# SUPREME COURT OF NOVA SCOTIA

**Citation:** *Healy v. Halifax (Regional Municipality)*, 2017 NSSC 83

**Date:** 2017-03-24
**Docket:** Halifax Nos. 328081, 328082, 328084, 328086, 328092, 328093, 328094, 328095, 328096, 328097, 328098, 328099, 328100, 328101, 328105, and 333639
**Registry:** Halifax

**Between:**

Robert Healy and Anna Healy, Robert F. Healy Insurance Agency Incorporated, Douglas Tamlyn and Deborah Tamlyn, Tamlyn Construction Limited and Aspen Resources Limited, Donald Saunderson and Eileen Saunderson, Martin Wexler and Cheryl Wexler, Herman Hugenholtz and Beverley Ruth Hugenholtz, Peter Hall, Richard Bendor-Samuel and Stephanie Ouderkirk, Brian Perry and Kelly Skelhorn, Lindsay Hugenholtz, Eric Slone and Catherine Slone, Beverley Sweetman, James Spurr and Valerie Spurr, Robert Daniel Selkirk and Sonja McVeigh, Lara Ryan and Brett Ryan

Plaintiffs

v.

Halifax Regional Municipality and Halifax Regional Fire and Emergency Service and The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendants

## Trial Format Decision

**Judge:** The Honourable Justice James L. Chipman

**Heard:** March 22 and 24, 2017, in Halifax, Nova Scotia

**Counsel:** Philip Chapman and Dillon Trider, for the Plaintiffs
Sandra Arab Clarke and Stewart Hayne, for the Defendants Halifax Regional Municipality and Halifax Regional Fire and Emergency Service
Michael T. Pugsley, Q.C. and Sheldon Choo, for the Defendant The Attorney General of Nova Scotia

**Orally by the Court:**

## Introduction

[1] In *Healy v. Halifax (Regional Municipality)*, 2016 NSCA 47, Justice Bourgeois introduced the background to this case as follows:

> [1] In April 2009, a forest fire in the Spryfield/Ferguson's Cove area of the Halifax Regional Municipality resulted in significant property losses. A number of homes were completely destroyed and others which were spared destruction sustained varying degrees of damage.
>
> [2] A number of homeowners commenced legal action. In 16 separate actions, the plaintiffs … made identical allegations of negligence and gross negligence against the defendants Halifax Regional Municipality, the Halifax Regional Fire and Emergency Service and the Attorney General of Nova Scotia…

[2] Justice Pickup was the initial case management judge. With his retirement on September 30, 2016, I assumed the role of case management judge. In advance of the March 22 motion, I met with counsel for the parties on: October 31 and December 6, 2016, and January 18 and February 23, 2017.

[3] On January 17, 2017, the Plaintiffs filed a Notice of Motion for an order pursuant to Rule 37.04(2) to set a date for the trial of the common issue of liability. Alternatively, pursuant to Rule 4.13(2) they moved for an Order to request a date assignment conference to set dates for a trial of the common issue of liability. In their Notice of Motion, the Plaintiffs also relied on Rule 1.01.

[4] With their Notice of Motion, the Plaintiffs filed an affidavit of their counsel, Philip Chapman, deposed January 17, 2017.

[5] On March 3, the Plaintiffs filed a further affidavit of Mr. Chapman, sworn on that date, along with a brief.

[6] By Notice of Motion filed March 3, the Defendants, Halifax Regional Municipality and Halifax Regional Fire and Emergency Service ("Halifax") moved under Rule 39 for an Order to strike paragraph 2 of Mr. Chapman's January 17 affidavit. Halifax filed a brief, book of authorities and affidavit of their counsel, Sandra Arab Clarke, sworn March 3.

[7] On March 3, 2017, the Defendant, The Attorney General of Nova Scotia representing Her Majesty the Queen in right of The Province of Nova Scotia ("the AGNS") filed a Notice of Motion under Rules 37.03 and 37.04 for an Order that the damages trials be heard together immediately following the common liability trial. With their Notice of Motion, the AGNS filed an affidavit of their counsel, Sheldon Choo, sworn March 3, along with a brief and authorities.

[8] On March 10, the AGNS filed a brief in response to the Plaintiffs' motion for permission to request a date assignment conference.

