or remove party
>
> 83.04 (1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).
>
> (2) …
>
> (3) A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief.
>
> Amendment by judge
>
> 83.11 (1) A judge may give permission to amend a court document at any time.
>
> (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.
>
> (3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
>
> (a) the material facts supporting the cause are pleaded;
>
> (b) the amendment merely identifies, or better describes, the cause.

Joining parties: Original plaintiffs who withdrew or discontinued claims

[52] The plaintiffs seek to join as plaintiffs those persons who previously withdrew or discontinued their claim in this action as against the defendant.

[53] Those who discontinued their claims are: Jean Vemb and Isabel Wareham, both of whom filed notices of discontinuance in October 2012. There are no other discontinued claims.

[54] **Civil Procedure Rule 9** governs the right of a plaintiff to resume his or her claim where they have discontinued on an earlier occasion:

> Cause of action remains

> 9.07 (1) Discontinuance of a proceeding or withdrawal of a cause of action does not give rise to a defence in subsequent proceedings for the same, or substantially the same, cause.
>
> (2) A judge who allows a proceeding to be discontinued or a claim to be withdrawn may impose terms concerning a subsequent proceeding for the same cause against the same parties.
>
> (3) A subsequent proceeding that amounts to an abuse of process may be controlled under Rule 88 - Abuse of Process.

[55] Having regard to the discretion permitted in **Rule 83**, and with the consent of the defendant, and being satisfied that there is no impediment to permitting these plaintiffs to return as plaintiffs, I am prepared to grant the motion to add those persons.

[56] Those whose claims were "withdrawn" are: Victor William Carvery, Edward Leo Carvery and Albert K. Sparks. Victor William Carvery "withdrew" his claim March 20, 1997. I granted a motion permitting him to be reinstated as a plaintiff on February 10, 2012. Edward Leo Carvery "withdrew" his claim on March 25, 1997. I granted a motion permitting him to be reinstated as a plaintiff on December 21, 2011. This was done by correspondence, however, an order was not issued at that time. I have now signed an order to give effect to this decision. Albert K. Sparks (now deceased) "withdrew" his claim April 17, 1997. I granted a motion permitting him to be reinstated as a plaintiff on November 24, 2011. An order was issued. There are no other plaintiffs who have "withdrawn" their claims.

[57] As a result, there are only those who "…have signed Releases to their action or had their claims otherwise dismissed" remaining that could form proposed Sub-class B.

Adding Parties: former plaintiffs whose claims have been dismissed either by consent or for failing to prosecute the claim.

[58] The question has been posed by the defendant:

> What is the effect of the Releases and Orders of this Court dismissing the claims of the AGS, the AGS on behalf of the 48 estates and former residents of Africville and their descendants who at the time were unascertained, and…of the individual plaintiffs? (see, Defendant's brief at para. 20)

[59] In my view, the answer to this question is integral to the resolution of these motions to amend.

Res Judicata

[60] In *Hoque v. Montreal Trust Co. of Canada* 1997 NSCA 153, Cromwell J.A. writing on behalf of the court described the plea of *res judicata*:

> 19 This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. …
>
> 20 *Res judi*cata has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) at 555:
>
> > .... The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ..... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-1:
> >
> > > I fully recognize the distinction between the doctrine of res judicata where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").
>
> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

…

30 The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matters not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.

…

38 Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra,* to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

39 …. There is authority for the view that *res judicata* should be applied in a more limited way when the judgment giving rise to the plea was obtained on default.

…

65 My review of these authorities shows that while there are some very broad statements that all matters which *could* have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party *should* have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.

69 At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them. This is seen in the cases concerned with collateral attack, supra, and is reflected in the restrictive approach to res judicata founded on default judgments.

(emphasis added)

[61] *Hoque, supra* has been cited with approval repeatedly. See, *Can-Euro Investments Ltd. v. Industrial Alliance Insurance and Financial Services Inc.*, 2013

NSCA 76; *Ross v. Bank of Montreal*, 2013 NSCA 70; *Kameka v. Williams*, 2009 NSCA 107, at para 18 (and para 90, concurring reasons); *Saulnier v. Bain*, 2009 NSCA 51, para 6. See also, *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at paras 20-24, per Binnie, J. for the Court.

