

SUPREME COURT OF NOVA SCOTIA

Citation: Williams v. Halifax (City), 2011 NSSC 84

Date: 20110217

Docket: Hfx 126561

Registry: Halifax

Between:

Rosella Williams, Terry Izzard, Lee (Honey) Carvery, Woody Tolliver, Evelyn Lawrence, Wendy Toussaint, Dr. Ruth B. Johnson, Gerald J. Johnson, Clarence Brown, Shirley Brown, Sharon David, Vera Carter, Grace Byers, Wennison Byers, Stanley A. Carvery, Alice Carvery, Ada Carvery Adams, Percy Carvery, Jr., Brenda Carvery, Elden Carvery, Percy Carvery, Vivian Carvery, George A. Grant, Clara Adams, Rose L. Grant, Warren Scott, Paula Grant-Smith, Lyle M. Grant, Ronald W. Howe, Albert K. Sparks, Jack Carvery, Alfreda Peters, Leon Emmerson, Sharon Carvery, Kim Polegato, Gloria Gordon, Karen Mayfield, George H. Grant, Herman Petersen, Victor Carvery, Edward L. Carvery, Fenwick Thompson, Donelda Thompson, Irvine T. Carvery, Clarence D. Carvery, Evelyn Thompson, Priscilla Carvery, Rodrick C. Dixon, Anne M. Dixon, Leroy E. Dixon, Wayne S. Dixon, Craig Vemb, Jean Vemb, Leo Vemb, Flemming Vemb, Robert Emmerson, Helena Parris, David Paris, Hope Johnston (Carvery), Gordon Carvery, Irene Izzard, Mildred D. Allen, Andrew Downey, Martina Izzard, Carolen Izzard, Olive Flint, Bernice Arsenault, Rosalyn Carvery, Ruby Oliver, Melvin R. Carter, Yvonne Carvery, Morton Flint, Herman Beals, Darlene Cain, Earlene Oliver, Wylie Cain, Sheila Lucas (Howe), Velma Marsman, and Ivy Marsman, and The Africville Genealogy Society, a body corporate, incorporated pursuant to the *Societies Act*, R.S.N.S. 1989 c. 435; and,

The Africville Genealogy Society, a body corporate, incorporated pursuant to the *Societies Act*, R.S.N.S. 1989 c. 435, in its capacity as representative of former residents of Africville and their descendants, presently unascertained, who may be affected by this proceeding, as confirmed by Order of Hall, J., dated February 27, 1996; and

The Africville Genealogy Society, a body corporate, incorporated pursuant to the *Societies Act*, R.S.N.S. 1989 c. 435, in its capacity as representative of the estates of Evelina Tolliver, Joseph Williams, William Walsh, Joseph Skinner, Herbert Carvery, Edward Carvery, Daniel Izzard, Robert Cassidy, Howard Byers, Sarah

Byers, Frances Cain Byers, Aaron Carvery, Hattie Carvery, Lucy Carvery, John Brown, Milton Carvery, Myrtle Carvery, Hazel Cassidy, Elsie Desmond, Douglas Chisholm, William Clayton, Cecil Dixon, Dora Dixon, Theresa Dixon, Christina Downey, David Dixon, Ken Elcock, Effie Flint, William Fowler, Percy Howe, Russell Howe, Thomas Howe, Ralph Jones, Wilfred Jackson, Charles Mantley, George Mantley, Sarah Mantley, Granville Newman, Clement Marsman, June Jackson, Walter Nichols, James Parris, Annable Regis, Vincent Simms, Leon Steed, David Stewart, Rose Swami and Ella Thomas, deceased persons, as confirmed by Order of Hall, J., dated February 27, 1996

Plaintiffs

- and -

The City of Halifax, a body corporate

Defendant

Final Decision on Motion of Plaintiffs' counsel to withdraw

Judge: The Honourable Justice Patrick J. Duncan

Heard: February 17, 2011, in Halifax, Nova Scotia

Counsel: Paul L. Walter, Q.C. Ashley Thomas and Randall Balcome, for the Applicants

Mary Ellen Donovan, Q.C. and Karen MacDonald for
Halifax Regional Municipality

By the Court (orally):

Introduction

[1] On September 15, 2010 a Notice of Motion was filed by Paul L. Walter Q.C. seeking an order pursuant to **Civil Procedure Rule 33.11** to remove himself, Randall P.H. Balcome, and John R. Bishop, and their law firm as counsel of record for 38 people who they were representing as plaintiffs in this case. The matter was returnable for hearing on October 8. My decision in relation to that application was reported as *Williams v. Halifax* 2010 NSSC 467.