[9] On March 10, the Plaintiffs filed a brief, book of authorities and affidavits deposed March 10 by Mr. Chapman and their other counsel, Dillon Trider. They also filed a brief on this date in response to Halifax's motion to strike paragraph 2 of Mr. Chapman's earlier affidavit.

[10] On March 10, Halifax filed a brief in response to the Plaintiffs' motion pursuant to Rules 4.13(2) and 37.04(2). They also filed a book of authorities and (two volume) affidavit of Ms. Arab Clarke, sworn March 9, 2017. Contained within their brief was Appendix "A", submissions with respect to a preliminary motion to strike portions of Mr. Chapman's March 3 affidavit.

[11] On March 13, Halifax filed a brief in response to the AGNS' Rule 37.03 motion.

[12] On March 13, the AGNS filed a brief in reply to the Plaintiffs' March 10 submissions.

[13] On March 13, the Plaintiffs submitted a rebuttal brief on the motion to allow the filing of a request for date assignment conference for a liability trial under Rule 4.03(2). On the day of the hearing the Plaintiffs provided (with agreement of the Defendants) a March 22, 2017 affidavit of Mr. Trider attaching the transcript of a July 4, 2012 appearance before Justice Murphy.

**Ruling on motion of Halifax to strike para. 2 of the Affidavit of Mr. Chapman, sworn January 17, 2017**

[14] Halifax takes issue with para. 2 of Mr. Chapman's affidavit which reads:

> On June 2, 2016, the Nova Scotia Court of Appeal ordered that the issue of liability in all 16 proceedings be determined by way of a separate common trial, the finding from which is binding in all matters.

[15] Halifax refers to Rule 39.04 which provides the Court with discretion to strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate for an affidavit. Further, they focus on Rule 39.04(2) which requires a judge to strike part of an affidavit containing a submission or plea.

[16] Halifax says that Mr. Chapman's affidavit submits that the Court of Appeal ordered that the issue of liability be determined by way of a separate common trial. They point out that the actual order from the Court of Appeal states differently. Para a. reads:

> The common issue of liability in all 16 actions, namely …, shall be heard in a common trial, the finding from which is binding in all matters;

[17] With reference to the above, Halifax argues that the order does not state that there is to be a separate liability trial. Rather, they point out that the common issue of liability shall be heard in a common trial. Accordingly, Halifax takes the position that to suggest the order states that there is to be a separate liability trial is a submission or plea.

[18] I should add that Ms. Arab Clarke advised (for the first time) in her oral submission that given the Plaintiffs' subsequently provided the Court with *Healy*, she no longer had a concern with Mr. Chapman's January 17 affidavit. Nevertheless, I am of the view that the issue requires a determination.

[19] By way of response, the Plaintiffs say Halifax's motion is trivial. In this regard, they say that para. 2 of Mr. Chapman's affidavit simply paraphrases the finding of the Court of Appeal at para. 40, which reads:

> I am satisfied that in the circumstances before the Court, it is just and convenient to have the issue of liability in all 16 actions heard in one common trial. The outcome of that proceeding will be determinative in all 16 actions. The end-result is that the 16 actions remain procedurally, but include only the damage claims. Liability from all 16 matters will now be determined by way of a separate common trial.

[20] They add that Rule 37.04(2) specifically states that when a common issue in two or more proceedings is ordered to be heard together, the remaining issues are tried separately.

[21] In coming to my determination of this matter, I have carefully listened to the parties and reviewed Mr. Chapman's January 17, 2017 affidavit, along with Ms. Arab Clarke's March 3, 2017 affidavit and attached Exhibit "A"; i.e., the Court of Appeal's order and decision in *Healy*. As well, I have reviewed Rules 37 and 39. Further, I have considered the case law, including the leading case of *Waverly (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs) (1993)*, 123 N.S.R. (2d) 46 (SC). In my view, Justice Bourgeois' decision clearly states that all 16 matters will be determined by way of a separate common trial. The fact that the order for judgment does not repeat the word "separate" does not take away from the fact that the decision itself (at para. 40) characterized what would be occurring as a separate common trial. I note Justice Bourgeois was cognizant of Rule 37, which she quoted in her decision (see pp. 13, 14). Once again, Rule 37.04(2) speaks to issues that are to be tried, or heard, separately. In all of the circumstances, I am therefore of the view that there is nothing improper about para. 2 of Mr. Chapman's affidavit. I certainly do not regard what he has deposed at para. 2 as a submission or plea and therefore decline Halifax's invitation to strike it.