[62] "Cause of action estoppel" precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction.

[63] Bryant, Lederman and Fuerst, in their text *The Law of Evidence in Canada* (3rd ed.) (LexisNexis, 2009) list the constituent elements of estoppel by *res judicata* in civil cases, at page 1285:

> (i) that the alleged *judicial* decision was what in law is deemed such;
>
> (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;
>
> (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
>
> (iv) that the judicial decision was final;
>
> (vi) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
>
> (vii) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.

[64] In this case the persons proposed to be included in Sub-class B were previously named plaintiffs. In each case an order of the court has been issued dismissing their claims. No appeal has been taken from those orders. They are presumptively final and binding. The defendant is entitled to rely on the finality of the orders.

[65] I do not agree with counsel for the proposed plaintiffs that adding these former plaintiffs as parties at this time is merely procedural, and that the argument as to the validity of the dismissal of their claims is only engaged after they are named as a party. In my view, a party whose claim is dismissed by order of the court cannot simply say that they want to be rejoined as a party and debate the

merits later. While this matter has been presented as a motion to amend a statement of claim, and I am governed by the discretion provided by **Rule 83**, the motions are, in effect, an attempt to institute an action by claimants who the defendant says are estopped from doing so.

[66] The key components of the defendant's position are that:

1. a comparison of the contents of the existing claim with the contents of the proposed amended claim show them to be the same;

2. the plaintiffs should have pleaded the expropriation cause of action in 1996;

3. to permit the creation of sub-class B amounts to a total repudiation of the Settlement Agreement and Releases executed in furtherance of the fulfillment of the agreement; and therefore

4. the plaintiffs should be estopped from being permitted to rejoin the action.

Are the components of the existing and proposed claims the same?

[67] The defendant has prepared the following chart to show that the claims are the same:

Nature of Claim	1996 Originating notice Of Action and Statement of Claim	Correspondence paragraph in Amended Notice of Action and Statement of Claim
The City of Halifax did not make arrangements to provide the Africville land owners with independent legal advice.	Paragraph 12	Paragraph 19(f)
The City of Halifax did not provide the Africville land owners with adequate compensation.	Paragraph 13	Paragraph 19(a)(b)(c) and 22(c)
The City of Halifax threatened pressured or forced the Africville residents to agree to the compensation offered.	Paragraph 14	Paragraph 18(a)

Nature of Claim	1996 Originating notice Of Action and Statement of Claim	Correspondence paragraph in Amended Notice of Action and Statement of Claim
The Africville land owners were not aware of the nature and consequences of any agreements they entered into.	Paragraph 15	Paragraphs 19(g) and 23
Any agreements reached between the Africville land owners and the City of Halifax and any Deeds executed by Africville land owners are void or unenforceable.	Paragraph 16	Paragraph 24
By not using the expropriation provisions in the Halifax City Charter, the City of Halifax committed an abuse of discretion and a series of jurisdictional errors, and therefore any agreements or Deeds entered into with respect to the relocation are void or voidable.	Paragraphs 18 and 19	Paragraphs 22 (a), (b) and (c), 25 and 26

[68] I agree with the defendant's submission. The factual underpinning alleged in support of the claim and the compensation sought is essentially the same in both. The amended claim differs only in that it omits certain allegations of fact that are not relevant to the expropriation argument; and it replaces the previous causes of action with one new one – the expropriation argument.

Should the "expropriation" argument have been pleaded in the 1996 Statement of Claim?

[69] Counsel for the plaintiffs says that persons who fall into the proposed Sub-class B, gave their Releases and consented to dismissal of their claims not knowing that they had a potential claim in expropriation. They claim that the defendant is guilty of fraud for not disclosing to them that the Municipality had expropriated the Africville lands until after they agreed to release their claims and dismiss their actions against the defendant.

