IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burnell v. Canada (Fisheries and Oceans),* 2014 BCSC 258

Date: 20140218
Docket: S077807
Registry: Vancouver

Between:

Barry Jim Burnell

Plaintiff

And

Her Majesty the Queen in Right of Canada, as Represented by the Minister of Fisheries and Oceans, and Pacific Halibut Management Association of B.C.

Defendants

Before: The Honourable Madam Justice S. Griffin

Third Interim Ruling: Certification and Amendments to Claim

In Chambers

Counsel for the Plaintiff:	Meldon Ellis Phillip Scarisbrick
Counsel for the Defendant Crown:	Paul F. Partridge Maria Molloy
Place and Date of Hearing:	Vancouver, B.C. March 11-13, 2013
Written Submissions of the Plaintiff:	Dated November 29, 2013
Written Submissions of the Defendants:	Dated December 13, 2013
Reply Submissions of the Plaintiff:	Dated December 18, 2013
Surreply of the Defendants:	Dated February 3, 2014
Place and Date of Judgment:	Vancouver, B.C. February 18, 2014

Introduction

[1] The plaintiff is a commercial halibut fisher suing the federal government in relation to a fisheries management scheme that the government put in place in 2001. The fisheries management scheme was discontinued in 2006 after the Federal Court found similar schemes on the east coast of Canada to be illegal.

[2] The plaintiff seeks to have the claim certified as a class proceeding on behalf of all affected fishers.

[3] The underlying legal causes of action are novel.

[4] In the course of the certification application and the back and force of submissions and interim rulings of this Court the plaintiff's claim as pleaded and argued has evolved.

[5] Two earlier rulings of the Court in relation to the certification application and the question of whether or not the plaintiff has pleaded a cause of action are indexed at: 2013 BCSC 1354 ("Interim Ruling"); and 2013 BCSC 1874 ("Second Interim Ruling").

[6] Presently the plaintiff seeks to amend the claim, change the defined class and add a subclass, and to complete its application for an order granting certification.

[7] I will analyze the certification application on the basis of the current proposed Second Further Amended Notice of Civil Claim ("SFNOCC").

Outline of Allegations in Claim

[8] An outline of the allegations in the plaintiff's claim was set out in the Interim Ruling at paras. 6-17 as follows:

> [6] The plaintiff's claim is based on certain steps taken by the Minister in the years 2001 to 2006.
>
> [7] Each year the Minister issues commercial halibut fishing licenses under the *Federal Fisheries Act*, R.S.C. 1985, c. F-14, permitting commercial license holders to catch and retain halibut in the coastal waters of British Columbia.

> [8] Each commercial halibut license issued by the Minister carries with it the right to purchase from the Minister a set portion (the Individual Vessel Quota or "IVQ") of the Total Allowable Catch (the "TAC") for halibut in British Columbia.
>
> [9] In each of the years 2001 to 2006 the Minister withheld 10% of the TAC that in the past had been issued to commercial license holders, and assigned it to the Pacific Halibut Management Society ("PHMA") under a new license L437.
>
> [10] At the same time, the Minister entered into a Joint Project Agreement ("JPA") with PHMA, pursuant to which PHMA would undertake fisheries management activities and pay funds to the Minister.
>
> [11] Under this fisheries management scheme, PHMA had the right to sell to individual license holders a proportionate share of the 10% of the TAC that had been assigned to it. PHMA then used these funds to pay the Minister and to pay its own expenses in relation to its fisheries management activities.
>
> [12] PHMA used the fees it obtained from selling the 10% of the TAC in two ways: to fund fisheries management activities at the direction and request of the Minister; and to pay the federal government directly to fund government fisheries management activities.
>
> [13] Thus, those commercial halibut fishing license holders who wished to purchase a proportionate share of the withheld 10% of the quota had to purchase it from PHMA. The cost of purchasing this proportionate share from PHMA was greater than it had been in the past when purchased directly from the government.
>
> [14] Originally there was another named plaintiff, Lorne Iverson, who commenced this proceeding. He named both Canada and PHMA as defendants. The claim against PHMA was discontinued on June 27, 2011.
>
> [15] Mr. Burnell was substituted as the plaintiff on November 29, 2011, after a contested application by the original plaintiff, Mr. Iverson. The basis for that application was a concern that Mr. Iverson might have an actual or perceived conflict with other members of the proposed class, since he was a director of PHMA at the material times when the Minister entered into the JPAs. It was thought that other class members could be critical of the steps taken by PHMA or the information communicated by PHMA to members of the class. The reasons for judgment in respect of that application are indexed at 2011 BCSC 1619.
>
> [16] The evidence filed in support of this motion suggests that approximately 80% to 90% of commercial halibut license holders were members of PHMA during the years 2001 to 2006.
>
> [17] Mr. Burnell was a member of PHMA and made payments to PHMA to access a proportionate share of the 10% of the quota during the years 2001-2006.

