IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burnell v. Canada (Fisheries and Oceans)*, 2013 BCSC 1354

Date: 20130730
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

Interim Ruling on Causes of Action

In Chambers

Counsel for the Plaintiff:	Meldon Ellis Phillip N. Scarisbrick
Counsel for the Defendant Crown:	Paul F. Partridge Maria Molloy
Place and Date of Hearing:	Vancouver, B.C. March 11-13, 2013
Place and Date of Judgment:	Vancouver, B.C. July 30, 2013

INTRODUCTION

[1] The plaintiff is a commercial halibut fisher who seeks to certify as a class proceeding this claim in relation to a pacific halibut fisheries management scheme instituted by the federal Minister of Fisheries and Oceans (the "Minister") from 2001 to 2006. He wishes to represent a class of just over 400 other commercial halibut fishers affected by the fisheries management plan in those years.

[2] In 2006, the courts declared the Minister did not have the power to finance Ministry activities from the sale of fishing or crabbing licenses to a private association: *Larocque v. Canada (Minister of Fisheries and Oceans),* 2006 FCA 237 [*Larocque*]; *Association des crabiers Acadiens v. Canada (Attorney General)*, 2006 FC 1241 [*ACA v. Canada*]. These declarations put an end to similar fisheries management schemes on the east coast of Canada and the scheme at issue here.

[3] The present claim was commenced in 2007.

[4] While there is more at issue, the heart of the dispute on this application is whether a private cause of action exists. The Minister says that even if an act of government is *ultra vires*, it does not automatically give rise to a private cause of action. It says that no cause of action is properly pleaded.

[5] A background description of the action and this application is a useful place to start.

BACKGROUND

Factual Basis of Claim

[6] The plaintiff's claim is based on certain steps taken by the Minister in the years 2001 to 2006.

[7] Each year the Minister issues commercial halibut fishing licenses under the Federal *Fisheries Act,* R.S.C. 1985, c. F-14, permitting commercial license holders to catch and retain halibut in the coastal waters of British Columbia.

[8] Each commercial halibut license issued by the Minister carries with it the right to purchase from the Minister a set portion (the Individual Vessel Quota or "IVQ") of the Total Allowable Catch (the "TAC") for halibut in British Columbia.

[9] In each of the years 2001 to 2006 the Minister withheld 10% of the TAC that in the past had been issued to commercial license holders, and assigned it to the Pacific Halibut Management Society ("PHMA") under a new license L437.

[10] At the same time, the Minister entered into a Joint Project Agreement ("JPA") with PHMA, pursuant to which PHMA would undertake fisheries management activities and pay funds to the Minister.

[11] Under this fisheries management scheme, PHMA had the right to sell to individual license holders a proportionate share of the 10% of the TAC that had been assigned to it. PHMA then used these funds to pay the Minister and to pay its own expenses in relation to its fisheries management activities.

[12] PHMA used the fees it obtained from selling the 10% of the TAC in two ways: to fund fisheries management activities at the direction and request of the Minister; and to pay the federal government directly to fund government fisheries management activities.

[13] Thus, those commercial halibut fishing license holders who wished to purchase a proportionate share of the withheld 10% of the quota had to purchase it from PHMA. The cost of purchasing this proportionate share from PHMA was greater than it had been in the past when purchased directly from the government.

[14] Originally there was another named plaintiff, Lorne Iverson, who commenced this proceeding. He named both Canada and PHMA as defendants. The claim against PHMA was discontinued on June 27, 2011.

[15] Mr. Burnell was substituted as the plaintiff on November 29, 2011, after a contested application by the original plaintiff, Mr. Iverson. The basis for that application was a concern that Mr. Iverson might have an actual or perceived conflict

with other members of the proposed class, since he was a director of PHMA at the material times when the Minister entered into the JPAs. It was thought that other class members could be critical of the steps taken by PHMA or the information communicated by PHMA to members of the class. The reasons for judgment in respect of that application are indexed at 2011 BCSC 1619.

[16] The evidence filed in support of this motion suggests that approximately 80% to 90% of commercial halibut license holders were members of PHMA during the years 2001 to 2006.

[17] Mr. Burnell was a member of PHMA and made payments to PHMA to access a proportionate share of the 10% of the quota during the years 2001-2006.

Declaration that Fisheries Management Schemes Were Illegal

[18] In 2006 the Federal Court of Appeal in *Larocque* declared that a similar fisheries management scheme involving snow crab in the Southwestern Gulf of St. Lawrence was illegal.

