**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Carvery v. Halifax (City)*, 2018 NSSC 204

**Date:** 20180831
**Docket:** HFX126561
**Registry:** Halifax

**Between:**

Nelson Carvery

Applicant

v.

City of Halifax

Respondent

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**Motion to Certify as a Class Proceeding**

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| **Judge:** | The Honourable Justice Patrick J. Duncan |
| **Heard:** | November 30, 2016, in Halifax, Nova Scotia |
| **Final Written Submissions:** | May 11, 2018 |
| **Counsel:** | Robert Pineo, Jeremy Smith, and Michael Scott for the Applicant<br><br>Karen MacDonald and Martin Ward QC for the Respondent |

**By the Court:**

## Introduction

[1] The current motion has its genesis in an action filed in 1996, decisions in which are cited as *Williams v. Halifax.*

[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.

[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.

[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.*

[14] For a more complete judicial history leading up to the current motion see *Williams v. Halifax,* 2015 NSSC 228.

**The Current Motion**

[15] Nelson Carvery, the plaintiff in this proceeding, moves for an order:

1. 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;
2. defining the class as:

   > all former residents and estates of deceased former residents of Africville who were removed from the physical community of Africville between 1962 and 1970 who have not signed Releases to this Action or had their claims otherwise dismissed or discontinued.

3. Certifying the Action on the basis of the following Common Issues:
   (a) liability on the basis that the defendant did not perfect the purported expropriation of the community of Africville;
   (b) damages; and
   (c) costs.
4. That the claims to be heard and the relief sought are as per the Amended Statement of Claim issued August 8, 2016;
5. that Notice of Certification be made to Class members as detailed in the Litigation Plan attached to the affidavit of Jeremy P. Smith and to the proposed order;
6. that the cost of notification be borne by the plaintiff with this cost being a cost in the cause of the action;
7. that notice and its distribution satisfies the requirements of Section 22(6) of the **CPA**;

8. that the Litigation Plan is a workable method of advancing the proceeding subject to clarification and amendment if required;
9. that a Class member may opt out of their participation in the proceeding by submitting an opt out form, attached to the Litigation Plan and signed by the Class member, to counsel for the plaintiff on or before the deadline therein stipulated;
10. that there shall be document production on all common issues;
11. that the defendant shall deliver its statement of defence no later than 45 days following issuance of this order;
12. that the costs of this motion are costs in the cause of this action; and
13. that there be granted such further and other relief as this Court may deem just.

[16] Between 1965 and 1969, titles of 55 Africville properties were granted to the defendants by quit claim deeds executed by former residents. The defendant, to ensure the quality of the title it has obtained, initiated an expropriation of what were understood to be its own lands. The plaintiff does not seek to challenge those dispositions. Instead, the plaintiff is seeking compensation for "communal lands" over which the plaintiff claims a compensable interest and which, it is alleged, were taken over by the defendant without compensating the interest holders.

[17] Counsel for the plaintiff makes the point that they seek the "aggregate" value of these lands as they were communal, so pursuit of individual claims is not feasible. In his submission, a class action is the only realistic way for proposed Class members to pursue compensation.

**Evidence**

[18] The evidence submitted by the plaintiff includes the affidavits of the proposed representative plaintiff, Nelson Carvery, and a solicitor's (Jeremy Smith) affidavit. The defendant has filed an affidavit of Shawnee Gregory, a lawyer employed by the defendant.

[19] Also filed with the court, by agreement of the parties, is Plan No. TT-1-15899. It is titled *"Plan Africville Area",* is dated February 1, 1964, and bears the stamp of the City of Halifax Works Department. The plan was prepared by William C. Boyle and was signed by the City Engineer, and the Commissioner of

Works. The perimeter of the "Africville Area" is delineated on the Plan by a red line.

[20] Within that perimeter are representations of several buildings, a few of which have been identified (e.g., "abattoir", "incinerator") but most have not. Given the evidence that there were residences in Africville at that time, and considering their shape, location and scale, it is reasonable to infer that at least some of these were residential buildings.

[21] Relative to the occupied areas, there appears to be a substantial portion of unoccupied lands within the red lined area, including along the western shore of the Bedford Basin. It is this unoccupied area that the plaintiffs allege was used in common among the residents of the day creating an "interest" in the land for which they were not compensated by the defendant when it sought to acquire unencumbered title to the Africville area.

**Statement of Issues**

[22] Section 7(1) of the **CPA** says that, if five conditions exist, the court "shall certify" the class proceeding. Those five conditions, restated, present the issues in this motion:

**Issue 1:** Do the pleadings disclose a cause of action? *Section 7(1)(a)*

**Issue 2:** Is there an identifiable class of two or more persons that would be represented by a representative party? *Section 7(1)(b)*

**Issue 3**: Do the claims of the Class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members? *Section 7(1)(c)*

**Issue 4:** Would a class proceeding be the preferable procedure for the fair and efficient resolution of the dispute? *Section 7(1)(d)*

**Issue 5:** Is there a representative party who:

(i) would fairly and adequately represent the interests of the class?

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding? and

(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members?

