SUPREME COURT OF NOVA SCOTIA
Citation: *Carvery v. Halifax (City)*, 2026 NSSC 50

Date: 20260211
Docket: Hfx No. 126561
Registry: Halifax

Between:

Nelson Carvery

Applicant

v.

The City of Halifax, a body corporate

Respondent

DECISION

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	January 22, 2025, in Halifax, Nova Scotia
Written Submissions:	December 23, 2024; January 16, 2025 from the Applicant January 13, 2025 from the Respondent
Post Hearing Submissions:	February 19 and October 23, 2025 from the Applicant March 12 and December 5, 2025 from the Respondent
Counsel:	Robert H. Pineo, for the Applicant Karen E. MacDonald, for the Respondent

By the Court:

Introduction

[1] One may reasonably wonder how it came to be that this Court is now being asked to decide who may have standing to be joined as a plaintiff in a claim that was first filed with the Court in 1996. Yet that is exactly what the current motion asks.

[2] This motion was advanced by the plaintiff and was framed as a series of questions governed by Rule 35.08 (Judge Joining Party). The arguments centred on the criteria upon which the Court would exercise its discretion to join the, as yet, unnamed parties as plaintiffs. During the initial period of reserve, I sought further submissions from counsel as to whether the motion was better framed as questions of law to be answered in accordance with the provisions of Rule 12. The genesis of the question was that there were no named persons applying to be joined. Instead, the Court was being asked to decide, based on agreed facts, whether any person claiming under certain circumstances would qualify as a matter of law.

[3] In a subsequent joint submission, counsel agreed that the motion engaged Rule 12 (Question of Law) and made the following averments:

- The parties are satisfied that "the facts necessary to determine the questions can be found without the trial or hearing".
- With respect to this Motion, the facts necessary can be found in the Agreed Statement of Facts that was filed with the Court.
- The parties further agree that the determination of the issues before the Court on this Motion will reduce the length of any hearing with respect to subsequent Rule 35 Motions for individuals to be joined as Plaintiffs to the action.
- The parties do not believe that there are any additional implications for the Court to consider in the analysis of the information before the Court as a result of this Motion being framed as a Rule 12 (Question of Law) Motion.

[4] A Notice of Amended Motion was filed on January 5, 2026, relying on Rule 35.08 and Rule 12.

Background

[5] The following is an abridged history of the claim, taken from my decision cited as *Carvery v. Halifax (City),* 2018 NSSC 204. The issue in that decision was whether to certify this claim as a Class Proceeding, an application I denied.

> [1] The current motion has its genesis in an action filed in 1996, decisions in which are cited as *Williams v. Halifax*.
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> [2] In a 1996 court order, the Africville Genealogy Society (the Society), was named as the representative of the estates of 48 named persons who had been residents of a community known as Africville and 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.
>
> [3] 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.
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> [4] The claim asserted that Africville was settled and established as a community in the early 1800s, by refugee slaves and settlers and also by residents of other African Nova Scotian communities. Africville was located on the shores of the Bedford Basin at the northern tip of the Halifax peninsula.
>
> [5] In the period 1962 to 1970, Halifax purchased the homes and lands of the residents, who relocated. Halifax then expropriated the lands and interests that it had acquired, together with the interests of one named landowner whose interests were not able to be acquired by purchase and sale.
>
> [6] The claim alleged that Halifax was 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 sought 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.
>
> [7] During the fourteen years following the filing of the claim, the action before this Court was largely dormant while the parties attempted to negotiate a settlement.

> [8] In 2010 a Settlement Agreement was reached, a term of which was that the Action would be dismissed.
>
> [9] To give legal effect to this 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 thirty 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 July 2010 hearing, 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, 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.

[6] For a more complete judicial history, see *Williams v. Halifax*, 2015 NSSC 228.

[7] During the ensuing four years the remaining plaintiffs sought out counsel to act on their behalf. When counsel was finally retained the legal basis of the claims was substantially reframed.

[8] Continuing from my 2018 decision:

> [13] In 2014 Robert Pineo filed a notice of change of counsel, indicating that he was now acting as the solicitor for the plaintiffs. A series of motions followed which resulted in a restructuring of the litigation. An order issued September 8, 2015, determined who, among the plaintiffs, had extant claims and those whose claims are dismissed. In addition, the pleadings were substantially amended by:
>
> > (i) Substituting a large portion of the original pleadings, most significantly, recharacterizing the basis of the defendant's liability as a flawed expropriation; and
> >
> > (ii) Naming Nelson Carvery as the sole and representative plaintiff in the amended claim, with a consequential amendment to the Style of Cause now identified as *Nelson Carvery v. The City of Halifax*.

[9] Nelson Carvery, the plaintiff in this proceeding, moved for an order certifying the within Action as a Class Proceeding pursuant to Sections 4(3) and 7 of the *Class Proceedings Act*, SNS 2007, c. 28 (CPA) and appointing the plaintiff as Representative Plaintiff for the Class. The motion to certify as a Class Proceeding was denied.

[10] That decision ultimately triggered the current motion. Individuals who might have been eligible as part of the Class (referred to as the "Potential Plaintiffs") now seek to determine whether there are legal impediments to their eligibility to be joined as a plaintiff.

Agreed Statement of Facts

[11] The parties filed an Agreed Statement of Facts dated December 20, 2024, together with 15 documentary exhibits. Those Facts are:

> Agreed Statement of Facts
>
> The Parties jointly present the following facts and appended documents as proven and can be used in this proceeding for any purpose, including for the truth of their contents:
>
> **Expropriation**
>
> 1. On November 26, 1969 ("the Filing Date"), Halifax expropriated the lands comprising the community of Africville by filing the Resolution of Council and Plan No. 2022 into the Registry of Deeds. The validity of the expropriation is an issue to be determined. *Agreed copies of the Resolution of Council and Plan No. 2022 are attached to this Agreed Statement of Facts as Exhibits "1" and "2", respectively.*
>
> **Purchase of Property Interests in Africville (Generally)**
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> 2. Between 1965 and 1967 some of the former residents of Africville executed Indentures quitting their property interests in Africville to Halifax. *An agreed list, as of December 12, 2024, of those who executed Indentures is attached to this Agreed Statement of Facts as Exhibit "3".*
> 3. The Indenture of Allen William Desmond executed on March 5, 1965 is representative of the Indentures executed by the other residents in terms of the statement of the Grantor's property interest, the mode of conveyance (quitted) and the description of the property interest conveyed, *An agreed copy of the Indenture of Allen William Desmond executed on March 5, 1965 is attached to this Agreed Statement of Facts as Exhibit "4".*
> 4. Further to paragraph 3, above, the following wording appears in all of the Indentures in the agreed list:

AND WHEREAS the Grantors have an interest in some portion of Africville

NOW THIS INDENTURE WITNESSETH that the Grantors for and in consideration of the sum of $XXXX of lawful money of Canada to the Grantors in hand well and truly paid by the Grantee at or before the sealing and delivery of THESE PRESENTS (the receipt whereof is hereby acknowledged) have and each of them hath remised, released, and forever quitted claim to, and by These Presents do and each of them doth remise, release and forever quit claim, unto the Grantee, its Successors and Assigns

All that certain lot, piece or parcel of land, situate in the City of Halifax and Province of Nova Scotia, and known as Africville, and more particularly shown bordered in red on City Plan No. TT-1-15899, dated February 1, 1964, and on file in the Office of the Commissioner of Works for the City of Halifax

An agreed copy of City Plan TT-1-15899, dated February 1, 1964, is attached to this Agreed Statement of Facts as Exhibit "5".

None of the Indentures contain terms or other wording stating that the grantors have conveyed the interests of their heirs.

Purchase of Property Interests in Africville (From Estates)

5. The Indenture of the Estate of David Dixon, Sr., David Dixon Jr., Elsie Dixon, Stanley Dixon, Evelyn Dixon, Elsie Desmond, Walter Nichols, Lloyd Farrell and Dora Mae Farrell dated June 30, 1967 (line 48 of Exhibit 3) contains the statement:

   AND WHEREAS the Grantors have an interest in some portion of Africville; under the Estate of the late David Dixon, Sr.

   The Indenture dated June 30, 1967 is attached to this Agreed Statement of Facts as Exhibit "6".

6. Some of the Indentures, and particularly the Indenture of the Estate of Arthur Dixon, Theresa Dixon (Widow), Bertha O'Brien, Alma T. White, Guy K. Dixon, Rose Dixon, Edith G. Reddie, Arthur A. Dixon and Audrey Dixon dated February 15, 1967 (line 51 of Exhibit 3) contains the statement:

   AND WHEREAS Arthur Dixon, deceased, had an interest in some portion of Africville during his lifetime;

   AND WHEREAS the said Arthur Dixon died intestate, leaving him surviving his widow, Theresa Dixon, and five children, all of whom are the Grantors herein;

   The Indenture dated February 15, 1967 is attached to this Agreed Statement of Facts as Exhibit "7".

Minor Children as Residents

7. The Parties agree that there were minor children who were resident in Africville and subject to the relocation between 1962 and 1969, and as of the Filing Date, remained minor children.

