SUPREME COURT OF NOVA SCOTIA

Citation: Williams v. Halifax (Regional Municipality), 2010 NSSC 467

Date: 20101229
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

Decision on Motion of Plaintiffs' counsel to withdraw

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	October 8, 2010, 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
	Rebecca Hiltz LeBlanc for Mildred D. Allen

By the Court:

Introduction

[1] On March 28, 1996, an Originating Notice (Action) and Statement of Claim was filed by 128 plaintiffs against the then City of Halifax (Halifax), which is now part of the amalgamated community known as the Halifax Regional Municipality.

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

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

[4] 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 plaintiffs seek 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.

[5] The Africville Genealogy Society (the Society), a body corporate incorporated pursuant to the **Societies Act** R.S.N.S. 1989 c. 435 was named as a plaintiff in its own right.

[6] By order of Hall J. (as he then was), dated February 28, 1996, the Society was named 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…". The Society initiated this claim naming these unknowns as plaintiffs.

[7] The order of Justice Hall also named the Society as the representative of the estates of 48 deceased persons, which estates were then named as plaintiffs in this action.

[8] The other original plaintiffs were 79 named individuals.

[9] Counsel of record for the plaintiffs are Paul L. Walter Q.C., Randall P.H. Balcome, and John R. Bishop. Mr. Bishop is no longer practicing law. Mr. Walter has taken the lead counsel role to date.

[10] The Society, through its Board of Directors, took advice from and gave instructions to counsel on its' own behalf and for the other plaintiffs. Mr. Walter satisfied himself that the non Society plaintiffs agreed to this arrangement for managing the litigation.

[11] Over the years, extensive work and negotiations were undertaken by counsel. The Society held meetings of the plaintiffs and acted as the conduit of information between the plaintiffs and their counsel. There was no direct communication between counsel and most of the individual plaintiffs.

[12] In early 2010, the defendant made an offer to settle the claim which offer was presented to the Board of Directors for the plaintiff Africville Genealogy Society. The proposal did not involve compensation to individual plaintiffs but rather payment of funds and transfers of property to the former Africville

community as a whole. A condition of the proposal is that there be no compensation payable to individual plaintiffs.

[13] Counsel for the plaintiffs recommended to the Society that the plaintiffs accept the settlement proposal. The society convened a meeting of the plaintiffs to consider the offer, following which the Society instructed Mr. Walter to accept the offer. A number of individual plaintiffs who accepted the settlement proposal signed releases in favor of the defendant.

[14] When, as part of the agreement, counsel prepared to present an Order to this court to dismiss the action by consent, counsel for the plaintiffs encountered difficulties. It became apparent that not all of the named plaintiffs agreed with the settlement. Other plaintiffs have died and no personal representatives could be located. As well, counsel and the Society lost contact with some of the plaintiffs.

[15] On June 30, 2010, an order was issued pursuant to **Nova Scotia Civil Procedure Rule 26.02 (1)** assigning me as case management judge.

[16] On July 7, 2010, following a chambers 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. This left outstanding the claims of 46 named plaintiffs.

[17] On September 15, 2010 a Notice of Motion was filed by Mr. Walter seeking an order pursuant to **Rule 33.11** to remove himself, Mr. Balcome, Mr. Bishop and their law firm as counsel of record for 38 people. The matter was returnable for hearing on October 8.

[18] Mr. Walter filed two personal affidavits, together with supporting documents and affidavits of service or attempted service on the plaintiffs whose claims continued to be outstanding. In the motion hearing I received the representations from counsel of record for the parties. I also heard submissions of Rebecca Hiltz LeBlanc, counsel for named plaintiff, *Mildred D. Allen*. A number of plaintiffs or family members were also in attendance and those who chose to were permitted to make oral representations to the court on the motion.

[19] This decision responds to Mr. Walter's application to withdraw as counsel, as well as to related issues that arose in the hearing.