**Issue 1: Do the pleadings disclose a cause of action as required by Section 7(1)(a) of the Class Proceedings Act?**

*The Statement of Claim*

[23] The Claim pleads various bases for liability to be affixed to the defendant:

1. that the defendant failed to follow the expropriation procedures required by the **Halifax City Charter** S.N.S. 1963, c.52, **(Charter)** and therefore must complete the required procedures and begin the compensation process; (paragraph 24, as amended);
2. in the alternative, that the defendant failed to follow the expropriation procedures required by the **City Charter**, the expropriation of the physical community of Africville has not yet been completed and therefore, the expropriation procedures and substantive rights pursuant to the **Expropriation Act,** RSNS 1989, c. 156 apply to the present case. (paragraph 25 as amended);
3. in the further alternative, that the defendant, in relocating the plaintiffs and having redeveloped the physical community of Africville, thereby removed all property rights from them and so the defendant has taken the lands by *de facto* expropriation, in which case the expropriation procedures and substantive rights pursuant to the **Expropriation Act** apply to the present case. (paragraph 26, as amended)

[24] As a remedy the plaintiff seeks "…. the aggregate communal uncompensated property rights and interests, injurious affection and disturbance damages, and an order for their compensation with prejudgment interest and costs."

[25] Paragraphs 1 and 2 identify the parties. Paragraphs 3 and 4 propose a Class Action and describe the proposed composition of the Class. Paragraphs 5 to 13 describe the community of Africville, and its history as an African Canadian community established in the 1800's on the shores of the Bedford Basin and Halifax Harbour (paras. 5-6).

[26] Paragraphs 7 and 8 describe the types of property interests that were held by the residents and the communal use of the lands.

[27] Paragraphs 9 to 13 describe the "purported" expropriation of the Africville lands and the reasoning behind the defendant's actions. Paragraphs 14 to 21 set out the particulars of the way in which the defendant took possession of the lands and why the plaintiffs say that the acquisition and later expropriation of the lands did not succeed in eliminating the interests of the residents in the communal use of the lands. It also alleges that the defendant failed to compensate those interest holders.

[28] Provisions of the **Halifax City Charter** dealing with expropriations and of the **Expropriation Act** are referenced in the pleadings.

*Proposed Amendments to the Statement of Claim*

[29] In a written reply brief, filed prior to the hearing of this motion, counsel for the plaintiff requested two amendments to the pleadings that would, in his submission, correct any perceived inadequacies raised by the defendant in their brief.

[30] Paragraph 4 of the Claim described the proposed Class members as:

> 4. The proposed Class members in this Action include all former residents and the estates of deceased former residents of Africville removed from the physical community of Africville between 1962 and 1970 who have not signed Releases to this Action or had their claims otherwise dismissed or discontinued.

[31] That is proposed to be replaced by:

> 4. The proposed Class members in this Action include all former residents and the estates of deceased former residents of Africville <u>who held property interests in the communal lands of Africville and had those property interests taken by the City of Halifax and who have not otherwise disposed of their property interests before November 26, 1969, were</u> removed from the physical community of Africville between 1962 and 1970 and who have not signed releases to this Action or had their claims otherwise dismissed or discontinued.

[32] Paragraph 21 of the Claim would be struck and replaced by:

> 21. The plaintiff pleads that the former residents (Class members) continued to hold their property interests in the communal lands to the date of the purported expropriation by the defendant on November 26, 1969.

[33] I have considered the circumstances and conclude that it is appropriate to grant permission to amend the claim as requested. Section 8(1) of the **CPA** permits the court to adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced. It was unnecessary to adjourn and to have done so would not have been efficient. The motion to amend was available for debate in the oral hearing. A Defence has not been filed to the current Claim and so the defendant's ability to respond will not be impaired by these amendments. In reaching this conclusion, I have considered the provisions of **Civil Procedure Rule 83** pertaining to amendments to pleadings.

*Position of the Defendant*

[34] The defendant submits that the pleadings fail to plead sufficient material facts to establish the existence of a cause of action.

[35] Counsel for the defendant correctly notes that expropriation by the defendant must be effected in compliance with the provisions of the **Charter** and, similarly, claims for compensation must meet the requirements of the **Charter**.

[36] Counsel submits that the plaintiff has failed to plead two statutory requirements necessary to a claim for compensation arising from expropriation:

> (i) That all the members of the class were "owners", (as defined by Section 406(b)) of the land that was expropriated by the City of Halifax;
>
> (iii) That the members of the class each held their respective legal interest in the land at the time of the expropriation on November 26, 1969, and that each class members' interest was expropriated by the City (s. 407);

[37] The defendant also takes issue with the plaintiff's claim to compensation for the uncompensated loss of "communal lands", because the pleadings do not adequately:

> (a) show who was an "owner" within the meaning of the legislation;

(b) describe the size or location of the lands claimed to be communally owned;

(c) state whether all class members could or would claim a communal use in the land,

(d) set out the particulars of the purposes to which the communal land was put by the class members;

(e) disclose how funds already paid by the defendant to purchase the Africville lands were shared;

(f) specify the damages alleged to have been incurred by the actions of the expropriating authority.

[38] As to the alternative pleading of a *de facto* expropriation, the defendant submits such a claim only arises in law where the property owner retains a legal title to the land, but the actions of the government have restricted its use so much that it is of little or no value, resulting in a taking of the land by statutory authority within the meaning of the **Expropriation Act.** Necessary to the proof of this cause of action, and not plead, says the defendant:

(a) That all the members of the class had a legal interest or were owners of the land in Africville;

(b) That the City of Halifax enacted valid legislation or lawfully took action that significantly restricted the class members' enjoyment of the land;

(c) That the class members held their interest in the land at the time when Halifax took control of the land;

(d) That the class members retained their legal interest in the land; and

(e) That there was legislation authorizing the City of Halifax to compensate the class members for the restrictions on their enjoyment of their land.