[9] As reviewed in the Interim Ruling, the plaintiff relies on comments or findings made in three authorities, *Larocque v. Canada (Minister of Fisheries and Oceans),*

2006 FCA 237; *Kingstreet Investments Ltd. v. New Brunswick (Finance),* 2007 SCC 1; *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24, for the following propositions:

a) that such a fisheries scheme is unlawful;

b) such a scheme amounted to an unlawful expropriation of or unlawful tax on a public resource;

c) the Minister misappropriated resources to fund his scientific research program;

d) the Minister deprived each licensee of a share of the TAC and indirectly imposed an additional charge on the licensees; and,

e) a citizen who has made a payment pursuant to an unlawful tax or *ultra vires* legislation has a right to restitution.

[10] The plaintiff relies on the above propositions to found his claim. However the claim remains novel. To my knowledge to date there has been no authority awarding a fisher damages or restitution of fees paid by the fisher under one of these fisheries management schemes.

Requirements for Certification

[11] The *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], sets out the requirements for certification in s. 4:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,

> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> [Emphasis added.]

[12] There must be an evidentiary basis for all of these requirements except the requirement that the pleadings disclose a valid cause of action: *Pro-Sys Consultants Ltd. v. Microsoft Corp.* 2013 SCC 57 [*Pro-Sys*] at paras. 99-100, 102 and 104.

Cause of Action

[13] The requirement that the pleadings disclose a cause of action is determined on the same basis as a motion to dismiss. A plaintiff will satisfy this requirement unless, assuming the facts as pleaded are true, it is plain and obvious that the claim cannot succeed: *Pro-Sys* at para. 63.

[14] The theory underlying the plaintiff's claim is that it was illegal for the federal Crown to collect monies from PHMA, which PHMA had collected from the commercial halibut fishers; and that therefore the federal Crown is liable to the fishers for those fees. The plaintiff has attempted to plead two causes of action: restitution of an unlawful tax; and, unjust enrichment.

[15] The Crown argues that these causes of action are not properly pleaded.

[16] In the Interim Ruling, I held:

a) the claim for restitution of an unlawful tax was at least arguable, and so I could not conclude that it was bound to fail (para 94). The pleading of the claim passes the threshold for establishing a cause of action (para. 98, 124);

b) the pleading of the claim for unjust enrichment clearly pleaded the lack of juristic reason, but it did not clearly identify the alleged the alleged benefit and deprivation (paras. 108-109). The problem was that the pleading and submissions were inconsistent on whether or not the

> claim was based on the allegation that the plaintiff had been deprived of quota; or, was based on the allegation that the plaintiff had been deprived of extra fees paid to PHMA to access the quota.

[17] The Interim Ruling concluded that the plaintiff was required to more clearly plead the precise nature of the alleged benefit and deprivation alleged to form the basis of the unjust enrichment claim (para. 114). The outcome of the certification application would have to follow the plaintiff's proposed amendments to the Notice of Civil Claim ("NOCC").

[18] The plaintiff then filed proposed amendments and written submissions in support of proposed amendments to the NOCC.

[19] I dealt with the proposed amendments to the plaintiff's NOCC in the Second Interim Ruling.

[20] I concluded that the proposed amendments to the NOCC did now identify the alleged benefit and corresponding deprivation aspect of the unjust enrichment claim. These were identified as the additional fees paid by the plaintiff to access the quota assigned by the Minster to PHMA. I concluded that the necessary elements to plead a claim in unjust enrichment were now properly pleaded (paras. 12-17).

[21] The Crown maintains its argument that the premise of both causes of action as pleaded is that the plaintiff and other members of the class had an entitlement to quota. The Crown argues that there is no legal entitlement to quota, and therefore both causes of action must fail.

