COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General),* 2012 BCCA 193

Date: 20120503
Nos. CA038705; CA038707

Docket: CA038705

Between:

Chief Robert Chamberlin, Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation, on his own behalf and on behalf of all members of the Kwicksutaineuk/Ah-Kwa-Mish First Nation and Her Majesty The Queen In Right Of The Province Of British Columbia as represented by the Minister of Agriculture and Lands

Respondent
(Plaintiff)

And

The Attorney General of Canada

Appellant
(Defendant)

- and -

Docket: CA038707

Between:

Chief Robert Chamberlin, Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation, on his own behalf and on behalf of all members of the Kwicksutaineuk/Ah-Kwa-Mish First Nation

Respondent
(Plaintiff)

And

Her Majesty The Queen In Right Of The Province Of British Columbia as represented by the Minister of Agriculture and Lands and Attorney General of Canada

Appellants
(Defendants)

And

British Columbia Salmon Farmers Association

Intervenor

Before: The Honourable Madam Justice D. Smith
The Honourable Madam Justice Garson
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of Canada, December 1, 2010, (*Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands*), 2010 BCSC 1699, Vancouver Docket S090848)

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Place and Date of Hearing:	Vancouver, British Columbia November 23, 24 and 25, 2011
Place and Date of Judgment:	Vancouver, British Columbia May 3, 2012

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Mr. Justice Hinkson

Concurring Reasons by:
The Honourable Madam Justice D. Smith (page 38, paragraph 103)

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

[1] The waters of the Broughton Archipelago have for centuries been a source of salmon for the Aboriginal peoples who inhabit the area. There is no dispute that in recent decades, many stocks of wild salmon, once abundantly available for fishing, have declined significantly. The cause of that decline, it is alleged in this action, is the operation of fish farms in and about the Broughton Archipelago. The plaintiff, Chief Robert Chamberlin, is chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation. He commenced the within action and applied to have it certified as a class action. In certifying the action, the chambers judge defined the class as "all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for food, social, and ceremonial purposes within the Broughton Archipelago and the rivers that drain into the Broughton Archipelago on behalf of himself and other Aboriginal collectives who have rights to fish in the Broughton Archipelago." His reasons for judgment may be found at 2010 BCSC 1699. This appeal turns on whether the class was properly defined.

Statement of Claim

[2] The Further, Further Amended Statement of Claim, filed July 6, 2010, describes the proposed class as follows:

> 1. This is a proposed class action on behalf of all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social, and ceremonial purposes ("Fishing Rights") within the Broughton Archipelago ("Class"). The boundaries of the Broughton Archipelago are set out on the map attached as Schedule "A" to this Statement of Claim.
>
> 2. The Broughton Archipelago is a network of fjords and islands located along the mainland coast and adjacent to the North Eastern side of Vancouver Island. The Broughton Archipelago is a unique ecosystem that supports significant stocks of wild salmon that migrate in cycles from their spawning grounds in the Broughton Archipelago to the Pacific Ocean and then return to spawn their original spawning grounds ("Wild Salmon").

[3] At para. 3 of the statement of claim, the plaintiff asserts that the Crown's regulation of salmon aquaculture is responsible for the "serious and material decline in wild salmon stocks within the Broughton Archipelago ...".

[4] Also at para. 3, the plaintiff alleges that this Crown conduct infringes its fishing rights in breach of s. 35 of the *Constitution Act, 1982*.

[5] Chief Chamberlin is the representative plaintiff, bringing the claim on his own behalf and on behalf of all members of the Kwicksutaineuk/Ah-Kwa-Mish First Nation.

[6] At para. 15, the plaintiff alleges that the operation of salmon aquaculture has reduced or destroyed the plaintiff's ability to harvest sufficient quantities of wild salmon to satisfy their sustenance, social and ceremonial needs.

[7] At para. 19 of the statement of claim, the plaintiff claims the following damages:

> 19. As a direct result of the unconstitutional infringement of the Fishing Rights, the Class has suffered loss and damages including, but not limited to:
>
> (a) general damages for the loss of their ability to exercise a constitutionally protected right which provides for a source of food, sustenance and is of cultural, social and economic significance;
>
> (b) the costs of purchasing or otherwise procuring, and transporting food to replace the Wild Salmon that are not available;
>
> (c) costs arising out of the lost ability to exercise the Fishing Rights at their preferred times, using their preferred means, in their preferred places; and
>
> (d) the loss of the cultural, ecological, and spiritual integrity of the Wild Salmon habitat and fishing sites, including their ability to maintain cultural practices related to the Wild Salmon harvesting, including traditional management of the Wild Salmon.

[8] The plaintiff claims the following relief at para. 20:

20. The Province and the Minister continue to authorize and regulate the Fish Farms in the manner set forth above and this continuing authorization and regulation causes unconstitutional, ongoing and irreparable harm to the Fishing Rights and gives rise to injunctive relief.

Wherefore the plaintiff claims:

(a) an order certifying this case as a class proceeding and appointing the Plaintiff as the representative plaintiff under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50;

(b) a declaration that the KAFN and the other Members of the Class have Fishing Rights within the Broughton Archipelago;

(c) a declaration that the manner in which the Province has authorized and regulated the Salmon Farms has contributed to a significant decline in the Wild Salmon stocks;

(d) a declaration that sections 11(2) of the *Land Act* and sections 13(5) and 14(2) of the *Fisheries Act* are of no force and effect because these provisions confer on the Minister the discretion to authorize salmon aquaculture and this discretion is not structured to accommodate the Fishing Rights of the Class;

(e) a declaration that the manner in which the Province has authorized and regulated the Salmon Farms has infringed the KAFN and other Class Members' Fishing Rights in violation of s. 35 of the *Constitution Act, 1982,* and that the permits authorizing and regulating the Salmon Farms are void and of no force and effect and/or are constitutionally inapplicable;

(f) an injunction prohibiting the Minister from issuing, renewing, or replacing any salmon aquaculture permits in the Broughton Archipelago;

(g) a mandatory injunction requiring the Province to remediate the impact of Salmon Farms on Wild Salmon by restoring Wild Salmon stocks and habitat to the position that they would have been in but for the Province's infringement of the Fishing Rights;

(h) damages and/or compensation;

(i) an order that the relief granted be implemented under the continuing supervision and jurisdiction of the Court; and

(j) such further other equitable and related relief as to this Court may seem meet and just.

Certification Application and Order

[9] In April 2010, the plaintiff applied for certification of the within proceeding as a class proceeding. The plaintiff proposed that the class be described as follows:

> ... all members of the First Nations who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social, and ceremonial purposes within the Broughton Archipelago (the "Class Members") or such other class definition as the court may ultimately decide on the motion for certification. The boundaries of the Broughton Archipelago are set out on the map attached as Schedule "A" to the Statement of Claim.