[19] In *Larocque*, the Minister had allocated a portion of the snow crab quota to a fisher, Mr. Desveaux, in return for which Mr. Desveaux was to perform a scientific survey of the crab stock. Mr. Desveaux had the right to sell the quota that had been allocated to him. In other words, he was paid in kind for his expenses in conducting the survey.

[20] The basic underlying premise of the fisheries management scheme in *Larocque* was that the Minister was selling the crab to pay for the cost of the scientific survey, there not being sufficient funds in the operating budget allocated to the Ministry by Parliament to otherwise finance the survey.

[21] The Federal Court of Appeal in *Larocque* held that the Minister did not have the power to pay for his department's scientific research by issuing licenses to fish and sell snow crab (at para. 27). In coming to this conclusion, it held that:

a) Canada's fisheries are a common property resource belonging to all the people of Canada and it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (at para. 13, citing *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12);

b) when the Minister decided to pay a contracting party with the proceeds of sale of the snow crab, he was paying with assets that did not belong to him. This was akin to "an expropriation of fishery resources or a tax on them for the purposes of funding the Crown's undertakings" (at para. 13);

c) any disbursement of public funds must be authorized by legislation, with the purposes of expenditure clearly identified, in accordance with the *Financial Administration Act* (at paras. 15-17); and

d) the Minister financed his scientific research program without first appropriating the funds necessary, and by misappropriating resources (at para. 26).

[22] Soon after *Larocque*, the case of *ACA v. Canada* was decided. That case involved a scheme more closely matching that alleged in the present case. In that case, the Minister issued a fishery license for a portion of the snow crab quota to a snow crab fishers' association. The association was to pay the Ministry certain amounts which would finance certain Ministry activities managing the fishery. In turn, the association was able to raise funds to do so by selling a share of its quota to members of the fishery.

[23] In *ACA v. Canada,* another association of fishers successfully challenged the legality of the scheme. The Federal Court held that the Minister's decision to set aside quota and issue a fishing license to the association was contrary to the *Fisheries Act* and *ultra vires* his powers under that *Act* (at para. 7).

[24] Furthermore, in *ACA v. Canada* the Court held at para. 6 that by deducting part of the allocation of the TAC, the Minister:

> deprived each licensee of this share of the TAC and indirectly imposed an additional charge on them.

[25] Thereafter the fisheries management scheme involving the Minister, PHMA, and the commercial halibut fishery on the Pacific coast ended.

[26] This class action was then commenced.

Core of Claim Advanced

[27] The core of the plaintiff's claim is set out at paragraph 20 of the Further Amended Notice of Civil Claim ("NOCC"):

> 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; [and]
>
> d. Collected monies from the plaintiff without legislative or constitutional authority[.]

[28] A claim of conversion at para. 20(e) of the NOCC was abandoned during the hearing before me.

[29] While the plaintiff is no longer claiming directly against PHMA, it alleges that PHMA was the "agent" or "partner" of the Minister in these wrongful actions (paras. 5, 6, 19, 21 NOCC).

[30] The representative plaintiff claims the following relief on his behalf and on behalf of class members in Part 2, "Relief Sought", of the NOCC:

> 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; (ii) unjust

enrichment by the Minister; or (iii) funds collected without legislative or constitutional authority by the Minister.

c. An accounting and restitution to the plaintiff of all monies 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 for the period January 1, 2001 to date;

d. Return of funds unlawfully converted by the defendants;

e. Restitution of monies collected from the plaintiff by the defendants without legislative or constitutional authority and retained by the defendants without a juristic reason;

f. An order certifying this action as a class action and appointing the plaintiff as class representatives(sic), and other appropriate orders under the provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 as amended;

g. An order that 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. Interest pursuant to the *Court Order Interest Act*;

i. Costs of this action on a solicitor and client basis; and

j. Such further and other relief that this court deems appropriate.

[Emphasis added.]

[31] The legal basis for the plaintiff's claim is stated at Part 3 of the NOCC as follows:

> 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.

[32] In submissions, the plaintiff explained that paras. 20(a) through (c) of Part 1 of the NOCC are based on the analysis in *Larocque*; and paras. 20(c) and (d) are based on the analysis in *Kingstreet Investments Ltd. v. New Brunswick (Finance)* [2007] S.C.J. No. 1; 2007 SCC 1 [*Kingstreet*] relating to the unlawful retention by the Crown of an unlawful tax.