[70] Mr. Pineo asserts in his affidavit that the fact of expropriation was only learned of by the plaintiffs when they saw the defendant's "unsworn Affidavit disclosing Documents provided to the defendants sometime in 2012". He also states that the original statement of claim pleaded that the defendant had not used the power of expropriation to acquire the Africville community, and that the defendant's statement of defence, filed in 2012, "…did not plead as a fact that it had, in fact, expropriated the community of Africville."

[71] The defendant flatly denies that the fact of expropriation was "hidden" from the plaintiffs and their legal counsel.

[72] Contrary to Mr. Pineo's affidavit, the statement of defence, filed March 30, 2012, specifically pleads that the defendant did expropriate the lands:

> 17. The defendant further states that to ensure clear title to the land, then vacant by reason of the aforesaid acquisitions from all known owners, it expropriated the Africville lands, and the plan of expropriation, Plan No. 2022, and the Resolution of Council, were recorded at the Registry of Deeds on November 26, 1969.

[73] The proposed Sub-class B plaintiffs were represented from 1996 until 2010 by legal counsel. The fact of expropriation was in the public domain throughout the time that Mr. Walter had carriage of the file. The Plan and Resolution of Halifax City Council giving effect to the expropriation was registered with the Registry of Deeds in November.

[74] There is also information, filed in this hearing, dating to 1969 that includes a newspaper advertisement giving public Notice of Expropriation of the lands of one resident of Africville and a copy of a letter to the estate of that former resident, Aaron Carvery, advising the estate of the expropriation and of rights of the estate to challenge the amount ordered to be paid. (It appears that Halifax had been unable to otherwise acquire the late Aaron Carvery's interest.)

[75] The fact of this expropriation was known to at least the descendants of Aaron Carvery. It was an easily discoverable fact for others interested in determining whether Halifax had expropriated any of the Africville land interests.

[76] Presumably title searches in support of establishing the plaintiffs' claims to land ownership would also have disclosed the expropriation plan registration.

[77] The issue of why expropriation was not previously advanced as a cause of action is a matter between Mr. Walter and those who consented to dismissal of their claims. The 1996 claim, at paragraph 11, states:

> During the relocation the City of Halifax did not expropriate the lands in question, but rather paid the Africville landowners compensation for their property.

[78] At paragraph 19, the claim alleges that the defendant abused its discretion by electing to negotiate the purchase of each person's land, rather than using the expropriation provisions in the City Charter.

[79] The language of these paragraphs is accurate but careful. The sequence, according to the evidence presently available to the court, shows that the defendant negotiated with the landowners for the purchase of the lands. Only after the purchases were concluded did it expropriate the lands, from itself as the landowner. The reasons for this, as pleaded, related to the concern that there might be outstanding and unidentified claimants to title of the lands.

[80] I cannot say that Mr. Walter did or did not know of the expropriation. I cannot say whether he did or did not provide legal advice and take instructions as to whether the validity of the expropriation, as a cause of action, should be considered. What I can say, from a look at the pleadings, is that the issue of whether the lands were subject to expropriation was considered and spoken to in the 1996 claim, and that the proposed Sub-class B claimants consented to dismissal of their claims with that knowledge.

[81] I conclude that the proposed cause of actions "should" have been pleaded in the 1996 claim.

Effect of the Releases and Consents to Dismissal

[82] Two persons are proposed as Representative Plaintiffs who would be members of Sub-class B, being: Lyle Grant and Ada Adams. I will use the circumstances of their cases for the purposes of this analysis.

[83] Lyle Grant and Ada Adams were original plaintiffs in 1996. The claim of Ms. Adams was dismissed on July 7, 2010, and that of Mr. Grant was dismissed on October 8, 2010. Both of these orders for dismissal were issued on consent of the parties and on the basis of the representations of Mr. Walter who was acting as legal counsel to these plaintiffs at the relevant times.

[84] Each signed a Release that included a declaration that "…the terms of this Release are fully understand [sic] by them after consultation with their solicitor".