[10] Following a lengthy hearing in April that continued into July and November, with the benefit of written submissions, Mr. Justice Slade certified the within action on January 12, 2010. His order includes the following terms:

> IN THIS CLASS PROCEEDING the claim asserted by the plaintiffs is for declaratory relief, injunctive relief and damages against the Province for allegedly breaching s. 35 of the *Constitution Act,* 1982.
>
> THIS COURT ORDERS that:
>
> 1. this action is certified as a class proceeding;
> 2. the capitalized terms in this order are derived from the Further Further Amended Statement of Claim as amended pursuant to the Consent Order dated May 3, 2010;
> 3. the class is described as all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for food, social, and ceremonial purposes within the Broughton Archipelago and the rivers that drain into the Broughton Archipelago (the "Broughton Archipelago);
> 4. Chief Robert Chamberlin is appointed as representative plaintiff for the class members;
> 5. the trial of this proceeding will determine the following common issues:
>
> (a) To what extent are the Wild Salmon populations in the Broughton Archipelago in decline?
>
> (b) To what extent has the Province purported to authorize and regulate the Salmon Farms under the *Land Act,* R.S.B.C. 1996, c. 245 and the *Fisheries Act, R.S.B.C.* 1996, c. 149?
>
> (c) Has the manner in which the Province purported to authorize and regulate the Salmon Farms:

(i) failed to prevent, or adequately manage the concentration of parasites, including sea lice, at the Salmon Farms and the transmission of these parasites from the Salmon Farms to the Wild Salmon;

(ii) failed to prevent or adequately manage the concentration of infectious diseases at the Salmon Farms and the transmission of these infectious diseases from the Salmon Farms to the Wild Salmon;

(iii) allowed the farming of non-indigenous Atlantic salmon species at the Salmon Farms and failed to prevent or adequately manage escapes of Atlantic salmon from the Salmon Farms that compete with the Wild Salmon for habitat and food;

(iv) permitted the Salmon Farms to be located in areas that encounter significant runs of Wild Salmon, particularly as vulnerable juvenile Wild Salmon;

(v) permitted Salmon Farms to operate without requiring fallowing in a manner that effectively protects Wild Salmon during critical periods when Wild Salmon stocks, particularly juvenile Wild Salmon, are known to be passing in close proximity to Salmon Farms;

(vi) permitted Salmon Farms that allow the transmission of parasites and disease to Wild Salmon by the use of permeable cages causing free flow of contaminated water and waste between the Salmon Farms and the marine environment; and

(vii) made other decisions about, among other things, the location of the farms, size of the farms, concentration of the non-indigenous salmon permitted in the farms, the application of pest and disease treatments and the timing of harvesting operations, which have significant negative impacts on the populations of Wild Salmon?

(d) To what extent have the actions or omissions of the Province caused or materially contributed to the decline of the Wild Salmon populations in the Broughton Archipelago?

(e) Did the Province have knowledge, real or constructive, of the existence or potential existence of any Fishing Rights within the Broughton Archipelago?

(f) Did the Province contemplate, or ought the Province have contemplated, that any Fishing Rights within the Broughton Archipelago could be affected by the manner in which the Province authorized and regulated the Salmon Farms?

(g) Are the Class Members entitled to an award of aggregate damages and, if so, in what amount?

> 6. The trial of common issues, including a determination whether one or several of the common issues will be tried before the others, will be addressed in case management;
>
> 7. notice shall be given to Class Members in the form, time, manner, and at the cost of the party or parties to be directed by the Supreme Court after further submissions by the parties; and
>
> 8. the time and manner for opting out of the proceeding shall be as directed by the Supreme Court after further submissions by the parties, which application shall be brought promptly if the British Columbia Court of Appeal upholds certification in this case.
>
> [Emphasis added.]

Issue on Appeal and Disposition of Appeal

[11] In my view the main issue on this appeal is whether the certified description of the plaintiff class is statutorily permissible. I conclude that it is not. As will be discussed below, I consider determination of this issue to be dispositive of this appeal. I also find that there is no acceptable definition which this Court could substitute for the one used by the chambers judge. It is therefore unnecessary to consider the further grounds of appeal addressed by the parties.

[12] In brief, my reasons for this conclusion follow. Because class proceeding legislation is procedural, and does not create substantive rights, a proposed class action must identify class members who individually have legal capacity to sue and assert a cause of action. The cause of action advanced in this case by Chief Chamberlin on behalf of his First Nation is a claim that the Crown infringed his First Nation's fishing rights by the manner in which it regulated fish farms in the Broughton archipelago. Before certification, that action was a representative action brought by a person who does have legal capacity. However, the certification of Chief Chamberlin's representative action on behalf of "Aboriginal collectives" fails to specify objective criteria by which a collective could, without an ethnographic analysis and court determination, identify its membership in the class. This analysis would be part of the infringement analysis which the certification order leaves to a later determination of the individual issues. Moreover, the term "Aboriginal collective," does not, without more, identify a group that has legal capacity.

Questions such as: who speaks for such a collective, how would it participate in the class action, how would it decide whether to opt-out, and whether determination of the common question would be binding on it, all illustrate the impermissible circularity of the definition of class members as certified in the order under appeal. Thus, for two central reasons, the lack of legal capacity, and the lack of known objective criteria, the class definition does not meet the criteria set out in the legislation.

Arguments on Appeal

[13] The appellants in this case are the Federal and Provincial Crowns. The British Columbia Salmon Farmers Association was granted intervenor status. The appellants objected to the certification order on numerous grounds, but as indicated already, these reasons focus on the parties' submissions regarding the identifiable class requirement for certification.

[14] Canada argues that there must be objective criteria for the identification of class members at the outset of the litigation. In the appealed order, Canada contends that no such objective criteria is provided. The class members are described as holders of Aboriginal fishing rights in the Broughton Archipelago but the determination of who holds such rights is not objective; the determination involves analysis of ethnographic and historical research and requires judicial findings of fact. Canada asserts it is not possible to identify who is or is not a member of the class prior to a trial determining the very issue needed to identify the class.

[15] The Province says in addition that the order certifying the proceeding is flawed because the class members are not "persons" as is required by the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, but are rather "aboriginal collectives" which are not recognized legal entities. It notes that, while the representative plaintiff is an individual, the claims are not personal claims as the class members are Aboriginal collectives, each with their own traditional territory within the Broughton Archipelago. Thus, essentially, British Columbia says the certified class is a class of multiple

representative proceedings. It submits that the certification criteria have not been met and the appeal should be allowed.

[16] The intervenor focuses on the common issues which relate to the impact of government regulation of fish farms on wild salmon. The intervenor argues that the court erred in accepting that a "system-wide" scientific inquiry could be carried out despite: different salmon runs (five species over 59 rivers); differing locations and histories of 29 salmon farms; different alleged immediate causes or mechanisms of harm to wild salmon (sea lice, disease, escapes and operational parameters of fish farms such as size, fallowing, location, permeable cages and harvesting); and Aboriginal rights of differing territorial scope for different Aboriginal collectives in the area. For reasons that will become evident, I have not addressed the intervenor's argument.

[17] The intervenor argues that no plausible methodology has been proposed for determining if fish farms are responsible for the decline in wild salmon stocks on a system-wide basis. In support of this submission, the intervenor emphasizes that the Broughton Archipelago system is complex, being comprised of ocean waters as well as a complex series of rivers, streams and fjords. It submits that there is no evidence that a common cause exists throughout the Archipelago.

[18] In support of the certification order, the respondent argues that the class is identifiable as a class comprised of collectives who are entitled to have or assert fishing rights in the Archipelago. He submits that self-identification through the assertion of a right to fish in the Broughton Archipelago is sufficient to meet the identifiable class requirement. The respondent submits that to hold that Aboriginal collectives cannot be "persons" within s. 4(1) of the *CPA* is contrary to the constitutional protection afforded to Aboriginal rights and that the jurisprudence is sufficiently advanced such that Aboriginal peoples can determine whether they are entitled to the constitutional protection provided by s. 35 of the *Constitution Act, 1982*. He submits that the *CPA* permits the court to enter upon a relatively elaborate

factual investigation in order to determine class membership and that difficulty satisfying the conditions is not a reason for finding that the class is not identifiable.

Statutory provisions

[19] The *CPA* test for certification provides as follows:

> **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.
>
> (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.
>
> [Emphasis added.]