**Ruling on motion to strike paras. 5, 6, 8 and 9 of the Affidavit of Mr. Chapman, sworn March 3, 2017**

[22] The paras. in question read:

> 5. The main thrust of the case against HRM/HRFES is that:
>
> a. There was a failure to identify the fact that the fire was not extinguished on April 29, 2009;
>
> b. On April 30, 2009, there was a failure to promptly survey the fire scene and to mop up original burn area;
>
> c. The one crew that surveyed the scene on April 30, 2009 left for lunch when a flare up was imminent; and
>
> d. When the call came in on the afternoon of April 30, 2009 about a fire in the same area, the crew failed to identify it as a flare up, failed to properly survey the entire burn area, and failed to call for back up assistance until later in the afternoon when the fire had already spread from the area and the homes of the Plaintiffs were in imminent danger.
>
> 6. The main thrust of the claim against DNR is that it failed to advise HRFES that the original fire had not been extinguished and that it required mop up the

> following morning. It is also alleged that DNR failed to supply personnel or offer assistance in the conduct of mop up the following morning.
>
> […]
>
> 8. By agreement of the parties, discoveries of DNR and HRFES personnel took place before discoveries of the Plaintiffs and insurance adjusters on damages. Discoveries of DNR personnel focused primarily on the events of the fire on April 29 and the status of the scene when DNR left it. Discoveries of HRFES personnel focused on the events of the fire on April 29, the transfer of information about the fire on April 30 as between off-going and on-coming personnel, attendance at the scene by four personnel on the morning of April 30, firefighting activities between 1:35 p.m. and approximately 3:00 p.m. on April 30, training on wild land fires, and the response by HRFES to the fire when it became known that it had burned beyond the original location and was headed toward Ferguson's Cove.
>
> 9. There were eight of the named Plaintiffs who were home and observed the fire on April 30, 2009.

[23] Halifax refers to Justice Davison's decision in *Waverley* at paras. 52 and 53 and says that the above referenced paras. are improper and should be struck. They also refer to Rules 22.15(3) and 39.04(2)(a), along with Justice Goodfellow's decision in *Horne v. Industrial Estates Ltd.* (1996), 152 NSR (2d) 380 (SC) wherein he stated:

> [T]he court cautions solicitors that a solicitor's affidavit normally should be used only for procedural, non-controversial facts, i.e. date of receipt or sending of a letter, statutory compliance as to filing, etc. and not to facts that are the personal knowledge of the client.

[24] While it is true that special scrutiny must be applied to solicitor's affidavits, and the paras. in question are hardly the model, I have no difficulty admitting paras. 5 and 6 as they offer Plaintiffs' counsel's summary of the key allegations set out in the Statements of Claim which bear his signature.

[25] In my view, paras. 8 and 9 are another matter. In this respect, I agree with Halifax's position that they are "most problematic". Para. 8 contains Mr. Chapman's interpretation of correspondence with counsel, which correspondence is not identified in his affidavit. It also contains his argument or submission as to the "focus" of the discoveries held to date. Para. 9 contains hearsay evidence. Hearsay is generally inadmissible, except through an exception under Rule 22.15. In my view, these motions do not fall within any of these exceptions.

[26] In the result and pursuant to the aforementioned Rules and caselaw, it is my determination that paras. 8 and 9 of Mr. Chapman's March 3, 2017 affidavit shall be struck.

**Summary of the Litigation History**

[27] The 16 matters are under case management as they all arise from fires which occurred on April 29 and 30, 2009 in the Spryfield/Purcell's Cove area of Halifax. Due to the fires, several properties were damaged or destroyed and the 16 lawsuits involve 28 Plaintiffs. Almost all (15 of 16) of the actions were commenced by Mr. Chapman on April 28, 2010. The 16th claim was commenced on August 5, 2010. The Plaintiffs allege negligence and seek recovery of damages arising from the fire. The actions initially named Halifax as Defendants. On August 25, 2011, the Plaintiffs were granted leave to amend their Statements of Claim to add the AGNS as a Defendant. The Amended Statements of Claim were issued on October 25, 2011.