[85] The document provides for a comprehensive blanket release by the Releasor, for themselves, their successors and assigns (among others):

> …from any and all actions, causes of actions, claims or demands which against the Releasees the undersigned ever had, now have, or which their respective successors, assigns, or any one of them hereafter can, shall, or may have for or by reason of any damages, losses, or injuries, including any debts, relating directly or indirectly to the undersigneds' claims and causes of actions arising from the relocation of Africville residents in the 1960's, and without in any way limiting the generality of the foregoing , relating in any way, directly or indirectly, to the subject matter of an action commenced by the undersigned in the Supreme Court of Nova Scotia (SH 126561).

[86] There is an obligation on a plaintiff to prosecute their claim. The reasons for permitting, or consenting to, a dismissal of one's claim is personal to that individual. The circumstances of these two proposed representative plaintiffs illustrates this point.

[87] Mr. Grant and Ms. Adams were represented by legal counsel who, I must presume, was acting on their instructions when he indicated their consent to the dismissal of their respective claims in this action. The defendant is not in a position to go behind the solicitor-client relationship that existed between Mr. Grant and Ms. Adams with Mr. Walter at the time of their having given consent to dismissal.

[88] The nature of the relationship of Mr. Walter's legal team and Mr. Grant may be quite different from that with Ms. Adams. Issues of the advice provided, the instructions given and the outcome agreed to are relevant to the validity of the consent. The remedy may or may not be as against legal counsel in either or both cases if the former plaintiffs are arguing against the quality of the legal services they received.

[89] In particular, I note that Mr. Grant's consent to dismissal was not until October of 2010, some 3 months after the challenge to Mr. Walter's representation was brought by those who did not agree to the settlement. During that period Mr. Walter was engaging in attempts to speak directly with those dissatisfied plaintiffs. It would be relevant and material information as to what, if any, communications took place as between counsel and Mr. Grant in that time frame.

[90] While the court may not have been called upon to adjudicate on the merits of the claims, the court can reasonably expect that plaintiffs who have the benefit of legal counsel, to have considered the merits of the claim and to have understood that the dismissal represented "final judgments ….conclusive as to all of the essential findings necessary to support them". see, para. 69, *Hoque*, *supra*.

[91] The Settlement Agreement was entered into following 14 years of negotiations between the plaintiffs and the defendant. The defendant fulfilled its part of the settlement, but the contested proposed amendments to paragraphs 1, 3 and 4 of the claim seek to reopen that settlement, causing significant prejudice to the defendant.

[92] One of the eight conditions in the Settlement Agreement is that the defendant will not pay compensation to individual plaintiffs. Proposed Sub-class B plaintiffs would be eligible to claim personal compensation notwithstanding that they signed the Release and consented to an order dismissing their claims. To permit this result would effect a total repudiation of the agreement which the defendant relied on when entering into and fulfilling their obligations under the terms of the Settlement Agreement.

[93] The defendant relied upon these releases and orders of dismissal. It will have done so to its considerable detriment if the proposed Sub-class B plaintiffs are permitted to pursue their claims again. The defendant transferred the land and paid millions of dollars to contribute to the construction of a replica church at the Africville site.

[94] In summary, by signing the Release and by giving their consent to dismissal, the proposed Sub-class B plaintiffs represented to the defendant in words and by acts or conduct that they accepted the terms of settlement, knowingly and with the advice of legal counsel. In doing so, these plaintiffs induced the defendant on the faith of such representations to alter its position to its detriment, that is, the defendant fulfilled the very significant obligations of the Settlement Agreement while surrendering its ability to defend against the claims of those persons. Granting the amendments will remove the finality that the terms of the agreement provided to both parties.

[95] I am cognizant of the fact that there were no findings made by a court as to the merits of the dismissed claims. Justice Cromwell observed in *Hoque*, *supra*, at para. 39 that: "There is authority for the view that *res judicata* should be applied in a more limited way when the judgment giving rise to the plea was obtained on default." However, it must also be remembered, as Justice Cromwell said in *Hoque*, *supra*, at para. 69 that: "At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them".

[96] I find that the facts of this case do not approximate those where a default judgement underpinned the success of the action against a defendant.

[97] I conclude that those persons whose claims were previously dismissed are estopped from being added as parties and as a result I refuse to permit an amendment to create proposed Sub-class B.