The Plaintiff's Burden in a Certification Application

[20] The plaintiff's task on certification is to prove some basis in fact for the certification requirements, including the requirement that there be an identifiable class of two or more persons. As was stated in *Pro-Sys* at para. 65:

> The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],
>
> > [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

Standard of Review on Appeal

[21] As stated by the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at paras. 14–16, class proceedings legislation should be construed generously and not in an overly restrictive manner that would impede realization of the statute's intended benefits; namely, judicial economy, access to justice and modification of the behavior of wrongdoers. Although the Court considered Ontario legislation in *Hollick*, this Court has adopted such reasoning (see for example: *MacKinnon v. National Money Mart Company et al.*, 2006 BCCA 148 at para. 16, 265 D.L.R. (4th) 214).

[22] A chambers judge has broad discretion in determining whether a class proceeding has met the criteria for certification and an appellate court should not interfere unless the chambers judge has erred in law or is clearly wrong: *Hoy v. Medtronic, Inc.*, 2003 BCCA 316 at para. 38, 14 B.C.L.R. (4th) 32.

[23] As stated by this Court in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2009 BCCA 503, 312 D.L.R. (4th) 419, an appellate court should be restrained in its review of certification orders:

> [28] Section 4 of the *CPA* states that an action "must" be certified if all of the statutory criteria are satisfied. Accordingly, a judge on a certification application is not exercising a discretionary power in granting or refusing certification of an action as a class proceeding. However, the judge has a measure of discretion in the assessment of the statutory criteria and, absent an error of law, this Court will not interfere with an exercise of judicial discretion unless it is persuaded the chambers judge erred in principle or was clearly wrong: *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, [1998] 6 W.W.R. 275 (C.A.) at para. 25, leave to appeal ref'd [1998] S.C.C.A. No. 13 [*Campbell*].

Analysis

1. The Relevant Legal Framework for Aboriginal Rights Claims

[24] Before reviewing the reasons for judgment, I will briefly summarize the key principles essential to the proof of an Aboriginal rights claim.

[25] In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1112, 56 C.C.C. (3d) 263*,* the Supreme Court of Canada developed a basic analytical framework for considering a claim alleging a breach of an Aboriginal right. The framework was subsequently summarized by the Court in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 2, as follows:

> In *Sparrow*, Dickson C.J. and La Forest J., writing for a unanimous Court, outlined the framework for analyzing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right

> has been infringed. Finally, a court must determine whether the infringement is justified.

[26] Under the first branch, establishing an Aboriginal right, the claimant must establish that the activity is an "element of practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right" (*Van der Peet* at para. 46). The court must determine whether the right claimed was a practice, custom or tradition practised by a pre-European contact Aboriginal group and whether, without the practice, custom or tradition, the culture of the group would have been fundamentally altered (*Van der Peet* at paras. 59–60). As was held by the Court in *R. v. Sparrow* Aboriginal fishing rights are not traditional property rights. They are not individual rights, "they are rights held by a collective and are in keeping with the culture and existence of that group".

[27] Reasonable continuity between the pre-contact practice, custom or tradition and those of the modern day right claimant is also required: *Van der Peet* at paras. 63–64.

[28] Aboriginal rights must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community: *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at para. 24. In *Powley*, the court approached the issue of ancestral connection by first identifying the historic rights-bearing community and then identifying the contemporary rights-bearing community.

[29] In *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, McLachlin C.J.C. addressed the question of ancestral connection or continuity. At para. 67 she wrote:

> ... The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices.

[30] Thus, in an Aboriginal rights claim, the identity of the proper rights holder is integral to the analysis. This is relevant for current purposes because the identity of the proper rights holder is also integral to the part of the class definition which requires class members to "have" or "assert" an Aboriginal right to fish. In other words, determination of the identity of the rights holder will be an important issue in the parts of the individual issues trials concerned with establishing the Aboriginal rights of each collective and will also be necessary to identify which collective is a member of the class because it has or asserts an Aboriginal right to fish in the Broughton Archipelago.

2. The Chambers Judge's Reasons

[31] The chambers judge concluded, based on his analysis of the ethnographic materials, that holders of Aboriginal fishing rights in the Broughton Archipelago could be identifiable as required by s. 4(1) of the *CPA.*

[32] The reasons contain a lengthy analysis of some of the possible ancestral ties of some of the proposed class members and of the manner in which Aboriginal groups are defined in different contexts: the *Constitution Act, 1982*; the *Indian Act*; and the British Columbia Treaty Commission process.

[33] The judge set out his task at paras. 19–21:

> Here, the entities are variously described in the pleadings and evidence as "Nations", "First Nations", "Tribes", and "Bands". The element that would establish each as a potential member of the class is the ability to claim an aboriginal right to harvest wild salmon in the environs of the Broughton Archipelago. This calls, at this stage, for a preliminary determination of the factors that would bear on the identification of holders of fishing rights in the Broughton Archipelago. Are the "persons" for the purposes of s. 4(1)(b) the nation, the tribes, or the bands? If the commonly used descriptor "First Nations" is to have any meaning in the context of a discussion of aboriginal rights, it must, in my opinion, refer to an aboriginal collective that can fairly assert itself as having an ancestral connection to an identifiable collective which, historically, engaged in practices that found the basis for the asserted right.
>
> It does not assist this determination that the proposed class is comprised of Bands. The *Indian Act* was not on the radar before contact, and band

> membership may not necessarily establish an ancestral connection with the members of the same indigenous aboriginal collective for which fishing was an integral aspect of a distinctive culture at contact.
>
> A discussion of the evidence and the resulting factors that go to establish the proper identity of the potential members of the class follows.
>
> [Emphasis added.]

[34] It is evident from the above that the judge ruled out the possibility that the class members could be described as Bands.

[35] Beginning at para. 24, the judge considered information provided in Chief Chamberlin's affidavit regarding how the Kwicksutaineuk/Ah-Kwa-Mish First Nation came to be known as a single collective. The affidavit also identified other "First Nations" who have or assert constitutionally protected treaty and/or Aboriginal rights to fish in the Broughton Archipelago.

[36] At para. 29, he made reference to different descriptors of Aboriginal groups:

> It is evident that the term "First Nation" as used by Chief Chamberlin in his affidavit and as reflected in the Statement of Claim is used as a descriptor for "bands" that appear in the registry of DIAND. This is consistent with the general usage of the term "First Nation", of which I take judicial notice. I am informed, in part, by a review of the foundation documents for three prominent aboriginal political organizations: the entity known as the Assembly of First Nations (AFN), the British Columbia-based First Nations Summit (FNS) and the Union of B.C. Indian Chiefs (UBCIC). The constitution of UBCIC establishes *Indian Act* bands as entities that qualify for membership. Foundation documents for the AFN and the FNS use the term "First Nations" to describe their members, and are organized to take direction from the chiefs of bands, in assembly.

[37] He identified from the Chamberlin affidavit and the affidavit of Lori Walker sixteen such First Nations. After referring to *Van der Peet*, he stated at para. 38 the following:

> In this test the aboriginal group is relevant as both the modern claimant of the right, and as the vessel of distinctive culture in which a qualifying historical activity must be located. The Court did not discuss how aboriginal societies are delineated, and adjudicated the claim on the basis that the Sto:lo were a qualifying aboriginal group.

[38] He then discussed authorities commenting upon the ancestral continuity requirement noted above.

[39] At para. 43, he quotes the language of Mr. Justice Vickers in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, concerning the manner in which a rights holder should be identified:

> Vickers J. concluded that the determination of the rights holder should focus on "the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person", rather than shifting political structures (at para. 457):
>
> > The political structures may change from time to time. Self identification may shift from band identification to cultural identification depending on the circumstances. What remains constant are the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person. The Tsilhqot'in Nation is the community with whom Tsilhqot'in people are connected by those four threads.

[40] It should be noted that Vickers J. was not concerned there with identifying a legal entity capable of suit because that action was pursued as a representative action, rather, his focus was on the means by which the modern-day claimants could establish an ancestral link to a pre-sovereignty group.

