IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burnell v. Canada (Fisheries and Oceans),* 2014 BCSC 1071

Date: 20140613
Docket: S077807
Registry: Vancouver

Between:

Barry Jim Burnell

Plaintiff

And

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

Defendants

Before: The Honourable Madam Justice S. Griffin

Fourth Interim Ruling: Subclass Certification

In Chambers

Counsel for the Plaintiff:	David G. A. Jones Meldon Ellis Naomi J. Kovak
Counsel for Proposed Subclass:	Mark Underhill
Counsel for the Defendant Crown:	Paul F. Partridge Maria Molloy
Place and Date of Hearing:	Vancouver, B.C. May 20, June 3 & 13, 2014
Place and Date of Judgment:	Vancouver, B.C. June 13, 2014

Introduction

[1] The question on this application is whether to approve a proposed subclass in this class proceeding, and the scope of that subclass.

[2] The action was certified as a class proceeding on February 18, 2014, in Reasons for Judgment indexed at 2014 BCSC 258 ("Certification Ruling"). Two earlier rulings of the Court dealt with the question of whether or not the plaintiff had pleaded a cause of action. These are indexed at: 2013 BCSC 1354 ("Interim Ruling"); and, 2013 BCSC 1874 ("Second Interim Ruling").

[3] In short, the class proceeding is brought on behalf of holders of commercial halibut fishing licenses in relation to a government fisheries management scheme that ran on the coast of British Columbia from 2001 to 2006. In general, the allegations are that the fisheries management scheme was illegal, that it cost fishers more to access quota under the scheme than it had before, and that the government ought to refund the additional fees from which it benefited.

[4] The fisheries scheme involved an association of halibut fishers, the Pacific Halibut Management Society ("PHMA"). What the government did was hold back 10% of the halibut quota from that which it had in previous years issued to fishers, assign it to PHMA, and then in turn, PHMA sold the 10% quota to fishers. PHMA was given the responsibility to manage the fishery and to remit some of the money to the government. Many of the fishers buying quota from PHMA were members of PHMA, and some of them were directors of PHMA.

[5] In the course of certification the plaintiff proposed that there be a subclass of former directors of PHMA. This was in response to the defendant's argument that it would have additional defences to claims of fishers who were directors of PHMA. As stated in the Certification Ruling at para. 50:

> In short, the defendant's position is that directors of PHMA approved of the fisheries management scheme at issue, and authorized PHMA to undertake all of the activities now challenged in the lawsuit. When they did so, the defendant argues that the directors were presumably acting under the

> general fiduciary duties owed by directors to act in the best interests of the society.

[6] And further, at para. 56 of the Certification Ruling:

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

[7] In the certification application, the plaintiff did not propose a separate representative plaintiff for the subclass. I held at paras. 61-64 of the Certification Ruling that there was a potential for conflicts and that there needed to be a separate representative plaintiff and a plan to deal with these conflicts.

[8] The Certification Ruling approved at para. 92 the following class definition, which excluded directors of PHMA:

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

[9] License L-437 was excluded because it was held by PHMA. First Nations fishers were excluded because they held different fishing licenses.

[10] The Certification Ruling gave liberty to the plaintiff to apply for approval of a subclass (at para. 94).

New Evidence

[11] At the time of the Certification Ruling the plaintiff was proceeding on the basis that individuals "held" the subject fishing licenses. This is why the defined class refers to "all holders" of these licenses who purchased quota from PHMA.

[12] Since the Certification Ruling, the parties have adduced new evidence which identifies that they had made some incorrect assumptions about the way the subject fishing licenses were held or issued.

[13] While the parties previously spoke of fishing licenses being “held” by individuals, this was more of a colloquial understanding of the effect of the licensing process. However, the evidence now suggests that the subject fishing licenses were issued in respect of fishing vessels, and that the license would also identify the registered owner of the fishing vessel.

[14] The evidence identifies that there could be more than one owner of a licensed fishing vessel. The co-owners of fishing vessels appear to have been identified in the defendant’s records, either for vessel registration or in respect of fishing licenses. However only one co-owner of a vessel would be identified in the defendant’s records as the “contact owner” who would appear on the license documents and be the person to whom all correspondence from the defendant would be sent.