[2] On January 6, 2011, the motion returned to court for further submissions and directions in relation to the status of the twenty-five plaintiffs whose claims were still pending by that date. The intended effect of the decision was to grant the motion in relation to the following 18 persons:

Grace Byers
Darlene Cain
Wylie Cain
Vera Carter
Elden Carvery
Yvonne Carvery
Sharon David
Andrew Downey
Olive Flint
Carolyn Izzard
Martina Izzard
Karen Mayfield
Helena Parris

Alfreda Peters
Warren Scott
Wendy Toussaint
Rosella Williams and
Shirley Brown

[3] Seventeen of these plaintiffs failed to appear at the October hearing to respond to Notice of the Motion. In the absence of opposition, I was prepared to grant the motion of counsel to withdraw. Shirley Brown was added to this list because of comments made in court by her representative, Donald Brown, which caused me to conclude that she did not want to have Mr. Walter or his colleagues as her counsel.

[4] With respect to the remaining seven plaintiffs, I concluded that it was premature to rule on the motion to withdraw. These individuals, or their representatives, satisfied me in oral submissions that in order to conclusively determine whether there could be a solicitor-client relationship that there needed to be an in person meeting as between the solicitor(s) and the clients. Those seven are:

Mildred Denise Allen
Wayne S. Dixon
Ronald W. Howe

Flemming Vemb
Jean Vemb
Leo Vemb and
Craig Vemb

[5] When the matter returned to court on January 6th, 8 of the 18 plaintiffs that I first listed above, or their representatives, appeared in court and made submissions.

Those persons were:

Grace Byers who appeared by Jason Regan
Wylie Cain
Yvonne Carvery (by Olive Flint)
Andrew Downey (by Viola Cain)
Olive Flint
Carolyn Izzard (by Mildred Denise Allen)
Martina Izzard and
Shirley Brown (by Donald Brown).

[6] These plaintiffs appeared and provided reasons for failing to appear at the October hearing and submitted that they should be treated in the same way as the seven who did appear. As the order to grant the motion in relation to them had not been taken out, they submitted that it was open to the court to grant them the same opportunity to meet with the solicitors and to determine whether a solicitor-client relationship could be maintained. In essence, they submitted that it was incorrect for Mr. Walter to assume that they disagreed with his advice and that they wanted the opportunity to meet and discuss the matter.

[7] Mr. Walter consented to this request and indicated the willingness of he and his legal team to arrange individual meetings with any of these 15 plaintiffs who wanted to meet and discuss the question of a continued retainer as solicitor.

[8] Detailed affidavit evidence presented by Mr. Walter reports on the results of the intended meetings. Carolen Izzard did not participate despite various efforts made to set up a meeting with her. Leo Vemb was represented by Craig Vemb. The remaining 13 plaintiffs each met with Mr. Walter's legal team and engaged in discussions that lasted up to 2¼ hours.

[9] Mr. Walter swears in his affidavit that he cannot continue to act as solicitor for the remaining plaintiffs. He submits that he cannot ethically continue to act for clients who do not accept his advice, and that to continue to act would place him in a conflict of interest. He is not able to provide the specifics of the discussions as to do so would breach solicitor - client privilege.

[10] I refer to and incorporate paragraphs 54-71 of my earlier decision on this motion into the reasons for this decision, as they set out the applicable legal principles and their general application to the circumstances of this case.

[11] For ease of reference I repeat the following taken from *R. v. Cunningham*, a Supreme Court of Canada case reported at 2010 SCC 10, where at paragraph 49,

Justice Rothstein states:

49 If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see *C. (D.D.)*, [1996] A.J. No. 829, at p. 328, and *Deschamps*, [2003] M.J. No. 336, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be *required* to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.

[12] I heard today from five of the plaintiffs. Martina Izzard submits that Mr. Walter had an obligation to ensure that the Africville Genealogy Society (AGS) instructions were properly obtained and a true reflection of the wishes of the members. Ms. Izzard does not feel he fulfilled his responsibility to individual members, like her.