[41] Beginning at para. 55, the chambers judge began more closely considering evidence pertaining to the historical roots of the Kwicksutaineuk peoples in the Broughton Archipelago, one of several members of the Kwak'wala language group known as Kwakwaka'wakw or Kwakiutl. He noted Daisy May Sewid-Smith's assertions that the Qwe'Qwa'Sot'Enox Nation, of which she is a member, are the Kwicksutaineuk peoples and that the Kwicksutaineuk/Ah-Kwa-Mish First Nation came into existence post-contact.

[42] At para. 59, the chambers judge began examining different historical and ethnographic materials containing information on the indigenous peoples occupying the Broughton Archipelago, attempting to match modern-day entities to the groups listed therein.

[43] He then, at para. 74, concluded that each of the eight First Nations referred to in the Chamberlin affidavit is an *Indian Act* Band with a name corresponding with that of a tribe identified in the ethnographic materials.

[44] In paras. 77 and 78, he appears to exclude certain tribes for whom he could find no ethnographic link to ancestral groups that existed at the time of contact with Europeans:

> The aboriginal collectives listed in the two Walker affidavits include four bands (Gwa'Sala-Nakwaxda'xw, We Wai Kai, Wei Wai Kum, and Kwiakah) are also *Indian Act* bands, with names that correspond to tribes listed in the ethnographic material. They, together with all the First Nations listed in the Chamberlin affidavit, are from the Kwak'wala language group. As such, they would be Kwakwaka'wakw (herein referred to as Kwakiutl).
>
> The remaining four aboriginal collectives set out in the Walker affidavits, Homalco, K'omoks, Tsilhqot'in, and Ulkatcho, do not appear to have corresponding Kwak'wala tribal names. Homalco, K'omoks, and Ulkatcho are, according to Walker, registered as *Indian Act* bands. The K'omoks are said to have North Coast Salish origins, but are considered a Kwakiutl band due to Kwakiutl territorial expansion up to the late 1800s. In their filed Statement of Intent in the British Columbia Treaty Process, the K'omoks self-identified as both Kwakiutl and Salish. This appears to reflect the K'omoks history as suggested by Kennedy and Bouchard.

[45] The chambers judge concluded that the following members could be class members as they had an ancestral tie to the Kwak'wala language group. He concludes that the eight First Nations listed in the Chamberlin affidavit are Kwakiutl, plus four identified in the Walker affidavit. These are the following First Nations listed in the Chamberlin affidavit:

> Kwicksutaineuk/Ah-Kwa-Mish
>
> Tsawataineuk
>
> Namgis
>
> Gwawaenuk
>
> Da'naxda"xw
>
> Kwakiutl
>
> Mamalilikulla
>
> Tlowistsis

[46] He also includes the following four Bands identified in the Walker affidavit:

> Gwa'Sala-Nakwaxda'xw
> We Wai Kai
> Wei Wai Kum
> Kwiakah

[47] Each of these First Nations is an *Indian Act* Band.

[48] The included Bands are identified by the judge on the basis of his examination of the ethnographic material. He found that each of them has common traditional territorial claims to fish in part of the Broughton Archipelago, and each belong to the Kwak'wala language group.

[49] He clarified these findings later at paras. 153 and 154 in which he indicated that the class members could be part of a more fluid structure:

> The ethnographic literature reveals that the First Nations referred to in Chief Chamberlin's affidavit as prospective members of the proposed class are all part of the Kwak'wala linguistic group. The same is true of several of the First Nations referred to in the Walker affidavits. The ethnographic literature reveals that the tribal structure of the Kwakiutl was somewhat fluid. Tribes, or more correctly numimas, would split, or recombine in new and distinctive collectives, in response to pressures both from within and without. The literature also indicates that, while each tribe had a territory, some resource sites were common property to the Kwakiutl.
>
> The evidence on this application is sufficient to establish the possibility that the fishing rights of the proposed members of the class, to the extent that they are of the Kwak'wala language group, and are therefore Kwakiutl, may extend throughout the Broughton Archipelago...

[50] The chambers judge appears to have conducted a preliminary analysis of the ancestral link required to establish an existing Aboriginal right. As already noted, in order to establish Aboriginal rights, claimants must establish they are the rights holders, that is, they must establish an ancestral connection with the pre-sovereignty group upon whose practices they rely to assert a claim to an Aboriginal right. Such a lengthy analysis merely to identify class members, appears to conflict with the *CPA* goals of judicial economy and access to justice (see: *Hollick* at paras. 14–16). The purpose of this analysis is not entirely clear to me and further bolsters my

conclusion that the definition is not sufficiently objective to fulfill the purposes of the *CPA*. While access to justice for Aboriginal groups is of importance, one cannot divorce such aspirations from reality, i.e., the complex analysis required to establish Aboriginal rights claims.

[51] The chambers judge seems to have recognized that the extent of his analysis made for the purpose of his preliminary determination could present problems in a subsequent hearing. At para. 101, he said:

> My conclusions on the identification of the Kwakiutl tribes, and related fishing rights, are made for the sole purpose of the application of the requirements of the *Class Proceedings Act*. As such, my conclusions are not determinative of their tribal identities or their fishing rights for any other purpose.

[52] This Court's decision in *Pro-Sys* is authority for the standard of inquiry at the certification stage and it says that only a minimum evidentiary basis is required. I also note that *Pro-Sys* is cited in the chambers judge's reasons.

[53] It is not clear to me whether the judge was searching for some basis in fact or making findings of fact as to which Aboriginal collectives could make an ancestral connection to a pre-contact Aboriginal group. For example, at paras. 89–91, the judge appeared to reach conclusions regarding class membership:

> [89] The ethnographic material referred to above establishes each of the collectives listed in the Chamberlin affidavit, and four of the aboriginal collectives listed in the Walker affidavits, namely Gwa'Sala-Nakwaxda'xw, We Wai Kai, Wei Wai Kum, and Kwiakah, as Kwakiutl. Each are present within a geographical area, largely co-extensive with the Broughton Archipelago, used and occupied at contact by the Kwakiutl. At contact, each had territorial interests within the larger geographical area, and enjoyed access to some resources, in common, within the larger territory with which the Kwakiutl, as a linguistic group (i.e. speakers of Kwak'wala), were associated.
>
> [90] Each of the collectives referred to in the above paragraph is a band with antecedents in the tribal divisions among the Kwakiutl. Each, as a band, occupies one or more *Indian Act* reserves. The reserves front on the waters of the Broughton Archipelago. It would be most unusual to suppose that, as fishing peoples, they do not use their reserves for staging their fishing activities.

> [91] The evidence on this application is sufficient to support a finding that there is an identifiable class that have an interest in the proposed common questions. Each of the Kwakiutl bands has an ancestral connection with a distinct tribe of Kwak'wala speakers.