[28] On November 5, 2010, Halifax entered 16 Defences and on February 2, 2012, the AGNS filed their Defences to the lawsuits.

[29] Arising from the July 4, 2012 hearing and decision (referenced in Mr. Trider's March 22, 2017 affidavit), by Order filed July 5, 2012, Justice Murphy denied the Plaintiffs' motion seeking an Order for liability to be severed from the assessment of damages.

[30] Affidavits and supplementary affidavits of documents have been disclosed, with the last affidavit production occurring on June 18, 2015.

[31] By agreement of the parties, representatives of the Defendants have been discovered on liability. It was further agreed that discoveries of the Plaintiffs and insurance adjusters would take place later.

[32] The Plaintiffs filed a further motion seeking an Order extracting the issue of liability from all actions to be determined in a common trial and a direction that the common liability trial be set down for a hearing. On July 9, 2015, (then) case management judge Justice Pickup heard and dismissed the motion. The Order arising from the decision was filed August 18, 2016.

[33] The Plaintiffs appealed the decision and on March 31, 2016, it was heard by the Court of Appeal. Justice Bourgeois rendered her unanimous decision on June 2,

2016. The Court of Appeal found that it was just and convenient to have the issue of liability in all 16 actions heard in one common trial. Justice Bourgeois returned the issue of timing of the liability trial to the case management judge, to be determined upon further motion of the parties.

[34] With Justice Pickup's retirement on September 30, 2016, I was assigned as case management judge and as previously indicated, met with counsel on October 31, 2016, December 6, 2016, January 18, 2017, and February 23, 2017. As part of this process, March 22, 23 and 24, 2017 were set aside to hear motions to resolve any outstanding issues between the parties. Oral argument was received on all of the motions on March 22. In the lead-up to the within motions, on March 1, 2017, the parties signed a Consent Order, which was issued on March 6, 2017. The first recital of the Order reads:

> Whereas the parties agree to set a schedule for the provision of answers to interrogatories issued to the Plaintiffs on April 12, 2016, and for the discoveries of the Plaintiffs and certain non-party witnesses with respect to all matters in issue in these proceedings, including both liability and damages;

[35] The Order goes on to set various dates including the discoveries of the Plaintiffs (on both liability and damages) to be completed no later than January 31, 2018.

[36] On March 7, 2017, I wrote to counsel advising that the earliest trial dates now available for a long trial (15 days or more in length) would be during the latter part of 2019.

**Main Issues as a Consequence of the Motions of the Plaintiffs and the AGNS**

[37] I am of the view that the Notices of Motion are related and therefore received oral argument on both motions at the same time. The Plaintiffs have placed the issue before the Court as to whether dates for the trial on liability should be set. The AGNS has moved for an order that damages trials be heard together immediately following the common liability trial. Halifax supports the AGNS' position and opposes the Plaintiff's motion.

**Positions of the Parties**

[38] The Plaintiffs' position is summarized at pp. 3, 4 of their March 3, 2017 brief:

a. The Court of Appeal has now ruled that liability for all 16 actions will be determined by way of a separate trial;

b. Rule 37.04 contemplates that the common issue of liability should be set down separately from the damage claims in all 16 actions;

c. The matter has been outstanding for almost eight years and it is time to do so. Justice is not being served;

d. The parties have an agreement and a consent order that is in the process of being filed requiring discovery of the plaintiffs over the next 10 months;

e. The liability trial will not take place until late 2018 [2019];

f. The liability evidence of the plaintiffs is quite minor in the overall scheme of things. There are a few plaintiffs who witnessed the fire approaching. There is also an allegation of contributory negligence arising from the fact that some of the plaintiffs had bark mulch spread on their properties.

[39] In their March 10 brief, the Plaintiffs cite a number of cases in support of their position:

*Comeau v. Ballam Insurance Services Ltd.*, 2010 NSSC 404

*Jeerh v. Yorkton Securities Inc.*, 2004 A.J. No. 1547 (Alta Q.B.)