8. The Parties agree that the age of majority as of the Filing Date was 21 years of age.

The Africville Genealogy Society as Representative of Residents and Estates

9. On February 16, 1996, The Africville Genealogy Society filed an Ex Parte Application pursuant to Civil Procedure Rule 5.10 (1) (b) (of the 1972 Rules) seeking to become the representative of former residents of Africville and their descendants, presently unascertained, who may be affected by the intended proceeding by the Africville Genealogical Society and others against the City of Halifax. *An agreed copy of the filed Application materials is attached to this Agreed Statement of Facts as Exhibit "8".*

10. On February 27, 1996, the Supreme Court of Nova Scotia granted an Order, inter alia, appointing the Africville Genealogy 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 pursuant to Civil Procedure Rule 5.10 (1) (b)." *An agreed copy of the issued Order dated February 27, 1996 is attached to this Agreed Statement of Facts as Exhibit "9".*

11. A Notice of Action and Statement of Claim was filed on March 28, 1996, against the City of Halifax. The Plaintiffs included individual Plaintiffs, the Africville Genealogy Society as representative of certain Estates, and the Africville Genealogy Society 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. *An agreed copy of the Notice of Action and Statement of Claim filed on March 28, 1996 is attached to this Agreed Statement of Facts as Exhibit "10".*

12. In February, 2010 a settlement was reached with some of the Plaintiffs, including the Africville Genealogy Society in its capacity as representative of former residents of Africville and their descendants, presently unascertained, who may be affected by this proceeding.

13. The Africville Genealogy Society executed a Release 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. *An agreed copy of the Release is attached to this Agreed Statement of Facts as Exhibit "11".*

14. On July 7, 2010 Justice Duncan (as he then was) issued an order dismissing the Action against the City of Halifax as it pertained to the claims of some of the Plaintiffs, including the Africville Genealogy Society 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. *An agreed copy of the Order issued July 7, 2010 is attached to this Agreed Statement of Facts as Exhibit "12".*

15. In a decision rendered July 30, 2015, Justice Duncan (as the then was) determined Plaintiffs whose claims had been previously dismissed were estopped from being, and refused permission to be, added as parties. A list of those Plaintiffs was attached as Schedule "B" to the decision and included "AGS for Unknowns". *An agreed copy of Schedule "B" to the decision is attached to this Agreed Statement of Facts as Exhibit "13".*

2012 Decisions

16. On June 8, 2012 and October 26, 2012, this Court heard Motions to join individuals as Plaintiffs to this Action and rendered oral decisions on those dates. *An agreed copy of the transcript of the June 8, 2012 and October 26, 2012 Motions is attached to this Agreed Statement of Facts as Exhibit "14".*

The Pleadings

17. The parties agree that the Notice of Action and Statement of Claim for this proceeding is the unfiled Notice of Action and Statement of Claim Amended: November__, 2021 (Third Amendment). *An agreed copy of the unfiled Notice of Action and Statement of Claim Amended: November__, 2021 (Third Amendment) is attached to this Agreed Statement of Facts as Exhibit "15".*

Issues

[12] The Applicant submits the following issues for determination:

Issue 1 What legal and factual requirements must a Potential Plaintiff meet to be joined as a plaintiff?

Issue 2 Can Potential Plaintiffs who signed Indentures be joined as plaintiffs?

Issue 3 Can Potential Plaintiffs who are descendants of persons who signed Indentures be joined as plaintiffs?

Issue 4 Can Potential Plaintiffs who were minor children on the date of expropriation be plaintiffs?

Issue 5 Does the 1996 Representative Order, and the subsequent Release signed by the Africville Genealogy Society, operate to bar Potential Plaintiffs from being joined as plaintiffs?

Issue 6 Can Potential Plaintiffs seeking to be joined as plaintiffs after the 2012 decision of this Court be added as plaintiffs?

Issue 1: What legal and factual requirements must a Potential Plaintiff meet to be joined as a plaintiff?

[13] Civil Procedure Rule 35.08 governs joinder of parties. It states, in part:

> **35.08 Judge joining party**
>
> (1) A judge may join a person as a party in a proceeding at any stage of the proceeding.
>
> (2) It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.
>
> (3) The presumption is rebutted if a judge is satisfied on each of the following:
>
> (a) joining a person as a party would cause serious prejudice to that person, or a party;
>
> (b) the prejudice cannot be compensated in costs;
>
> (c) the prejudice would not have been suffered had the party been joined originally, or would have been suffered in any case...
>
> [Emphasis added]

[14] The answer to this issue turns largely on a potential plaintiff's ability to show an "interest in the issues before the court". The parties agree that meeting that requirement relies on showing an interest in the issue of a failed expropriation. Counsel for the parties agree that this depends upon how provisions of the *Halifax City Charter 1963* ("HCC 1963") are interpreted as they pertain to qualifications for a claim arising from an expropriation and mechanisms for compensation.

Statutory interpretation

[15] It is not controversial that the interpretation of a statute is based on the "modern principle", as summarized by Keith J in *Simmons v. Burglund*, 2024 NSSC 400:

> [6] The Court's jurisdiction to interpret statutes is anchored in the foundational principle that: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, para. 26, quoting Elmer Driedger's *Construction of Statutes* (2nd ed., 1983), page 87). This principle is commonly referred to as the "Modern Principle" of statutory interpretation.

[16] The *Interpretation Act*, RSNS 1989, c. 235, provides that "[e]very enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters … (e) the former law, including other enactments upon the same or similar subjects, [and] (f) the consequences of a particular interpretation…"

The *Halifax City Charter 1963*

Grounds for expropriation claims

[17] The applicant relies on the HCC 1963 as the source of the requirements for a claim for expropriation compensation.[1] Sections 406(a) and (b) defined "land" and "owner" for purposes of expropriation:

> (a) "land" includes:
>
> (i) any land, whether held in fee simple or for any less estate or interest;
>
> (ii) any stream, water course or other land covered with water, not included in the Water Act, or the right to dam up or stop the flow of water and thereby to overflow any land; and
>
> (iii) any easement or right in, upon or over any land or any other estate, right or interest therein;
>
> (b) "owner" includes a trustee, executor, guardian, curator, agent, or other person having the charge or control of any land.
>
> [Emphasis added]

[18] Section 407 provided the power to negotiate to acquire land, and to expropriate if necessary. Where expropriation occurred, section 408(1) required the City to:

> …make due compensation to the owners or occupiers of, or other persons interested in, any land taken by the City in the exercise of any powers conferred by this Act, and … pay damages for any land or interest therein injuriously affected by the exercise of such powers, and the amount of such damages shall be such as necessarily result from the exercise of such powers beyond any advantage that the claimant may derive from the completed work.
>
> [Emphasis added]

[1] An issue arose as to whether the *Expropriation Procedures Act*, SNS 1969, c. 9, was the governing legislation. However, that statute did not come into force until 1 October 1970, after the expropriation: see Applicant's Post-hearing submission at paras. 16-26; Respondent's Post-hearing submission at paras. 12-14.

[19] Section 408(2) provided that "any claim for such compensation or damages, if not mutually agreed, shall be determined as provided by Section 414."

The definition of "land"

[20] The applicant says the definition of "land" in s. 406(a) is broad enough to include equitable proprietary interests such as easements, trusts, and *profits a prendre* based on communal use of the land.[2] He says the definition of "owner" in s. 406(b) "logically" includes "the holding of and derivation of benefits from 'land' as broadly defined..."[3]

[21] The respondent says the uses the residents made of the land do not equate to ownership, and that the holding of, and derivation of benefits from, the land is the result of ownership, not its definition.[4]

[22] The applicant is not wrong to argue that interests short of full title may be compensable in expropriation proceedings, as the HCC 1963 contemplates in s. 406(a). However, compensation requires a claimant to be an owner, occupier, or "other person interested" in the land. An interest of a "person interested" could fit within s. 406(a)(iii): "any easement or right in, upon or over any land or any other estate, right or interest therein…"

[23] Eric CE Todd's text **The Law of Expropriation and Compensation in Canada** expressly addresses security interests, leaseholds, and easements, rights of way, and surface rights as potentially compensable interests. [5]

Owner, occupier, person interested

[24] In my view, the more significant question is not the scope of compensable interests, but whether the alleged owner, occupier, or person interested in fact qualifies under the statute. Based on sections 408(1) and (2) of the HCC 1963, the applicant submits that the elements of the claim are that the potential plaintiff (1) was an "owner" of the land expropriated, and (2) suffered damages caused by the expropriation.[6] By contrast, the respondent maintains that to establish an interest in

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[2] Applicant's brief at paras. 20-25.
[3] Applicant's brief at paras. 26-28.
[4] Respondent's brief at paras. 26-27.
[5] Eric CE Todd, **The Law of Expropriation and Compensation in Canada**, 2d edn (Toronto: Carswell, 1992), at chapters 11-13.
[6] Applicant's brief at paras. 18-19.

the proceeding (as required for joinder) a proposed plaintiff must have (1) had proprietary ownership rights in Africville (2) as of 26 November 1969, the date of the expropriation.[7]

[25] While the expropriation claims involve the allegation that the City failed to follow the formalities of the HCC 1963, specifically by failing to deposit the Expropriation Resolution in the Registry of Deeds, the respondent says the City owed no such duty to anyone who was not an owner at the time of the expropriation.[8] As a proposition of law, this is consistent with my previous decision refusing certification as a class proceeding, at 2018 NSSC 204:

> [104] The procedural rights on an expropriation, provided for by the **Charter**, are only available to a person who qualifies as an "owner" under Section 406(b). For example:
>
> - 409(1): requires the preparation, prior to expropriation, of "a plan and a description of such land", and "a list of the owners of such land, according to the last revised assessment role";
> - 410(2): requires that any Resolution of Council for expropriation "contain…names of the owners… according to the last revised assessment role;
> - 413(1): requires that Notice of the Expropriation go out to the former "owners" by registered mail, including, among other things, information as to their right to appeal the amount of compensation.
>
> ...
>
> [106] The defendant can only be held liable to those persons who have first established that they are entitled to the procedural and substantive rights afforded under the **Charter**. *i.e.*, they fall within the meaning of an "owner". If there is a basis in evidence to demonstrate this, then one turns to the question of whether the defendant failed to "perfect" the expropriation of their interest.
>
> [Emphasis added]

[26] The applicant says the proprietary rights referenced by the respondent must be defined in accordance with the HCC 1963. Rather than ownership at the time of the expropriation, the applicant says, this would only require "an outstanding claim for compensation as of the date of expropriation."[9] The foundation of this position

[7] Respondent's brief at paras. 17-18.
[8] Respondent's brief at paras. 19-22.
[9] Applicant's reply brief at paras. 3-6.

appears to be the principle that expropriation is a "process", as described in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 SCR 32:

> 37. The courts have long determined that the actual act of expropriation of any property is part of a continuing process. In *McAnulty Realty*, *supra*, at p. 283, Duff J. noted that the term "expropriation" is not used in the restrictive sense of signifying merely the transfer of title but in the sense of the process of taking the property for the purpose for which it is required. Thus, whether the events that affected the value of the expropriated land were part of the expropriation process, or, in other words, a step in the acquisition of the lands, is a significant factor for consideration in many expropriation cases...
>
> [Emphasis in the original]

[27] In the applicant's view, the entire process, beginning with the Department Report and the Rose Report, and ending in the expropriation, constituted the expropriation process.[10] The applicant has not provided any authority that would support such an expansive understanding of the "process". Notably, in *Dell Holdings*, the party expropriated from owned the relevant land during the so-called "shadow period". As the court said, when land is expropriated, "[i]t is the taking of the land which triggers and gives rise to the right to compensation."[11] It is difficult to conceive how anything occurring after the property is conveyed without expropriation could be "a step in the acquisition of the lands", as described in *Dell Holdings*. The applicant has pointed to no authority for the proposition that a former owner of an interest in property who voluntarily conveyed it – even if the conveyance was to an entity with the power to expropriate – retains any right to compensation based on expropriation. On this point, it is worthwhile to consider Todd's definition of expropriation:

> For the purposes of this text, "expropriation" is defined as,
>
> > The acquisition, pursuant to statutory powers, or property rights without the consent of the owner of those rights.
>
> It follows that the law of expropriation comprises,

[10] Applicant's reply brief at paras. 9-10.
[11] *Dell Holdings* at para. 33.

> The legal and procedural rules, derived from statutes and judicial decisions, which prescribe the rights and liabilities of a property owner and of the person authorized to acquire that owner's property rights without the owner's consent.[12]

[28] Nothing in this language contemplates that expropriation compensation remains available to a former owner who has voluntarily conveyed the property.

Strict compliance

[29] The applicant maintains that the respondent was required to comply with the statutory requirements, in accordance with authorities indicating that the statutory procedures in expropriation legislation must be strictly complied with. Thus, in *Costello and Dickhoff v. City of Calgary*, [1983] 1 SCR 14, the court said, "where a power is given by a statute to a municipal government to expropriate individual interests in land, the statutory conditions for the exercise of that power must be strictly complied with."[13]

[30] In *Dell Holdings*, *supra*, the majority said, in respect of the Ontario *Expropriations Act*:

> 20 The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court...
>
> 21 Further, since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor... In *Laidlaw v. Municipality of Metropolitan Toronto*, [1978] 2 S.C.R. 736, at p. 748, it was observed that "[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute".
>
> 22 The application of these principles has resulted in the presumption that whenever land is expropriated, compensation will be paid. This has been the consistent approach of this Court...

[31] Even if the respondent failed to comply with strict statutory formalities at the time of the expropriation, it does not follow that this creates or revives a duty owed

[12] Todd, **The Law of Expropriation and Compensation in Canada**, at 20-21.
[13] *Costello* at para. 26.

to former owners. Given that the respondent was expropriating from itself, any duty would be owed to itself.

[32] Section 412 of the HCC 1963 required the respondent to give public notice in a newspaper of the registration of the expropriation plan in the Registry. The HCC was amended in 1964 to permit expropriation from "unknown" owners, in ss. 407(3) and 410(2)(b), without relieving the respondent of any of the statutory prerequisites for expropriation. The applicant says these provisions further undermine the respondent's position that a person must have been an owner at the time of expropriation to claim compensation.[14] It is difficult to see how this follows; these provisions are not inconsistent with a construction of the statute by which a claimant must fall within the definition of "owner" at the time of expropriation.

Due compensation

[33] The HCC 1963 did not define or describe "due compensation." The applicant says a statutory right to compensation presumes "full compensation."[15] In *Dell Holdings*, the majority said the Act "should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken."[16] The applicant says "due compensation" should be interpreted in view of the rights to own, hold, use, enjoy, derive sustenance from, and sell real property.[17] Additionally, the applicant says compensation is not limited to the value of the land, but should also include disturbance damages.[18]

[34] The respondent submits that the definition of "due compensation" is irrelevant on this motion. The prerequisite for compensation is to have been an owner at the relevant time. Further, the type of damages available goes to compensation, but does not establish ownership.[19]

Conclusion

[35] The question we are left with is: What is the "interest in the issues before the court" that a potential plaintiff must demonstrate to satisfy the requirements of Rule 35.08(2)?

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[14] Applicant's reply brief at paras. 16-19.
[15] Applicant's brief at paras. 29-32.
[16] *Dell Holdings* at para. 23.
[17] Applicant's brief at para. 34.
[18] Applicant's brief at paras. 35-40.
[19] Respondent's brief at paras. 29-30.

[36] It seems clear that an entitlement to compensation follows a finding that a party was an owner, occupant, or "other person" interested in the land in accordance with the HCC 1963 expropriation provisions. In other words, being an owner, occupier, or person interested is a prerequisite. A mere claim that a person had some connection to the relevant land at an earlier time does not establish this. The governing authorities confirm that a "broad and liberal interpretation" is required, but this does not mean the scope of persons contemplated as owners or occupiers is as broad as the applicant claims.

[37] Respondent's submission on this issue reminds the court that even if the potential plaintiff can establish an interest in the issues before the court, it is a rebuttable presumption which the respondent intends to oppose, substantially on the basis of the prejudice resulting from the delay in seeking to join in this claim. See CPR 35.08(3).

[38] The legal and factual requirements a Potential Plaintiff must meet to be joined as a plaintiff are:

1. To provide evidence that they have an interest in the issues before the court, in accordance with Rule 35.08(2).
2. Mere presence on the land is not sufficient.
3. The evidence must show that the person was an "owner" of the "land" as at the date of the expropriation. The broad interpretation of these requirements in the Halifax City Charter 1963, urged by the applicant, is not supported in law.
4. The Potential Plaintiff must not be barred from joining due to having signed a Release, having quit claimed their interest prior to expropriation, or having their interest foreclosed by earlier court orders dismissing their claim.

Issue 2: Can potential plaintiffs who signed Indentures be joined as plaintiffs?

Effect of Indentures

[39] The applicant submits that signing an Indenture between 1965 and 1967 should not now disqualify a potential plaintiff from being joined. The Indentures acknowledged that the grantors "have an interest in some portion of Africville" and that, for consideration, they "hath remised, released, and forever quitted claim to,

and by These Presents do and each of them doth remise, release and forever quit claim, unto the Grantee, its Successors and Assigns."[20]

[40] The applicant concedes that the language of the Indentures "would, without more, convey all of the property interests of the signatory to Halifax, leaving that resident without any ownership interest in land upon which to bring a claim in expropriation."[21] However, the applicant says the 1964 *Act to Amend the Law Relating to the City of Halifax, and to Amend Chapter 56 of the Acts of Nova Scotia, 1963, the Halifax Special Tax Provisions Act, SNS 1964, c. 74* (the 1964 Amending Act), which was referenced in the preambles/recitals to the Indentures and the Expropriation Resolution, provides authority for a plaintiff who has executed an Indenture to subsequently seek compensation for expropriation. Section 6 of the 1964 Amending Act stated:

> 6(1) The City may acquire from any person having an interest less than fee simple, a partial interest, a possessory interest or claim not amounting to a claim to title or less than a complete or valid possessory title to any lands and buildings or lands or buildings situate in the Africville Area ... that person's interest, claim or title, and may compensate such person in such amount and upon such terms and conditions as the Council may determine.
>
> (2) The City may pay to any person residing in the Africville Area ... who is liable in the opinion of the Council to suffer undue hardship because of the expropriation or intended expropriation by the City of all or any part of such Africville Area, such amount and upon such terms and conditions as the Council may determine.
>
> (3) In the event that the City expropriates all or any part of such Africville Area ... and any person claiming compensation as a result of such expropriation, establishes a claim to such compensation in any court of competent jurisdiction, if that person had received any compensation or payment from the City under the provisions of subsection (1) or (2), the City shall deduct such amount from the claim for compensation.
>
> [Emphasis added]

[41] The Indentures acknowledged in a recital that legislation had been passed "to facilitate the acquisition" of the Africville area by the City of Halifax "for redevelopment purposes." Similarly, the Expropriation Resolution noted, "WHEREAS under the authority of section 6" of the 1964 Amending Act, the City "acquired certain lands in the Africville Area..."[22]

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[20] Agreed Statement of Facts at para. 4.
[21] Applicant's brief at para. 4.
[22] Applicant's brief at paras. 46-47.