[54] In any event, the evidence regarding the proper rights claimant will clearly be highly controversial in this case. This is illustrated by the evidence of Daisy May Sewid-Smith, discussed by the chambers judge at paras. 56–58:

> [56] Affidavits sworn by Daisy May Sewid-Smith, filed by Canada, challenge Chief Chamberlin's assertion that the Kwicksutaineuk/Ah-Kwa-Mish First Nation has aboriginal fishing rights in the Broughton Archipelago. She deposes that she is a member of the Qwe'Qwa'Sot'Enox Nation. She says that Kwicksutaineuk is an alternate spelling of the name of her nation. She denies membership in the Kwicksutaineuk/Ah-Kwa-Mish First Nation, and says that the latter is a merged group which came into being post-contact, and as such has no traditional claim to the fishing rights of the Qwe'Qwa'Sot'Enox Nation.
>
> [57] In an affidavit previously filed in the Federal Court, Ms. Sewid-Smith deposes that she is a great-granddaughter of Olsiwite, who was one of the survivors of the massacre of the Qwe'Qwa'Sot'Enox people at Gilford Island in or about 1856. There were 24 survivors of the massacre of the Qwe'Qwa'Sot'Enox people by the Noxalk (Bella Coola) peoples in 1856. The few survivors fled their homeland territory, Gwayasdums (Gilford Island), but never relinquished their ownership of their traditional territory. Her ancestors went to a Mamalilikulla village to live, but retained their distinct identity as Qwe'Qwa'Sot'Enox, and retained their ownership and use of their traditional territories.
>
> [58] Ms. Sewid-Smith traces the history of the allocation of *Indian Act* reserves for the benefit of the indigenous peoples of the Broughton Archipelago. This led, she deposes, to the establishment of reserves within the traditional territory of the Qwe'Qwa'Sot'Enox for the benefit of related tribal groups with no ancestral connection to the land, including the group now comprising the Kwicksutaineuk/Ah-Kwa-Mish First Nation.

[55] The point is not whether Ms. Sewid-Smith is correct. The point is that this in-depth analysis of the merits of the claim shows the difficulty in determining class membership using the certified definition. The chambers judge's reasons demonstrate that this analysis is considerably more involved than is appropriate. I also discuss below the question of whether the members of the class, as defined by the judge, are juridical persons for the purpose of this action.

[56] As will be discussed in more detail below, class definitions must be clear and must state objective criteria. The chambers judge's reasons show that the class definition in this case does not provide clear and objective criteria.

[57] In addition, I must address the fact that the ethnographic research discussed by the chambers judge involved additional ethnographic writings which were not part of the record. The ethnographic research is not admissible through the doctrine of judicial notice as the facts therein were not common knowledge and I am also not satisfied that they met the requisite standard of undisputed accuracy.

[58] There can be no doubt that the process he engaged in was procedurally unfair, and constituted an error of law. Indeed, the respondent does not defend the order appealed from on the basis of the correctness of the judge having embarked on such a course. Rather, he says that the judge's own research was not relevant to the outcome. Authorities on this question of a court relying on facts that did not form part of the evidentiary record include: *R. v. Peter Paul* (1998), 158 D.L.R. (4th) 231, 124 C.C.C. (3d) 1 (N.B.C.A.), leave to appeal ref'd, [1998] S.C.C.A. No. 298; and *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (C.A.).

[59] Beginning at para. 60, the chambers judge set out the additional literature he considered. At paras. 64–78, he reviews this literature and makes his "preliminary" findings as to which groups are Kwakiutl.

[60] The chambers judge, in my respectful view, erred in making findings on the basis of evidence that did not form part of the record.

[61] Thus in this case, there are two overlapping aspects to the enquiry as to the permissibility of the class definition. The first, is the question of the legal capacity of the class members; and the second, is the definitional question of whether the class definition naming Aboriginal collectives sufficiently identifies members of the class. As I have said, there is overlap between the issues that arise in establishing the identity of the class members who have an Aboriginal right to fish and in proving an

Aboriginal rights claim; both involve identification of the proper claimant and some consideration of whether the continuity requirement is fulfilled.

3. Legal Capacity to Sue

[62] Legal capacity (as distinct from standing) was recently described by the New Brunswick Court of Appeal in *Province of New Brunswick v. Morgentaler*, 2009 NBCA 26, 306 D.L.R. (4th) 679:

> [47] In my respectful judgment, the following passage taken from [Thomas A. Cromwell, *Locus Standi – A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 3], captures the essential difference between legal capacity and standing:
>
> > The distinction between capacity and standing is that capacity generally depends on the personal characteristics of the party divorced from the merits of the proceeding or the nature of the question in issue in it. It concerns the right to initiate or defend legal proceedings generally. Standing is concerned with the appropriateness of the court's dealing with the particular issue presented at the instance of the particular plaintiff. It is more concerned with the nature of the issue and the context in which it is raised than with the personal characteristics such as age, mental capacity, etc., of the plaintiff. A party may have capacity to sue but lack standing…

a. The Need for Legal Capacity in a Class Proceeding

[63] Rule 1-1(1) of the *Supreme Court Civil Rules*, B.C. Reg. 95/2011, defines a plaintiff as "a person who starts an action". "Person" is not defined.

[64] The common law rule is that, in order to sue or be sued, a party must be a natural person, corporation or a body given such capacity through legislation (see: *National Hockey League v. Pepsi-Cola Canada Ltd.* (1992), 92 D.L.R. (4th) 349, 70 B.C.L.R. (2d) 27 at para. 77 (C.A.)).

[65] It is a long-standing principle that an unincorporated association does not have capacity to sue or be sued absent legislation providing otherwise, either expressly or by implication (see: *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 and *Canadian Reform Conservative Alliance*

Party Portage-Lisgar Constituency Assn. v. Harms, 2003 MBCA 112, 231 D.L.R. (4th) 214 at para. 22). In *Canada Morning News Company v. Thompson*, [1930] S.C.R. 338 at 342, [1930] 3 D.L.R. 833, the Court held that:

> That an unincorporated society such as the [Chinese Nationalist League of Canada]...cannot become a lessee is established by several judgments of which it is only necessary to refer to two, - *Jarrott v. Ackerley*, and *Henderson v. Toronto General Trusts Corporation*. These decisions rest upon the incapacity of an unincorporated and unregistered society to assert any position which is maintainable in law only by a legal entity....
>
> [Footnotes omitted.]

(See also: Arthur J. Meagher and Ronald A. Meagher's *Parties to an Action* (Toronto and Vancouver: Butterworths, 1988) at 358-359.)

[66] Actions launched by members of unincorporated associations can be brought in the names of members, personally or in a representative capacity (Meagher at 360–362).

[67] Certification under the *CPA* does not endow non-juridical person class members with the substantive right to sue.

[68] In *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 at para. 17, Mr. Justice LeBel, speaking for the majority, held that:

> The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights (*Malhab v. Métromédia C.M.R. Montréal inc.*, [2003] R.J.Q. 1011 (C.A.), at paras. 57-58; *Tremaine v. A.H. Robins Canada Inc.*, [1990] R.D.J. 500 (C.A.), at p. 507; Y. Lauzon, *Le recours collectif* (2001), at pp. 5 and 9). It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so: D. Ferland and B. Emery, eds., *Précis de procédure civile du Québec* (4th ed. 2003), vol. 2, at pp. 876-77.

[69] As was held by a five-judge division of this Court in *MacKinnon v. National Money Mart Company*, 2009 BCCA 103 at para. 68, 89 B.C.L.R. (4th) 1:

> ... The various unique features of class proceedings (see *MacKinnon v. Money Mart Co.* (2006) 265 D.L.R. (4th) 214, at paras. 17–8) are essentially

> procedural. Class actions begin their lives as ordinary actions that are then certified if the statutory conditions are met. A class action may be decertified at a later point, in which event the proceeding may be permitted to continue as an ordinary one: s. 10(2). The *Rules of Court* apply to the proceeding unless otherwise provided in the *Act*. In provinces where no similar legislation exists, court rules have been used to "fill the procedural vacuum": *Western Canadian Shopping Centres*, at paras. 34–5.

[70] In summary, the *CPA* is a procedural vehicle; it does not create a substantive right to litigate. As a result, where an association or group would lack capacity to act as a plaintiff independently, it cannot be made a capable plaintiff by simply being identified in a certification order for a class proceeding. It seems axiomatic from this discussion that a party to a class proceeding must be a legal entity with legal capacity to sue or be sued.

[71] For additional jurisprudence supporting my conclusion that a class member must have legal capacity to sue, see: *Magill v. Expedia Canada Corp*, 2010 ONSC 5247 at paras. 42–44.