*Position of the Plaintiff*

[39] The plaintiff responds that the position advanced by the defendant misapprehends the terms "land" and "owner", as well as to whom compensation would be payable pursuant to the **Charter**, when those concepts are interpreted in the context of expropriation law. In support of the plaintiff's position I have been referred to the following provisions of the Statement of Claim:

> 8. The physical community of Africville was a vibrant community with schools, stores, farms and fishing operations. It included the shoreline of Halifax Harbour and Bedford Basin, including the appurtenant water lots (lands covered with water.) The lands of Africville were used communally by the residents.
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> …
>
> 19. To affect [sic] the purchase of the Africville residents' property rights during the Relocation, the City of Halifax, did not:
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> …
>
> c. offer and pay to the Africville residents compensation for the communal lands formerly enjoyed by the members of the community.

[40] Specific references to the **Charter** have been put forward. They will be dealt with in my analysis.

[41] As to the balance of the defendant's objections, the plaintiff says that:

> … he has pleaded sufficient facts to establish that pursuant to the **City Charter**, he and the Class members had a sufficient property interest in the communal lands to meet the threshold requirement for land ownership so as to found the alleged cause of action: the voidance of the purported expropriation. Furthermore, on a reading of the pleadings, the fact that the Plaintiff and Class members continued to hold their property interests to the date of the purported expropriation arises by necessary implication. (Reply brief, at p. 8)

*Legal Principles*

[42] Fichaud J.A., writing on behalf of a unanimous court in *Capital District Health Authority (c.o.b. East Coast Forensic Hospital) v. Murray*, 2017 NSCA 28, reviewed the legal standards that must be met to satisfy the conditions set out in Section 7(1) of the **CPA.** Relevant to this issue he wrote:

> 30 The plaintiff "must show some basis in fact for each of the certification requirements set out in ... the Act, other than the requirement that the pleadings disclose a cause of action". The latter point is "governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is 'plain and obvious' that no claim exists": …
>
> …
>
> 32 As for disclosing a "cause of action", section 8(2) of the *Class Proceedings Act* says that a certification order "is not a determination of the merits of the proceeding". Hence the "plain and obvious" standard borrowed from

jurisprudence regarding summary judgment on the pleadings. Winkler, *The Law of Class Actions in Canada*, page 24, elaborates:

> The question on a certification motion is not whether the plaintiff's claims are likely to succeed on the merits, but rather whether the claims in the action can appropriately be prosecuted as a class proceeding. Class action statutes are procedural and class action legislation expressly states that an order certifying a class proceeding is not a determination of the merits of the proceeding. The purpose of a certification motion is to determine how the litigation is to proceed and *not* to address the merits of the claim. In other words, the question for a judge on a certification motion is not "will it succeed as a class action?" but rather "can it *work* as a class action?"
>
> (emphasis added)

[43] In the earlier case of *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, the court held that:

> 35 A cause of action has been defined as:
>
> > ... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. (*Read v. Brown* (1888), 22 Q.B.D. 128 per Lord Esher, M.R. at 131)
> >
> > and
> >
> > ... simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. (*Letang v. Cooper*, [1965] 1 Q.B. 232, per Diplock, L.J. at 242).
>
> …
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> 37 In his decision, the certification judge correctly described the test for ascertaining whether a cause of action is made out:
>
> > [16] The requirement under section 7(1)(a) of the Act that pleadings disclose a cause of action is assessed strictly on the pleadings, assuming all facts pleaded to be true and reading the claim generously realizing that drafting deficiencies can be addressed by amending the pleadings (Ward Branch, *Class Actions in Canada*, Aurora, ON, Canada Law Book, 2009 para 4.80).
> >
> > (emphasis in original)

[44] In *3021386 Nova Scotia Ltd. v. Barrington (Municipality)*, 2010 NSSC 173, a motion for summary judgment, I had occasion to consider the question of what facts must be pleaded to sustain a cause of action:

14 The general principles as to what "facts" must be pleaded in support of the "cause of action" are set out in **CPR** 38:

> 38.02 (1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.
>
> (2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.
>
> (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

15 The defendants have submitted legal authority as to the consequences of the failure to plead a material fact, which is central to certain of their arguments. In *Bruce v. Odhams Press Ltd.*, [1936] 1 K.B. 697, at pp. 712-713, 1 All E.R. 287 at pp. 294-295, Scott, L.J. wrote:

> The cardinal provision in rule 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under R.S.C. Ord XXV, r. 4 (see *Philipps v. Philipps*); or a further and better statement of claim may be ordered under rule 7.
>
> The function of "particulars" under rule 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim -- gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish between a "material fact" and a "particular" piece of information which is reasonable to give the defendant in order to tell him the case has to meet; hence in the nature of things there is often overlapping.

…

> 18 For its' part, the plaintiff relies on the decision of the Northwest Territories Court of Appeal in *Fullowka v. Whitford*, [1997] N.W.T.R. 1 as setting out the key principles relevant to such an argument as the plaintiff offers. I will summarize from the lengthy citation provided by counsel:
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> – "... the impugned pleading must be read generously" and "... will not be struck out if the flaws in it are capable of amendment" (para. 11);
>
> – "... a pleading will not be struck out for want of a cause of action unless the law is plain and obvious and beyond doubt. It ... must be hopeless to be struck out" (para. 12);
>
> – "A court must use extreme caution on a motion to strike a pleading for want of a cause of action" (para. 12);
>
> – "That the plaintiffs will have to make novel arguments is no ground to strike out" (para. 12);
>
> – "... a pleading is valid and suffices to raise a certain cause of action if it gives facts which create that cause of action. It need not name that or any cause of action or give a legal conclusion, and indeed it may name a different cause of action, or the wrong cause of action" (para. 16);
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> – "A pleading should not be struck out for want of a cause of action, even if interpreting a statute one way would bar the suit" (para. 18);
>
> – It is not appropriate "... to decide a general important or serious question of law in a motion to strike of the pleading" (para. 22);
>
> …
>
> – The court specifically rejected any suggestion that it is appropriate to strike a statement of claim, where the claim pleads the facts which give a cause of action, but does not give the details of when, where or how. (para. 28). "Details in the claim of where, when or how are useful, even necessary, but only to let the defendant defend himself, not to create a cause of action." (para. 30).