Consent Order of October 8 , 2010

[20] At the out set of the motion hearing I was presented with a further Consent Order dismissing the claims of six named plaintiffs being:

Roderick C. Dixon
Leroy E. Dixon
George A. Grant
Lyle M. Grant
Evelyn Lawrence
Gloria Gordon

[21] The Consent Order also dismissed the claims of seven other named plaintiffs who have died since the initiation of the claim. Those persons are:

Anne M. Dixon
George H. Grant
Robert Emmerson
Herman Peterson
Donelda Thompson
Evelyn Thompson
Clarence D. Carvery

[22] The order, as presented, also included the name of plaintiff *Irene Izzard*, who is deceased. Mr. Walter advised the court that he obtained the consent of Ms. Izzard's Trustee in bankruptcy to the dismissal of the proceeding. I was not satisfied that a Trustee in bankruptcy has legal authority to speak for the estate of the deceased person for the purpose of dismissing the action and therefore declined to sign the order insofar as it related to Irene Izzard's claim. In view of the representations in the hearing I direct a stay of her claim be entered in accordance with **Civil Procedure Rule 35.11**, for reasons that I discuss below.

Named plaintiffs now deceased

[23] A number of other plaintiffs have died since the action was filed.

[24] I have reviewed documents filed by Mr. Walter and am satisfied that the following 4 persons are deceased, and that their personal representatives were notified of Mr. Walter's motion to withdraw:

Clarence Brown
Wennison Byers
Rosalyn Carvery
Dr. Ruth B. Johnson

[25] The following 3 persons were alleged by Mr. Walter to be deceased, based on his information and belief, but without a formal proof of death being tendered. Service of the Notice of Motion was effected on next of kin for two of them.

[26] During the course of the hearing, a number of plaintiffs and/or family members were present. Some of those in attendance indicated a family relationship with these persons and confirmed to my satisfaction that in fact these 3 plaintiffs are deceased:

Jack Carvery
Morton Flint
Gerald J. Johnson

[27] **Nova Scotia Civil Procedure Rule 35.11** states:

> 35.11 (1) A proceeding is stayed from when a party dies until an executor, administrator, or other personal representative of the estate of the deceased becomes a party, or a judge appoints a representative under Rule 36 - Representative Party.

[28] No personal representative of these persons has become a party to this proceeding. I conclude that the proceeding initiated by these seven deceased persons must be stayed. As exact dates of death are not known in some cases, the order will stay the proceeding as of "the date of their death" and continue unless and until a personal representative of the estate becomes a party in accordance with **Rule 35.11.**

[29] For the same reasons, I also direct a stay of proceeding of the claim of plaintiff *Irene Izzard*.

[30] In the result, it is unnecessary to determine the application of counsel to withdraw as solicitor for these now deceased persons.

Remaining Plaintiffs

[31] The claims of twenty-five individual plaintiffs remain outstanding.

[32] During the hearing of July 7, 2010, Mr. Walter requested that the court set a further date in anticipation of the motion to withdraw as counsel, which motion had

not been filed as at that time. It was expected that there may be problems in locating some of the named plaintiffs, but it was premature to consider an order for substituted service. Given the number of people involved and the history of his relationship with the plaintiffs, many of whom he never spoke to personally, I indicated to Mr. Walter that if he did file this motion then, in those cases where personal service could not be effected, he should attempt service in the ways traditionally ordered by a court when considering orders for substituted service.

[33] The evidence filed in support of this motion demonstrates a dedicated and costly effort by Mr. Walter and those assisting him to provide proper notice to the affected plaintiffs.

[34] I am satisfied that the following 17 persons were served personally with Notice of Motion:

Shirley Brown
Grace Byers
Wylie Cain
Vera Carter
Yvonne Carvery
Sharon David
Wayne S. Dixon
Andrew Downey

Olive Flint
Ronald W. Howe
Carolen Izzard
Martina Izzard
Karen Mayfield
Helena Parris
Alfreda Peters
Jean Vemb
Rosella Williams

[35] The following 5 persons were served substitutionally on another person:

Mildred D. Allen
Elden Carvery
Wendy Toussaint
Flemming Vemb
Leo Vemb

[36] The following 3 persons could not be served personally or by a form of substituted service on another person:

Darlene Cain
Warren Scott
Craig Vemb

[37] Four of the eight people who were not served personally appeared in person at the hearing and made representations in person or through a representative. They were *Mildred Allen, and Fleming, Leo* and *Craig Vemb*.