[22] As stated in the Crown's initial submission in response to the initial certification application:

> The Minister has absolute discretion pursuant to section 7 of the *Fisheries Act*, R.S.C., 1985, c. F-14, (the *"Fisheries Act"*), to issue fishing licences. Under sections 7 and 43 of the *Fisheries Act* the Minister may issue or authorize to be issued, fishing licences with terms and conditions. In addition, the Minister's authority to issue a commercial halibut fishing licence falls under section 19 of the *Pacific Fishery Regulations, 1993*, SOR/93-54, (the *"Pacific Fishery Regulations, 1993"*). Under section 22 of the *Fishery*

> *(General) Regulations*, SOR/93-53, (the *"Fishery (General) Regulations"*), the Minister may specify conditions respecting the quantity of fish that may be caught (i.e. quota).

[23] In the Second Interim Ruling, I held at para. 18:

> [18] In reaching this conclusion, I am mindful of the defendant's argument that there can be no deprivation or enrichment when there is no legal entitlement to quota. That argument in my view has more force when what is being claimed as the deprivation and enrichment is the loss of 10% of quota. However, given the claim as framed is pleading that the Additional Fees were the deprivation and benefit, and given the low threshold for pleading a cause of action, I am able to conclude that the unjust enrichment claim, framed as proposed, will establish a cause of action.

[24] I remain of the view that the plaintiff's claim, as framed, meets the low threshold for pleading a cause of action: it is not plain and obvious that it will fail.

Identifiable Class

[25] The Supreme Court of Canada summarized the goal of the class definition requirement in class proceedings in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57:

> I agree with the courts that have found that the purpose of the class definition is to (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at paras. 26 and 30; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)), at para. 10; Eizenga et al., at § 3.31). *Dutton* states that "[i]t is necessary . . . that any particular person's claim to membership in the class be determinable by stated, objective criteria" (para. 38). According to Eizenga et al., "[t]he general principle is that the class must simply be defined in a way that will allow for a later determination of class membership" (§ 3.33).

[26] Both the Interim Ruling and the Second Interim Ruling noted inconsistencies between the plaintiff's submissions in support of certification, and the proposed class. The plaintiff was directed to make his position clear in the proposed amendments.

[27] The plaintiff's position on the proposed class has changed in the course of the certification application but that is not necessarily unusual or a barrier to certification.

[28] The issue before the court now is whether or not the current proposed class meets the requirements for certification.

[29] The proposed class is:

> All Category L Commercial Halibut fishing licence holders who were not directors of PHMA during the class period and were deprived of 10% of their quota as a result of the Minister's actions; and, were required to pay extra fees and other charges to the PHMA in order to access this 10% of his or her quota as described above in each year between 2001 and 2006 inclusive., (the "Class");

[30] The defendant objects that the class as defined, referring to class members paying for "their" or "his or her" quota, wrongly incorporates the notion that class members own quota.

[31] The plaintiff has responded by indicating that the critical point is that the class members paid extra fees to access quota from PHMA, as compared to prior to the fisheries scheme at issue when they used to access this quota directly from the government. To overcome the defendant's objection, the plaintiff proposes re-wording the class as follows:

> All holders of a Category L Commercial Halibut license to fish for halibut in the waters of British Columbia issued by the MINISTER OF FISHERIES AND OCEANS (the "Minister") between 2001 and 2006 inclusive who purchased quota from PHMA, except for the following:
>
> (i) the holder of license L-437;
>
> (ii) First Nations fishers holding Category FL Commercial Halibut Fishing licenses; and
>
> (iii) license holders who acted as directors of PHMA.

[32] I accept that the alternative version of the proposed class definition is preferable, as it avoids incorporating into the class definition any contested factual issue regarding the entitlement to quota.

[33] The reason for the exclusion of the holder of license L-437 is that the license was held by PHMA.

[34] First Nations fishers had different licenses, and are also not included.

[35] The proposed class also excludes directors of PHMA. The plaintiff proposes a subclass of PHMA directors, which I will address shortly.

[36] The defendant argues that the description of the fishery in the proposed alternative class as being "in the waters of British Columbia" is inaccurate as there is no such defined body of "waters". It argues that the license refers to Canadian fisheries waters, consistent with s. 2 of the *Fisheries Act*.

[37] I accept the defendant's argument in this regard and see no reason to include the reference to waters of British Columbia.

The Proposed Class

[38] There must be two or more persons in the proposed class.

