



Court File No. S077807
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Barry Jim Burnell

Plaintiff

and:

Attorney General of Canada

Defendant

Brought pursuant to the *Class Proceedings Act*, RSBC, 1996, c.50

**ORDER MADE AFTER APPLICATION
(CERTIFICATION)**

☐ BEFORE THE HONOURABLE MADAM JUSTICE GRIFFIN)
) 18/February/2014
)

THE APPLICATION of the Plaintiff, Barry Jim Burnell, coming on for hearing at 800 Smithe Street, Vancouver, B.C. on March 11 to 13th, 2013, and on hearing Meldon Ellis and Phillip Scarisbrick, counsel for the Plaintiff, and Paul F. Partridge and Maria Molloy, counsel for the Attorney General of Canada; and on reading the pleadings, application materials and supplemental written submissions of Meldon Ellis, David G. A. Jones, and Naomi Kovak, counsel for the plaintiff, and the supplemental written submissions of Paul F. Partridge and Maria Molloy, counsel for the Attorney General of Canada:

THIS COURT ORDERS that:

1. the plaintiff's Second Further Amended Notice of Civil Claim is approved in the form attached as **Schedule "A"**;
2. This action is certified as a class proceeding against the Attorney General of Canada;
3. the class is defined as:

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 the Pacific Halibut Management Association of B.C., 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.

4. Barry Jim Burnell is appointed as the representative plaintiff for the class;
5. the nature of the claims asserted on behalf of the class is as follows:
 - (a) recovery of unlawful tax; and
 - (b) unjust enrichment.
6. the class seeks the following relief:
 - (a) a declaration that the Minister's conduct was unlawful;
 - (b) a declaration that the Minister has been unjustly enriched and/or collected an unlawful tax;
 - (c) an accounting and/or restitution of funds collected by the Minister; and
 - (d) interest.
7. this proceeding is certified on the basis of the common issues attached as **Schedule "B"**;
8. ~~the litigation plan attached at Schedule "C" is approved as sufficient at this stage;~~ *SGJ.*
9. notice of certification shall be given to members of the class in the time and manner to be directed by this Court; and

or opting in,
if applicable, SGT.

10. the time and manner for opting out of the proceeding are to be as directed by this Court.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of lawyer for the Plaintiff

Meldon Ellis

Signature of lawyer for the Attorney General

Paul Partridge

By the Court



Registrar

SCHEDULE A

Second Further Amended Notice of Civil Claim Pursuant to the Order of Madam Justice Griffin
pronounced on
Further Amended Notice of Civil Claim filed February 22, 2012
Amended Notice of Civil Claim filed April 5, 2011
Original Writ of Summons and Statement of Claim Filed November 20, 2007.

No. S077807

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY JIM BURNELL

PLAINTIFF

AND:

ATTORNEY GENERAL OF CANADA and ~~PACIFIC-~~
~~HALIBUT MANAGEMENT ASSOCIATION OF B.C.~~

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

SECOND FURTHER AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. The plaintiff is a fisherman and resides at ~~7950 Hunter Street, Burnaby, British Columbia V5A 2B9~~ 21976, 86A Avenue, Langley British Columbia, V1M 3S7.
2. The defendant, the Attorney General of Canada, as represented by the Minister of Fisheries and Oceans (~~the~~ "Minister"), is the government of Canada.
3. The ~~defendant, the~~ Pacific Halibut Management Association of B.C. (~~hereinafter~~ "PHMA") is a society incorporated pursuant to the *Society Act* of British Columbia and has an office and place of business at Suite 118, 1-5765 Turner Road Nanaimo BC V9T 6M4.
4. PHMA was incorporated on October 29, 1997 by representatives of BC coastal halibut fishers at the instigation of the Minister.
5. The plaintiff says that at all material times PHMA acted as agent for the Minister.
6. In the alternative, the plaintiff says at all material times PHMA acted as the partner of the Minister.
7. In bringing this action on behalf of a class of halibut fisherman in British Columbia who held halibut fishing licenses in the years between 2001 and 2006 inclusive, such class to be further defined in the motion for certification the plaintiff pleads and relies upon the provisions of the *Class Proceedings Act*, R.S.B.C. 1996. c. 50 and amendments thereto.
8. At all material times the plaintiff was the joint owner (with his spouse) of Motor Vessel (M/V) ~~"Autumn Venture" VRN 26859~~ "Island Gale" VRN 24753 and joint holder (with his spouse) of licence ~~#L0087~~ #L0057 issued to him by the Minister (~~hereinafter the~~ "Licence") permitting him to fish for halibut in the waters of British Columbia. The licence was issued to him under the *Fisheries Act* R.S.C. 1985, c. F-14 and associated regulations.