*Analysis*

[45] The issues posed by the defendant's argument are focused on whether the pleaded facts, *i.e.*, that certain defined residents of Africville used and enjoyed the communal lands of Africville for fishing, business and farming operations and were not compensated for the loss of those uses, meet the threshold of land ownership described in the **Charter**. The parties have each presented their positions as to the interpretation to be put on the relevant provisions of the **Charter**.

[46] I agree with the plaintiff that what has been pleaded is a claim for compensation for a purportedly historical use of communal lands for economic activities, which use was lost when the defendant took possession of the lands. As pleaded, the Class members would be relying on a lesser interest than ownership in fee simple, use under a lease or by licence. What they claim is for the loss of the ability to continue to use the lands for these purposes, which it is said is an expropriation for which they have not been compensated. The exact legal basis for the existence of such an interest is not identified but the concept of acquisition of legal rights over land by use or possession are known in law.

[47] The claim does not seek to set aside the legal effects of the quit claim deeds executed by former residents in favor of the defendant, nor does it seek to challenge the expropriation of those lands where title was lawfully held by the defendant. Finally, the claim does not seek compensation for any former resident or the estate of such resident where there has been a release of any such claim or a dismissal of their claims.

[48] Section 406(a)(i) of the **Charter** defines "land" as including "any land, whether held in fee simple or for any less estate or interest". Section 406 (a)(iii) describes land as including "any easement or right in, upon or over any land or any other estate, right or interest therein". The wording of these sections is very broad and does not attempt to limit the type of "interest" that might attach in the land.

[49] An "owner" is described in Section 406(b):

> "owner" includes…. a trustee, executor, guardian, curator, agent or other person having the charge or control of any land.

[50] Section 408(1) of the **Charter** provides that:

> The City shall 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 of the powers conferred by the Act, and shall 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 contemplated work.
>
> (emphasis added)

[51] Even if a claim for compensation must be tied to the control or charge of the land in question, as stated in Section 406(b), I am satisfied that the pleading alerts the defendant to the fact that the plaintiff asserts such control of the land by the proposed class members. It also is clear that the interest claimed to have been lost is asserted to be distinct from those interests conveyed by deeds to the defendants prior to the purported expropriation.

[52] As to the lands subject to the claim, it is common ground that the defendant filed a Resolution and Plan at the time of the expropriation, as the legislation required.

[53] That plan would necessarily delineate the area the defendant sought to expropriate, including buildings on the land. By the pleadings, members of the Class are limited in their pursuit of compensation from the defendant to that area which the defendant claims title to.

[54] In this way, the pleadings identify the lands that the plaintiffs say were not expropriated successfully as those which were used in common and for economic activities, in particular. Whether such an interest can be proven is not the question to be answered at this stage. Similarly, whether the plaintiffs can identify, with sufficient precision, the location and use of the communal lands is not necessary to the pleadings. The proof of that is a matter for determination on the evidence. It is not a basis upon which to say that the pleadings are deficient for the purposes of satisfying Section 7(1)(a) of the **CPA**.

[55] I conclude that, assuming the pleaded facts to be proven, it is not plain and obvious that claim of the plaintiff cannot succeed. The plaintiff has met his burden under Section 7(1)(a).

**Issue 2: Is there an identifiable class of two or more persons that would be represented by a representative party? *Section 7(1)(b)***

[56] The **CPA** requires that:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> …
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;

[57] In *Monaco v. Coquitlam (City)*, 2015 BCSC 2421, Abrioux J. reviewed the criteria of an identifiable class:

> 143 In *Marshall* at para. 132, Fisher J. cited *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38 [*Dutton*] for the proposition that the class must be capable of clear definition and have issues of fact or law common to all its members. Clear definition is required so that individuals who are entitled to notice, relief if awarded, and to be bound by the judgment can be identified. Although "[i]t is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria." *Dutton* at para. 38.
>
> 144 As for the class relationship to the common issues, Fisher J. stated:
>
> > [133] Establishing a rational relationship between the identified class and the common issues is not an onerous requirement. As stated in *Hollick* at para. 21:
> >
> > > The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.
>
> 145 In *Ileman*, Weatherill J. reduced this requirement to a three-part test:
>
> > [122] There are three purposes for defining the class:
> >
> > a) to identify persons who have a potential claim for relief against the defendants;
> >
> > b) to define the parameters of the lawsuit so as to identify those persons who are bound by the result; and
> >
> > c) to describe who is entitled to notice of certification.
> >
> > The class definition must state objective criteria by which the class members can be identified: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 at para. 10 (Ont. Gen. Div.); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38.
>
> 146 In addition, each putative Class member must have a potential cause of action: *Hollick* at para. 19.
>
> …

> 152 A class may also not be objectively defined where a preliminary finding of fact needs to be made in each individual case before membership in the class can be determined: *R. v. Nixon* (2003), 24 C.L.R. (3d) 95 (Ont. Sup. Ct.) at paras. 6-8.

[58] The proposed Class members are described in paragraph 4 of the Statement of Claim, as amended by this decision:

> 4. The proposed Class members in this Action include all former residents and the estates of deceased former residents of Africville who held property interests in the communal lands of Africville and had those property interests taken by the City of Halifax and who have not otherwise disposed of their property interests before November 26, 1969, were removed from the physical community of Africville between 1962 and 1970 and who have not signed releases to this Action or had their claims otherwise dismissed or discontinued.
>
> (emphasis on amendment)

[59] The sole proposed Representative Plaintiff is Nelson Carvery.