[39] While the numbers varied from year to year, the plaintiffs' pleading alleges that in 2006 there were 404 license holders holding licenses similar to that held by the plaintiff. Mr. Burnell has provided affidavit evidence to the effect that he held such a license and that there are over 400 people who hold similar fishing licenses.

[40] In addition, Mr. Ellis, counsel for the plaintiff, filed an affidavit made December 18, 2013 referring by name to another who was a halibut license holder who has told Mr. Ellis that he is interested in pursuing this claim.

[41] I am satisfied that there is evidence that two or more persons are in the proposed class.

[42] As for whether or not people in the class are determinable by objective criteria, clearly they are determinable by two objective facts:

a) they held the identified category of fishing license,

b) they paid fees to PHMA to obtain quota in the defined years.

[43] I conclude that the proposed alternative class definition meets the requirements of the *CPA*.

The Proposed Subclass

[44] The plaintiff also proposes a subclass of directors of PHMA as follows:

> This action is also brought as a proposed class action by the plaintiff pursuant to the *Class Proceedings Act*, 1996, c. 50, as amended, S.B.C. 1998, s. 96, on behalf of the sub-class of all directors of the PHMA who held Category L Commercial halibut fishing licences and were deprived of10% of their quota as a result of the Minister's actions; and were required to pay extra fees and other charges to the PHMA in order to access this 10% of his or her quota as described above in each year between 2001 and 2006 inclusive.

[45] In the alternative, the plaintiff proposes the following subclass:

> All holders of a Category L Commercial Halibut license to fish for halibut in the waters of British Columbia issued by the MINISTER OF FISHERIES AND OCEANS (the "Minister") between 2001 and 2006 inclusive who purchased quota from PHMA and acted as directors of PHMA except for the following:
>
> (i) the holder of license L-437; and
>
> (ii) First Nations fishers holding Category FL Commercial Halibut Fishing licenses.

[46] The alternative version of the subclass is proposed for the same reason as the alternative version of the class: to avoid asserting as part of the class definition that class members owned quota. I find that the alternative version of the subclass definition is preferable for this reason.

[47] For the same reason as above, the reference to "in the waters of British Columbia" is unhelpful and should not be included in any subclass definition.

[48] As for the persons in the proposed subclass, over the course of this proceeding the plaintiff has equivocated on the question of whether or not to include former directors of PHMA in this proceeding. The plaintiff's position now is that the directors should not be in the class but should be included as a subclass. This is in

recognition of the fact that the defendant may have defences that apply to these people that do not apply to the rest of the class.

[49] The actions of PHMA are at issue because the plaintiff claims that PHMA acted as agent or partner with the Minister in the unlawful fisheries management scheme.

[50] In short, the defendant's position is that directors of PHMA approved of the fisheries management scheme at issue, and authorized PHMA to undertake all of the activities now challenged in the lawsuit. When they did so, the defendant argues that the directors were presumably acting under the general fiduciary duties owed by directors to act in the best interests of the society.

[51] The PHMA's purposes as stated in its Constitution included:

> (a) To promote the welfare and defend the interests of B.C. halibut fishermen;
>
> (b) To provide official representation of and for B.C. halibut fishermen in dealings with federal and provincial government departments…
>
> …
>
> (f) To promote legislation, regulations and government policies which may benefit B.C. halibut fishermen and the pacific halibut fishery, generally, and to oppose such legislation, regulations and policies which may be detrimental to B.C. halibut fishermen and to the B.C. halibut fishery, generally.

[52] The defendant says the former directors of PHMA can hardly take the position now that they were somehow prejudiced by the very scheme they directed for the benefit of the society and halibut fishers. The defendant says that the directors cannot possibly have a cause of action arising out of this fisheries management scheme.

[53] I admit to being troubled by this aspect of the claim. Given that PHMA is excluded as a plaintiff, for obvious reasons that the alleged wrong is the carrying out of a contract to which PHMA was a willing party and for which it is described as an agent or partner of the defendant Crown, how can the directors of PHMA be plaintiffs? However, the question should be approached from the perspective of

whether or not the plaintiff's claim discloses a cause of action, not whether or not the defence is strong.

[54] It strikes me that there is room for there to be a different perspective on the role of PHMA versus that of the Crown in entering into the fisheries management scheme. The scheme was unlawful because government did not have the power to do what the scheme purported to do, not because of any dishonesty or misconduct on the part of PHMA directly.