Darlene Cain

[38] I have evidence that plaintiffs' counsel conducted unsuccessful online searches for Ms. Cain. A civic address for Ms. Cain was provided to counsel by the Society and counsel also sent her a letter which was returned indicating that she had moved. A process server was engaged to attempt personal service at the address, but on attendance learned that Ms. Cain had been evicted some two months prior to that date and there was no forwarding address made available. The process server was otherwise unable to locate Ms. Cain. Finally, a Notice of Motion was published on September 18, 22 and 24 in the Halifax Chronicle Herald newspaper. Ms. Cain was one of the named persons to whom the notice was directed. All of the essential information of the Motion was provided including contact information of Mr. Walter and Mr. Balcome.

Elden Carvery

[39] I have evidence that plaintiffs' counsel conducted unsuccessful online searches for Mr. Carvery. A former plaintiff and cousin of Mr. Carvery indicated

that information for him could be sent in care of Vivian Carvery at an address in Lower Sackville, Nova Scotia. A letter was sent to Mr. Carvery in care of Vivian Carvery and at the address which had been provided. As well, notice of the motion was served on Vivian Carvery. Finally, a Notice of the Motion was published on September 18, 22 and 24 in the Halifax Chronicle Herald newspaper. Mr. Carvery was one of the named persons to whom the notice was directed. All of the essential information of the Motion was provided including the contact information of Mr. Walter and Mr. Balcome.

Wendy Toussaint

[40] I have evidence that plaintiffs' counsel conducted unsuccessful online searches for Ms. Toussaint. An interview with a former plaintiff caused counsel to believe that she was living in the United States but could be located through her mother, Carol Toussaint, who lives in Halifax Regional Municipality. An unidentified person at the mother's home indicated that correspondence to Wendy Toussaint should be sent to her mother at an address that was provided and that the information would be given to Wendy Toussaint. This was done by mail.

[41] The motion documents were then served personally on Carol Toussaint. Also, a Notice of the Motion was published on September 18, 22 and 24, 2010 in the Halifax Chronicle Herald newspaper. Ms. Toussaint was one of the named persons to whom the notice was directed. All of the essential information of the Motion was provided including the contact information of Mr. Walter and Mr. Balcome.

Warren Scott

[42] I have evidence that plaintiffs' counsel conducted unsuccessful online searches for Warren Scott. Information was provided by the Society giving an address for Mr. Scott that was located in Toronto, Ontario. Four attempts were made at serving Mr. Scott at the address which had been provided, all unsuccessful. The process server also left a detailed telephone message on Mr. Scott's answering machine. Also, a Notice of the Motion was published September 24, 2010 in the Halifax Chronicle Herald. Mr. Scott was one of the named persons to whom the notice was directed. All of the essential information of the Motion was provided including the contact information of Mr. Walter and Mr. Balcome.

[43] In the circumstances I am satisfied that it is appropriate to exercise the discretion provided by **Civil Procedure Rules 2.03(1)(c)** and **33.11(2)** to dispense with the requirement of personal service of the notice of motion to these four named plaintiffs. In making this determination I have considered and compared the examples set out in **Rule 31.10** (Order for substituted method of giving notice of proceeding) with the efforts made by the applicant counsel in this case.

[44] Reasonable attempts to serve notice of the motion have been made. I see no likelihood that further attempts to serve will offer a better chance of successful personal service. I am also mindful of the fact, as was represented by counsel and some of the plaintiffs who made oral submissions at the hearing, that the plaintiffs identify themselves as a close knit community of friends and relatives who keep in communication with each other. This action and the discussions of the settlement proposal have been controversial and well publicized within the community. While it is no guarantee that the four plaintiffs have had actual notice of the motion, I am satisfied that the most effective means to provide notice has been attempted.