*Jeffrie v. Hendricksen*, 2011 NSSC 351

*John Deere Finance Ltd. v. Kwell Farm Machinery Syndicate*, [1994] NSJ No. 317 (NSSC)

*King v. RBC Dominion Securities Inc.*, [2012] N.S.J. No. 312

*MacNutt v. Nova Scotia (Attorney General)*, 2005 NSSC 337

*Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2014 NSCA 88

*R.C. v. Nova Scotia (Attorney General)*, 2016 NSSC 299

*Re. Hillcrest Housing Limited et al.* (1986), 56 Nfld. P.E.R.I. 237

*Shane v. Allen*, [2011] N.S.J. No. 383

*Stone v. Raniere*, 1992 CanLii 6302 (NSSC)

[40] In their brief, the AGNS views the most just and convenient way to deal with the damages trials is to have them heard together or sequentially, following the common liability trial. In support of their position, the AGNS refers to Rule 37.03, which states: "a judge may order that proceedings be tried or heard together, or in sequence". They cite a number of authorities as supportive of their position:

> *A.C.A. Cooperative Associations Ltd. v. Associated Freezers of Canada Inc et al*, (1990) 97 N.S.R. (2d) (T.D.)
>
> *Boone (Guardian ad item of) v. King*, 2004 NLSCTD 154
>
> *C.(R.) v. Nova Scotia (Attorney General)*, 2016 NSSC 299
>
> *Fraser v. Westminer Canada Ltd*, 2001 NSSC 176
>
> *Gallant v. Farries*, 2012 ABCA 98
>
> *Healy v. Halifax (Regional Municipality)*, 2016 NSCA 47
>
> *Jeffrie v. Hendriksen*, 2011 NSSC 351 (N.S.S.C.)
>
> *Pic Realty Canada Limited v. Rocca Group Limited* (1982), 41 NBR (2d) 271
>
> *Rajkowa v. Watson and Maritime Medical Care Inc.* (2000), 216 N.S.R. (2d) 1
>
> *Seafreez Foods Inc. v. Rothmar Manufacturing Corp.*, 1993 CarswellNS 376
>
> *Terfry v. Smith*, 2006 NSSC 259

[41] The AGNS then gets to what they characterize as the "crux of this motion" as follows at para. 34 of their March 3 brief:

> The crux of this motion is deciding what format for the trial is fair to all parties, or to put it another way, equally unfair to the parties after balancing and weighing the options. These options include:
>
> (a) Severing liability and damages: this is what the Plaintiffs want but creates a substantial burden on the Defendant AGNS. It creates added delay and therefore negatively impacts the finality of the proceeding. It means counsel for DNR and the client have to gear up twice for trials which will result in a degree of inefficiency and duplication. It fragments the issues which the Courts have held is an undesirable way to have cases heard.
>
> (b) Combining liability and damages into one hearing: this adds to the work of the Plaintiffs' counsel and means the trial will be longer. However, it also means the Plaintiffs gain by having a ruling on both damages and liability. It also (subject to the evidence on liability) increases the chances of settlement on damages because the Defendants are facing a court ruling on damages. This is a much more efficient option than option one for the Defendant AGNS.

(c) Having the liability trial followed by individual trials on damages: similar considerations as option two above.

[42] As for Halifax, their position may be summarized from para. 6 of their March 10 brief:

> The Defendants HRM/HRFES oppose the present motion, which represents a fourth attempt by the Plaintiffs to proceed with a trial on liability alone. The Defendants HRM/HRFES submit that:
>
> (a) The Plaintiffs' motion is fundamentally flawed, in that it incorrectly presupposes that the Court of Appeal ordered that the common liability trial proceed before any further pre-trial steps relating to damages be completed. It did not.
>
> (b) The Plaintiffs' request has been made and refused three times. The legal principles and material facts pursuant to which the request was denied by Justice Pickup continue to apply. The decision of the Court of Appeal does not change those principles nor the manner in which they were applied.
>
> (c) The Plaintiffs cannot seek trial dates for liability alone where there has been no discovery of the Plaintiffs on any issue whatsoever.