[33] In argument, the plaintiff described the nature of the remedy in *Kingstreet* as "public restitution" for an unauthorized tax, as opposed to common law restitution based on unjust enrichment. I will describe *Kingstreet* shortly.

[34] However, the plaintiff submitted that a common law unjust enrichment claim is being advanced as well.

[35] The Crown argues that the plaintiff's claim for public restitution is bound to fail, and that the plaintiff has not pleaded a cause of action based on the common law of unjust enrichment.

Proposed Class

[36] The proposed class is:

> All holders of a Category L Commercial Halibut licence to fish for halibut in the waters of British Columbia issued by the MINISTER OF FISHERIES AND OCEANS (the "Minister") between 2001 and 2006 inclusive, except for the holder of licence L-437 (the "Class");

[37] PHMA, as the holder of license L-437, is expressly excluded from the proposed class.

[38] As well, there were apparently a small group of First Nations halibut fishers who had their own class of licenses, approximately 30 people, and they are not within the class description.

[39] The plaintiff estimates that there are approximately 400 members of the proposed class of category "L" commercial halibut fishers.

[40] In oral reply submissions, the plaintiff proposed narrowing the class to exclude two small groups of people:

a) those who did not buy quota from PHMA, and so who did not pay any extra fees;

b) those people who were directors of PHMA during the relevant years, and who might be seen as making decisions on behalf of PHMA.

Proposed Common Issues

[41] The plaintiff proposes that the following issues be certified as common issues:

a. Did the Minister unlawfully withhold a portion of the individual vessel quota for halibut from each class member?

b. Did the Minister unlawfully assign the portion of the individual vessel quota for halibut withheld from each class member to the defendant PACIFIC HALIBUT MANAGEMENT ASSOCIATION OF B.C. (the "PHMA")?

c. Did the defendant PHMA act as agent / partner of the Minister and / or assist the Minister to conduct the unlawful activities?

d. Is the defendant, Minister liable to repay to the class members the "excess fees" that they were required to pay to the PHMA in order to access that portion of their quota assigned to the PHMA, either on the basis of:

i. restitution for unjust enrichment; or,

ii. restitution of an unconstitutional tax?

[42] The fourth proposed common issue in the above form was varied slightly during the hearing of this application from that proposed in the Notice of Application.

[43] The first proposed common issue is difficult to understand in light of the plaintiff's oral submissions that the intended class will exclude those people who did not access quota through the PHMA. This would mean that all of the class members did obtain quota.

[44] However, the theory of the plaintiff's claim is that the Minister withheld quota that the class members formerly could access, and only provided it through PHMA after the class members paid higher fees to PHMA than they would have paid if they had been able to access it directly from the government.

REQUIREMENTS FOR CERTIFICATION OF CLASS PROCEEDINGS

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

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> [Emphasis added.]

[46] The first requirement, that the pleadings disclose a valid cause of action, does not require evidence, but the other requirements do require some evidence in support: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 [*Ernewein*], leave to appeal to SCC refused, [2005] S.C.C.A. No. 545, citing *Hollick v. Toronto (City),* 2001 SCC 68 [*Hollick*], at paras. 24-26.

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

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Do the Pleadings Disclose a Cause of Action

[48] The issue that took the most time in the hearing before me was the argument by the Crown that the pleadings do not disclose a cause of action.

[49] There are two lines of legal authority to keep in mind in the analysis of this requirement.

[50] First, the threshold for pleading a cause of action is low, similar to that addressed on a motion to strike a pleading. The legislation does not require a preliminary test of the merits of the claim: *Hollick* at para. 16.

[51] The test is more easily described in reverse: assuming the facts as pleaded by the plaintiff are true, the test is whether it is "plain and obvious" that the pleaded claim discloses no cause of action, or is certain to fail, or would be an abuse of process if allowed to proceed: *Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90 (C.A.) at paras. 6-8, 34. Even if the claim is novel, or if there is a strong defence, it should be considered as disclosing a reasonable cause of action.

[52] There must be material facts pleaded to support the alleged cause of action: Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 3-1(2)(a); *Young v. Borzoni*, 2007 BCCA 16 at para. 20.