[42] According to the applicant, s. 6(3) permits a plaintiff who executes an Indenture to bring a claim for compensation for expropriation, notwithstanding the prior Indenture.[23]

[43] The respondent submits that the Indentures foreclose the ability to be joined as a plaintiff, as the individual concerned was no longer an owner as of the time of expropriation and thus does not have an interest in the proceedings.[24]

[44] The effect of a quit claim deed is to "pass any title, interest or claim which the grantor may have in the premises without professing that the title is valid... A quit claim deed may be used where it is necessary for a party to relinquish a potential possessory title or claim to the property": CW MacIntosh and Diana Ginn, **Nova Scotia Real Property Practice Manual** (LexisNexis: looseleaf), at §5.1B. As such, the grantors passed any title, interest, or claim in the Africville lands in the Indentures.

[45] This view is supported by the *Conveyancing Act*, SNS 1956, c. 3, in force when the Indentures were executed, which provided that a conveyance "that identifies the parties and property, and specifies the property right to be conveyed, and which is validly executed, is effective to convey that property right": s 3(1). Further, "[e]xcept where a contrary intention appears by the conveyance ... where words of limitation are not used, the conveyance conveys the whole property right that the party conveying had power to dispose of by the conveyance, including, in the case of real property, the fee simple...": s 6(a).

[46] As noted above, the applicant does not dispute that on the face of the Indentures the grantors passed any property rights they had. The applicant argues, however, that section 6(3) of the 1964 *Amending Act* provides an exception. The respondent disputes this, arguing that this provision provides only for a set-off of any compensation previously paid by the City to a resident who subsequently established a claim for compensation as a result of the expropriation. To establish compensation for expropriation, the person would still need to have had an ownership interest when the land was expropriated. This appears to be correct. Nothing in section 6(3) purports to revive any prior interest the claimant had. In my view, the section provides a basis upon which an owner whose property was expropriated could seek further compensation where it transpired that they had a greater interest than initially believed.

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[23] Applicant's brief at paras. 48-49.
[24] Respondent's brief at paras. 32-33.

[47] The applicant argues that the principle that an expropriated owner may claim disturbance damages for "economic loss suffered by an owner by reason of having to vacate expropriated property" means that the Indentures do not bar the potential plaintiffs. While the potential plaintiffs who executed Indentures accepted the value of their property rights, according to the applicant, they only became entitled to disturbance damages as a result of the later expropriation, the applicant submits. Todd writes that disturbance damage "may be defined generally as economic loss suffered by an owner by reason of having to vacate expropriated property." The applicant has not provided any authority to suggest that economic losses may arise after the owner has voluntarily conveyed the property, even if that conveyance is to an entity with the power to expropriate.

Conclusion

[48] Potential plaintiffs who signed Indentures cannot be joined as plaintiffs. All interest they had in the expropriated land was conveyed to the City by Indenture prior to the expropriation. The asserted interpretation of section 6(3) as a basis for the applicant's position could only be relied upon by those who were still owners as at the time of the expropriation. The grantors were not owners at that time and so cannot claim the further compensation that 6(3) was intended to allow for.

Issue 3: Can Potential Plaintiffs who are descendants of persons who signed Indentures be joined as plaintiffs?

[49] The applicant submits that descendants of individuals who executed Indentures may claim for compensation for expropriation. According to the applicant, if those who executed Indentures are not disqualified from bringing claims, it "logically follows" that their descendants cannot be disqualified. Further, the quit claims under the Indentures only disposed of property interests personal to the grantors, as "[t]his is how a quitted claim differs from a conveyance by warranty deed."[25] Finally, the Indentures do not expressly convey the interests of the grantors' heirs. For these reasons, the applicant submits that the Indentures do not bar claims by descendants.[26] No authority is provided for any of these legal propositions.

[50] The 1956 *Conveyancing Act* provided that "[e]xcept where a contrary intention appears by the conveyance ... the parties are deemed to agree that it shall enure to the benefit of, and bind, them and their respective representatives and

[25] Applicant's brief at para. 52.
[26] Applicant's brief at paras. 50-54.

assigns": s 6(c). "Representative" was defined as, *inter alia*, "heirs, executors and administrators": s 2(2)(d). Finally, a "conveyance of any property right in land" included "the buildings, easements, tenements, hereditaments and appurtenances belonging or in anywise appertaining to that property right": s 6(d). As such, the respondent submits, the Indentures bound the grantors' heirs, and the conveyances included the hereditaments and appurtenances to the land, absent any indication of a contrary intention, of which none has been identified.[27]

[51] As the respondent submits, children or heirs of Africville residents who executed Indentures would have no interest in the proceeding unless they had an ownership interest separate and apart from that of their ancestor at the time of the expropriation. The effect of the quit claim deeds was to pass whatever interest the grantor held. The applicant provides no authority to support the notion that a child or potential heir retains some separate interest in property that has been quit-claimed.[28]

[52] There is caselaw contemplating that a specific grant of land in a will could provide a foundation for title that would allow a compensation claim. In *Canada (Attorney General) v. Newfoundland*, [1988] FCJ No 715 (Fed Ct (TD)), the Federal Attorney General applied to clarify title to certain expropriated lands. One parcel was claimed through a will. The court said:

> 24 Title to parcel "K", an area of about 1,040 m2, is claimed by three sons and one daughter of the late John F. Linehan. Leo, Patrick, John and Ellen Linehan claim title to the land by reason of a bequest of it to them in their father's will, dated November 14, 1985. Under Newfoundland law on the death of a land holder title passes to the deceased personal representatives and not to the beneficiaries named in the will. There being no proof that the will of the late John Linehan was ever probated the four claimants to compensation in respect of parcel "K" have not made out any proprietary interest in the land (*Re Farrell's Estate*, 44 Nfld. & P.E.I.R. 251) and are not entitled by law to claim any compensation in respect of its expropriation.
>
> 25 On the other hand the four children do have the right to require their father's will to be probated and, had the expropriation not taken place, to require the executor of their father's estate to transfer the property described in parcel "K" to them equally. Because of the expropriation they cannot now require this to be done. I am satisfied that the four children have established a claim, not a right, to compensation in respect of the expropriation of parcel "K" and in the absence of anyone contesting that claim or filing a competing one I will recommend that Leo,

[27] Respondent's brief at paras. 46-47.
[28] Respondent's brief at paras. 42-43.

> Patrick, John and Ellen Linehan be compensated in equal shares for the expropriation of parcel "K".

[53] The interest created by a devise of a life estate followed by a gift to descendants also arose in *Brown v. Peterborough (City)* (1957), 8 DLR (2d) 626 (Ont CA), where the testator "devised those lands to the claimant Klondyke Gold Brown for life 'and upon his death equally to such of his children as survive him.'" Notwithstanding this, the executors had conveyed the property to Brown in fee simple*;* however, Brown and his children all claimed compensation in the expropriation proceeding, and the court held that the executors should also be named as claimants in a representative capacity in the event that Brown had any more children.[29]

[54] *Canada v. Newfoundland* and *Brown*, in my view, support the proposition that a specific devise in a will can be a source of a compensable interest. But these were instances of specific devises with named beneficiaries. More importantly – and this point is relevant to other issues raised in this motion – the testators owned the property at the time of the expropriation. The grantors of the Indentures in this case did not.

Conclusion

[55] I conclude that Potential Plaintiffs who are descendants of persons who signed Indentures cannot be joined as plaintiffs on the basis claimed by the applicant. Any claim they might have would be predicated on the grantors of the Indentures having an interest in the land at the time of the expropriation. For reasons provided in relation to Issue 2, I find that they did not have such an interest in the issues before the court. Their descendants then are in no better position to advance such a claim.

Issue 4: Can potential plaintiffs who were minor children on the date of the expropriation be plaintiffs in this claim?

[56] The parties agree that there were minor children "who were resident in Africville and subject to the relocation between 1962 and 1969" and who remained minors (under the age of 21) as of November 26, 1969, being the date of the expropriation.

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[29] *Brown* at paras. 14-16.

[57] The issue poses the question of the legal requirements under which those minors could have an "interest in the issues before the court", within the meaning of Rule 35.

[58] Section 408(1) of the *HCC 1963* required the City to provide "due compensation to the owners or occupiers of, or other persons interested in, any land taken…" The definition of "owner" in s. 406(b) included "a trustee, executor, guardian, curator, agent or other person having the charge or control of any land." The applicant submits that there is nothing in this language to bar a potential plaintiff who was a minor at the time of the expropriation from advancing claims.

[59] A minor could own real property at common law, and there is no express exclusion of minors in the *HCC 1963* definitions of "owner" or "land". According to the applicant, the expropriation deprived minors who were "occupiers", residents, and users of the land with future property rights, and submit this is sufficient to join them as plaintiffs.[30]

[60] No authority has been offered in support of these legal propositions. In particular, the applicant has not substantiated the notion that a child may be compensated for the alleged loss of a potential future property right.

[61] The respondent says that potential plaintiffs, who were minors at the date of the expropriation, did not have "charge or control" of any land. Further, the inclusion of "trustee" and "guardian" in section 406(b) implies that any interests of a minor would have to be through a trustee or guardian as "owner".