[98] In the alternative, and assuming I am wrong in concluding that the applicants are estopped from being added, I refuse permission to amend the statement of claim so as to create a Sub-class B that includes all former residents and the estates

of deceased former residents of Africville who were removed from the physical community of Africville between 1962 and 1970, who have signed Releases to this action, and whose claims were dismissed by an order of the court with their consent. The motion to amend in this manner is denied. In my view, even if it could be said that the applicants are not estopped from being added, it is inappropriate to grant permission having regard to the facts as I have found them.

*Effects of Judicially Imposed Dismissal (**Rule 4.22**)*

[99] Proposed Sub-class B also proposes to include plaintiffs whose claims were "…otherwise dismissed or discontinued". I have previously indicated that persons whose claims were discontinued are permitted to rejoin the action as plaintiffs and will fall into Sub-class A. There are other plaintiffs whose claims were dismissed for want of prosecution. One of the proposed representative plaintiffs falls into this category.

[100] Rosella Williams was originally a plaintiff in the action. Her claim was dismissed by an order made pursuant to **Rule 4.22** on January 4, 2012. Her name remains as the first named plaintiff in the style of cause solely for the purpose of ensuring consistency for case administration and citation purposes.

[101] Rosella Williams' claim was dismissed for failing to prosecute the claim in a timely manner. She did not appear at the hearing of the Prothonotary's motion and made no representations in support of continuing her claim. The dismissal hearing took place almost a year and a half after the division arose among the plaintiffs, and almost 16 years after the action was commenced. There was ample opportunity for Ms. Williams to be heard. I have no evidence to support a conclusion that the order of dismissal should be set aside.

[102] Similarly, I have no basis upon which to set aside any other order dismissing a plaintiff's claim for failing to prosecute.

[103] The motion to amend so as to create a Sub-class B that includes "plaintiffs whose claims were otherwise dismissed" is denied.

The limitation period argument

[104] The defendant submits that **Rule 35.08(5)** precludes the court from joining new parties because their claims are statute barred, having come forward after the expiration of the relevant limitation period.

[105] Counsel for the plaintiffs submits that having regard to the law of expropriation it is not clear that such a defence is supportable, and that the determination can only be made following a trial of the issue.

[106] In view of my decision to deny the motion to add the contested new parties it is unnecessary to respond to this argument. Having said that, I note my agreement with the position of the plaintiffs. The defendant can and has pleaded a limitation period defence. It will be a matter for trial to determine whether the defence can be made out as against the existing plaintiffs. I would not be prepared to rule that **Rule 35.08(5)** would be a basis upon which to deny the motion to add proposed parties.

Removing Parties

[107] Having resolved who is a plaintiff, counsel seeks to then amend by removing the names of all of those persons as parties, but for the intended representative plaintiffs.

[108] To give effect to this result, the plaintiffs seek, and the defendant consents, to amend the pleadings by removing the names of all named plaintiffs from the style of cause except those who are determined to be a Representative Plaintiff. i.e., Nelson Carvery.

Style of Cause

[109] In view of the denial of motions that would permit Rosella Williams, Lyle Grant and Ada Adams to be added as plaintiffs, the motion to amend the style of cause and paragraph 1 of the statement of claim to add Rosella Williams, Lyle Grant and Ada Adams as representative plaintiffs in this claim is denied.

[110] In view of the motion to certify as a class action, and with Nelson Carvery being the sole Representative Plaintiff, the style of cause will be amended to include only the name of Nelson Carvery as plaintiff.

Consequential amendments

Paragraphs 3, 4, 31 and 32(b)

[111] The defendant consents and I am prepared to grant an order amending paragraphs 3 and 4(a) in the manner requested by the plaintiffs. I refuse the motion to amend to create paragraph 4(b).

[112] Ms. Vemb and Ms. Wareham are the two persons who discontinued their claims. By agreement of counsel they are added as parties again. They are now captured by the definition of Sub-class A described in paragraph 4(a). As such the pleading in proposed paragraph 31 is unnecessary and will not form part of the amended statement of claim.

[113] Similarly paragraph 32(b) seeking an order to reinstate their claims is moot and will not form part of the amended statement of claim.