Position of applicant counsel

[45] It has been submitted that Mr. Bishop, who is no longer a practicing lawyer in Nova Scotia, should be removed as solicitor of record. I agree and so order.

[46] Mr. Walter and Mr. Balcome (the applicants) also submit that they should be permitted to withdraw as they are unable to obtain instructions from these remaining clients, and/or because the remaining plaintiffs have rejected their advice to accept the settlement offer. They submit that they cannot ethically continue to represent those clients.

Position of the respondent plaintiffs

[47] Seventeen (17) of the remaining plaintiffs have not responded to the application in court, although two of them have made their position known directly to Mr. Walter. He advised the court that *Alfreda Peters* and *Olive Flint* do not agree to accept the settlement offer.

[48] Eight (8) of the remaining plaintiffs participated in the motion hearing, either in person or through a representative.

[49] *Mildred D. Allen*, was represented by Ms. Hiltz LeBlanc, who has been retained solely to address the application to withdraw as counsel, and not to have carriage of the claim itself. Ms. Allen's position on the motion is that:

1. Communications as between a lawyer and their client must be mutual and that Mr. Walter has never attempted to seek her instructions in person;

2. It is not correct for Mr. Walter to assume that she or any other of the remaining plaintiffs disagree with the settlement offer simply because they have not signed or otherwise indicated a willingness to sign a release or consent to dismiss. She submits that their position could only be ascertained once counsel has met to give advice and take instructions, which has not happened; and

3. That while she feels that there has been a substantial breakdown in the relationship between these solicitors and her as their client, her interests would be severely compromised by granting the motion since it would cause her to lose the services of the lawyers who have had carriage of the matter for almost 15 years and who have a special knowledge of the circumstances and information that would be difficult and costly for newly appointed counsel to attain. For this reason, she "leaves the matter with the court" to decide.

[50] *Shirley Brown* was represented by her son, Donald Brown. Mr. Brown's position, on behalf of his mother, is that personal compensation to the plaintiffs should form part of the settlement. His mother feels that Irvine Carvery, the instructing member of the Society to plaintiffs' counsel, was incorrect to recommend acceptance of the offer. She has never spoken with legal counsel in person and wants a different lawyer to deal with the matter.

[51] *Craig Vemb* speaking on behalf of himself, *Jean Vemb, Leo Vemb* and *Flemming Vemb* challenged the legitimacy of the decision taken by the Society arguing that it was presented to the members/plaintiffs improperly. Mr. Vemb says that he felt "bamboozled" by the manner in which the question was put to the members. He wants the Society to re-present the information in a "proper" meeting and after due deliberation. I advised Mr. Vemb that it was not open to the court on this motion to delve into any disputes between the Society and its' members. He expressed a general lack of confidence in plaintiffs' counsel.

[52] *Wayne S. Dixon* and *Ronald Howe* were present but did not speak to the motion.

[53] Ms. Hiltz LeBlanc, with the consent of Ms. Allen, and the court's agreement, spoke to the Vembs and others in attendance during a break in the hearing in an effort to assist them in expressing what remedy they sought. After the break, she advised that they were, in effect, in agreement with the position she had first advanced on behalf of Ms. Allen, and as set out above. They lack confidence in the applicant lawyers, who have not communicated directly with

them about a settlement these plaintiffs claim not to understand, and that they view as suspect. However, they fear the prejudice they believe they will suffer by losing lawyers who have such specialized knowledge of the case. In sum, they too "leave it to the court" to decide.

Analysis

[54] The applicants acknowledge that from the beginning they only communicated with, and took instruction from the Society. Individual plaintiffs were added on the instruction of the Society and after a form was signed that confirmed the authority of the lawyers to act on their behalf. The form was not presented in this application, but I accept the representations as to this arrangement as outlined by Mr. Walter at the July 7, 2010 hearing and which information he confirmed again at the October 8th hearing.