[15] The subject matter of a fishing license, namely the right to participate in a fishery, and a proprietary interest in the fish caught pursuant to the license terms, has been described by the Supreme Court of Canada as proprietary in nature: *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 at para. 34.

[16] There is thus some evidence to suggest that co-owners of vessels issued a fishing license would expect to have a proprietary interest in the subject matter of the fishing license. There is case law that could support the conclusion that such an ownership interest would be proportionate to the ownership interest in the vessel: *Harnum v. Green*, 2006 NLCA 46 [*Harnum*] at para. 30.

[17] The *Fishery (General) Regulations*, SOR/93-53, provides in s. 21 that where there is a change in the registered ownership of shares of a corporation holding a fishing license, such that a different person holds the largest number of shares or one person holds more than 50% of the shares, the Minister must be notified in

writing within 15 days of the date of the change. The plaintiff takes from this that the defendant is interested in this information because of the connection between ownership of the vessel and rights under the fishing license.

[18] The reference to more than 50% of the shares of a corporation owning a licensed vessel is a classic definition of corporate control, i.e. the majority shareholder controls the election of the board of directors and thus controls the corporation: see *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795 at paras. 35-36.

[19] Complicating the issue is the fact that the PHMA by-laws only allowed one person per fishing vessel to be a member of the society; these members of the society then elected the directors. Thus, a director of PHMA could either be the sole owner of a licensed fishing vessel, or a co-owner with others who were neither members of PHMA nor directors. A director of PHMA could be a co-owner holding a controlling interest in a licensed vessel, a minority interest, or even be in a partnership with others in the vessel.

Issues

[20] There are two issues that arise on the present application of the plaintiff for approval of a subclass:

a) should the class definition be revised to reflect the new evidence in regards to how fishing licenses were actually held, and how should it deal with those people who were not directors, but together with a director were co-owners of licensed vessels (“Associated Owners”);

b) should a subclass of directors be approved, and if so, how should it deal with Associated Owners?

Analysis

Revision to Class Definition

[21] Regardless of the other issue regarding Associated Owners, the class definition needs to be refined. As currently worded, members of the class are

"holders" of fishing licenses. However, the new evidence suggests that "holders" of licenses might simply be the fishing vessels.

[22] The plaintiff proposes substituting the class definition wording of "All holders of a Category L Commercial Halibut license" with "All owners of fishing vessels with a Category L Commercial Halibut icense... ("Licensed Vessels")".

[23] The defendant proposes substituting "holders of" with "All vessel owners with a Category L - Commercial Halibut license… in respect of a licenced vessel (Licenced Vessel Owners)".

[24] Both definitions work to address the point but I prefer the plaintiff's version as it more accurately identifies the license as being "with" the vessel.

[25] As for the issue of whether or not Associated Owners should be carved out of the main class, I will address this issue below in relation to the question of the subclass.

Subclass of Directors of PHMA

[26] The *Class Proceedings Act*, R.S.B.C. 1996, c. 50, provides for the creation of a subclass where the court is of the opinion that the subclass members have claims that raise common issues not shared by the class members and the court is of the opinion that their interests require separate representation: s. 6(1). The court must be satisfied that there is a representative plaintiff who: would fairly and adequately represent the interests of the subclass; has produced an appropriate litigation plan; and, does not on the common issues for the subclass have an interest that is in conflict with other class members (s. 6(1)(a),(b),(c)).

[27] Mr. Lorne Iverson, a fisher who had the relevant halibut license and was a director of PHMA during each of the years 2001 to 2006, has provided affidavit evidence establishing that he is willing to be the representative plaintiff for a proposed subclass of PHMA directors. He has provided evidence that there are 27

former directors of PHMA. He proposes that the subclass be represented by separate counsel from that of the main class.

[28] The proposed issue common to the proposed subclass is:

> Does a subclass member's position as director of PHMA preclude the subclass member from claiming against the Minister for restitution of an unlawful tax and/or unjust enrichment?