[13] Denise Allen says that Mr. Walter should have identified the potential conflict long before 2010 and that his failure to do so has the potential to leave her without a lawyer when she could have had someone else working on the matter perhaps as long ago as 2000. Mr. Walter takes issue with this and says that the conflict only became apparent in 2010 when he made his recommendation to the plaintiffs to settle.

[14] Ronald Howe points out that approximately 15 years have gone by since this action was initiated and now, because of the AGS and Mr. Walter's actions he is worried that the matter is only now going to be dealt with on its merits and that his ability to prosecute is prejudiced or is being prejudiced by this.

[15] Wylie Cain submits that it is a matter of contract. Mr. Walter has one and should fulfill his responsibilities under the contract to represent.

[16] Craig Vemb questions the quality of the representation over the years. He has similar concerns with respect to the relationship of the AGS to Mr. Walter as counsel, and what he sees, as well, as a failure to reflect the AGS membership views.

[17] With the benefit of Mr. Walter's legal opinion and advice, over 90 plaintiffs claims have been withdrawn or dismissed by the court. There has been a settlement that is publicly known and referred to in the written and oral submissions on this motion.

[18] It is reasonable to infer that the advice provided by Mr. Walter has been rejected by the remaining plaintiffs because the advice is adverse to, or at least not consistent with, the instructions that these remaining plaintiffs seek that counsel act upon. I take this from counsel's representations and evidence, and in part from the comments that have been made by the plaintiffs in speaking to this motion, not just today, but on the previous days that we have been here. I cannot see how, in such circumstances, it would be possible to maintain the necessary confidence that must exist in the solicitor-client relationship.

[19] In fact the representations that I heard today make that even more apparent. The speakers express a strong distrust of the quality of Mr. Walter's legal work, his advice and the manner in which he achieved the settlement that was accepted.

[20] It would be difficult for Mr. Walter to advance a position now that is inconsistent with that adopted by approximately 80% of the other plaintiffs and which was subject to lengthy negotiations with the defendant. It is reasonable to infer that he would have a credibility problem now going to the defendant to advocate a different result than one he has already negotiated and recommended acceptance of.

[21] I am mindful that this is a complicated case and likely to be an expensive one to prosecute. The remaining plaintiffs risk a disadvantage by not having the knowledge of Mr. Walter to assist them in pursuing this claim. I am sympathetic to those concerns. It would be better for all if the plaintiffs had legal representation.

[22] However, the law and experience tells me that there are times when there is no solid basis on which to continue the solicitor-client relationship. Every decision, every piece of Mr. Walter's advice from now on that runs contrary to the wishes of these plaintiffs will be subject to doubt and distrust. They have already questioned the quality of his work - that is no basis for a relationship that has to be based on trust and respect.

[23] In saying this, I want to be clear, I make no finding that these allegations against Mr. Walter have any merit. These are the feelings of the speakers that I have heard from today and I have heard them. It is not part of my role to make an assessment of whether they are accurate. Instead, my duty is to look at the impact that these opinions have on whether Mr. Walter could continue to act. I conclude that they reinforce the case that Mr. Walter has put forward in support of his motion.

[24] I grant the motion. Mr. Walter, Mr. Balcome and Mr. Bishop will be removed as solicitors of record for the plaintiffs. I am confident that Mr. Walter will try to ensure the effective transfer of the file to any new counsel that the plaintiffs may retain to take over this claim. I add one proviso to this, Mr. Walter: that you, as counsel, provide continuing assistance to the Prothonotary by providing, from time to time, all available contact information for any plaintiff whose claim is outstanding. I urge that counsel use the assistance of the AGS where that is appropriate and may be of assistance.

[25] Turning to the matter of Ms. Vera Carter. Ms. Vera Carter sadly passed away in January, according to the information I have been provided. She has been named as a plaintiff. I had previously granted the motion for counsel to withdraw from representing her. Affidavit evidence of Mr. Walter has satisfied me that Ms. Carter passed away on January 17, 2011. There has been no representative joined to pursue this claim in her name. Therefore, I direct, pursuant to **Rule 35.11** that a stay of proceedings be entered of the claim of Vera Carter.