[55] The settlement offer was intended to be communicated to the individual plaintiffs at the meeting convened by the Society for that purpose. I do not have evidence as to what information was provided, or who was in attendance at the meeting.

[56] Mr. Walter swears at paragraph 11 of his affidavit of September 3, 2010 that:

> … In July and August of 2010, letters were mailed to the outstanding living Plaintiffs and to representatives of the outstanding deceased Plaintiffs, informing them of their options to either, settle with the Defendant or, pursue their claims on their own, as we would be making a motion to withdraw as a solicitor.

[57] A sample of the letter was tendered in the motion hearing. It sets out a brief history of the litigation, and seven points of the "settlement package" that the letter describes as "reasonable and worthy of acceptance". In bold letters it indicates that individual compensation to former residents of Africville or their descendants is not included in the settlement.

[58] The letter encloses a release and also indicates that if the recipient has any questions pertaining to the release then they were invited to contact Mr. Walter. It then continues in the closing paragraphs:

> 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. However, I should point out that our firm will not be able, for ethical reasons, to continue to represent you and we will make a motion to the court to withdraw as your legal counsel in this matter. If we do not receive your signed release by August 20, 2010 we will assume that you intend to continue your legal action against the City, and we will deliver to you our Notice of Motion to withdraw as your legal counsel.

> Finally, I should point out that if you decide to continue your legal action against the City, it will be necessary for you or your new legal counsel to take appropriate steps to move the matter forward as failure to do so could ultimately result in dismissal of your action.

[59] Counsel advised that some of the plaintiffs responded to this letter and that some agreed to the dismissal of the action in the consent order that came out of the October 8 hearing as discussed above. Other than that, I do not have evidence confirming receipt of the letter by the addressees.

[60] The applicants have adopted the position that they cannot continue to represent any individual plaintiff who has not signed the release and has not contacted them to discuss the matter.

[61] Generally, it is very difficult for a lawyer to withdraw his or her representation of a client without the client's consent. Chapter 11 of the **Nova Scotia Barristers' Society Legal Ethics Handbook:**

> Rule
>
> A lawyer has a duty to a client not to withdraw services except for good cause and upon notice appropriate in the circumstances.
>
> Guiding Principles

> 1. Although the client has a right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having once accepted professional employment, the lawyer has a duty to complete the task as ably as possible unless there is justifiable cause for terminating the relationship.
>
> 2. The lawyer who withdraws from employment has a duty to minimize expense and avoid prejudice to the client, doing everything reasonably possible to facilitate the expeditious and orderly transfer of the matter to the successor lawyer.
>
> 3. Where withdrawal is required or permitted by this Rule, the lawyer has a duty to comply with all applicable rules of court.

[62] The Handbook does not exhaustively define the causes that justify a lawyer's withdrawal, but it does provide examples of situations where lawyers are obliged to withdraw, as well as examples where lawyers have the option of withdrawing. The applicants have referred me to the following Commentary, taken from the Handbook, advising where withdrawal is obligatory:

> Obligatory Withdrawal
>
> 11.1 In some circumstances the lawyer is under a duty to withdraw.
>
> Examples of such circumstances are
>
> > (a) where the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the court and, following explanation, the client persists in such instructions;
> >
> > (b) where the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass another person or cause injury or damage to another person or another person's property;

> (c) where it is clear that the lawyer's continued employment will lead to a breach of these Rules such as a breach of the Rules relating to Conflict of Interest;
>
> (d) where the lawyer is not competent to handle the matter.
>
> 11.2 In these situations the lawyer has a duty to inform the client that the lawyer must withdraw.
>
> ...
>
> 11.5 The lawyer may also withdraw if unable to obtain instructions from the client.
>
> (Emphasis added)

[63] The applicants also rely on the provisions in Chapter 6 of the Handbook as it relates to the “Rules relating to Conflict of Interest”, identified in 11.1 (c) set out above. That states:

> Chapter 6
>
> Impartiality and Conflict of Interest Between Clients
>
> A lawyer has a duty not to:
>
> (a) advise or represent both sides of a dispute; or
>
> (b) act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.
>
> Guiding Principles
>
> What is a conflicting interest?