[29] Leaving aside the exact definition of the subclass for the moment, I am satisfied that there is sufficient evidence to support the creation of a subclass of directors of PHMA who have the above issue common to them not shared by other members of the class. I am persuaded that they do require separate representation to protect their interests and because of the possible conflict between their interests as former directors of PHMA and the interests of other class members. I am satisfied that the role of independent counsel would resolve the issues of potential conflict between members of the subclass and the class. I find that Mr. Iverson is suitable as a representative plaintiff of a subclass of directors of PHMA, and that the the litigation plan he has provided is appropriate, other than the comments I will make on revisions to the subclass definition and common issues.

Associated Owners

[30] I turn now to address the issue of what to do about Associated Owners.

[31] The main difference between the parties on this application has to do with whether or not Associated Owners should be included in the subclass of directors of PHMA (the defendant's first position); or, should be part of the main class (the plaintiff's position although somewhat modified).

[32] The evidence referred to in the Certification Ruling was that in 2006 there were approximately 404 licenses of the type at issue here (at para. 39).

[33] The defendant has filed evidence that based on the records of the Department of Fisheries and Oceans there are approximately 71 individuals or corporations associated with the 27 PHMA directors in co-ownership arrangements

of licensed vessels. In other words, some licensed vessels had multiple owners and the owners changed over the material time but during part of that time a PHMA director was associated as a co-owner with some Associated Owners.

[34] The plaintiff says the subclass should be defined as:

> All owners of fishing vessels with a Category L Commercial halibut license to fish for halibut issued by the Minster of Fisheries and Oceans ("Licensed Vessels") between 2001 and 2006 inclusive for which quota was purchased from PHMA who were:
>
> (a) directors of the PHMA;
>
> (b) corporations in which a PHMA director had a controlling interest; and
>
> (c) partnerships in which a PHMA director was a partner.
>
> If a licensed vessel was owned in part by a member of the Subclass and in part by other person(s) (hereinafter "Associated Owners") then Associated Owners are member of the Class and their claims shall correspond to their proportionate ownership interest in the licensed vessel.

[35] During the course of the application, the plaintiff agreed that the last paragraph of the above definition was not a necessary part of the subclass definition.

[36] The plaintiff's definition would include in the subclass only those Associated Owners who were corporations controlled by the PHMA director or who were partnerships in which a PHMA director was a partner. The plaintiff agrees that it is better to define what it is meant by a controlling interest as owning more than 50% of the shares of the corporation.

[37] The plaintiff's definition appears intended to capture anyone who would be standing in the shoes of the PHMA director such that there might be a *prima facie* argument that the PHMA director's actions and knowledge could be imputed to them. However, all other Associated Owners of a fishing vessel who own shares of a fishing vessel together with a PHMA director would remain in the main class.

[38] The defendant's proposed subclass definition is:

> All PHMA Directors and Associated Owners with a Category L - Halibut Fishing Licence issued by the Minister of Fisheries and Oceans in respect of a licenced vessel for which additional quota was purchased from the PHMA between 2001 and 2006, inclusive.

[39] I note that the certified class definition excludes directors of PHMA. It does not exclude people who were co-owners of fishing vessels together with someone who was also a director of PHMA.

[40] The defendant would exclude from the main class the following, which excludes the defendant's broad definition of Associated Owners:

> …
>
> (iii) Licenced Vessel Owners, or appointed representatives, who acted as directors of the PHMA (PHMA Directors); and
>
> (iv) Licenced Vessel Owners whose licenced vessel was represented, or owned in part, by a PHMA Director and in part by other [persons who have a proportionate ownership interest in the licensed vessel (Associated Owners)].

[41] Alternatively, the defendant proposes an "Associated Owner" subclass.

[42] In my view, the question of whether or not the Associated Owners should be excluded from the main class and put in a subclass should be answered by going back to the reasons for the creation of the subclass in the first place.

[43] The reasons for the subclass of PHMA directors, as identified in the Certification Ruling at paras. 49-52, 56, 61-62, had to do with the defendant's position that the directors of PHMA authorized PHMA to enter into the fisheries management scheme and are therefore precluded from claiming any relief as a result of the illegality of the scheme; and, further, that as directors they owed fiduciary duties to act in the best interests of PHMA and could therefore be in conflict with other members of the class and indeed may be exposed to claims by other members of the class.