[62] The respondent further submits that there is no right to "possible future use" of land for which then minors could claim. Any interest must have crystallized by the time of the expropriation.[31]

[63] The respondent says that it would have been impossible to complete an expropriation if minors were included as "owners" under the HCC definition. Section 407(1) authorized Council to negotiate with the "owner or owners of such land or other persons interested therein."[32] However, at common law, minors lack

[30] Applicant's brief at paras. 55-57.
[31] Respondent's brief at paras. 50-51.
[32] Respondent's brief at para. 52.

the capacity to contract, except for necessities: *Burton Canada Company v. Coady*, 2013 NSCA 95[33]. As Jeffrey Wilson writes in **Wilson on Children and the Law**:

> Nothing precludes a child from directly owning land or personal property or from having a beneficia to entitlement through a trust. The difficulty, however, is that because a child is generally unable to contract as an adult, it may be impractical to hold property in a child's name as dealing with that property before adulthood may require court or other approvals.[34]

[64] Generally speaking, the respondent submits that the context of the expropriation provisions suggests that they were not intended to apply to minors; for instance, Section 413 required that notice be sent to the former owners setting out, among other things, the amount of compensation to be paid. The former owner is advised that they must give notice in writing that the proposed compensation is insufficient and requiring the appropriate amount to be determined by the County Court. The respondent submits that it is difficult to see how such provisions could be applied to the case of a small child not otherwise represented by, for example, a trustee or guardian as owner.[35]

[65] The complications of children's interests being implicated in an expropriation proceeding are illustrated by *McDonald v. Ottawa Public School Board* (1908), 12 OWR 572, [1908] OJ No. 322 (Ont HCJ), where a testator left a parcel of land to a relative, Helen McDonald, as a life estate, then to her two children. The defendant School Board commenced an expropriation proceeding, and McDonald appointed an arbitrator in accordance with the statutory procedure. The issue of the children's interest came before the court. The court said:

> 9 The plaintiffs have nearly arrived at their majority, but they are infants in law and must be regarded as no more capable to act in a case like the present than if of much more tender years. Considering the nearness of each plaintiff to the age of 21, and considering the facts, as set out in the affidavits of mother and daughters occupying this property, my inclination would be, if it could be done, to have the matter postponed for the short time until the plaintiffs become of age.
>
> 10 With these aspects of the case I cannot deal. The question is, under the *Public Schools Act*, can the land, owned by infants be expropriated, infants not being in a position to name an arbitrator, and so, as it is contended, not in a position to refuse or neglect to make such appointment within the meaning of the statute? The power of the School Board or Board of Education of every urban municipality

[33] *Coady* at para. 217, per Beveridge JA, dissenting.
[34] Jeffrey Wilson, **Wilson on Children and the Law** (Butterworth's, 2011 Update), at §5.33.
[35] Respondent's brief at paras. 53-55.

> as to expropriation, as given by the new sec. 118, is very huge: "They shall have power to acquire and expropriate any land required by them to he used for a school site, or the enlargement of, or in addition to, any existing site,"
>
> 11 The land in question is not, as land, such as would he outside of the statute, or such as should be beyond reach of the School Board for educational purposes. It should be available, if bona fide required. My conclusion is that the lands of infants can, under the Public Schools Act, for school purposes, be expropriated.

[66] While title rested with the executor during McDonald's life estate, the court noted the plaintiff children "… may never own the property. They are interested now, and they may be interested to the extent of the absolute ownership."[36] The court also noted that the appointment of an arbitrator by an infant would be a voidable act.[37]

Effect on other legislation

[67] As the respondent submits, the expansive definition of "owner" or "occupier" advocated by the applicant would have implications for the interpretation of those terms in other legislation, particularly where the control or use of land was in issue. Most obviously, if a child could be an "occupier" under the *Occupiers' Liability Act*, SNS 1996, c. 27, the result could be that a child could be held liable merely by virtue of living on the premises. There are similar implications for the *Unsightly Premises Act*, RSNS 1989, c. 485, and the *Trails Act*, RSNS 1989, c. 476.[38]

Charge or control

[68] The respondent relies on *Karge v. Ontario (Minister of Environment and Energy)*, [1996] OEAB No. 51, for the position that the phrase "charge and control" imports a requirement of actual decision-making authority and possession rights, which minors cannot legally exercise.[39] *Karge* involved the interpretation of the phrase "charge and control" in the Ontario *Environmental Protection Act*. The Board said:

> 68 In the absence of any special context requiring otherwise, words in statutes are to be given their ordinary meaning. Therefore, dictionary definitions of "charge" and "control" are useful starting points for determining the meaning of these terms in section 43 of the EPA . The Concise Oxford Dictionary defines

[36] *McDonald* at para. 12.
[37] *McDonald* at para. 12.
[38] Respondent's post-hearing brief at paras. 19-23.
[39] Respondent's post-hearing brief at paras. 25-30.

"charge" as "task, duty, commission; care, custody". "take charge" means "assume control or direction of". "Control" is defined as "1. the power of directing, command (under the control of). 2. the power of restraining, esp. self-restraint. 3. a means of restraint; a check." As a transitive verb, "control" is defined as "1. have control or command of; dominate. 2. exert control over; regulate. 3. hold in check; restrain". Black's Law Dictionary, 5th edition, defines "control" as "the power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee".

69 As can be seen from these definitions, charge, control and domination are overlapping, and to some degree, synonymous concepts. The courts have also treated these terms, as well as others such as "care" and "custody" as having considerable overlap. In *Indemnity Insurance Co. of North America v. Excel Cleaning Service*, [1954] S.C.R. 169, the Supreme Court of Canada discussed the meaning of the phrase "in the care, custody or control of the insured" in an insurance policy. The Court was required to determine whether wall-to-wall carpet attached to the floor at the premises of a cleaning company's customer was in the care, custody or control of the cleaning company while it was being cleaned. The Court stated:

> Reference to the Oxford Dictionary discloses that these words, as commonly used, possess a variety of meanings. A study thereof does indicate that, as here used, "care" would include a measure of protection and preservation, "custody" of safekeeping and protection and "control" of direction or domination.

70 In the same case, the Court was required to determine whether the cleaning company was "in charge" of the carpet during cleaning. The Court reviewed three court decisions involving clauses in insurance policies using the phrase "in charge". In one case, the question was whether a person using an elevator to move equipment was in charge of the elevator. In a second, the issue was whether a garage operator was in charge of an automobile left there for maintenance. In the third, the issue was whether a person driving a car was in charge of it if the owner was sitting beside him. The Court stated:

> The phrase "in charge", as construed in the last three mentioned cases, means that one who can be properly so described must have either physical possession or control of the chattel.

71 In R. v. Slessor, [1970] 1 O.R. 664, the Ontario Court of Appeal considered whether an owner of a car who was seated beside the driver could be convicted of failing to stop at the scene of an accident under what was then section 221 of the Criminal Code. That section required a person in care, charge or control of the vehicle to stop, give his or her name and address, and offer assistance if anyone was injured.

72 In this context, the Court stated at p. 675:

> The word "care" involves the concept of possession, responsibility, charge or oversight. "Charge", too, is a word of broad comprehension. One speaks of a person who is fixed with the responsibility of supervision as one who is in "charge". The word "control" is frequently used as synonymous with "superintendence" and suggests the possession of a restraining or directing influence or "management".

Conclusion

[69] As the respondent submits, it is a challenge to accept that a minor could assume "charge or control" of land within the statutory meaning of those terms. The most concrete factor is the inability of a minor to make a binding contract.

[70] The parties agree that if a child had a property interest separate and distinct from their parents, this could stand as an interest capable of expropriation, though it is likely that the expropriation and compensation process would still need to operate through a guardian or trustee. But the idea of an interest capable of expropriation accruing to a child as a result of living on a property with the child's parents is not convincing.

[71] In the absence of evidence showing the minor to have exhibited "charge or control" of the land, most likely through a trustee or guardian, merely being a resident living on the land would not constitute an interest in these proceedings sufficient to join them as a plaintiff.

[72] Potential Plaintiffs who were minor children on the date of expropriation could only be joined as a result of a guardian or trustee being an "owner" of the "land" on behalf of that minor and as at the time of the expropriation.

Issue 5: Does the 1996 Representative Order, and the subsequent Release signed by the Africville Genealogy Society and Court Orders related thereto, operate to bar Potential Plaintiffs from being joined as plaintiffs?[40]

Effect of the 1996 Representation Order

[73] The parties disagree on the scope and effect of the 1996 Representation Order. The February 1996 order states, at paragraph 4:

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[40] This issue was framed differently as between the parties. I have stated the issue in the way presented by the respondent, that is, to include "and Court Orders related thereto" as part of the question.

> AND IT IS FURTHER ORDERED that the Africville Genealogy Society, a body corporate, incorporated pursuant to the *Societies Act*, R.S.N.S. 1989 c. 435 is hereby appointed as 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 and others pursuant to Civil Procedure Rule 5.10(1)(b).

[74] This appointment under Rule 5.10(1)(b) allowed the Society to represent persons who were not specifically named or identified at the outset of litigation – namely, "presently unascertained" former residents and descendants of Africville residents who might be affected by the proceeding.

[75] Justice Moir has stated that "… the Driedger contextual approach to interpreting statutes and the principle of commercial efficiency for interpreting contracts, with necessary modification, apply to the interpretation of orders": *Royal Bank of Canada v. Robertson*, 2016 NSSC 176, at para 19. As such, "[c]ontextual interpretation applies to orders. The words of an order 'are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the…[order], the object of the…[order] and the intention of…[the court]'": *Robertson* at para 20.