[53] Second, the court's choice is not between either striking a defective pleading or allowing the claim to be certified if all other certification requirements are met in the hopes that the defects can be fixed later. In some circumstances, the latter process could make it impossible for the defendant to meaningfully respond to the certification application: *Brown v. Canada (Attorney General)*, 2013 ONCA 18 at paras. 44-45.

[54] The court may refuse to allow a claim to be certified on the basis of defective or uncertain present pleadings, but it may also choose not strike the claim on the basis that the plaintiff may seek to amend, and if the plaintiff so chooses, then seek to reapply for certification.

[55] In submissions, the plaintiff argued that it has pleaded two alternative causes of action for the restitution of moneys unlawfully collected and used by the Minister:

> The plaintiff's pleadings disclose a cause of action for restitution of moneys unlawfully collected and used by the Minister for financing purposes contrary to the principles established in the *Larocque* case; and recoverable either (a) under the principles of public restitution established in the *Kingstreet* case; or (b) on the basis of common law restitution for unjust enrichment.

[56] The Crown argues that:

a) the plaintiff's pleading based on the *Kingstreet* case and alleged claim of public restitution is defective and does not establish a cause of action as it is dependent on the allegation of an unlawful tax which cannot possibly succeed; and

b) the plaintiff has not in fact pleaded the elements of common law unjust enrichment, but rather, has simply pleaded that because the actions of the Minster were unlawful based on *Larocque*, this gives rise to such a remedy. The Crown says this is not a proper pleading of a cause of action.

[57] As will become clear, I have not accepted the Crown's submission that the pleadings do not disclose a cause of action. However, because the ultimate success or failure of the causes of action remains to be decided, my analysis will necessarily be brief.

Cause of Action for "Public Restitution"

[58] I will first address the plaintiff's claim for public law restitution of an unlawful tax.

[59] In *Kingstreet,* the Supreme Court of Canada held that there was a valid claim for restitution of taxes collected and retained by the government under *ultra vires* legislation. This is what is known as "public law restitution".

[60] The facts in *Kingstreet* involved a user charge that night clubs had been required to pay the New Brunswick provincial liquor corporation when purchasing liquor. The user charge was found at trial to be an indirect tax which was *ultra vires* the province. The issue that made its way up to the Supreme Court of Canada was the remedy that flowed from that finding. Specifically, the issue was framed as whether money paid to a public authority pursuant to *ultra vires* legislation is recoverable (at para. 5). Given the finding that the money paid was paid pursuant to an indirect tax, the issue was further stated to be whether a government can retain unconstitutionally-collected taxes (at para. 13). The Court held that a government cannot do so.

[61] In *Kingstreet*, Bastarache J. held at paras. 14-15:

> The Court's central concern must be to guarantee respect for constitutional principles. One such principle is that the Crown may not levy a tax except with authority of the Parliament or the legislature: *Constitution Act, 1867*, ss. 53 and 90. This principle of "no taxation without representation" is central to our conception of democracy and the rule of law. As Hogg and Monahan explain, this principle "ensures not merely that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes" (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 246. See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at pp. 55-16 and 55-17; *Eurig*, at para. 31, *per* Major J.).
>
> When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle. As a result, a citizen who has made a payment pursuant to *ultra vires* legislation has a right to restitution: P. Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", in P. D. Finn, ed., *Essays on Restitution* (1990), c. 6, at p. 168.

[62] In *Kingstreet*, the Supreme Court of Canada distinguished between the remedy of restitution based on constitutional grounds, and restitution for unjust enrichment, holding that the former applied but the latter did not. It left open the possibility that claims of unjust enrichment against the government may be

appropriate in certain circumstances, but held that it is an inappropriate framework for restitution of an unlawful tax (paras. 34-40).

[63] Thus, in order to support the plaintiff's *Kingstreet*-based claim, the question is whether or not the plaintiff has pleaded a claim for restitution of an unlawful tax.

[64] The Crown points out that a tax has very specific elements. It must be: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 at para. 15; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at paras. 21-22.

[65] The plaintiff pleads in Part 1, Statement of Facts, NOCC that:

a) if he wished to access his portion of the 10% of his IVQ assigned to PHMA, he was required to purchase it from PHMA by paying an additional levy (at para. 12) ;

b) in each of the years 2001 through to 2006, he paid PHMA an additional levy to access the 10% of his IVQ assigned to PHMA (at para. 13);

c) part of the funds paid to PHMA by halibut licence holders was remitted by PHMA directly to the Minister and used to fund government fisheries management activities (at para. 18); and

d) part of the funds paid by the plaintiff was used by PHMA for fisheries management activities that it conducted as agent for (or partner of) the Minister (at para. 19).