> 1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client. Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.

[64] In *R. v. Cunningham* 2010 SCC 10 Rothstein J. set out the jurisdiction of a Superior Court to rule on a motion to withdraw as counsel:

> 9… The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused. These constraints are thoroughly outlined in the rules of professional conduct issued by the provincial or territorial law societies …
>
> 18 Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, this Court confirmed that inherent jurisdiction includes the authority to remove counsel from a case when required to ensure a fair trial:
>
> > The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction.
>
> It would seem to follow that just as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel's application for withdrawal.
>
> …

> 20 Applications regarding withdrawal or removal of counsel, whether for non-payment of fees, conflict of interest or otherwise, are the types of matters that fall within the necessarily implied authority of a court to control the conduct of legal proceedings before it.
>
> …

[65] At paragraphs 46-51, the court set out a number of factors that should be considered in determining whether counsel's request to withdraw should be granted. Relevant to this motion is the following passage from the decision:

> **49** If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see *C. (D.D.)*, at p. 328, and *Deschamps*, 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.

[66] Justice Rothstein concluded:

> **59** In sum, a court has the authority to control its own process and to supervise counsel who are officers of the court. The Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. This jurisdiction, however, should be exercised exceedingly sparingly. It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary, nor where counsel seeks withdrawal for ethical reasons. Where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether withdrawal would cause serious harm to the administration of justice.

[67] This motion presents a significant dilemma for the remaining plaintiffs, and for the court in supervising its own process. The underlying facts and legal arguments made in support of the plaintiffs' claims are complex.

[68] Settlement negotiations between plaintiffs' and defendant's counsel have been ongoing from the outset. Very few steps have been taken to date in advancing the litigation.

[69] Counsel for the defendant has made it clear that once they know who the remaining plaintiffs are, and who, if anyone, represents them, they will seek that the prothonotary bring a motion to dismiss the action for want of prosecution in accordance with **Civil Procedure Rule 4.22.** Even if the motion is unsuccessful, it is apparent that the remaining plaintiffs and their new counsel, if any, would be required to immediately undertake to advance the litigation expeditiously.

[70] There is considerable merit in the position advanced by the plaintiffs in their oral submissions at the motion hearing and to the effect that their ability to prosecute this claim is prejudiced by the loss of counsel who have considerable familiarity with the complexities of the claim.

[71] In my view, the fiduciary relationship that existed between these applicants and these plaintiffs must be honored, to the extent that ethical guidelines will permit.

[72] I am not satisfied on the evidence presented that the applicants are unable to obtain instructions from their clients. Until July of 2010, the plaintiffs had no communication or opportunity to personally instruct counsel. In fact, it was understood that they were not expected to do so. The letter that the applicants sent out to the plaintiffs, while inviting them to contact the applicants to discuss the matter, would not, by its wording, have indicated that the lawyers were open to provide advice beyond the narrow issue of the form and substance of the release. To the contrary, it suggested that if the release was not signed then there would be no solicitor-client relationship.

[73] The eight plaintiffs who participated in the motion hearing did not concede that they have failed to instruct counsel nor that they would fail to do so in the future, especially now that they are alerted to the fact that it is necessary for them to do so.

[74] The facts in this situation are not comparable to those in *Wagner v. Carvery* 2009 NSCA 1117 where counsel, despite a "relentless search" for his client was unable to locate them to obtain instructions.

[75] The applicants adopt the view that since they have already recommended acceptance, they are not in a position to continue to act for those who would not agree with that advice. The second question, then, is whether the remaining plaintiffs, by failing to sign the releases have demonstrated an unwillingness to accept the advice of the applicants.

[76] As a general proposition I agree that where a lawyer provides advice, and the client rejects that advice, it may be evidence of a breakdown of the solicitor-client relationship that is so serious that they cannot continue that relationship. Similarly, and relevant to this case, the solicitor-client relationship may be observed to have broken down where the client loses confidence in the lawyer's ability or willingness to advance their interests.