9. The Licence entitled the plaintiff to receive each year from the Minister an individual vessel quota (hereinafter the "quota") that was assigned to him from the Total Allowable Catch for halibut for Canada, as determined by the Minister ("TAC"). The quota represented the amount of halibut that the plaintiff could catch and sell in that year. The plaintiff had to pay a fee to the Minister for the quota.
10. The proportion of the TAC allocated to each licence by way of quota holding associated with that licence was set by the Minister in the early 1990's. It has remained unchanged until today. When setting up the halibut fisheries management scheme under review below, the Minister still respected those allocations.

The Fisheries Management Scheme:

11. The Minister, by agreement with PHMA, established a scheme whereby 10% of the allocation for each licence was diverted through PHMA and was offered for reallocation only to the licensee from whom it had been diverted upon payment of the Additional Fees as defined below at paragraph 23 ("Scheme").
- ~~10.~~ 12. During the year 2001 the Minister instituted the practice of withholding 10% of the entire quota to be granted to the holders of halibut licences in British Columbia and assigning it to the PHMA.
- ~~11.~~ 13. During the year 2001, the Minister issued a halibut licence, No. 437, in the name of PHMA representing the 10% of the entire withheld halibut quota.
- ~~12.~~ 14. The plaintiff, if he wished to avail himself of his portion of the 10% of his quota, was required to purchase it from the PHMA by paying an additional levy.
- ~~13.~~ 15. ~~The said~~ This practice continued in each year from 2001 through to 2006. In each year the plaintiff paid the Minister for his quota and then paid the PHMA an additional levy to access the 10% of his quota assigned to the PHMA.
- ~~14.~~ 16. On February 6, 2001 the Minister and the PHMA entered into a "Joint Project Agreement" the purposes of which were expressed to be (*inter alia*):
- a. Ensure the proper management of the commercial halibut fishery;
 - b. Provide adequate funding and resources; and,
 - c. Carry out all other activities necessary in support of the fishery ...

15. 17. Under the agreement the obligations of the PHMA included both paying funds to the Minister and performing various activities ("representing payments in kind") under the heading "FISHERIES MANAGEMENT" including (*inter alia*):
- a. Fund Fisheries and Oceans Canada activities as identified in the agreement;
 - b. Fund and ensure the operation of an independent dockside monitoring program; and,
 - c. Fund and ensure independent data entry ... of validated landings and other data as requested by DFO.
16. 18. During the period March 31, 2001 to March 31, 2002, the PHMA agreed to pay the sum of \$836,635 directly to the Minister and to expend \$400,000 to third parties on the independent dockside monitoring program.
17. 19. In each year between 2002 and 2006 the PHMA agreed to pay further sums directly to the Minister and it agreed to expend funds to third parties for programs directed and requested by the Minister.
18. 20. In other words, part of the funds paid to the PHMA by halibut licence holders was remitted by PHMA directly to the Minister and used to fund government fisheries management activities.
19. 21. A further part of the funds paid by the plaintiff was used by the PHMA to pay for fisheries management activities that it conducted as agent for (or partner of) the Minister.
22. The plaintiff says that the Minister was unjustly enriched at the expense of the plaintiff as follows.

Deprivation to Plaintiff:

23. Those licensees who accepted the offer to access their 10% through PHMA had to pay more to obtain it than they had when it came directly from the Minister. In particular they had to pay, in addition to that they would have had to pay to the Minister, additional fees, including:
- a. Cost Recovery Fees; and,
 - b. Rockfish Research Fund Fees. (collectively, "Additional Fees").