Authority to release claims

[76] The applicant says the 1996 order did not permit the Society to represent plaintiffs throughout the litigation – including releasing claims – but only to represent "presently unascertained" plaintiffs who "may be affected by the intended proceeding" in commencing a proceeding.[41] The reasoning for this construction appears to be that the order did not set out procedures for the class proceeding, and there was no comprehensive class proceeding legislation at the time. Accordingly, the applicant submits, the Society would have been required to return to the court to determine the procedures to be followed.[42]

[77] The applicant maintains that because the 1996 order could deprive potential plaintiffs of the chance to assert legal rights, it should be interpreted strictly, as limiting the Society's representative power to commencing the action without having all plaintiffs ascertained. As such, the Society would have had no right to release claims of potential plaintiffs in 2010.

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[41] Applicant's brief at paras. 61-64.
[42] Applicant's post-hearing brief at paras. 3-8.

[78] The respondent maintains that the order authorized the Society to represent the potential plaintiffs throughout the proceeding and to release their claims. The affidavit of George Grant, Sr., relied on by the applicant, supports this view when read as a whole. Mr. Grant stated his belief that the Society was a "fit and proper representative" of the estates of the named deceased persons and unascertained persons "in the proposed legal action against the City of Halifax."[43]

[79] There is nothing in the language of the order to suggest that its intended effect was limited to commencing a representative proceeding. Nor does 1972 Rule 5.10 suggest any such limitation. The language of the rule plainly contemplates an ongoing proceeding, starting with the use of the word "represent" without qualification in Rule 5.10(1). There is no convincing reason to read the scope of the order in the narrow manner proposed by the applicant.

Effect on unascertained potential plaintiffs

[80] The applicant relies on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, in arguing that the appointment of the Society under the 1996 Order lacked the procedural safeguards necessary to bind absent plaintiffs. *Dutton* is the Supreme Court's leading articulation of the requirements for representative proceedings at common law in the absence of comprehensive class action legislation. The rule in question was an Alberta Rule of Court similar to 1972 NS Rule 5.09, providing that "[w]here numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all."[44] The Court said:

> 34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. ... However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

[81] With respect to notice, the court stated that:

> … A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice.

[43] Respondent's brief at paras. 53-64.
[44] *Dutton* at para. 10.

> However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.[45]

[82] The applicant submits that the safeguards of notice and opt-out rights required by *Dutton* were absent in the Africville proceedings, and therefore the Society had no authority to dismiss claims on behalf of unascertained persons. 1972 Rule 5.10, which was the authority for the 1996 order, stated, in part:

> 5.10. (1) In a proceeding concerning,
>
> …
>
> (b) property subject to a trust;
>
> …
>
> the court may appoint one or more persons to represent any person, including any unborn or unascertained person, or the members of a class of persons who have a present, future, contingent, or unascertained interest in, or who may be affected by the proceeding, and who, or some of whom, cannot be readily ascertained or found.
>
> (2) Where the person or persons appointed under paragraph (1) are parties to the proceeding, any order in the proceeding is binding upon any person or class so represented.
>
> (3) Where in a proceeding under paragraph (1), a compromise is proposed, and any person or member of the class referred to in the paragraph and interested in the compromise is not a party to the proceeding, but
>
> (a) there is another person in the same interest who is a party and who assents to the compromise or on whose behalf the court sanctions the compromise, or
>
> (b) the absent person or member of the class is represented by a person appointed under paragraph (1) who so assents,
>
> the court, if satisfied that the compromise will be for the benefit of the absent person or member of the class and that it is expedient to exercise the power, may approve of the compromise and order that it shall be binding on the absent person or member of the class, and unless the order has been obtained by fraud or non-disclosure of material facts, the person or member of the class shall be bound accordingly.

[83] The 1996 Order makes no mention of a notice process or opt-out rights, nor does it reference judicial oversight of any settlement. While Rule 5.10 allowed a

[45] *Dutton* at para.49.

representative to bind unascertained persons, the common law as later described in *Dutton* requires that such representation be accompanied by procedural safeguards, including notice and the opportunity to opt out. The apparent lack of such safeguards raises the question of whether the 1996 order can bar all claims by unascertained individuals. The underlying concern is not simply whether the Society had nominal authority, but whether that authority was exercised within the bounds of procedural fairness as articulated in *Dutton*.

[84] These apparent defects of the 1996 order are not seriously contested by the respondent. The respondent says, however, that "the fact remains that those claims were released and an Order was issued in July of 2010 dismissing the claim. Further, in July of 2015 this Honourable Court confirmed the release and the dismissal of those claims."[46] No appeal was taken from either of these orders, and they therefore remain binding.[47] The 2010 release by the Society was executed in its capacity as a representative of the former residents and their unascertained descendants, in accordance with the 1996 order. The July 7, 2010 dismissal order included the Society in the same capacity. The respondent submits that in issuing the July 2010 order, the court "was satisfied that the compromise was for the benefit of the absent persons or members of the class."[48]

[85] It appears undisputed as between the parties that there are questions as to whether the 1996 order was executed in accordance with the understanding of procedural rights in class proceedings that would be articulated some five years later in *obiter* in *Dutton*. The court in that case expressly noted that as recently as 1983, "the modern class action was very much an untested procedure in Canada."[49] The issue of what constituted sufficient notice was not before the court.[50] As the respondent argues, it is difficult to conclude anything other than that the 1996 order remains in effect. Moreover, it was compliant on its face with 1972 Rule 5.10. As such, there is no principled basis to treat it as anything other than effective as a full representation order in accordance with the former rule.

[86] While there was no formal mechanism for notice, as a Class Proceeding would require, there was ample reason to believe as early as 2010 that relevant and material information about the existence of the claim and the opportunity to participate as a party was widely disseminated.

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[46] Respondent's brief at para. 66.
[47] Respondent's brief at paras. 66-67.
[48] Respondent's post-hearing brief at para. 10.
[49] *Dutton* at para. 46.
[50] *Dutton* at para. 49.

[87] It is important, in assessing whether sufficient notice existed of the 2010 and subsequent court proceedings, to consider the unique circumstances of this case. Based on comments and evidence provided to the Court beginning in 2010 and throughout the hearings in 2011 and 2012 it was apparent that Africville was a community of families known to each other. It is true that some of the original residents and some descendants left Nova Scotia after everyone was moved from Africville.

[88] However, it was evident that the issue of advancing claims against the City for what happened to that community during its existence, and for how its residents were ultimately required to leave it, was well known. Counsel was retained for that purpose in 1996 and it was a live issue for negotiation for the next 14 years. It was also well known in 2010 that there was an opportunity to settle or continue the litigation.

[89] Mr. Walter made representations to the court at the July 2010 hearing as to the efforts made to ensure that possible claimants were aware of the proceedings, both through counsel's efforts and those of the Africville Genealogy Society. Once the division became evident in that proceeding, Mr. Walter was directed to undertake to speak to those persons who claimed that they were not consulted about the settlement, and to seek instructions on whether they wished to participate in the settlement or to continue to pursue the claim personally. He was directed to return to court on October 8, 2010 to inform the court of the results of that process.

[90] In his September 3, 2010, affidavit[51], Mr. Walter outlined the history of his firm's representation of the 1996 plaintiffs and averred:

> …
>
> 6. In early 2010, the Defendant made an offer to settle this proceeding to the Board of Directors of the Plaintiff, Africville Genealogy Society. I was involved, as solicitor for the Africville Genealogy Society, in negotiations leading up to this settlement offer.
>
> 7. The above proposal did not involve any compensation to individual Plaintiffs but rather payments of funds and transfers of property to the former Africville community as a whole. In fact, it was a condition of the proposal that no compensation be paid to individual Plaintiffs.

[51] Affidavit of Paul Walter, dated September 3, 2010, filed September 15, 2010, in support of the Motion to Withdraw.

> 8. I recommended to the Africville Genealogy Society that it accept the above mentioned settlement proposal made by the Defendant, and the Board of Directors of the Africville Genealogy Society did in fact accept it.
>
> 9. Subsequent to the acceptance of this proposal by the Board of Directors of the Africville Genealogy Society, a number of individual Plaintiffs also accepted this settlement proposal and have signed releases in favour of the Defendant.
>
> 10. On July 7, 2010, the Honourable Justice Patrick Duncan granted a consent dismissal order to dismiss the claims of a number of Plaintiffs.
>
> 11. Subsequently, 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 their solicitor. A sample of these letters is attached to this Affidavit as Exhibit "1".
>
> 12. In response to the letters sent out to the outstanding Plaintiffs, an additional number of Plaintiffs have accepted the settlement proposal of the Defendant and have signed releases in favour of the Defendant.

[91] Mr. Walter filed a supplementary affidavit on September 23, 2010, in which he outlined, in detail with 12 exhibits appended, the considerable efforts that were made to locate and to meet individuals interested in the proceedings, and where possible to take instructions as to whether they wished to continue or settle. Affidavits of Service of the motion to withdraw were also filed. These efforts included:

- Emailed and regular mail correspondence to potential or existing plaintiffs.
- Three Notices published in the Halifax Chronicle Herald.
- Searches of Property online and Probate Records.
- Employed process servers in Nova Scotia and Ontario.
- Consulted with instructing persons from the Africville Genealogy Society.

[92] Consistent with Mr. Walter's evidence, several persons attending the July and October 2010 court proceedings identified themselves to the Court as dissenting plaintiffs, and others who sought to be added as plaintiffs rose to identify themselves.