*Position of the Defendant*

[60] The defendant argues that:

(i) the proposed class is not identifiable;

(ii) the proposed class is not rationally connected with the cause of action and the common issues, thus permitting individuals to be included in the class though they have no cause of action against the defendant; and

(iii) that the plaintiff has failed to meet the burden upon him to show a basis in fact for the existence of a second person that would be a member of the class as defined in the amended paragraph 4.

[61] These factors are, in its submission, fatal to the motion for certification.

*Overly Broad or Vague*

[62] Summarizing the authorities, the questions to be addressed are:

1. Is the class capable of clear definition?

(i) Can individuals be identified who are entitled to notice, relief if awarded, and who would be bound by the judgment?

(ii) Can an individual be identified as a member of the class by objective criteria without the need to make a preliminary finding of fact?

(iii) Could the class be defined more narrowly?

2. Is there a connection between common issues and the Class member?

[63] The criteria for class membership as it is proposed are:

1. They must have been a "resident" of Africville;
2. They must have been "removed" from Africville between 1962 and 1970;
3. They must have held a "property interest";
4. That property interest must have been in "communal lands";
5. That property interest must have been extant at November 26, 1969 (date of expropriation);
6. The property interest must have been taken by the defendant, the City of Halifax;
7. They cannot be a member of the class if they have signed a Release to this action or otherwise had their claims dismissed or discontinued.

[64] There are, in my opinion, significant problems with the proposed class description.

*What were the metes and bounds of Africville prior to expropriation?*

[65] Africville was not an incorporated entity with defined boundaries. Whether a proposed class member was a resident in Africville requires an initial finding of fact as to where the lands described as Africville were. In this way, a potential

class member would have an objective means to assess whether they are eligible to be a class member.

[66] This is a shortcoming that could be addressed by the plaintiff by providing a metes and bounds description of the lands it seeks to advance a claim over. It might be resolved by attaching the *"Plan Africville Area"* of February 1, 1964, but that is a matter for plaintiff to address.

*Who was a "resident" of Africville?*

[67] There are no stated objective criteria by which to determine who would have been a "resident" of Africville, and no mechanism to determine who qualifies as a resident for the purpose of the claim. Examples of the questions that arise include the duration and nature of occupation of the lands that would qualify an individual as a "resident".

[68] This is a question of fact that would require a pre-determination for each proposed member of the class.

*What does it mean to say that the proposed class member must have been "removed" from Africville between 1962 and 1970?*

[69] It is unclear how being "removed" from Africville is rationally connected to the cause of action. Further, even if so connected, there are no stated objective criteria upon which to determine whether a class member was "removed" from Africville. The need for this can be demonstrated by a few questions.

[70] "Removed" has the connotation of a compelled change of location. Must the removal have been effected by, or at the instance of, the defendant? Does "removed" in the proposed class description refer to an involuntary physical removal, removal subject to legal direction, or a voluntary decision to move from Africville? Consider, for example, an individual who was a tenant of a person who deeded their property interest to the defendant, and so was required to move at the instance of the landowner - was the tenant "removed" from Africville?

*What type of "property interest" is sufficient to qualify as a class member?*

[71] There are no stated objective criteria upon which an individual could determine whether they had a "property interest" in the "communal lands" of Africville.

[72] Being a "resident", assuming that term can be narrowed down, does not in and of itself determine the existence of a "property interest". For example, could a child (as at 1970) have held a "property interest"? If so, on what basis?

[73] The nature of the interest claimed must bring the proposed class member within the definition of "owner" in the **Charter**. There are insufficient preconditions in the proposed class definition to ensure that only those whose "property interest" would qualify under the **Charter** are included.

[74] Assuming that the criteria for a "property interest" can be enunciated, then factors that might indicate to an individual whether they qualify as a class member could be included, such as how they exercised "charge or control over the land".

[75] If, for example, the interest was said to be created by use over time, then typical issues of fact could include:

- the length of residency;
- the type of tenancy/residency;
- the way in which the "communal lands" were used to create the interest;
- the required duration of use of the "communal lands" to create the interest.

[76] In its current form, paragraph 4 is deficient. Without clarity, it leaves open the opportunity for persons to claim who do not share a common interest with that claimed by the plaintiff.

*What constitutes "communal lands"?*

[77] The challenge presented by this term is intertwined with the determination of who qualifies as having a "property interest". Paragraph 8 of the Claim refer to uses of the shores for fishing and land for farming, and that the "lands of Africville were used communally by the residents."

[78] In an exchange of written submissions made subsequent to the hearing, counsel for the plaintiff proposed a further amendment to the pleadings to define

"communal lands" as all of the lands in Africville that were not acquired by the defendant prior to the expropriation on November 26, 1969.

[79] The defendant says that the only way it can know how to defend the claim is to have a metes and bounds description of the lands claimed as "communal".

[80] In the context of the identification of class members, it is a pertinent question as to how an individual is to know whether the land/land use they claim compensation for would be included in the "communal lands".

[81] The plaintiff's position is largely tied to evidence intended to be adduced at trial through the use of expert opinion and fact testimony as to the lands conveyed, and lands used that were not conveyed. That after the fact determination does not address who is eligible as a member of the proposed class at the time of certification, nor does it inform the question of who the defendant was supposed to provide with Notice of Expropriation, one of the fatal flaws of the expropriation alleged by the plaintiff.