[77] Again, I am not satisfied that the evidence supports a conclusion that the relationship as between the applicants and some of the remaining plaintiffs has so broken down as to necessitate the termination of the solicitor-client relationship. It may very well be that such a breakdown will soon be well evidenced, but there is a paucity of evidence to support that conclusion at this point and so it would be premature to grant the motion at this time.

[78] In my view, it is necessary for the applicants to sit down with those remaining plaintiffs who are open to seek advice and provide instructions in this matter. It will only be after such meetings have taken place that a true determination can be reached as to whether the solicitor-client relationship has so broken down as to require the withdrawal of the applicants as counsel. In effect, it would be the first opportunity for direct communication between solicitor and client.

[79] It is possible, and some may consider it likely, that these applicants and the remaining plaintiffs that I specify will not be able to forge an ongoing and productive solicitor-client relationship. To allow for this possible outcome, I have decided that I will not dismiss the motion at this time. Instead, I will adjourn

further consideration of the motion to a future date, to be determined with counsel. The applicants will be given the opportunity to present evidence at that future time to demonstrate that an effort has been made to meet with, provide advice to, and seek instructions from the remaining plaintiffs. It will also be an opportunity for the applicants to lead evidence, if available, of the breakdown of the relationship between them, or any other reasons that might support the application to withdraw.

[80] I am not expecting the applicants to provide information that could infringe on solicitor-client privilege. I am mindful that a court must accept counsel's answer at face value when an application to withdraw is founded on ethical reasons. *see, Cunningham, supra*, at paragraphs 48-49. My concern in this case is simply that there has been no opportunity for communication as between the applicants and the remaining plaintiffs, from which the applicants could determine that they are ethically obligated to withdraw. Once they have done so, if they still are of the view that they are ethically obligated to withdraw, then the court will further consider the motion.

[81] The plaintiff clients will also have an opportunity to file affidavit evidence or make representations, if they choose, at any future court hearing of the motion to withdraw.

[82] Notwithstanding my comments to this point, I am of a different view with respect to those remaining plaintiffs who have been served personally with notice of this motion and have made no effort to communicate with the applicants, have not signed and returned the release, and made no appearance or representations to the court in opposition to the motion to withdraw as their solicitor.

[83] Those plaintiffs who attended at court for the hearing provided information that challenged the underlying arguments put forth by the applicants in support of their motion, as that information related to them personally. In addition, representations were made to the court that left open the question as to whether a solicitor-client relationship could yet exist. This additional information differentiates these plaintiffs from those who have, by their inaction, signaled their acceptance of the position put forward by the applicants.

[84] I have concluded therefore that the motion of the applicants to withdraw as counsel will be granted in relation to the following plaintiffs whose claims are still outstanding:

Grace Byers
Darlene Cain
Wylie Cain
Vera Carter
Elden Carvery
Yvonne Carvery
Sharon David
Andrew Downey
Olive Flint
Carolen Izzard
Martina Izzard
Karen Mayfield
Helena Parris
Alfreda Peters
Warren Scott
Wendy Toussaint
Rosella Williams

[85] It will also be granted in relation to *Shirley Brown*, as her son clearly represented at the motion hearing that she did not want the applicants to remain as her lawyers since she disagreed with the advice given and the steps taken to reach the settlement.

[86] I am not prepared at this time to grant the motion to withdraw as counsel in relation to 7 of the outstanding plaintiffs. When this matter re-convenes on January 6, 2011, I will hear the parties as to scheduling a return date to confirm the status of the applicants as counsel to these persons:

Mildred D. Allen,
Wayne S. Dixon
Ronald W. Howe
Flemming Vemb
Jean Vemb
Leo Vemb
Craig Vemb

[87] I will also provide on January 6, directions for future steps in the Motion and the Action.

[88] Submissions as to costs on the motion, if any, may be made on January 6.

Duncan J.