[93] By the time of the October 2010 hearings those who wished to continue as at that time were identified. In addition, those who had decided to settle as a result of

the consultations with counsel between July and October 2010 had their claims dismissed.

[94] Satisfied that Mr. Walter and his firm had done as much as could be done to inform plaintiffs and potential plaintiffs of their options, Mr. Walter and his firm were permitted to withdraw from representing those individuals.

[95] Though there was no longer counsel acting for the plaintiffs, several joinder applications were presented to the Court. Some of those applicants for joinder in 2011 and 2012 were living outside of Nova Scotia and participated in hearings by telephone, suggesting that the fact of the proceedings was finding its way to a broad base of possible claimants.

[96] The breadth of the outreach to possible plaintiffs is also seen in Schedule A to the 2021 Notice of Action (Third Amendment) which lists 163 "plaintiffs" whose cities of residence were in a variety of communities in six Canadian provinces and four states in the United States of America.[52]

[97] In summary, many of the concerns for process expressed in *Dutton* were addressed and acted upon with apparent success.

Estoppel

[98] The applicant submits that because the 1996 order and the Release were known to the respondent and the court at the time of the 2011 and 2012 joinder orders, the court has implicitly held that the order and release did not bar joinder of plaintiffs, and the respondent is estopped from relying on this argument on this motion.[53]

[99] The respondent acknowledges that the 1996 and 2010 orders were not raised in 2011 and 2012, when the additional plaintiffs were added. The respondent says its position on this point has been made clear since 2015, and that it is evident from prior decisions that this remains a live issue.[54] In the 2015 decision[55] the court expressly noted that the respondent had raised the question of "the effect of the Releases and Orders ... 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

[52] Exhibit 15.
[53] Applicant's brief at paras. 59-60.
[54] Respondent's brief at paras. 56-58.
[55] *Williams v. Halifax (Regional Municipality)*, 2015 NSSC 228 at para. 58.

were unascertained, and...of the individual plaintiffs" (at para. 58). The applicant did not appeal the court's decision that persons who had signed releases were estopped from being added as plaintiffs in the then-proposed class action.[56]

[100] The respondent says the requirements of promissory estoppel are not established. The elements were recently reviewed in *Colman v. AAA Plumbing and Heating Ltd*, 2024 NSSC 84, [2024] NSJ No 205:

> 80 In order to address this question, it is helpful to summarize the following principles related to the doctrine of promissory estoppel:
>
> 1. The essential elements of promissory estoppel were summarized by the Supreme Court of Canada *in Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 ("Maracle"). Sopinka, J. wrote:
>
> > The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. (at para. 13)
>
> 2. The representation or assurance required to ground an allegation of promissory estoppel must be clear and unequivocal...
>
> ...
>
> 4. In *Maracle*, the Supreme Court of Canada determined generally that an "acknowledgement of liability" is a factor which, under the common law, can ground an argument of promissory estoppel in response to an expired limitation period. However, it is not the only ground. A continuing course of negotiations which may lead another party to believe that strict legal rights will not be relied upon may also suffice, in appropriate circumstances. (see paras. 13 - 17)

[101] The respondent says there were no clear and unequivocal assurances by words or conduct that it would not rely on the 1996 order and release; merely not raising the point in the 2011 and 2012 motions did not bar the respondent from raising the issue later in the proceeding. Nor is there evidence that the applicant changed his position as the result of any alleged assurance.[57]

[102] The applicant responds that he was not alleging promissory estoppel, but estoppel by conduct, arguing that "in the circumstances of this matter, that some

[56] Respondent's brief at paras. 59-60.
[57] Respondent's brief at para. 62.

Potential Plaintiffs were previously joined without regard to the 1996 Representative Order, that the Respondent should be estopped from raising it now."[58] This does not rebut the respondent's position, in view of the Court of Appeal's description of estoppel by conduct in *Ross v. Bank of Montreal*, 2013 NSCA 70:

> [29] There are no water-tight compartments in estoppel; Bruce MacDougall, *Estoppel* (Markham, Ontario: LexisNexis Canada Inc., 2012), 1.34 p. 17. Estoppel by conduct is sometimes characterized as a subset of estoppel by representation…
>
> …
>
> [31] Thus there must be a positive representation, or silence where the party is under a duty to speak; an intention that the other party would act on the representation; and detrimental reliance by the other party.
>
> [32] The judge applied this law properly when he found the Rosses' defence was not barred by estoppel by conduct:
>
> > [40] BMO also alleged estoppel by conduct. In *Scotsburn Co-operative Services Ltd v. WT Goodwin Ltd.*, [1985] 1 S.C.R. 54 at para. 26, the Supreme Court of Canada adopted the following definition of estoppel by conduct from Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed 1977), p. 4:
> >
> > > ... where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.
> >
> > [41] I am not convinced that estoppel by conduct applies in the circumstances of this case. Neither Sportsclick nor the defendants were obligated to attend and make submissions at the various receivership stages. Further, it cannot be said that BMO relied on the defendants' silence. Therefore, estoppel by conduct does not apply.
>
> [33] I am satisfied the judge did not err when he found the Rosses' defence was not barred by estoppel by conduct.

[58] Applicant's reply brief at para. 32.

[103] In my view, the respondent is not estopped from advancing its argument respecting the 1996 order, for reasons similar to those dismissing the application of promissory estoppel.

Conclusion

[104] For the reasons set out above, the 1996 representative order, and the subsequent Release signed by the Africville Genealogy Society, and court orders related thereto, operate to bar certain Potential Plaintiffs from being joined as plaintiffs.

[105] I acknowledge the applicant's entreaty[59] that:

> …Therefore, the Applicant respectfully submits, that to provide fairness and justice to the former community of Africville, this Court should apply the following two considerations on the present Motion:
>
> 1. this Court has previously implicitly decided that the Order and Release do not serve as a bar to the joinder of the Potential Plaintiffs; and,
> 2. Halifax, having decided not to raise this issue in the past motions, has likewise implicitly agreed that the Order and Release serve as a bar to the joinder of the Potential Plaintiffs and should be estopped from being able to rely upon them in this Motion.

[106] With respect, my orders made, respectively, through the period 2010 to 2015 were supported with reasons. They culminated with Schedule B to my 2015 decision wherein I listed all the persons or estates whose claims were dismissed. To ignore my own orders ten plus years later would require very compelling legal arguments to do so. I am unable to agree with the applicant that those reasons exist.

Issue 6: Can Potential Plaintiffs seeking to join as plaintiffs after the 2012 decisions of this Court be added as plaintiffs?

Positions of the Parties

[107] The applicant submits that 2012 decisions refusing joinder to certain proposed plaintiffs are not binding on the current potential plaintiffs. Among the prejudice that underpinned the 2012 decisions was the additional burden of documentary production requirements for additional plaintiffs, and the difficulty of managing a

[59] Applicant's brief at para. 60.

trial with 43 self-represented plaintiffs. The applicant says these concerns no longer exist, as the potential plaintiffs will be represented by a single law firm.[60]

[108] The respondent says the 2012 decisions are not distinguishable, and that the prejudice found at that time is not resolved by the fact that the potential plaintiffs now have counsel.

Background

[109] As indicated, in 2010 a division arose among the original plaintiffs in the 1996 Claim. Many wanted to settle and did so. Another group did not agree. Orders of dismissal, where appropriate, were issued.

[110] In the years 2010, 2011, and 2012, I heard the applications of several people who sought to be joined as plaintiffs pursuant to Rule 35.08. Some were successful; some were not.

[111] The test that was applied to demonstrate "an interest in the issues to be before the court" was satisfied based on residency in Africville during the period described in the 1996 Statement of Claim.

[112] That claim alleged numerous bases for liability of the respondent and for personal damages owing to the plaintiffs on grounds including fraud, deceit, taking actions that were *ultra vires* the City of Halifax, trespass to property, breach of contract, destruction of real and personal property, nuisance, tortious conspiracy, breach of fiduciary duty, intimidation as well as alleged *Charter of Rights and Freedoms* violations.[61] Those causes of action were abandoned after 2012. The current claim is framed as an allegation of a flawed expropriation process[62] and therefore the requirements to become a plaintiff have changed.

June 8, 2012: Applications for Joinder

[113] By the time of the hearing on June 8, 2012, I had granted 26 people the right to continue the action as individual named plaintiffs. Twenty (20) more applications were presented at this hearing. One did not proceed as the applicant passed away just before the hearing. Of the remaining applications the respondent consented to

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[60] Applicant's brief at paras 69-74. The 2012 decisions were also concerned with the limitations bar to joinder under Rule 35.08(5), which is not before the court on this motion.
[61] Exhibit 10: 1996 Statement of Claim.
[62] Exhibit 15: Notice of Action Amended (Third amendment) 2021.

joining 16 applications and opposed three, being those of Conrad Black, Rose Carvery and David Parris.

[114] Mr. Parris's application was denied as he had signed the 2010 Release.

[115] Opposition to the applications of Conrad Black and Rose Carvery was argued on two grounds:

1. Their applications were filed after March 30, 2012, which was the date that a Statement of Defence was filed. That Defence advanced a limitation period defence to the claim. It was submitted that at that point Rule 35.08(5) was engaged in the analysis of whether to permit joinder.
2. The respondent's second submission was that the Court should refuse to exercise its discretion to add further parties due to the prejudice that doing so would be occasioned to the respondent.