*Is there a second person that would be a member of the class?*

[82] Nelson Carvery filed an affidavit that attests to his family "and the community members at large" having used the common lands in Africville "for farming, gathering berries and for recreational purposes" (para. 5), and also the use of the "shoreline of the Halifax Harbour and Bedford Basin for fishing purposes for docking our boats, storing our fishing gear, cleaning our catch, etc." (para. 6)

[83] On the basis of information received from his father, Aaron "Pa" Carvery, Nelson Carvery believes that his father owned six parcels of land in Africville, and that he refused to sell the land to the City in 1969. Further he believes that only one was purported to have been expropriated by the City and no compensation was paid for any of the six (para. 8). He denies that his father or the family received notice of the expropriation and was unaware of it until 2014 (para. 10). In paragraph 12 he states that he was not part of the original lawsuit begun in 1996 and has never released any claim nor had any claim dismissed.

[84] The plaintiff submitted in its original written arguments, correctly, that the definition of the proposed Class, if clear and ascertainable by objective criteria, does not require that all members of the class be identifiable. It must however be defined as narrowly as possible. Counsel also acknowledged that the burden is on the plaintiff to show there is a basis in fact to show the existence of a second member of the class.

[85] The plaintiff takes the position that the proposed Class definition narrowed inclusion of members "geographically and temporally" and "to extant claims." As to "undiscovered" "potential Class members" the plaintiff submitted that "complementary data is available in public records, tax information, academic studies, and historical research, and the historical knowledge of the community" which could be used to identify Class members. The earlier orders of this Court dismissing claims can be used to eliminate those who do not fall within the proposed description. Finally, publicity will bring forward other Class members.

[86] The defendant submits that the plaintiff has not met its burden. Counsel says:

> (i) Mr. Carvery's affidavit fails to identify any other person who shares a common factual basis for a claim for compensation, that is, a person who owned land in Africville at the time of the expropriation in November 1969 and who alleges a failure of Notice and of compensation for those property interests; and
>
> (ii) that the proposed class definition must also be specifically limited so as to exclude claims of "residents of Africville and their descendants who were unascertained as of July 10, 2010", being the date that those claims were dismissed by this Court on the consent of then counsel for the Africville Genealogy Society, the court ordered representative of those persons.

[87] In a post hearing reply brief, counsel for the plaintiff responded to these arguments by proposing that claims made as part of the previous form of this Action demonstrated a basis in fact for the existence of a second Class member.

[88] In a Court Order dated September 8, 2015, I ordered that the Stays of Proceedings of fourteen named estates be vacated and a personal representative appointed for each. This permitted those Estates to continue as plaintiffs in the Action as pleaded in 1996. The order also permitted Jean Vemb and Isabel Warren to be re-joined as plaintiffs in the 1996 version of the claim, having previously filed Notices of Discontinuance in 2012.

[89] No evidence has been presented from, or on behalf of these estates, Ms. Vemb or Ms. Warren, that would speak to the way in which their circumstances would be related to the cause of action claiming a failed expropriation. The 2015 Order was related to their right to participate as a named plaintiff in the claim as framed in 1996. Their right to do so as a plaintiff in that matter is quite different

from whether they would fall within the description of the proposed Class members in a class proceeding.

[90] I am not satisfied that the plaintiff has met the burden to demonstrate that there is a basis in fact to show the existence of a second member of the class as proposed in this motion to certify.

*Unascertained Residents*

[91] The defendant's concern with the identification of "residents of Africville and their descendants who were unascertained as of July 10, 2010", raises a legitimate concern.

[92] The language of the 1996 Order was evidently intended to encompass all who might have been able to advance a claim in that action whether or not they were identified as a named plaintiff in the Action. The challenge in the current context is to distinguish those "unascertained residents" whose claims have been dismissed by consent in 2010 from those who have come forward after that date to advance a claim. To this point there has been no determination of whether, or how it could be decided, an individual who came forward with a claim after 2010 was included in the term "unascertained resident", or is a descendant of one.

[93] The defendant says that the proposed Class definition must specify this limitation, however, in my view, this begs the question of what criteria will be used to determine who is captured by that dismissal order. This perspective was not discussed in the hearing and if this action is to continue it will need to be addressed, at least initially in a case management meeting.

*Conclusion as to Issue 2*

[94] For the reasons set out above I have concluded that the plaintiff has not satisfied the requirements of Section 7(1)(b) of the **CPA**. Specifically, I am not satisfied that the proposed definition of a Class member (either in its original form or in the amended form advanced in submissions) would identify persons who have a potential claim for relief against the defendant.

[95] The proposed Class description does not adequately identify those persons who would be bound by the result, nor does it adequately describe who would be entitled to notice of certification.

[96] Further, the plaintiff has failed to satisfy the burden to demonstrate that there is a basis in fact to show the existence of a second member of the class as proposed in this motion to certify.

[97] Finally, the question of who is captured by the 2010 Order, which dismissed the claims of the "unascertained" residents and their descendants, is relevant to the determination of eligibility for Class membership. Assuming this matter continues, the means by which those persons are to be identified will need to be discussed at the next Case Management Meeting

**Issue 3: Do the claims of the Class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members? S*ection 7(1)(c)***

[98] Section 2 (e) of the **CPA** states:

> (e) "common issues" means
>
> > (i) common but not necessarily identical issues of fact, or
> >
> > (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[99] The plaintiff proposes the following as common issues:

(a) liability of the defendant for its failure to perfect its purported expropriation of Africville, inclusive of a determination of that imperfection;

(b) quantification of damages including injurious affection, disturbance, pre-judgement interest (and when that should be set), and any other uncompensated land rights which can be demonstrated; and

(c) costs as contemplated by expropriation legislation, or more customarily.