[44] The reasons for the subclass do not apply to the Associated Owners: they were not directors of PHMA and so did not cause PHMA to enter into the fisheries management scheme; and they did not owe the fiduciary duties that directors owed.

[45] The plaintiff's proposed subclass seeks to address the defendant's concern about Associated Owners by including that potentially small sub-group of Associated Owners who might be said to be closely linked to a director, namely, corporations of which a PHMA director held a 50% interest, or partners of a director.

[46] The premise of the defendant's position that all Associated Owners should be in the subclass is that the Associated Owners were "represented" in PHMA by the PHMA director with whom they co-owned a licensed fishing vessel, and so will be subject to any defence the defendant raises against directors. There is no evidence to support that premise at present.

[47] As directors, the available inference is that the directors represented the PHMA society membership as a whole. It is to be remembered that Associated Owners were not even members of PHMA since only one owner per licensed vessel could be a member.

[48] The defendant's position also appears to treat the ownership interests in a registered vessel, and through that in the rights attached to a fishing license, as indivisible. However, as noted above, there is authority that suggests these rights are divisible as property interests in proportion to the ownership interest in the fishing vessel: *Harnum* at para. 30.

[49] The defendant has not articulated any defence that would apply to the Associated Owners separate from other class members and that would create a potential conflict with other class members. I am not persuaded that the majority of Associated Owners need the protection of representation separate from that of the main class members.

[50] In *Peppiatt v. Royal Bank* (1996), 27 O.R. (3d) 462 (Gen. Div.) [*Peppiatt*] the Court dealt with an application by the defendant to either decertify the class proceeding or create a number of subclasses. The claim involved allegations of breach of contract, breach of trust, negligence, misrepresentation and breach of fiduciary duty. It arose out of the sale of equity ownership units to members of a golf

club. The defendant bank argued amongst other things that there were too many differences between members of the class, including those who sat on the Board of Governors of the club and those who did not. The defendant bank argued that some of the members who sat on the Board of Governors could have a conflict with other members of the class (at para. 8). The defendant bank argued as well that those who had knowledge of the Board of Governor's actions at issue should be in a subclass.

[51] In *Peppiatt*, the Court refused to de-certify the class action. The Court approved a few subclasses, including those who sat on the Board of Governors, but did not approve a subclass of those who had knowledge of the Board of Governor's actions (at para. 68). The Court held that "[s]ubclasses can be determined as the need arises" (para. 49).

[52] While the nature of the present claim is quite different than the claim in *Peppiatt*, the distinction, for purposes of creation of a subclass, between directors and non-directors of an entity involved in the alleged wrongful actions is analogous.

[53] I am satisfied that the plaintiff's proposal is an appropriate way of dealing with Associated Owners. There is a sufficient basis now to determine that there should be a subclass of directors of PHMA, together with the vessel co-owners who were corporations of which they owned more than 50% of the shares, or who were in admitted partnerships with them. There is not currently a sufficient basis to determine that all Associated Owners should be in the subclass or in a separate subclass.

[54] There remains a question as to how to address the fact that some people might have been directors of PHMA for only part of the time period covered by the class definition.

[55] I come back to the reason for the creation of the subclass, namely the potential for conflict with the main class and the need for separate representation. Keeping this in mind, the conflict in my view justifies excluding from the main class

anyone who fit within the subclass at any time during the material period. This captures the possibility that serving as a director of PHMA even for a short time during the material time period of the fisheries management scheme could give rise to a defence or make the person subject to criticism by the main class, and this justifies such persons having separate representation.

[56] If during the course of the action conflicts emerge between groups of members of the main class or subclass those can be addressed at the time. Where there is a conflict there remains the option of creating further subclasses based on groupings of plaintiffs who have common factual circumstances: *Peppiatt*; *Sankar v. Bell Mobility,* 2013 ONSC 5916 at para. 72, leave to appeal ref'd 2013 ONSC 7529; *Dhillon v. Hamilton (City)*, [2006] O.J. No. 2664 at para. 29.

[57] The case law is clear that a class action proceeding is sufficiently flexible to deal with variations in the factual matrix over time: see *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 59, citing *Rumley v. British Columbia*, 2001 SCC 69.