[43] With respect to caselaw, Halifax cites the following as supportive of their position:

> *A.C.A. Cooperative Association Ltd. v. Associated Freezers of Canada Inc. et al* (1990), 97 N.S.R. (2d) 91 (T.D.)
>
> *Elliott et al v. Cadigan et al*, 2003 NLSCTD 147
>
> *Fraser v. Westminer Canada Ltd.*, 2001 NSSC 176
>
> *Gallant v. Farries*, 2012 ABCA 98
>
> *Hains v. Granat*, 2011 NSSC 263
>
> *Halifax (Regional Municipality) Pension Committee v. State Street Bank & Trust Co.*, 2011 NSSC 355
>
> *Horne v. Industrial Estates Ltd.*, 1996 NSR (2d) 380
>
> *Jeffery v. Naugler*, 2010 NSSC 385
>
> *Malley v. Roach*, 2011 NBQB 58

*McManus v. Nova Scotia (Attorney General) et al (1991)*, 119 N.S.R. (2d) 137

*National Bank Financial Ltd. v. Potter*, 2005 NSSC 9

*Nauss v. Rushton*, 2001 NSSC 167

*Rajkhowa v. Watson*, 2000 NSCA 50

*Terfry v. Smith*, 2006 NSSC 259

*Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)* (1993), 123 NSR (2d) 46 (SC)

## Analysis and Disposition

[44] I have listed the voluminous cases advanced by the parties and they are of guidance to the Court. Nevertheless, and as acknowledged by counsel for the AGNS, each case has its own dynamic. In any event, I have read all of the authorities submitted by the parties, inclusive of Justice Bourgeois' decision in *Healy*. Further, I have considered the affidavits, namely:

Mr. Chapman, deposed January 17, March 3 and 10, 2017;

Mr. Trider, deposed March 10, 2017;

Ms. Arab Clarke, deposed March 3 and 9, 2017;

Mr. Choo, deposed March 3, 2017; and

Mr. Trider, deposed March 22, 2017.

[45] I have also considered the relevant Rules; i.e., 1.01, 4.13(2), 37.03 and 37.04.

[46] Based on my consideration of the above, along with the oral arguments advanced by counsel, I am of the view that on balance it is just and convenient in the interests of justice that the Plaintiffs' alternative remedy should succeed. In this regard, pursuant to Rule 4.13(2) there shall be an order for a DAC to set dates for a trial of the common issue of liability.

[47] In coming to my decision that a separate liability trial should be scheduled, I am mindful of Justice Bourgeois' decision and especially what she stated in para. 43:

> In my view, how and when the common liability trial is heard should be returned to the court below for its consideration. These are complex proceedings which are being case managed by a single judge. Now that it is clear that a common liability trial will take place, further trial management is best left to the case management judge. There are multiple possibilities which may flow from the creation of a common trial. Perhaps the liability trial will be determined first, but many other options are conceivable. The case management judge, upon further motion of the parties, is in the best position to assess what is appropriate in the circumstances.

[48] We have now had the motion(s) contemplated by Justice Bourgeois. In the circumstances, I am of the overwhelming view that of the multiple possibilities, it is appropriate to have the liability trial determined first. I hasten to add that the fires occurred nearly eight years ago. In the spirit of Rule 1.01, it is, in my view, most efficient to get the liability issue set down for trial. From the arguments, I accept the Plaintiffs' pitch that in the entire scheme of things, the liability evidence of the Plaintiffs is anticipated to be quite minor. Undoubtedly, some of the Plaintiffs witnessed the fire approaching; however, it is my sense, based on my review of the file, that it will be the Defendants' responders and the experts who will be of most interest to the trier of fact on the issue of liability.

[49] Once again, Justice Bourgeois ordered one common liability trial, leaving flexibility in terms of how and when damages would be dealt with. Whereas her decision may be read to contemplate as one possibility what the AGNS motion proposed, their proposal would amount to something very similar to one massive trial on both liability and damages. To my mind, such a scenario is hardly an efficient way to deal with the claims. For one thing, it is possible no liability will be found, which will leave no requirement for damages trials. Alternatively, a liability finding following the common liability trial may result in the settlement of some or all of the damages claims. Just because damages trials are not soon set does not mean that the claims cannot be quantified. Indeed, the March 6, 2017 Order calls for a number of damages steps to take place, including discovery of the Plaintiffs and insurance adjusters. This will lead to the parties better evaluating the claims and it is conceivable that up to 16 damages figures could be established prior to the liability trial, such that the decision on liability would be the end of the matter. Alternatively, the parties are free to by consent set down, for example, a novel damages issue for trial and it is possible that such a trial (of shorter than 15 days in duration) could be scheduled between now and the time of the liability trial, expected in late 2019.