[66] The plaintiff goes on to attempt to describe the above payments as an unlawful tax, and to claim restitution, in the following pleadings in the NOCC:

a) in assigning quota to PHMA for resale to the plaintiff, and contracting with PHMA to remit the funds to the Minister or use them for fisheries management, the Minister has levied a tax unauthorized by parliament,

and collected monies from the plaintiff without legislative or constitutional authority (at para. 20 (c) and (d));

b) the Minister's acts, as described above, were unlawful (Part 2, Relief Sought, item a);

c) the funds and payments in kind received by the Minister constitute funds collected without legislative or constitutional authority (Part 2, Relief Sought, item b (iii));

d) the plaintiff seeks relief of restitution of monies collected by Minister, and by PHMA on behalf of the Minister, without legislative or constitutional authority (Part 2, Relief Sought, items c and e); and

e) the plaintiff's claim is based on the reasoning in *Larocque* and *Kingstreet* (Part 3, Legal Basis).

[67] The Crown argues on this application that because the monies paid by the plaintiff were voluntarily paid to PHMA, not to Canada, they cannot possibly constitute a tax. The plaintiff had a choice of whether or not to make the payments. The payments were made to PHMA which is not a public body. PHMA was not an agent for the government, or at least the material facts of agency are not pleaded.

Agency Argument

[68] Since the fees paid by the plaintiff were paid to PHMA, it seems necessary that the plaintiff must establish that these were in fact fees imposed or collected on behalf of the Crown. As noted above, the plaintiff pleads that PHMA was the agent or partner of the Crown in these activities.

[69] The Crown is critical of the plaintiff's pleading that PHMA was an agent or partner of the Minister. The Crown submits that all that is pleaded in the NOCC is a conclusion of agency (and presumably partnership), but not the material facts that would support such a conclusion. As such, the Crown submits that the plaintiff does not properly plead a cause of action.

[70] The Crown relies on *Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 4196 [*Durling*] at paras. 69-79. In *Durling*, the pleadings regarding one group of corporate defendants were hopelessly muddled, and it seemed that in order to avoid sorting out the relationships, the plaintiff simply pleaded that these companies were both *alter egos* and agents for the other. The chambers judge held that the material facts had not been pleaded and that it was plain and obvious that the agency pleading would fail. The chambers judge observed at para. 78:

> An agency relationship can be created through an agency agreement or it can be implied. Neither is alleged in the statement of claim. An agency relationship requires a principal and an agent. While class counsel argues that Teskey Construction was agent for Teskey Concrete in the lease of 48 Murray Road, this basic pleading of fact is not in the statement of claim. The pleading simply lumps the four Teskey defendants together and alleges that they were agents of the other without providing any facts about how the four Teskey defendants were agents of each other. Basic material facts are missing: were there one or more agency agreements, when was the agreement made, was the agreement express or implied, who was the principal, who was the agent, what was the purpose of the agency agreement and how are the four Teskey defendants each agent for the other? There are simply no material facts of the alleged agency in this pleading.

[71] I do not see a problem on the plaintiff's claim here similar in scale to the problem in *Durling*. There is not the same degree of confusion as there was in *Durling*, arising from the NOCC, as to what the relationship was between PHMA and the Minister.

[72] The Crown also relies on the case of *Holmes v. United Furniture Warehouse LP,* 2009 BCSC 1805 at paras. 55-57, [*Holmes*]; appeal on unrelated grounds dismissed, 2012 BCCA 227. There the Chambers judge heard arguments that a pleading's bare allegation as to the nature of the legal relationship between parties -- as partners, joint venturers, or agents -- was insufficient to support a cause of action. The Chambers judge agreed and held:

> 65 The plaintiffs claim, in para. 117, that CP, Olsen and Consumers Trust took part in implementing the Cashable Voucher Program "as partner, joint venturers and agents of the Defendant Retailers" and as such are jointly and severally liable with the Defendant Retailers for the loss and damage suffered by the plaintiff and class plaintiffs.