*Proposed Common Issue (a): Liability*

[100] As set out previously, the claim of the plaintiff is founded in the argument that the defendant failed to follow the expropriation procedures required of it by

the **Charter**. It is pled, in the alternative, that because of the defendant's failure to follow the expropriation procedures required by the **Charter** the plaintiff is entitled to the procedures and substantive rights provided pursuant to the **Expropriation Act**. The final and alternative basis of the claim is an allegation of a *defacto* expropriation founded on the defendant "removing all property rights" from the plaintiff thereby entitling him to the procedures and substantive rights provided pursuant to the **Expropriation Act**.

[101] Each of these arguments require a determination of the validity of the expropriation, which the plaintiff submits the first proposed Common Issue encompasses and is in common to all of the proposed Class members.

[102] The defendant responds that in framing the issue in this way, the plaintiff is circumventing the foundational issue of whether the proposed individual Class members had an interest which could trigger the procedural and substantive rights claimed, in particular whether they were an "owner" at the time of expropriation.

[103] The Nova Scotia Court of Appeal, in *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, approved of the following legal principles relating to common issues:

> 123 The legal principles relating to common issues were summarized in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para.81 as follows:
>
> > 81 There are a number of legal principles concerning the common issues requirement in s. 5(1)(c) that can be discerned from the case law. Strathy J. provided a helpful summary of these principles in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement as described by Strathy J. in *Singer*, at para. 140, are as follows:
> >
> > > The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 39.
> > >
> > > An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud*, at para. 53.
> > >
> > > There must be a rational relationship between the class identified by the plaintiff and the proposed common issues: *Cloud*, at para. 48.

> The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick*, at para. 18.
>
> A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp*., [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.
>
> With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Dutton*, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 46 B.C.L.R. (4th) 234, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-46 and 160.
>
> A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, at para. 39, aff'd (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff'd *[2003] O.J. No. 1160* and *[2003] O.J. No. 1161* (C.A.); *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Div. Ct.).
>
> Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc*., 2003 CanLII 35843 (C.A.), at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, at para. 139.
>
> Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29.

124 In our view, the certification judge erred by certifying in his Order all the common issues proposed by the respondents without considering the necessary

> legal principles to determine whether each of the common issues shared a substantial common ingredient that would advance the litigation. We will address the common issues as they relate to each certified cause which remains.

[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.

[105] Nelson Carvery's affidavit, when read in conjunction with the allegations in the Claim, asserts the actual ownership of land by his father and the taking of it by expropriation without notice and without compensation. The apparent basis of his claim under the **Charter** is evident.

[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.

[107] Whether an individual is an "owner" is a question of fact and law. There is no indication in the materials before me to show that the interests claimed by Class members would be in common with those of Nelson Carvery, or even with other individuals in the proposed Class. Unfortunately, the description of the Class ( Issue 2) failed to set criteria that may have ensured that the claimants had such common interests.

[108] Whether there has been a failure to perfect the expropriation generates some obvious common issues. *e.g.*, whether the defendant complied with the procedural requirements of **Charter** sections 409(1), 410(2), 411 (deposit at the Registry of

Deeds of a copy of the Plan of Expropriation and the Resolution of Council), 412 (publication of the details of the expropriation in the newspaper), and 413(1).

[109] I have reached the following conclusions with respect to proposed Common Issue (a):

- There is a rational relationship between the claim and the question of liability founded on a failed expropriation;
- Establishing the liability of the defendant would be a common issue that is a substantial ingredient of a claim;
- The common issue need not dispose of the litigation - it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class.

[110] As it is currently framed, however, the proposed common issue is overly broad. The action would inevitably break down into individual proceedings. The establishment of who the defendant could be liable to is dependent upon findings of fact that must be made with respect to each individual claimant. The process would be neither fair nor efficient if liability was sought to be resolved on a question that does not address the most fundamental questions of liability – whether the individual qualifies as an "owner" that has a right to the procedural and substantive rights set out in legislation. It is impossible to ensure, on the form of this proposed common issue, whether success for one member will mean success for all.

[111] I conclude that proposed Common Issue (a) does not meet the requirements of the **CPA.**

*Proposed Common Issue (b): Damages*

[112] The decision in *MacQueen* approved the following statement at paragraph 123:

> Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis.

[113] The proposed Common Issue is a general invitation to assess damages. The details of the methodology for that determination has been presented in the submission of plaintiff's counsel.

[114] Counsel for the plaintiff set out the plan in his pre-hearing brief:

> 43 …the damage claims are proposed to be decided in the aggregate, by reference to the community of Africville as a whole, with individual apportionment of the proceeds to be the purpose of a later process. Hypothetically, the Court's guidance on the form such a process should take would be appreciated.
>
> 44 Quantification of damages at the community level is both more workable than determination of individual claims, and lends itself well to the commonly-held nature of many of the rights claimed.
>
> 46 …Quantification of the land claims is intended to proceed, as is usual in expropriation matters, by expert appraisal.

[115] In his pre-hearing Reply brief, plaintiff's counsel added that the value of compensation sought is the value attached to the communal lands, which are:

> 30 …the balance of the lands not purchased or otherwise acquired by the Defendant prior to the purported expropriation. The claim is pleaded so that damages are an aggregate of this value. Each Class member will share on a *pro rata* basis of the compensation for this communal land. (at paragraph 30).

[116] In adopting this approach, counsel argued against the position presented by the defendant in its submission, which advocated that there were questions that need to be answered to establish and allocate damages among claimants. Plaintiff's counsel submitted that the questions were not relevant since there is no intention to quantify the claimants' shares on an evidence based, individualized calculation for each proposed Class member.

[117] In paragraph 31 of his Reply brief , counsel for the plaintiff outlined the "methodology for determining damages in this matter". The proposal is to use a real estate appraiser, a surveyor and a photogrammetrist to assess the gross value of the lands, to be shared among the Class members.