Paragraphs 28-30

[114] Proposed paragraphs 28-30 plead the reasons that those persons who signed Releases should have those Releases declared null and void. Paragraph 32 specifically sets out the request for an order to declare the Releases null and void. These questions have been rendered moot by my determination that Sub-class B will not be included in the amended claim. Therefore the motion to amend to include paragraphs 28-30 is denied.

[115] The defendant's reliance on **Rule 35.08(5)** as precluding the court from permitting otherwise eligible litigants to advance a claim because their claims are statute barred is not a basis to deny the participation in the claim as a plaintiff, or as a member of a class. Pleading a limitation period defence is just that, a pleading. It does not prohibit a person from bringing their claim forward. The

question of whether this may be certified as a common issue is for the proposed certification hearing.

Summary as to Motions 4 and 5

[116] The motion to amend the Pleadings "…by striking the Originating Notice and Statement of Claim in their entirety and substituting them with the Notice of Action and Statement of Claim filed with the Notice of Motion" is granted subject to the following comments and exceptions:

1. The proposed amended statement of claim will be in the form filed on January 13, 2015 with the affidavit of Anthony Scott;

2. The motion to amend to create a paragraph 4(b) describing a Sub-class B is denied;

3. The motion to amend the claim by naming as Representative Plaintiffs those persons whose claims have been dismissed by a court order is denied, therefore paragraph 1 cannot include the names of Rosella Williams, Lyle Grant and Ada Adams as Representative Plaintiffs;

4. The style of cause will name Nelson Carvery, as a Representative Plaintiff. The style of cause will not include the names of Rosella Williams, Lyle Grant or Ada Adams;

5. The motion to include proposed paragraphs 28-30 is denied;

6. The motion to add as plaintiffs those whose claims were withdrawn, being Victor Carvery, Edward Carvery and Albert K. Sparks is moot as they are already plaintiffs. There are no other claims that have been withdrawn;

7. The motion to add as plainitffs those who discontinued their claims, being Jean Vemb and Isabel Wareham is granted. There are no other claims that have been discontinued;

8. The motion to amend the claim by deleting all plaintiffs' names, including the estates of deceased plaintiffs who have approved

Personal Representatives, from the style of cause and from paragraph 1, excepting Nelson Carvery is granted;

9. Proposed paragraphs 31 and 32(b) seeking to reinstate the discontinued claims of Jean Vemb and Isabel Wareham will be deleted.

Motion 6: *To set a date for a Motion for Directions for the proposed certification of the amended claim under the* ***Class Proceedings Act****.*

[117] Counsel should contact my assistant when they are ready to have a case management conference to discuss the future course of this action.

Motion 7: *Costs*

[118] If the parties are unable to agree on costs, I will receive their oral submissions at the next case management conference.

Order

[119] I direct counsel for the plaintiffs to prepare the order.

Schedules

[120] Attached as Schedule "A" is a list of plaintiffs who, as a result of these motions, will be removed as parties to this action.

[121] Attached as Schedule "B" is a list of plaintiffs whose claims have been previously dismissed and who, as a result of this decision, are estopped from being, and refused permission to be, added as parties.

Duncan, J.

Schedule "A"

(Removed as parties)

Living Plaintiffs (37)

1. Allen, Mildred D.
2. Brown, Donald
3. Brown, Shirley
4. Carvery, April
5. Carvery, Blenn Edward
6. Carvery, David Bruce
7. Carvery, Dean
8. Carvery, Edward Bayfield
9. Carvery, Edward Leo
10. Carvery, John Edward
11. Carvery, Rose Charlene
12. Carvery, Victor William
13. Carvery, Yvonne
14. Cassidy, Marlene Bernice
15. Dixon, Donna Darlene
16. Dixon, Leonard James
17. Emmerson-DeLeon, Debra Lee
18. Flint, Bernice
19. Flint, Idella Marie
20. Flint, Olive
21. Flint, Raymond Patterson
22. Flint, Sheila
23. Grant, Warren
24. Howe, Ronald W.
25. Izzard, Marjorie Carrie-Ann
26. Izzard-Carvery, Marie Louise
27. Izzard, Martina
28. Izzard, Phillip Daniel
29. Izzard, Shawn
30. Peters, Alfreda
31. Thomas, Roger Leslie
32. Vemb, Craig
33. Vemb, Flemming
34. Vemb, Jean
35. Vemb, Leo
36. Wareham, Isabel
37. Williams, Teresa Patricia (Carvery)