[72] The next question then is: does an "aboriginal collective", as described in the order under appeal, have legal capacity?

[73] The Province argues in its factum that the class description in the certification order does not name entities that are necessarily juridical persons with the capacity to sue and, without such capacity, they cannot be plaintiffs in a class action:

> 93. Defining the class members as "aboriginal collectives" gives rise to a further error. The CPA requires that class members and their representatives be "persons". While the authorities acknowledge that Indian "bands" constitute juridical persons in certain circumstances, there is no such recognition for "aboriginal collectives" nor tribal entities. The class members in this proceeding are "aboriginal collectives", not Indian "bands". Aboriginal collectives are not recognized in the law as legal entities. Because an aboriginal collective is not a "person", it is necessary for those collectives to bring this proceeding in a representative capacity, thereby invoking s. 41(b) of the CPA.

[74] The respondent argues that Aboriginal collectives are constitutional entities and are identifiable entities and that the class definition is intended to capture these entities that have s. 35 rights. The respondent argues that the members of the class

can self-identify as Aboriginal collectives who have or assert Aboriginal or treaty rights.

b. Is an Aboriginal Collective a Juridical Person?

[75] It appears to now be settled law that Bands registered under the *Indian Act* have legal capacity to sue or be sued. Mr. Justice Johnston's survey of the jurisprudence in *Willson v. British Columbia (Attorney General)*, 2007 BCSC 1324, 78 B.C.L.R. (4th) 84 at paras. 44–57, is most helpful to the question at hand:

> **2) Can a Band of Indians sue or be sued in its own name?**
>
> [44] … My question was prompted by this concern stated by McEachern C.J.S.C. (as he then was) in *Martin and Corbett v. British Columbia and MacMillan Bloedel Limited* (1986), 3 B.C.L.R. (2d) 60 (B.C.S.C.), at p. 89:
>
> > It is an open question whether Indian bands are juridical persons capable of suing and being sued even though bands are recognized by the Indian Act, R.S.C. 1970, c. I-6.
>
> …
>
> [46] In British Columbia, the Court of Appeal has dealt with the question in *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 34 B.C.L.R. (2d) 344 (B.C.C.A.). In that case, 36 Indian chiefs commenced action against the C.N.R., alleging trespass if the railway were allowed to expand its line, and that the trespass would adversely affect the aboriginal fishery on the Thompson and Fraser Rivers. When the plaintiffs applied to add a claim on behalf of three nations, the chambers judge refused, holding that the proper parties were the Indian Bands and the nations, not the chiefs as representatives.
>
> [47] After stating that the rights being asserted by the plaintiffs were communal in nature, Macfarlane J.A., for the court, says at p. 349:
>
> > It is not necessary in this case to decide in what situations the band may be regarded as a legal entity for the purpose of commencing an action. It is sufficient to observe that a representative action may be brought by the members of the band council *(Mathias v. Findlay,* [1978] 4 W.W.R. 653 (S.C.)), or by a chief of a band for himself, and the majority of his band *(Pap-Wee-In v. Beaudry,* [1933] 1 W.W.R. 138 (Sask. K.B.)).
> >
> > The question in this case is not whether a band, through the members of its council, can bring an action in trespass, but whether the chief of a band (a group of Indians) can bring a representative action on behalf of himself and all other members of the band to enforce their communal rights. ...
>
> And later, at p. 350:

> It is a mistake, in my view, to conclude that aboriginal rights vest in an entity (which clearly does not exist today) and to ignore the historical fact that the rights are communal, and that they are possessed today by the descendants of the persons who originally held them. ...

This is the context in which the court endorsed the representative action as the proper form for bringing an action at p. 355:

> Thus, it appears that a representative action has been endorsed as the correct form in which to bring a claim involving aboriginal rights. The important thing is that all interests be represented at trial and that all persons who my have such a claim are bound by the result. ...

[48] I note that on an application to re-open an appeal to the Supreme Court of Canada, the court stated that the above conclusions were *obiter dicta*, were not required for the decision of the issue before the Court of Appeal, and should not be decided at that stage (see *Oregon Jack Creek Indian Band v. C.N.R. (No. 2)*, [1990] 1 S.C.R. 117).

[49] The Court of Appeal expressly declined to decide in what circumstances an Indian band can sue as a legal entity. The application of the plaintiffs here, to add the six Indian bands of which they are chiefs and on behalf of which they are already suing in a representative capacity, squarely raises the issue.

[50] An Indian Band has been considered to be legally capable as:

- an employer for the purposes of the *Canada Labour Code* (see *P.S.A.C. v. Francis,* [1982] 2 S.C.R. 72);
- a juridical person for the purpose of suing to determine the validity of surrender of reserve lands (see *Montana Indian Band v. Canada,* [1998] 2 F.C. 3 (T.D.));
- capable of contracting, and suing and being sued in contract (see *Clow Darling Ltd. v. Big Trout Indian Band* (1989), 70 O.R. (2d) 56 (Ont. Dist. Ct.));
- capable of executing a contract of guarantee (see *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135,* [1993] 1 W.W.R. 373 (Alta. Q.B.));
- competent to sue and defend actions between Indian bands, to determine which of two bands is entitled to possession and enjoyment of a reserve (see *Wewayakum Indian Band v. Wewayakai Indian Band,* [1991] 3 F.C. 420 (T.D.));
- competent to sue for a declaration that certain amendments to the *Indian Act,* R.S.C. 1985, c. I-5, were unconstitutional (see *Sawridge Band v. Canada* [2003] 3 C.N.L.R. 358 (F.C.T.D.)); and

- the proper parties to an action commenced by a corporation formed by 7 First Nations to claim aboriginal fishing rights, in place of the corporation, so that the First Nations were substituted for their corporate vehicle (see *Anishinaabeg of Kabapikotawangag Resource Council Inc. v. Canada (Attorney General)*, [1998] 4 C.N.L.R. 1 (Ont. Ct. J.)).

[51] In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development,* [2001] 4 F.C. 451 (C.A.), the Federal Court of Appeal recognized that an Indian band is not legally the same as its members, nor do the members of an Indian band stand in the same place as the band itself. That was the result when individual descendants of the Beaver Band claimed entitlement to the proceeds of judgment awarded for breach of fiduciary duty relating to mineral rights on a reserve. The Beaver Band had subsequently divided into the Blueberry River Indian Band and the Doig River Indian Band. The Federal Court of Appeal agreed with the trial judge that the rights that had been breached were communal rights, and the damages should be paid to the respective bands as communal entities. In the process, the court said at paras. 15 and 16:

> The definition of "band" does not constitute an Indian band as a legal entity. Rather, I take it from the definition of "band", and other provisions of the *Indian Act,* that in relation to rights to an Indian reserve, a band is a distinct population of Indians for whose use and benefit, in common, a reserve has been set aside by the Crown.
>
> ...
>
> However, it does not follow that because an Indian band is not a legal entity, rights accruing to the band are the rights of its members or their descendants in their individual capacities.

[52] There may be some significance in this case that the plaintiffs have styled themselves, in their collective sense, as First Nations, not as Indian bands. That may have been to avoid the difficulties arising in some of the authorities from the fact that while Europeans were prepared to sign treaties with groups of Indians, when parliament created the notion of bands in the *Indian Act*, it did not see fit to grant these entities the capacities granted to corporations or to municipal organizations. As Slatter J. said in *Papaschase Indian Band (Descendants of) v. Canada (Attorney General),* 2004 ABQB 655, at para. 166:

> If a band has a sufficient existence to sign a treaty, why can it not sue to enforce the treaty?

If so, the potential for continuing confusion remains where the term used in the *Indian Act* - band - is avoided in favour of another description - First Nation - which does not have the same statutory *imprimateur*.