24. The Additional Fees effectively doubled what would have been the cost of all quota to the licensee had the Scheme not been in effect. Hence the plaintiff suffered a substantial deprivation.

Enrichment to Minister:

25. The extra funds generated by the Additional Fees under the Scheme were disbursed by PHMA in accordance with its agreement with the Minister. Some of the extra funds went to fund fisheries management activities which are the legal responsibility of the Minister, while some of the funds went to the Minister in cash.
26. Since the fisheries management activities would have had to be carried out by the Minister in any event, the Minister benefitted both from the funding of those activities and from the direct cash payments. Hence the Minister was enriched by the Scheme to the full extent of the Additional Fees referred to above.

Lack of Juristic Reason:

27. The Minister used the sale of the fisheries resource to fund its management activities, contrary to the legal principle that Canada's fisheries are a common property resource belonging to all the people of Canada, as established by the Federal Court of Appeal in *Larocque v. Canada (Minister of Fisheries and Oceans)* 2006 FCA 237. That "use" by the Minister was not authorized by statute nor approved by parliament, and was in contravention of the *Financial Administration Act*, R.S.C., 1985, c.F-11.
28. In short, the Minister has been enriched by the receipt of extra funds or benefits generated by the Additional Fees, either by receiving cash payments from PHMA under the Scheme, or by saving inevitable fisheries management expenses that would have incurred but for the Scheme; the plaintiff and other class members have suffered a corresponding deprivation. There was no juristic reason for the enrichment, as the Minister's receipt of the benefits of Additional Fees under the Scheme is unlawful.
- ~~20.~~ 29. The plaintiff says that in assigning 10% of the quota to the PHMA for resale to the plaintiff, and contracting with PHMA to either remit the funds or use them for fisheries management, the Minister:
- a. Appropriated a public resource that did not belong to him to finance fisheries management activities;
 - b. Violated the provisions of the *Financial Administration Act* R.S.C. 1985, c. F-11,

in particular sections 19 and 32;

- c. Levied a tax unauthorized by parliament;
- d. Collected monies from the plaintiff without legislative or constitutional authority; and,
- e. The Minister was unjustly enriched at the expense of the plaintiff; and,
- e. ~~Converted to his ministry's use monies and/or halibut quota belonging to the plaintiff; and,~~

~~21.~~ 30. The plaintiff says that the PHMA was the agent or partner of, or joint venturer with, the Minister ~~in the aforesaid activities~~ and is therefore jointly liable for those activities.

31. The Minister is jointly liable for the acts and omissions of PHMA.

THE CLASS

~~22.~~ 32. It is known by the plaintiff that there are 4365 holders of commercial halibut licences ~~like that of the plaintiff in British Columbia.~~

33. The number of Category "L" Commercial Halibut Fishing Licenses like that of the plaintiff, varied for each year in the period between 2001 and 2006. In 2006, there were 404 Category "L" Commercial Halibut Fishing Licenses.

~~23.~~ 34. This action is brought as a proposed class action by the named plaintiff pursuant to the *Class Proceedings Act*, 1996, c. 50, as amended, S.B.C. 1998, s.96, on behalf of ~~all 436 halibut fishing licence holders who:~~

- a. ~~Were deprived of 10% of their quota as result of the Minister's actions; and,~~
- b. ~~were required to pay extra fees 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; and~~
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 the 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.