[26] I am also directing a change in the style of cause and what that means is that all of the documents that the parties have had to this point listed as plaintiffs all of the 128 plaintiffs that started the action. I am now directing that future documents will be changed to only reflect those persons whose claims are still alive and able to proceed. And so to properly reflect the parties to this action, and pursuant to **Rule 82.09 (7)**, I direct that the style of cause in this matter is varied to include only those plaintiffs whose claims have not been withdrawn or dismissed. There are 24 living individual plaintiffs who will be listed as follows and in this order:

Rosella Williams
Mildred Denise Allen
Shirley Brown
Grace Byers

Darlene Cain
Wylie Cain
Elden Carvery
Yvonne Carvery
Sharon David
Wayne S. Dixon
Andrew Downey
Olive Flint
Ronald W. Howe
Carolyn Izzard
Martina Izzard
Karen Mayfield
Helena Parris
Alfreda Peters
Warren Scott
Wendy Toussaint
Craig Vemb
Flemming Vemb
Jean Vemb, and
Leo Vemb

[27] The style of cause will then list the following persons, whose claims have been stayed by reason of their death and in accordance with **Rule 35.11**:

Clarence Brown

Wennison Byers
Vera Carter
Rosalyn Carvery
Dr. Ruth B. Johnson
Jack Carvery
Morton Flint
Gerald J. Johnson, and
Irene Izzard

[28] Each of the above named plaintiffs, the 24 individuals and the deceased persons, will be reflected in the court record as self represented unless and until new counsel has been named. Just by way of clarity, for those persons present who are interested, the reason that the deceased persons claims are still considered to be part of this action is that there is a provision, as you will recall from earlier decisions, that permits a personal representative under certain circumstances to come back and carry on the action in the name of the deceased person. So those claims have not been dismissed, they are still there, they are just not going anywhere until somebody comes forward to participate.

[29] Now the last question I have to resolve today is costs. I have previously described this motion as premature as it related to some of the plaintiffs. Some context is necessary to understand why this was so.

[30] Counsel for the plaintiffs agreed some years ago that they would take instructions and give advice through the Africville Genealogical Society. When the settlement was reached it was the AGS that acted as the conduit for this information.

[31] It became apparent to counsel that there were some plaintiffs who were unable to be located or who were understood to be adverse to the proposed resolution.

[32] To address this problem, Mr. Walter's firm expended a great deal of time and incurred significant expense to ensure that the remaining plaintiffs were provided the necessary opportunity to meet and discuss the issues which gave rise to the settlement and to the motion to withdraw as counsel. Those efforts started with counsel's letter to the plaintiffs in July of 2010 and continued through the most recent set of meetings into January 2011. Counsel have done all that they could be reasonably expected to do to assess whether the solicitor - client relationship could be maintained.

[33] Counsel's assessment of the ability to act for the plaintiffs in this matter has ultimately shown to be correct and the motion has been successful.

[34] Costs are in the discretion of the court. Typically when a party is successful they get their costs paid by the losing party. Mr. Walter does not ask that anyone

pay his costs and he is correct in not doing so, since this is not the typical type of situation where costs would be ordered, and I point out that is true for all parties.

[35] Now Ms. Allen has made representations this morning and indicates that she feels that she needed to engage counsel to ensure her continued role as a plaintiff. That is not a basis I can order costs on a motion of counsel to withdraw. Ms. Allen's right to continue as a plaintiff was never in jeopardy and that was pointed out in Mr. Walter's correspondence in the July of 2010, and I quote from the last page of that letter where he says:

If you do not agree with the terms of the settlement package presented by the City and wish to continue your legal action against the City, you may do so.

He then goes on to explain why his firm would not be able to act in that case. So it was in writing in July of 2010 that those persons who did not agree with the settlement could continue.

[36] The reason that Ms. Hiltz LeBlanc, (appearing previously for Ms. Dixon) advanced in support of costs was that at that point, in January, she was anticipating that there was some, I think she had called it, some measure of success or some

partial success. Success is measured at the end of the day. That is today and in the end, if you characterize it as success, I suppose you could say then Mr. Walter's motion has been successful. Again, this is not a typical situation where costs would be contemplated by the court.

[37] So for all of these reasons I am not persuaded that it is appropriate to order costs against the applicants, and as the applicants have not sought costs, all of the parties will bear their own costs.

[38] Order accordingly.

Duncan, J.