[53] In *William v. Lake Babine Indian Band* (1999), 30 C.P.C. (4th) 156 (B.C.S.C.), Taylor J. said at para. 30:

> In *Martin v. B.C.* (1986), 3 B.C.L.R. (2d) 60 (S.C.) at 65, McEachern C.J.S.C. (as he then was) left open the question of whether a Band

> was a juridical person. Subsequent decisions have determined, however, that a Band is such a juridical person that can sue or be sued in its own right. See *Springhill Lumber Ltd. v. Lake St. Martin Indian Band*, [1986] 2 C.N.L.R. 179 (Man. Q.B.).
>
> [54] I agree with those authorities that say that Indian bands ought not to continue under legal disabilities. In my view, neither bands nor their advisors ought to have to concern themselves with whether litigation in contemplation is one of the types where action might be permitted by the band, nor should bands have to continue to vex individuals to act in a representative capacity in order that a band's collective legal interest can be protected.
>
> [55] I conclude, therefore, that Indian bands have the capacity to sue and to be sued in British Columbia. The plaintiffs' application to add the bands for which they already act in a representative capacity will not be denied on the ground that the bands lack the capacity to sue. I point out that there is no application to substitute the bands for existing representational parties, and this finding has the advantage of maintaining the preferred practice of representative proceedings for the time being.
>
> ...
>
> [57] In summary:
>
> ...
>
> 4. An Indian band, as defined by the *Indian Act*, is a juridical person that can sue and be sued in its own name.

[76] I agree with Johnston J., and for the reasons he gives, in concluding that an *Indian Act* Band is a juridical person. An *Indian Act* Band is a unique entity. It is an enduring, self-governed entity that has distinct rights and obligations: *Montana Band v. Canada*, [1997] A.C.F. no 1486, 140 F.T.R. 30. However, Johnston J. did not, and was not, required to address the question of whether a Band could sue for an Aboriginal right.

[77] A review of the reasons for judgment in this case reveals that the chambers judge designated the class members as "Aboriginal collectives" because of his recognition of the fact that Band membership does not necessarily establish the requisite ancestral connection to assert an Aboriginal right. I agree with the chambers judge in this regard. This is so because in some cases, an Aboriginal collective may self-identify along traditional lines independent of *Indian Act* designation as a Band. A Band is not necessarily the proper entity to assert an

Aboriginal right. Having correctly recognized that it could not be assumed a band was the proper entity to assert Aboriginal rights, the chambers judge erred in then assuming that non- juridical persons, "Aboriginal collectives", could be class members.

[78] This issue is not merely technical but has important practical implications. If the class members are not *Indian Act* Bands then the question arises as to who speaks for the collective. As noted in *Willson*, when an Aboriginal group commences a legal action, it chooses a representative (usually but not necessarily the group's chief) to institute a representative proceeding. Here, because inclusion in the class is a non-voluntary process and because an Aboriginal collective is not necessarily a legal or organized entity, the question arises as to who speaks for the collective and how it should agree upon and exercise its participatory or opt-out rights in a class proceeding.

[79] Because the term "aboriginal collective" is not defined in the order or in the reasons for judgment, the question is whether such a group is a juridical person. As addressed above, the respondent argues that because the Aboriginal collectives hold constitutional rights, they ought to be able to sue through this class action. I decline to decide in a general way if any Aboriginal collective, for example a First Nation that may be organized and governed along traditional lines, could or could not be a juridical person. That question can be left for another day. Here, there is no evidence that the "aboriginal collectives" who are class members are organized in a way that could confer legal status on them. Most importantly, as I discuss in the following passages, the identity of the groups is not ascertainable without an in-depth examination of the merits of the individual liability issues in the proposed action.

4. Jurisprudence Regarding Identifiable Class: Objectivity, Merits-Based Criteria and Claims-Based Criteria

[80] A further basis for my conclusion that the class description does not meet the requirements of the *CPA* is that the class members cannot be identified through

objective criteria. As noted by Eizenga *et al.* in *Class Actions Law and Practice* (Ontario: LexisNexisCanada, September 2011) at 3-16.1, the identifiable class requirement is particularly important in jurisdictions where class proceedings legislation provides for "opt-outs" (see s. 16 of the *CPA*).

[81] The class definition at issue includes both merits-based and claims-based criteria. Merits-based criteria are dependent on the outcome of the litigation and claims-based criteria are dependent upon a class member asserting a claim. While merits-based criteria may require a potential class member to have suffered damage or loss, a claims-based requirement will merely require the person to claim to have suffered damage or loss.

[82] Here, the class includes Aboriginal collectives who "have" or "assert" certain rights. The requirement to "have" a right is a merits-based criterion as the class action is concerned with the violation of these rights. The alternative requirement to "assert" a right is a claims-based criterion; a class member qualifies by asserting that they have a right.

[83] The questions which must now be answered are whether the merits-based criterion used in this case is permissible and whether the claims-based criterion is sufficiently objective.

[84] The identifiable class requirement was discussed by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 38:

> ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It 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 ... [Emphasis added.]

[85] The *Dutton* stipulation that "criteria should not depend on the outcome of the litigation" may also be referred to as a prohibition against merits-based criteria. The facts in *Nixon v. Canada (Attorney General)* (2002), 21 C.P.C. (5th) 269 (Ont. S.C.J.) are helpful to illustrate some of the difficulties which may arise when merits-based definitions are used. In *Nixon*, the action was brought against the federal government for failing to prepare for and respond properly to a fire started by inmates of the Kingston Penitentiary in Ontario. The proposed class was comprised of inmates of the part of the penitentiary that had suffered the fire, excluding those liable for starting it or for impeding efforts to extinguish it. The court refused to certify the action on the grounds that the question would require consideration of central issues in the action and the inquiry required to determine class membership would raise a number of practical difficulties.

[86] In this case, a suit involving Aboriginal rights claims, those who "have" an Aboriginal right to fish are class members. As addressed above, establishing an Aboriginal right to fish will also be a critical and possibly contentious issue in the litigation.

[87] It is also noteworthy that the certified common issues are part of the infringement analysis outlined in the *Sparrow* and *Van der Peet* analytical framework already discussed. Thus, the court will be required to consider questions related to infringement before the determination of the nature of the right and the identification of the rights holder. While in the purest sense, some of the common issues are theoretically possible to isolate from the question of infringement, their ultimate determination will be an integral part of the infringement analysis. The point is that it is difficult to draw a bright line between the individual and common issues.

[88] There is some authority for the proposition that the prohibition against merits-based criteria should only apply when the criteria relate to the merits of the common

issues. In *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, 69 C.P.C. (6th) 60, leave to appeal ref'd [2008] S.C.C.A. No. 512, Madam Justice Smith noted that there is considerable authority for the proposition that merits-based criteria are impermissible. However, her reasons also indicate that it may be beneficial to limit the prohibition to criteria speaking to the merits of the common issues, thereby allowing criterion that rely on the merits of issues that will be determined through individual issues trials. Her analysis drew extensively on Mr. Justice Cullity's reasons in *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (S.C.J.), aff'd (2008), 54 C.P.C. (6th) 167 (Div. Ct.).

[89] For present purposes, it is unnecessary to resolve the issue of the limits of the merits-based criteria prohibition because in this case, it is my view that the merits-based criterion at issue is either impermissibly merits-based or not sufficiently objective. The question of whether a class member has an Aboriginal fishing right, although not a common issue, will be central to the litigation. It is not sufficiently objective as having an Aboriginal right to fish is not a clear and sufficiently easily ascertainable identification criterion. As is demonstrated by the chambers judge's lengthy and somewhat tortured analysis, the question is a complex one that requires preliminary determination of core issues that will be highly contentious between the class members. These considerations are more than sufficient to conclude that the requirements of s. 4(1) have not been met.