[55] The legal concepts relied on by the plaintiff to support the claim relate to public restitution and unjust enrichment, not contract. I conclude that it is premature to determine that the claims of directors will not succeed.

[56] The key difference between the class and the subclass is that the defendant has an additional defence it can raise with respect to the subclass, namely, that as directors of PHMA they authorized PHMA to enter into the alleged scheme with the Minister and thus they are precluded from claiming any relief arising from the scheme being found to be unlawful.

[57] In *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43; leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 512 ("*Wuttunee*"), the Saskatchewan Court of Appeal held at paras. 125-126 that a subclass may have common issues separate from the main class, but they must also share a common link with the main class, so that there remains a single, over-riding class with issues common to all members.

[58] Here the common issues for the main class will also be common issues for the subclass. However, there is an additional defence that will be asserted with respect to the subclass, identified as issue 19 below.

[59] The *CPA* provides for certification of a subclass in s. 6(1):

> 6(1) Despite section 4 (1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in

> addition to the representative plaintiff for the class, a representative plaintiff who
>
> (a) would fairly and adequately represent the interests of the subclass,
>
> (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and
>
> (c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

[60] The plaintiff does not propose a separate representative plaintiff for the subclass. The plaintiff argues in the alternative that if the court is concerned about a conflict on the common issues, then certification of the proposed subclass ought to be granted conditional upon the addition of a former director of PHMA as a representative plaintiff.

[61] There is a potential for conflicts between the members of the class and the subclass. One obvious example is that there could be a conflict in terms of getting instructions on settlement. Another is that the directors of PHMA could give evidence as to the merits and benefits of the fisheries management scheme that differs from that of the other members of PHMA and which undermines the claims of the other members of the PHMA.

[62] Furthermore, the directors of PHMA could in theory be exposed to claims by the other class members, as noted by Mr. Iverson in his Affidavit #1.

[63] If there was to be a subclass there would need to be, at minimum, a separate representative plaintiff for the subclass. The representative plaintiff would also need to meet the requirements of s. 6(1) including producing a litigation plan.

[64] Furthermore, before I would approve a subclass the plaintiff will need to provide a litigation plan that deals with these potential conflicts from the perspective of the main class. How, for example, will counsel for the plaintiff deal with contradictory evidence between members of the main class, and members of the subclass; or with the desire of the main class to make or accept a settlement offer that might cut-out the subclass; or with evidence that implicates the directors in not

providing sufficient information to members of PHMA; or that deals with pressures by the main class to claim against the directors?

[65] The evidence also does not deal with how many directors would be in the subclass. In this case I would want more evidence as to the number of directors and whether or not there is more than one who is interested in the claim.

[66] In conclusion, I am not presently satisfied that the creation of a subclass of directors of PHMA will be appropriate.

Common Issues

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

(1) During January 1, 2001 to December 31, 2006 (the “Class Period), did the Minister withhold a portion of the individual vessel quota for halibut (“IVQ”) from each class and subclass member (hereinafter the “Withheld IVQ”)?

(2) During the Class Period, did the Minister assign the Withheld IVQ to the PHMA?

(3) During the Class Period, did the Minister and PHMA agree to collect fees from the class and subclass members to access the Withheld IVQ?

(The scheme described at common issues 1, 2 and 3 is hereinafter described as the “Scheme”)

(4) Did PHMA direct funds collected from the class and subclass members for accessing the Withheld IVQ to the Minister as part of the Scheme?

(5) Did PHMA perform services for the Minister that would have been performed by the Minister but for the Scheme thus saving an inevitable expense for the Minister?

(6) Did the Minister use the funds received in connection with the Scheme to directly or indirectly fund fisheries management?

(7) By implementing the Scheme, did the Minister appropriate a public resource that did not belong to him to finance fisheries management activities?

(8) By implementing the Scheme, did the Minister violate the provisions of the *Financial Administration Act*, R.S.C. 1985, c. F-11, and in particular sections 19 and 32?

(9) Did the collection of funds by or on behalf of the Minister under the Scheme constitute an unlawful or unconstitutional tax?

(10) Is the Minister liable to account for and repay funds to the class and subclass members? If yes, in what amount?

(11) Did the class and subclass members pay more to access the Withheld IVQ under the Scheme than they would have paid prior to the imposition of the Scheme for the equivalent IVQ? (any positive difference hereinafter described as the "Additional Fees") If yes, in what amount?