[58] As the case evolves, it may be that some members of the main class will be situated differently than others and so too members of the subclass without giving rise to the need to create subclasses.

[59] The Supreme Court of Canada in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, explained that a common issue may give rise to varied answers to reflect differences between class members but still be a common issue so long as it does not give rise to conflicting interests. The Court held at paras. 45-46:

> Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and

> varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

[60] I have one lingering concern and that is the ability for members of the subclass to identify whether or not they were in a partnership with a director of PHMA. It may be that some ownership arrangements of fishing vessels were quite casual and Associated Owners would not know whether or not the arrangement can be legally characterized as a partnership.

[61] The ability of a class member who was an Associated Owner to determine whether he should be in the subclass or main class should not first require a legal determination of whether a particular vessel co-ownership arrangement was a partnership.

[62] In my view this problem can be solved by refining the subclass to include those persons who claim they were in a partnership with a Director of PHMA. This will enable subclass members to self-identify. A claims-based class definition was approved by the Supreme Court of Canada in *Rumley v. British Columbia*, 2001 SCC 69.

[63] The factual basis on which to claim a partnership will be clear to some people (perhaps a husband-wife co-ownership arrangement, or arrangement between brothers, for example).

[64] I am satisfied that others who do not believe they were partners with a director and so who do not assert this can remain in the main class. This does not mean that the defendant will be precluded from trying to prove that some Associated Owners who do not assert that they were partners with a director of PHMA nevertheless were partners, and then to rely on any defence that might come of this. Even if such a defence was to succeed, such co-owners would not have been taking any actions as PHMA directors and will not be in the same conflict position as the actual directors of PHMA with the other members of the main class nor will they

require separate counsel. I therefore see no reason to exclude them from the main class at this stage.

[65] I am therefore persuaded that the plaintiff's approach to the proposed subclass is the appropriate approach, although with some changes to the proposed language in light of my reasons.

Conclusion

[66] The application to certify a subclass is allowed.

[67] Based on the reasoning above, the subclass will be defined as:

> All owners of fishing vessels with a Category L Commercial Halibut License to fish for halibut issued by the Minster of Fisheries and Oceans ("Licensed Vessels") between 2001 and 2006 inclusive (the "Material Time") for which quota was purchased from PHMA and:
>
> (a) who at any time during the Material Time:
>
> i. were directors of PHMA; or,
>
> ii. were corporations in which a PHMA director owned more than 50% of the shares; or
>
> (b) who claim that they were in a partnership with a PHMA director in relation to a Licensed Vessel and the purchase of quota from PHMA at any time during the Material Time.

[68] The class definition will be amended as follows, accepting primarily the plaintiff's position but also taking into account the possibility that persons did not retain the same status the entire time:

> All owners of fishing vessels with a Category L Commercial Halibut License to fish for halibut issued by the Minister of Fisheries and Oceans ("Licensed Vessels") at any time between 2001 and 2006 inclusive who purchased quota from PHMA, except for the following:
>
> (i) the holder of license L-437;

(ii) First Nations fishers holding Category FL Commercial Halibut Fishing licenses; and,

(iii) members of the subclass.

[69] The common issue in relation to the subclass should be amended to match the subclass definition, as follows:

> Does a subclass member's position as director of PHMA, a corporation in which a PHMA director owned more than 50% of the shares, or as someone who claims they were in a partnership with a PHMA director in relation to a Licensed Vessel and the purchase of quota from PHMA, preclude the subclass member from claiming against the Minister for restitution of an unlawful tax and/or unjust enrichment?

[70] The litigation plan for the proposed subclass proposes amending each common issue referring to the "class" to also include the words "and/or subclass".

[71] I do not see that as necessary.

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

[73] The subclass members have an equal interest in the determination of the common issues that have already been certified. But to make this clear, it would be helpful to add the further sentence to the subclass common issue: "If not, are the answers to the other common issues the same or different for members of the subclass?"

[74] The new common issue as framed is not a reason to exclude the other Associated Owners from the main class at present, given that no conflict of interest

has been identified and they share the same interests in the outcome of the other common issues.

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

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