Analysis

[116] The first argument relates to Rule 35.08(5) which states:

> (5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

[117] The respondent's counsel made this same argument on previous joinder applications. In fact, the intention to plead the limitation period expiry was well known by the parties and the court for some time. However, in December 2011, I ruled that I was not prepared to consider the limitation period argument as a basis to refuse joinder prior to a Defence being filed that included this pleading. Hence, the respondent's consent to the granting of joinder of 16 of the applicants at the hearing was given because their applications were filed prior to March 30, 2012.

[118] The respondent's second argument was that the Court should refuse to exercise its discretion to add further parties due to the prejudice that doing so would be occasioned to the respondent. The argument was that there had to be a point in time where the matter needed to move ahead and adding more plaintiffs in 2012 for something that occurred in the 1960s and had been in litigation since 1996 was only

further contributing to increased work to defend, more time needed to litigate and more delay in bringing the matter to trial.

[119] My decision[63] accepted the respondent's arguments and concluded that the application of Mr. Black was denied. I was not prepared to exercise discretion to grant his application because there was no evidence of an intention to bring the claim to the attention of the defendant or the Court prior to the Defence being filed.

[120] In the case of Ms. Carvery, there was evidence of good faith attempts to file her application to join, prior to the filing of the Defence. In that circumstance I exercised my discretion to grant her application.

The Hearing of October 26, 2012

[121] My decision[64] considered the applications to join filed by Sylvia Mantley and Donald Desmond. I accepted that the applicants had an "interest in the issues to be before the court". The position of the respondent echoed their position in the February hearing.

[122] The applications were denied.

[123] The arguments for undue prejudice made in 2012 which I accepted, were summed up in the respondent's brief:

> 69. One of the issues with respect to prejudice that was examined by the Court was with respect to the production of documentation. As noted by Your Lordship in the decision of October 26, 2012, HRM at that point had produced its Affidavit Disclosing Documents to all of the Plaintiffs at that time. However, if new Plaintiffs were added, it was recognized that HRM would have to go back and review all of the City's records to see if there is information that has not been given out with respect to each new Plaintiff who was added. Your Lordship noted, at page 173, starting at line 15 (Exhibit 14, Agreed Statement of Facts):
>
> > So they would have to go back to square one to determine through their records what they have that might pertain only to your claims that would otherwise not have had to be produced.
>
> 70. The Respondent submits that the same will apply if any of the 93 Potential Plaintiffs, separate and apart from the 51 that remained as of October 2012, were permitted to be added as a Plaintiff. Further, the Applicant will have to do the same for any Potential Plaintiff for which they have not already produced information

[63] Exhibit 14 at p. 99 Decision (Unreported) dated June 8, 2012.
[64] Exhibit 13 at p. 165 Decision (Unreported) dated October 26, 2012.

in the Plaintiff's ADD. On October 30, 2024, correspondence was sent to Mr. Pineo in which HRM identified 30 Potential Plaintiffs for which there was no information contained in the Plaintiff's ADD.

71. In the 2012 decisions the Court also raised the concern of delay, and of trying to determine how much additional time was needed to allow for further disclosure and possible discoveries, before the matter was ready for trial. The Court also recognized the concern that more individuals may want to join the action, and how that might impact on the proceeding; this is the very issue that is currently before this Honourable Court. Commencing at page 174, at line 1, Your Lordship states:

> But the more difficult thing is how much time do I add now to the process to allow all of that to take place. We're 40 years since it happened, 16 years since the Action was started, two years since I came in, and now as we're getting close to the point where I can finally say let's start talking about a time for a trial. We're going to stop the process and start it again for the addition of two complainants.
>
> That, in and of itself, might not be over ... it could be overcome potentially but the problem that I also have is if I permit people to come in at this stage on these kinds of facts, how will I ever stop it. When will we ever get to trial? Like, how many more people.
>
> I don't know how many more people may be out there thinking about it, who are in the same position, for example, as you, Ms. Mantley, who have been kind of sitting back thinking about it, working at it, and not ... aren't here yet. But what if they come forward in a month or three months from now and they say well, you did it for Ms. Mantley and I'm exactly in the same position as her.
>
> And the difficulty is that the issues for them are going to be exactly the same as they are now, which is that I have to ... every time this happens, I have to start ... stop the process and start again. And I think that's really going to throw a wrench into ever getting this to trial and it's been made very clear to me … people have died already since ... even in the two years since I started it. We have had plaintiffs that we've lost, and I've had to stay the proceedings because they're no longer here, they're no longer available as witnesses, let alone as plaintiffs.
>
> The longer this is delayed, and I permit continuous delay, the claim will literally and figuratively die. There'll be nobody left to tell me what happened if I'm the trial judge, what happened if we don't get there soon. So, that's prejudice that I, you know, I see from where I sit. I have a real obligation to the 43 plaintiffs who are still here to get them to trial as soon as possible. So, I do see that as a serious problem.

[124] Other information referenced in the decision included that:

- The defendant was not seeking discovery examinations and appeared to be “almost ready for trial”;
- That Mr. Desmond knew about the matter for at least two years before making his application; and
- That the matter was undoubtedly going to be lengthy given that there were already 43 plaintiffs, all self-represented.

[125] The record will show that over the years since 2010, it has been a significant challenge to push the matter forward. Going into 2012 there appeared to be some certainty that the matter could be scheduled. At a January 4, 2012, Hearing I directed, among other Directions, that the Statement of Defence be filed by March 31, 2012. That was done on March 30, 2012. I also ordered that the parties file Affidavits Disclosing Documents by September 27, 2012, which the defendant had done. So, by the time these applications to join were being brought forward in 2012, my conclusion was that the presumption in Rule 35.08 (1) was rebutted. Relying on Rule 35.08(3), I concluded that joining further parties would cause serious prejudice to the then known plaintiffs as well as to the respondent. The existence of the action was well known in the potential plaintiffs’ community since 1996 and by 2010 there was an identified group of plaintiffs to proceed with the case. Compensation in costs was not a practical consideration and it was not argued.

Conclusion

[126] This is not a representative proceeding. Having one lawyer does not reduce the need to defend individual claims. Each plaintiff joined now adds to the workload and the delay and demand on counsel and on the resources of the Court. These impact negatively on both existing potential plaintiffs and the defendant in seeking to have this matter adjudicated. This must be seen in the context of the passage of 30 years since the Action was filed and over 55 years since the expropriation was filed.

[127] My 2012 decisions identified the many problems that granting further applications would likely cause. None of these concerns have been alleviated in the succeeding years.

[128] Having said that, there is one difference I do acknowledge. Those decisions related to motions seeking to join as a party. The decisions were not a dismissal of any claim an individual might have. Indeed, based on the test applied at the time I

was satisfied that the 2012 applicants did have an interest in the issues as they were framed in 2010 to 2012.

[129] The issues before the court have changed since 2012. A new application by an individual impacted by the 2012 decisions that denied the motion to be joined could be brought on that basis; that is, that they have an interest in the issues as they now are before the court, i.e., whether there was a flawed expropriation. The legal bases to support a claim to have an interest in the issues before the court have been set out in this decision. Any such application brought at this time would be subject to consideration of all the factors set out in Rule 35.08. Each would need to be decided on the evidence before the court in the hearing, including that which speaks to prejudice to the parties of joining at this time.

CONCLUSION

Issue 1

[130] The legal and factual requirements a Potential Plaintiff must meet to be joined as a plaintiff are:

1. To provide evidence that they have an interest in the issues before the court, in accordance with Rule 35.08(2).
2. Mere presence on the land is not sufficient.
3. The evidence must show that the person was an “owner” of the “land” as at the date of the expropriation. The broad interpretation of these requirements in the Halifax City Charter 1963, urged by the applicant, is not supported in law.
4. The Potential Plaintiff must not be barred from joining due to having signed a Release, having quit claimed their interest prior to expropriation, or having their interest foreclosed by earlier court orders dismissing their claim.

Issue 2

[131] Potential Plaintiffs who signed Indentures cannot be joined as plaintiffs by relying on their interests in the land that were terminated by execution of the Indenture prior to expropriation.

Issue 3

[132] Potential Plaintiffs who are descendants of persons who signed Indentures cannot be joined as plaintiffs solely on the basis of presence on the land or being a descendant. The potential plaintiff must satisfy the court that as at the time of the expropriation they were an "owner" of the "land" in their own right.

Issue 4

[133] Potential Plaintiffs who were minor children on the date of expropriation could only be joined as a result of a guardian or trustee being an "owner" of the "land" on behalf of that minor and as at the time of the expropriation.

Issue 5

[134] The 1996 Representative Order, and the subsequent Release signed by the Africville Genealogy Society and court orders related thereto, operate to bar those Potential Plaintiffs from being joined as plaintiffs.

Issue 6

[135] Potential Plaintiffs seeking to be joined as plaintiffs after the 2012 decisions of this Court who have not otherwise had their claims dismissed may be added as plaintiffs if they can establish that they have an interest in the issues before the court, i.e., that they were an "owner" of the "land" at the time of the expropriation as defined in this decision.

[136] Any potential plaintiff seeking to join and who can satisfy the requirements of Rule 35.08, as defined in this decision, must also be in a position to respond to the defendant's argument that joinder of any new parties at this time should be rejected on the basis of Rule 35.08, i.e., serious prejudice to the parties that cannot be compensated in costs.

COSTS

[137] I will receive submissions on costs if the parties are unable to resolve them otherwise.

Duncan J.