(12) Has the Minister been unjustly enriched by:

a. the receipt of all or part of the Additional Fees under the Scheme; and/or,

b. the performance of services by the PHMA for the Minister, thereby saving inevitable fisheries management expenses that would have been incurred but for the Scheme?

(13) Have the class and subclass members suffered a corresponding deprivation in the amount of the Additional Fees?

(14) Is there a juridical reason why the Minister should be entitled to retain the enrichment?

(15) Is the Minister liable to make restitution to the members of the class and/or subclass? If restitution is payable, in what amount?

(16) What is the liability, if any, of the Minister for court order interest?

(17) What is the appropriate distribution of monetary relief and interest to class and subclass members, and who should pay for the cost of that distribution?

[68] In addition, in response to the defendant's submissions the plaintiff proposes the following additional common issues:

(18) Did the defendant PHMA act as agent/partner of the Minister and/or assist the Minister to conduct the unlawful activities?

(19) If yes, is PHMA's participation in the unlawful activities a defence to claims by the subclass against the Minister for an unlawful or unconstitutional tax and/or unjust enrichment? If not, what claims remain?

[69] The defendant has argued that there is no evidentiary basis to support these issues, and they will not move the litigation forward.

[70] I disagree. There is evidence before me of the new fisheries management scheme in the time period covered by the class; and of the fact that additional fees were charged to access the quota through PHMA. The fees charged will vary depending on the amount of quota allowed to a particular class member, but the formula for the calculation of those fees will be the same across the board.

[71] The issues as framed deal piece by piece with the causes of action and the legal theories on which they are based.

[72] Issue 18 is poorly worded, as it suggests that PHMA is a defendant, which it is not. The words "the defendant" preceding PHMA in that issue should be deleted. Nevertheless, there is a factual issue, common to all class members, as to what was PHMA's role in the fisheries scheme.

[73] I am satisfied that the issues (1) through (18), with (18) revised as stated above, are common to members of the class and that deciding them will substantially move the litigation forward. However, to the extent any of these issues

refer to both class and subclass members, the subclass reference should be removed given that a subclass has not been approved.

[74] As for issue (19), the defendant argues that what the plaintiff is attempting to articulate is unclear.

[75] As I have not approved the subclass issue (19) as proposed does not apply.

[76] However, the issue is anticipatory of a defence which does give rise to a common issue.

[77] A theme arising from the defendant's position as argued and pleaded is that all of the people who accessed quota through PHMA did so as voluntary members of PHMA, in return for the perceived benefits of PHMA's involvement in fisheries management, and thus they cannot be said to be unjustly deprived and the Minister unjustly enriched. It strikes me that it will be necessary to decide in this case whether or not the class members' membership in PHMA precludes them from the claims that are advanced.

[78] On the current pleadings, I conclude that issue 19 is more properly framed as:

> (19) Does a class member's membership in PHMA preclude the class member from claiming against the Minister for restitution of an unlawful tax and/or unjust enrichment?

[79] This is the only proposed common issue that I would change; the rest currently appear appropriate as drafted, subject to the removal of references to a subclass and the minor change to issue (18) referred to above.

Preferable Procedure

[80] The relevant factors in determining whether or not a class proceeding would be a preferable procedure include those set out in s. 4(2) of the *CPA*:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims 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.

[81] The defendant argues that a number of common issues will arise for each class member, including each member's knowledge and support of the fisheries management scheme and support of the directors of PHMA who authorized PHMA's actions.

[82] I can anticipate that the issue of whether or not members of the class received a corresponding deprivation in relation to payment of the Additional Fees will require analysis of the benefits received by class members for the scheme. At present, it appears to me likely that any alleged benefits will also be common. As the evidence unfolds it may be that there will be a need to determine some individual issues but that bridge can be crossed if and when necessary. The common issues predominate.

[83] The evidence of Mr. Burnell satisfies me that the litigation will be too costly for individual class members to prosecute in relation to any potential outcome and that there is no other available procedure to them. The class action procedure will remove the barriers to justice that the economics of the claims otherwise create.

[84] Furthermore, I find that the issues in the case are predominately common, and there are efficiencies to be gained by hearing all of the claims in one action.

[85] I am satisfied that a class proceeding is the preferable procedure for the determination of the claims.