~~— 24. It is unknown to the plaintiff how many licence holders paid the extra fees, but those who did not were deprived of 10% of their quota.~~

- 25- 35. There are questions of law and fact common to the class. The claims of the plaintiff are typical of the claims of the class and the plaintiff ~~herein~~ will adequately represent and protect the interests of the class.
- 26- 36. Separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to individual members of the class which could establish incomplete standards of conduct for the defendants.
- 27- 37. Questions of law and fact common to the members of the class with respect to the relief claimed predominate over questions affecting individual members. A class action is superior to other available methods for a fair and efficient adjudication of this controversy.
- 28- 38. The plaintiff, who is a member of the proposed class, has sustained financial loss as a result of the unlawful conduct of the defendants as alleged in this ~~Statement~~Notice of Civil Claim and has no conflict with other members of the proposed class.
29. 39. In the absence of a Class Proceeding, the defendants will retain the benefits of ~~their~~ its wrongful conduct because class members are likely to bring, and have not brought, separate individual lawsuits due to the size of individual class members' claims and their limited resources as compared with the cost of litigation and the resources of the defendants.

Part 2: RELIEF SOUGHT

The plaintiff seeks and claims on his own behalf and on behalf of all ~~C~~class ~~M~~members:

- a) A declaration that the Minister's practice of withholding 10% of the entire quota to be granted to the holders of halibut licences in British Columbia and assigning it to the PHMA and in turn receiving funds or payments in kind from PHMA's sale of that quota is unlawful;
- b) A declaration that all funds and payments-in-kind received by the Minister from the PHMA from sale of quota constitute either: ~~(i) an unlawful conversion of property not owned by the Minister;~~ (i) unjust enrichment by the Minister; or (iii) an unlawful tax funds collected and used without legislative or constitutional authority by the Minister.

- c) An accounting and an order of restitution to the plaintiff and each class member on account of the Additional Fees collected from the plaintiff by the Minister and the Pacific Halibut Management Association of B.C. ("PHMA") on behalf of the Minister from the plaintiff and the class members for the period January 1, 2001 to date December 31, 2006;
- d) ~~Return of funds unlawfully converted by the defendants;~~
- e) d) Restitution of monies collected from the plaintiff by the Minister ~~defendants~~ without legislative or constitutional authority; and/or restitution for unjust enrichment for the amounts by which the Minister was unjustly enriched at the expense of the class and ~~retained by the defendants without a juristic reason;~~
- f) e) An order certifying this action as a class action and appointing the plaintiff as class representatives and other appropriate orders under the provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 as amended;
- g) f) An order that monetary relief damages ~~to~~ be an aggregate award on behalf of all members of the class under Part 4, Division 2 of the Class Proceedings Act, R.S.B.C. 1996, c. 50;
- h) g) Interest pursuant to the *Court Order Interest Act*;
- i) h) Costs of this action on a solicitor and client basis; and
- j) i) Such further and other relief that this court deems appropriate.

Part 3: LEGAL BASIS

The plaintiff's claim is based on the reasoning of the Federal Court of Appeal in *Larocque v. Canada (Minister of Fisheries and Oceans)* 2006 FCA 237; and that of the Supreme Court of Canada in *Kingstreet Investments Ltd. v. New Brunswick (Finance)* [2007] S.C.J. No. 1; 2007 SCC 1. And the plaintiff's claim is further based on the equitable remedy of restitution for unjust enrichment and the plaintiff will rely, inter-alia, on the reasoning of the Supreme of Canada in its decision in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24.

Plaintiff's address for service:

~~#440-319 West Pender Street~~

~~Vancouver, BC V6B 1T3~~

~~Fax number address for service : 604-688-7385~~

400-856 Homer Street

Vancouver, BC

Canada V6B 2W5

Fax: 604-689-7554

PLACE OF TRIAL: Vancouver, B.C.

Date: March , 2014

Signature of lawyer for plaintiff

David Jones
Camp Fiorante Matthews Mogerman

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The plaintiff sues the federal government for misuse of funds obtained through the sale of a public resource – to wit, the right to fish for halibut. The plaintiff seeks restitution of the Additional Fees he was required to pay to access his quota.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☐ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property
- ☐ the provision of goods or services or other general commercial matters
- ☐ investments losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☒ a matter not listed here

Part 3: THIS CLAIM INVOLVES

- ☒ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☒ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

Part 4:

[If an enactment is being relied on, specify. Do not list more than 3 enactments.]

Fisheries Act R.S.C. 1985, c. F-14

Financial Administration Act R.S.C. 1985, c. F-11

Schedule "B"

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 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?