Estates (14)

1. Brown, Clarence
2. Byers, Wennison
3. Carter, Vera
4. Carvery, Bernadine
5. Carvery, Doramae
6. Carvery, Jack
7. Carvery Rosalyn
8. Dixon, Wayne S.
9. Flint, Ernest
10. Flint, Morton
11. Izzard, Irene
12. Johnson, Gerald J.
13. Johnson, Ruth B.
14. Sparks, Albert K.

Schedule "B"

(Claims dismissed)

Dismissed Original Plaintiffs (By Consent)

2010 July 10

1. Adams, Ada Carvery
2. Adams, Clara
3. Arsenault, Bernice
4. Beals, Herman
5. Carter, Melvin R.
6. Carvery, Alice
7. Carvery, Brenda
8. Carvery, Gordon
9. Carvery, Hope Johnston
10. Carvery, Irvine T.
11. Carvery, Lee (Honey)
12. Carvery, Percy Jr.
13. Carvery, Percy
14. Carvery, Priscilla
15. Carvery, Sharon
16. Carvery, Stanley
17. Carvery, Vivian
18. Emmerson, Leon
19. Grant, Rose L.
20. Izzard, Terry
21. Lucas, Sheila Howe
22. Marsman, Ivy
23. Marsman, Velma
24. Oliver, Earlene
25. Oliver, Ruby
26. Paris, David
27. Polegato, Kim
28. Smith, Paula Grant
29. Thompson, Fenwick
30. Tolliver, Woody
31. AGS for Unknowns
32. AGS in own right

2010 October 08

33. Dixon, Rodrick C.
34. Dixon, Leroy E.
35. Gordon, Gloria
36. Grant, George A.
37. Grant, Lyle M.
38. Lawrence, Evelyn

Dismissed Estates of Original Plaintiffs

2010 July 10

1. Brawn, John
2. Byers, Frances Cain
3. Byers, Howard
4. Byers, Sarah
5. Carvery, Aaron
6. Carvery, Edward
7. Carvery, Hattie
8. Carvery, Herbert
9. Carvery, Lucy
10. Carvery, Milton
11. Carvery, Myrtle
12. Cassidy, Hazel
13. Cassidy, Robert
14. Chisholm, Douglas
15. Clayton, William
16. Desmond, Elsie
17. Dixon, Cecil
18. Dixon, David
19. Dixon, Dora
20. Dixon, Theresa
21. Downey, Christina
22. Elcock, Ken
23. Flint, Effie
24. Fowler, William
25. Howe, Percy
26. Howe, Russell
27. Howe Thomas
28. Jackson, June
29. Jackson, Wilfred
30. Jones, Ralph
31. Izzard, Daniel
32. Mantley, Charles
33. Mantley, George
34. Mantley, Sarah
35. Marsman, Clement
36. Newman, Granville
37. Nichols, Walter
38. Parris, James
39. Regis, Annabelle
40. Sims, Vincent
41. Skinner, Joseph
42. Steed, Leon
43. Stewart, David
44. Swami, Rose
45. Thomas, Ella
46. Tolliver, Evelina
47. Williams, Joseph
48. Walsh, William

2010 October 08

49. Carvery, Clarence D.
50. Dixon, Anne M.
51. Grant, George H.
52. Emmerson, Robert
53. Petersen, Herman
54. Thompson Donelda
55. Thompson, Evelyn

Dismissed Original Plaintiffs (Rule 4.22)

1. Byers, Grace
2. Cain, Darlene
3. Cain, Wylie
4. Carvery, Elden
5. David, Sharon
6. Downey, Andrew
7. Izzard, Carolen
8. Mayfied, Karen
9. Parris, Helena
10. Scott, Warren
11. Touissant, Wendy
12. Williams, Rosella