[50] I would add that part of my rationale relates to the practical affect of what the alternative to what I am ordering would involve. I have characterized the prospect of such a trial as massive. After all, we would be looking at the 16 damages actions heard together after the liability trial or sequentially thereafter. Whereas the Defendants have estimated that such scenarios would amount to only 12-14 additional days of trial, I have serious concerns regarding this estimate. I need only point to the litigation history (involving protracted disputes) and the mere fact that there are the 16 claims involving 28 Plaintiffs as support for my concerns.

[51] In all of the circumstances, I do not believe that damages trials in sequence or one overall damages trial immediately following the liability trial make sense. I say this having regard to my review of the aforementioned material, along with having had the benefit of case managing the matter for the past six months.

[52] I would add that many of the cases were put forward to either advance or rebut the notion that the damages trials are “inextricably intertwined” such that on balance it would be just and convenient in the interests of justice to have them heard together. In any event, the burden to have the damages matters consolidated or heard together is not applicable on these motions. Further given my determination that damages are for another day, I need not decide whether they will be heard sequentially or together. Indeed, part of my rationale for deciding the motions as I have is to allow for continuing flexibility on how to deal with damages on February 1, 2018 (when all of the steps in the March 6, 2017 Order are completed) and beyond. Finally, notwithstanding the parties’ prognostications, is it very difficult to “crystal ball” the damages claims when damages discoveries have not yet occurred.

**Conclusion and The Way Forward**

[53] I wish to conclude by setting the stage for the process forward. As previously communicated to counsel in my March 7, 2017 letter, it is anticipated that trial dates will not be available until the latter part of 2019. In the result, the trial is approximately two years away. I will establish the precise timing upon receipt of a RDAC, completed and filed by Plaintiffs’ counsel and Memoranda filed by Halifax and the AGNS within a week of the filing of the RDAC. Further, today I will schedule a mutually convenient date and time for the DAC. The DAC will be conducted in person, followed by a case management meeting. During the DAC I will canvass counsel with respect to the standard items on the DAC

memorandum. Upon considering counsels' input, I would then expect to schedule the precise number of days and dates for the separate liability trial.

[54] I recognize that my expectation of setting the matter down will be notwithstanding that the parties have yet to complete all of the normal steps enumerated in Rule 4.13(1). Nevertheless, I am of the emphatic view that with reference to Rule 4.13(2)(c) that the efficient administration of justice requires that the conference take place. This matter has been in case management for a number of years and for all of the reasons outlined in this decision, the Plaintiffs have satisfied me that given the special circumstances, the liability trial ought to be scheduled.

[55] During the DAC, the parties need not repeat the many arguments they have marshalled on these motions. Rather, I will bear in mind their Memoranda and any fresh arguments and trial time estimates as part of my consideration.

[56] Damages assessments, if required, will take place at various times in the future. In the time between now and the expected common liability trial, the parties have a fairly onerous schedule to adhere to (pursuant to the March 6, 2017 Order) which will require the completion of various steps no later than January 31, 2018. I expect the remaining time between that date and the expected liability trial will be dedicated to preparation for the liability trial. At the same time, the process (already established by the March 6, 2017 Order and generally) contemplates advancement of the damages claims.

[57] In conclusion, I wish to draw upon Justice Karakatsanis' words in *Hyrniak v. Maudin*, 2014 SCC 7 at paras. 1 and 2:

> 1. Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> 2. Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[58] I accordingly urge counsel to work toward proportional procedures to resolve their issues. If trial(s) is/are required it/they will take place; however, the parties will be aware of and need to consider all avenues to adjudicate their issues.

[59] There will be no costs on the preliminary affidavit motions. Costs of $5,000 ($2,500 by the AGNS and $2,500 by Halifax) shall be payable forthwith to the Plaintiffs.

Chipman, J.