[90] I now turn now to the question of whether the claims-based criterion requiring a class member to "assert" a claim is sufficiently objective and certain. The authorities conflict as to whether such definitions avoid the objectivity issues raised by merits-based criteria.

[91] In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, the Supreme Court of Canada upheld a class definition crafted by this Court which included claims-based criteria. It required the members of the class to claim injury, loss or damage as a result of sexual misconduct occurring at a residential school. In *Attis v. Canada (Minister of Health)* (2007), 46 C.P.C. (6th) 129 (Ont. S.C.J.) aff'd

2008 ONCA 660, 300 D.L.R. (4th) 415, the court held at para. 55 that, because the Supreme Court of Canada in *Rumley* repeatedly referenced the class definition in discussing the common issues, it is safe to conclude that the definition was, at least, implicitly approved. However, as pointed out by Smith J.A. at para. 102 in *Wuttunee*, the appellant in *Rumley* did not challenge the definition on appeal to the Supreme Court of Canada and the question of individual abuse was not a common issue.

[92] Courts have held that claims-based definitions do not meet the objectivity requirements because they allow claimants to self-identify at their convenience (see: *Ragoonanan* at para. 44). On the other hand, in *Walls et al. v. Bayer Inc.*, 2005 MBQB 3, [2006] 4 W.W.R. 720, the court held at para. 27 that the fact of claiming to suffer injury is sufficiently objective.

[93] In *Wuttunee*, Smith J.A. held that claims-based criteria may be acceptable but only where the definitions can be said to be sufficiently objective and certain. At para. 103, she held that:

> [103] In my view, what emerges from this review is a requirement for careful scrutiny of the facts and circumstances of a particular case prior to deciding: (1) whether a particular class definition is too broad to satisfy the requirement that it be rationally connected to the causes of action and common issues identified in the case; (2) that a merits based definition will necessarily lead to circularity or otherwise be objectionable; and (3) whether a claims based class definition sufficiently meets the requirements of objectivity and certainty, in light of the established purposes of class definition.

[94] This approach was cited with approval by the Newfoundland and Labrador Court of Appeal in *Ring v. Canada*, 2010 NLCA 20 at para. 71, 86 C.P.C. (6th) 8.

[95] In this appeal, Canada submits that the Supreme Court of Canada in *Hollick* held that mere assertions of rights are insufficient to establish an identifiable class; some evidentiary basis is required. The cited paragraph provides:

> [25] I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that

> there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course 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: see Branch, *supra*, at para. 4.60. [Emphasis added.]

[96] I do not think that this passage goes quite as far as Canada claims. While it clearly requires an evidentiary basis for certification, it does not necessarily prohibit definitions that require the assertion of rights. In this case, it may be arguable that the affidavit evidence shows that there are Aboriginal collectives who assert an Aboriginal right to fish in the Broughton Archipelago and, further, who can provide a basis for their belief that they have an arguable claim.

[97] However, in my view, even if claims-based criterion are in some cases acceptable, here the claims-based criterion is not sufficiently objective and certain because it requires a claim of a very complicated and contentious (even among members of the class) legal result.

[98] I derive some support for this conclusion from consideration of Smith J.A.'s analysis of the facts in *Wuttunee*. In that case, the certified class definition included purchasers of a drug who were also members of at least one of four sub-classes. One such sub-class described plaintiffs who were induced to purchase the drug instead of a cheaper alternative, through unfair marketing practices. She held that the sub-group element of the definition was impermissibly merits-based as it relied on the merits of the common issues. She also held that the problem could not be remedied by simply amending the definition to provide that the class included people who claim to have been induced by unfair marketing practices, i.e., amending the definition to change it to a claims-based definition. Justice Smith concluded that

such amendment in that case would not meet the requirements of objectivity and certainty. She distinguished such a definition from a claim anchored in part in objective verifiable fact, such as a claim to have suffered injury. At para. 106, Smith J.A. held that:

> In my respectful view, this definition cannot meet the requirements of objectivity and certainty. Unlike a definition in terms of those who *claim* loss or injury, which claim would itself be related to an objective, verifiable fact or event, *any* purchaser of Vioxx is free to claim that Merck engaged in some unspecified unfair marketing practice, or not, as and when he or she sees fit. There is *no* objective fact that, in itself, would either legitimate or defeat such a claim. The claim that Merck engaged in unfair marketing practices is the claim of a legal result. Although such a conclusion would be based on facts, the definition of this subclass does not indicate what those are or tie the definition to them. If the requirement that the class definition not be subjective means anything at all, this definition, in my view, cannot satisfy that criterion.

[99] In my view, these considerations also apply to the matter at hand and the criterion requiring class members to assert an Aboriginal right is not sufficiently objective.

Conclusion

[100] I conclude that the chambers judge erred and was clearly wrong in certifying the class as all Aboriginal collectives who have or assert Aboriginal and/or treaty rights to fish within the Broughton Archipelago. The class is comprised of parties that do not have capacity to sue and the class definition does not meet the objectivity requirements of s. 4.

[101] No amendment to the certification order was suggested by the parties and, for the reasons I have already explained, I conclude that amendment is not a viable route for addressing the problems with the certified class definition.

Disposition

[102] I would allow the appeal and strike out the order certifying this proceeding as a class action.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Hinkson"

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[103] I have had the privilege of reviewing the draft reasons of my colleague Madam Justice Garson. I am in agreement with Justice Garson's analysis and disposition of the appeal on the basis that the respondent has not demonstrated an identifiable class under s. 4(1)(b) of the *Class Proceedings Act.* I would add however my comments on the form of this action.

[104] The claims being advanced are for declaratory and other relief for the infringement of communally held Aboriginal rights to wild salmon fishing in the Broughton Archipelago. The existence and scope of those rights will depend on the unique anthropological, ethnographical, and demographic history of the Aboriginal entity seeking to assert them. While Aboriginal fishing rights adhere to the Aboriginal entity asserting them, they are not personal rights of the individual members of the Aboriginal entity; they do not exist independent of the entity. Rather they are collective rights that are for the use and benefit of all of the members of the Aboriginal entity asserting them.

[105] The claims by Chief Chamberlin of the Kwicksutaineuk/Ah-Kwa-Mish First Nation are for the recognition and enforcement of collectively held Aboriginal fishing rights. Chief Chamberlin sues not only on his own behalf but on behalf of all of the Aboriginal collectives within the Broughton Archipelago. The action is framed as multiple claims of infringement of Aboriginal fishing rights, each independent of the other, on behalf of multiple Aboriginal collectives within the Broughton Archipelago. Framing an action for the enforcement of collective rights by multiple Aboriginal collectives does not in my view change the essential character of the claims; they remain manifestly collective claims throughout.

[106] Even if it could be assumed that the Aboriginal collectives who would form the proposed class are all legal entities, it does not follow that the rights asserted in this action are the rights of those collectives. The rights claimed in this action are communal rights held collectively by all members of the entity who are connected to

the historical rights holders. A Band as a legal entity is not identical with its members and it is the members as a collective, rather than the Band as a distinct legal entity, who hold the rights asserted in this action.

[107] The *Class Proceedings Act* provides a procedure for the advancement of multiple individual claims arising from a common wrong. It is not designed to advance multiple collective rights claims for multiple collective entities. Claims of this nature (for collective rights) are generally made through a representative action, where a member (or members) of the Aboriginal entity asserting the rights, sues in a representative capacity on behalf of himself or herself and all of the other members of the Aboriginal entity.

[108] I too would allow the appeal and rescind the order certifying the action under the *Class Proceedings Act.*

"The Honourable Madam Justice D. Smith"