Representative Plaintiff

[86] The proposed representative plaintiff appears to be a suitable representative.

[87] The defendant argues that Mr. Burnell will have a conflict of interest with the subclass. I have not certified the proposed subclass. I see no conflict on the class as currently defined.

[88] The defendant also argues that Mr. Burnell has not produced an appropriate litigation plan. They argue that it fails to describe a workable method for addressing individual issues.

[89] I am satisfied with the litigation plan at this stage of the litigation but expect it to be refined as the proceeding progresses.

[90] I find that Mr. Burnell is a suitable representative of the class and has an appropriate litigation plan.

Conclusion

[91] The plaintiff's application to amend the Notice of Civil Claim in the form submitted as the SFNOCC is allowed.

[92] The plaintiff's application to certify the proceeding as a class proceeding is also allowed, on the basis of the following class:

> All holders of a Category L Commercial Halibut license to fish for halibut issued by the MINISTER OF FISHERIES AND OCEANS (the "Minister") between 2001 and 2006 inclusive who purchased quota from PHMA, except for the following:
>
> (i) the holder of license L-437;
>
> (ii) First Nations fishers holding Category FL Commercial Halibut Fishing licenses; and
>
> (iii) license holders who acted as directors of PHMA.

[93] The common issues will be those identified as (1) through (19), set out on attached Appendix "A".

[94] The application to certify a subclass is dismissed, with liberty to apply with evidence that addresses the concerns I have already raised regarding the certification of a subclass. As I do not consider it fair to the defendant to have the possibility of a subclass application outstanding for an indeterminate period of time, I will order that the plaintiff will have 30 days from the date of this judgment to give notice of such an application and notice of any evidence in support, if it chooses to do so.

[95] The parties may seek a further hearing before me to deal with issues of notice to class members.

"S.A. Griffin, J."
The Honourable Madam Justice Susan A. Griffin

APPENDIX "A"

(1) During January 1, 2001 to December 31, 2006 (the "Class Period), did the Minister withhold a portion of the individual vessel quota for halibut ("IVQ") from each class member (hereinafter the "Withheld IVQ")?

(2) During the Class Period, did the Minister assign the Withheld IVQ to the PHMA?

(3) During the Class Period, did the Minister and PHMA agree to collect fees from the class members to access the Withheld IVQ?

(The scheme described at common issues 1, 2 and 3 is hereinafter described as the "Scheme")

(4) Did PHMA direct funds collected from the class members for accessing the Withheld IVQ to the Minister as part of the Scheme?

(5) Did PHMA perform services for the Minister that would have been performed by the Minister but for the Scheme thus saving an inevitable expense for the Minister?

(6) Did the Minister use the funds received in connection with the Scheme to directly or indirectly fund fisheries management?

(7) By implementing the Scheme, did the Minister appropriate a public resource that did not belong to him to finance fisheries management activities?

(8) By implementing the Scheme, did the Minister violate the provisions of the *Financial Administration Act*, R.S.C. 1985, c. F-11, and in particular sections 19 and 32?

(9) Did the collection of funds by or on behalf of the Minister under the Scheme constitute an unlawful or unconstitutional tax?

(10) Is the Minister liable to account for and repay funds to the class members? If yes, in what amount?

(11) Did the class members pay more to access the Withheld IVQ under the Scheme than they would have paid prior to the imposition of the Scheme for the equivalent IVQ? (any positive difference hereinafter described as the "Additional Fees") If yes, in what amount?

(12) Has the Minister been unjustly enriched by:

a. the receipt of all or part of the Additional Fees under the Scheme; and/or,

b. the performance of services by the PHMA for the Minister, thereby saving inevitable fisheries management expenses that would have been incurred but for the Scheme?

(13) Have the class members suffered a corresponding deprivation in the amount of the Additional Fees?

(14) Is there a juridical reason why the Minister should be entitled to retain the enrichment?

(15) Is the Minister liable to make restitution to the members of the class? If restitution is payable, in what amount?

(16) What is the liability, if any, of the Minister for court order interest?

(17) What is the appropriate distribution of monetary relief and interest to class members, and who should pay for the cost of that distribution?

(18) Did PHMA act as agent or partner of the Minister and/or assist the Minister to conduct the unlawful activities?

(19) Does a class member's membership in PHMA preclude the class member from claiming against the Minister for restitution of an unlawful tax and/or unjust enrichment?