[118] A Chartered Business Evaluator will rely upon evidence of the Class members and statistical evidence to reach an aggregate economic value of the loss

suffered by the Class members for loss of their ownership interests, again to be shared on a *pro rata* basis.

[119] At paragraph 32 of the Reply brief, the following conclusion is offered:

> The evidentiary basis upon which the claims will be based will, by necessity require evidence from the individuals. The Plaintiff and the Class member have not pleaded any individual issues and there are no such individual issues that arise in the pleading of this case.

[120] Sections 32 to 36 of the **CPA** provide authority and guidance for awarding and distributing an aggregate monetary award in a manner proposed by plaintiff's counsel. Were other conditions for certification met, it is possible that the proposed means to assess damages could have been refined into a workable methodology based upon the representations of plaintiff's counsel.

[121] At this point the question is moot, because the overriding question to be answered before turning to damages is that of liability. The proposed Common Issue dealing with that question does not meet the requirements necessary to support certification.

*Common Issue (c): Costs*

[122] Provisions for the assessment of costs are set out in the **CPA** at Sections 40 and 41. It is unnecessary to address this as a Common Issue at this time.

*Conclusion as to Issue 3*

[123] For the reasons given, proposed Common Issue (a), which purports to establish **"**liability of the defendant for its failure to perfect its purported expropriation of Africville, inclusive of a determination of that imperfection" is overly broad. It fails to break out the legal principles necessary to the establishment of liability and will necessarily break down into individual fact finding for each proposed Class members. As such it cannot advance the litigation as it is currently framed.

[124] The proposed Common Issue (b) as to damages is premature in the absence of a Common Issue going to liability. The proposed methodology for awarding an aggregate award is founded in the legislation and may provide a workable solution if the litigation advances to that point.

[125] Common Issue (c) is simply a request for costs, which are provided for in the **CPA**. It is a moot point at this time.

**Issue 4: Would a class proceeding be the preferable procedure for the fair and efficient resolution of the dispute? *Section 7(1)(d)***

[126] A precondition to certification is that a class proceeding would be preferable for the fair and efficient resolution of the dispute. The relevant section of the **CPA** states:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute;
>
> …
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[127] Counsel for the plaintiff submits that "a Class Proceeding is, in reality, the only way to advance this action." During the currency of the action commenced in 1996 cited as *Williams v Halifax*, and which I have case managed since 2010, there were various times when the courtroom was filled with significant numbers of individual self-represented plaintiffs seeking adjudication of various motions. That experience made the challenges of ensuring access to justice and promoting

judicial economy apparent. It supports the pragmatic assessment of plaintiff's counsel.

[128] However, those various hearings were conducted successfully and decisions rendered, albeit, largely on procedural issues. It did demonstrate that individual claims could be litigated outside of a class proceeding, however, it was apparent that a trial of the matter, as it was previously framed, was going to be very time consuming and complex.

[129] The current claim attempts to narrow the causes of action significantly, as well as the numbers of potential claimants. The evidence, even if each proposed Class member were to testify as to their "property interest", would still be much narrower than it would have been under the 1996 pleading. If a Class proceeding could be achieved it would likely provide the optimal means by which to advance the litigation and to bring a conclusion to this long standing and contentious dispute.

[130] Unfortunately, the plaintiff has been unable to satisfy the conditions in Section 7(1)(b) and (c) of the **CPA** and so certification cannot take place. This renders a further consideration of the preferability analysis moot.

**Issue 5: A suitable representative party.** ***Section 7(1)(e)***

[131] Is there a representative party who:

(i) would fairly and adequately represent the interests of the Class?

(ii) has produced a plan for the Class proceeding that sets out a workable method of advancing the Class proceeding on behalf of the Class and of notifying Class members of the Class proceeding? and

(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other Class members?

[132] This question is also moot, having regard to the results in relation to Issues 2 and 3. Any consideration of this question would depend upon the results of a determination that satisfies those concerns.

**Conclusion**

[133] The plaintiff requested amendments to paragraphs 4 and 21 in the statement of claim. They were discussed at the motion hearing. The request is granted. Here are the new provisions:

> 4. The proposed Class members in this Action include all former residents and the estates of deceased former residents of Africville who held property interests in the communal lands of Africville and had those property interests taken by the City of Halifax and who have not otherwise disposed of their property interests before November 26, 1969, were removed from the physical community of Africville between 1962 and 1970 and who have not signed releases to this Action or had their claims otherwise dismissed or discontinued.

and paragraph 21 of the Claim is struck and replaced by:

> 21. The plaintiff pleads that the former residents (Class members) continued to hold their property interests in the communal lands to the date of the purported expropriation by the defendant on November 26, 1969.

[134] In an exchange of written submissions made subsequent to the hearing, counsel for the plaintiff proposed a further amendment to the pleadings to define "communal lands" as all of the lands in Africville that were not acquired by the defendant prior to the expropriation on November 26, 1969. I am not prepared to grant that amendment at this time given the timing of when it was proposed, however the plaintiff is permitted to bring it forward again as part of a future attempt to certify, should that take place.

[135] For reasons set out above, I have concluded that the requirements of Section 7(1) (b) and (c) of the **CPA** have not been satisfied. Therefore, the motion for certification of the action and appointing the plaintiff, Nelson Carvery, as Representative Plaintiff, is denied.

[136] If the parties are unable to agree as to costs, I will hear their submissions in person or in writing, as they request.

[137] Counsel are invited to contact my office to set a date for a future case management conference to discuss next steps in this proceeding.

[138] Order accordingly.

Duncan, J.