> 66 The defendants submit that this amendment contains a conclusion of law unsupported by any material facts. I agree. There are no material facts pleaded that would support an allegation of partnership, joint venture or agency. It is not proper for a plaintiff to plead a proposition of law in the absence of some material facts which define the claim sufficiently to permit the defendant to know the case it must meet: *Victoria Grey Metro Trust Company* at para. 8.
>
> 67 Both partnerships and joint ventures are founded on the existence of a contract between the parties. Very generally, a partnership exists where there is a valid contract of partnership and the members of the partnership carry on business in common and with a view to profit: *Partnership Act*, R.S.B.C. 1996, c. 348, s. 2; *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27, aff'd 2009 BCCA 34...
>
> 68 There are also various ways in which a relationship of principal and agent can arise. For example, an agency may be constituted by agreement, either express or implied from the conduct of the parties; retrospectively by subsequent ratification by the principal; or as a result of an agent's apparent authority: Francis Reynolds, *Bowstead and Reynolds on Agency*, 18th ed. (London: Sweet & Maxwell, 2006) at pp. 37-38.
>
> 69 Nothing is pleaded to bring the bare allegations of partnership, joint venture or agency within these basic legal requirements. Such pleading cannot stand.

[73] The NOCC seems to me to be obviously alleging that the relationship between PHMA and the Minister was based both on the JPA and the parties' conduct. The overall sense of the facts pleaded is that PHMA was acting on the Minister's behalf in this relationship in selling quota and collecting fees for fishery management activities, remitting fees to the Minister, and in undertaking fishery management activities.

[74] As the Crown points out, one of the policy reasons for requiring a party to provide a pleading is to enable the other side to know the case they have to meet.

[75] I have no difficulty finding that the Crown is able to appreciate from the plaintiff's pleading that the relationship of agency and partnership between the Minister and PHMA is based on the entire relationship and conduct of PHMA and the Minister, the facts of which are pleaded in the NOCC.

[76] The Crown pleads in its Response to Further Amended Claim ("Response") at Part 1, Statement of Facts, Division 2, para. 8:

> The PHMA is a private organization, representing its membership, comprised of the registered owners of commercial halibut fishing vessels for which the Minister has issued Category L- Halibut Commercial Fishing Licences ("Commercial Halibut Licence(s) Holder(s)"), and is governed by its own Constitution and Bylaws, with its own aims, objectives and guidelines. In further response to the whole of the Claim and paragraphs 5, 6, 19 and 21 specifically, the PHMA at no time acted as an agent or partner of the Minister, as alleged, or at all. The Joint Project Agreements ("JPAs") between the PHMA and Her Majesty the Queen in right of Canada ("Canada") expressly state that there is no agency relationship.

[77] The Crown points out that the terms of the JPA expressly state that PHMA is not agent for the Crown. However, whether or not the JPA thus precludes a finding that PHMA acted as the Crown's agent or partner in selling fish and collecting fees that were then paid to the Crown will remain to be seen. In other words, the Crown's position advances a defence, but does not necessarily establish that there is no cause of action.

[78] I should also note that presumably the plaintiff does not have all of the documents and correspondence that passed between PHMA and the Crown, some of which may support or detract from the plaintiff's pleading of an agency or partnership relationship. Those documents presently would be in the control of PHMA and the Crown. It would seem artificial to require more specificity than is currently pleaded in that circumstance.

[79] I do not find that the pleading of agency or partnership lacks sufficient material facts or is bound to fail.

[80] I conclude the material facts of the relationship between PHMA and the Minister are sufficiently pleaded and evident from the NOCC.

Restitution of Unlawful Tax

[81] Leaving aside the agency argument, the Crown also argues that the plaintiff does not plead that any legislation imposing the alleged tax was *ultra vires*, but rather, argues that the actions of the Minister were unauthorized. Therefore, the Crown argues that the material facts necessary to support a claim for public restitution are not pleaded and this cause of action cannot possibly succeed.

[82] In *Larocque*, the crab fishery management scheme was seen by the Federal Court of Appeal as amounting to selling the crab resource to pay for DFO responsibilities. The Federal Court of Appeal held that this scheme was "like an expropriation of fishery resources or a tax on them for the purposes of funding the Crown's undertakings" (emphasis added, at para. 13). This comment was *obiter*. However, it does support the proposition that there is at least an argument that the government activity of the sort at issue in this case amounts to taxation.

[83] In *ACA v. Canada* the Court agreed with the plaintiff's argument that by way of the fishery management scheme, the "Minister... indirectly imposed an additional charge on [each licensee]" (at para. 6). That was not a claim for public restitution and might also be seen as *obiter*, as the issue of whether or not the scheme imposed a tax was not being decided. Nevertheless, the characterization of the Minister's actions in *ACA v. Canada* makes the plaintiff's claim in the present case, based on a similar scheme, at least arguable.

[84] The case of *Chiasson v. Canada (Attorney-General)*, 2008 FC 616 [*Chiasson*] followed *Larocque.* It was a claim by fishers for a return of $1.5 million in fees paid to the Minister by an association of fishers under a similar fishery management scheme. The court framed the issue at para. 1 as:

> What should be done with the proceeds of the essentially illegal sale of snow crab?

[85] The court in *Chiasson* held at para. 21:

> As the illegality of the Minister's action is no longer an issue, a decision must be made regarding what is to be done with the amount of $1,500,000. There are three possibilities: a) that the money remain in the hands of the Department; b) that all or part of the money be returned to the APPFA; or c) that the money be distributed proportionally among those who had their allocations reduced to enable the Minister to issue a fishing licence to the APPFA for 1000 metric tons of snow crab.

[86] In *Chiasson,* the Court acknowledged the argument, also advanced here by the Crown, that the applicants had no proprietary right to the snow crab, given that the Minister's power to issue fishing licenses was discretionary under s. 7 of the

Fisheries Act. While the facts in *Chiasson* were somewhat different than the facts here, the trial court nevertheless saw an analogy with the situation in *Kingstreet*, holding at para. 24:

> I am also of the opinion that an analogy can be drawn with the decision of the Supreme Court in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3. In that decision, the Court decided that taxpayers who had paid *ultra vires* taxes were entitled to recover them, thereby rejecting the rule formulated by Mr. Justice La Forest in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 prohibiting the recovery of unconstitutional taxes. The action is based more on a constitutional principle than on the concept of unjust enrichment. In this case, the applicants did not pay directly, but it is arguable that they paid indirectly through the reduction of their allocations.
>
> [Emphasis added]

[87] However, all of the above analysis in *Chiasson* was *obiter* because in the result the trial court held it did not have jurisdiction to award damages on an application for judicial review (at para. 29).

[88] Nevertheless, the trial court in *Chiasson* made two declarations at para. 31:

> In this case, I am prepared to declare that the Minister illegally used or sold 1000 metric tons of snow crab to finance departmental research activities and is illegally holding the proceeds of the 2006 sale.

[89] On appeal in *Chiasson*, the Federal Court of Appeal expressed disagreement with the trial court's analysis and second declaration: 2009 FCA 299. The issue to some extent had to do with the trial court's jurisdiction to make such a declaration on an application for judicial review. The Federal Court of Appeal held at para. 24:

> In my opinion, the issue is a pure question of law: despite this Court's decision in *Larocque*, above, according to which the Minister could not finance his Department's scientific research by issuing a licence to fish and sell snow crab, could the judge determine whether the Minister was illegally holding the sum of $1 500 000, which the APPFA had paid him under the agreement?

[90] The Federal Court of Appeal in *Chiasson* disagreed with the notion that the fishers had lost any entitlement to quota under the fisheries management scheme, and noted at paras. 28-31:

> In any event, it is important to emphasize that the respondents were not entitled to a specific percentage of the TAC. It is now well accepted that the Minister has absolute discretion regarding the issuance of fishing licences (see *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, paragraphs 36, 37, 40 and 49).
>
> Another observation about Justice Harrington's comments concerns our decision in *Larocque*, above. At paragraph 26 of his reasons, Justice Harrington writes, relying on this decision, "that the Crown has no right to an amount belonging to a third party". I understand from Justice Harrington's remarks that he was of the opinion that the Minister could not validly claim the payment of the sum of $1 500 000 because "a third party" was entitled to receive this amount. In other words, according to the judge, because the Minister did not have the power to use fishery resources to finance some of his department's management and research activities, it follows that the Minister was illegally holding the sum of $1 500 000 received from the APPFA since he was not entitled to claim it.
>
> ...
>
> I am of the opinion that Justice Harrington's second declaration is not one that he could make on an application for judicial review filed under section 18.1 of the *Federal Courts Act* (the "Act"). In fact, the second declaration concerns the Minister's contractual rights arising from the agreement with the APPFA. A close reading of paragraphs 21 and 26 of the judge's reasons satisfies me that when he made his second declaration, the judge was mindful of not only the Minister's contractual rights, but also those of the APPFA and any that the respondents might have, considering that the TAC of 25 869 tons (from which their percentage was to be calculated) was reduced by 4% because of a permit for 1000 tons issued to the APPFA.

[91] Significantly, the Federal Court of Appeal in *Chiasson* disagreed with the trial court's analysis as to the impact of *Larocque* and the notion that it meant that the Minister was illegally holding sums he had received from the fishery association. The Court held at para. 30:

> In my view, there is no doubt that our decision in *Larocque*, above, in no way supports Justice Harrington's second declaration. The only conclusion reached by this Court in *Larocque*, above, is that the Minister cannot finance his Department's research programs by issuing fishing licences and selling fishery resources. With respect, I see nothing in *Larocque*, above, that could allow the judge to declare that the Minister was illegally holding the sums he received from the APPFA

[92] The Federal Court of Appeal in *Chiasson* set aside the trial judge's second declaration that the Minister was illegally holding the proceeds of sale of the snow crab.

[93] The decision in *Chiasson* is certainly a lesson in not reading too much into a precedent. With this in mind, I note that it is also important not to read too much into the Federal Court of Appeal decision in *Chiasson*: it did not hold that a claim could not be made out for public restitution based on the illegal fisheries management scheme. Simply put, such a claim was not before the court.

[94] There is no case on point which treated the payments made by fishers under a fisheries management scheme as a tax subject to a public restitution claim based on the *Kingstreet* principle. Nevertheless, there are enough threads in the case law suggesting the possibility of such a claim that I must conclude that it is at least arguable, just as there are arguable defences. I consider it premature to conclude that it is bound to fail.

[95] The Crown argument that there was no unlawful tax may be a defence, but I am not persuaded it is an argument that makes it plain and obvious that the claim for restitution of an unlawful tax will fail.

[96] As for whether or not the claim is sufficiently pleaded, I note that the Crown pleads in its Response , amongst other things, at Part 3, Legal Basis, para. 11, that:

> Canada denies that it levied a tax against the Plaintiff or collected monies from the Plaintiff without legislative or constitutional authority. The only fee collected by Canada from the Plaintiff in 2001 to 2006 was the licencing fee for the Plaintiff' s Licence prescribed by the *Pacific Fishery Regulations, 1993*. Any other monies were collected by the PHMA. The monies received by Canada from the PHMA defrayed the incremental management costs of the IVQ managed commercial halibut fishery for the direct benefit of those paying for it, that being the Commercial Halibut Licence Holders.

[97] This pleading illustrates that the NOCC has clearly put in issue the question of whether or not there was an unlawful tax imposed on the plaintiff, sufficient for filing a Response.

[98] As I read it, the plaintiff is essentially alleging that the Minister contracted with PHMA to do what the Minister could not do: impose a tax on the fishery to fund DFO responsibilities. The question of whether or not the fisheries management scheme in effect imposed a tax is a question that will ultimately have to be determined, but I

conclude that the pleading of it passes the threshold for establishing a cause of action.

Cause of Action for Common Law Unjust Enrichment

[99] The plaintiff also submits that he advances a claim in common law unjust enrichment.

[100] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*], the Supreme Court of Canada commented on the principle in *Kingstreet* that "restitution is generally 'available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*'" (at para. 89).

[101] *Elder Advocates* involved a proposed class action brought on behalf of elderly patients of long term care facilities in Alberta. These patients paid fees for their accommodation and meals. Part of these fees allegedly included a "care component" which was subsidizing medical care costs that the provincial government was required to provide without fee.

[102] The claim in *Elder Advocates* sought recovery of the allegedly overpaid charges including on the basis of common law unjust enrichment. The plaintiffs pleaded the three well-known elements of unjust enrichment set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25: the province was unjustly enriched by the fees; the plaintiffs were correspondingly deprived by the amount of the fees; and, there was an absence of juristic reason for the fees. The class action was certified and the province appealed.

[103] The provincial government in *Elder Advocates* argued that *Kingstreet* stood for the proposition that a claim against the government could not be based on the common law of unjust enrichment, but only on the public law claim of restitution of an unlawful tax. The Supreme Court of Canada disagreed with this argument.

[104] Chief Justice McLachlin for the Court in *Elder Advocates* held at para. 91:

> In my view, *Kingstreet* stands for the proposition that public law remedies, rather than unjust enrichment, are the proper route for claims relating to

> restitution of taxes levied under an *ultra vires* statute, on the ground that the framework of unjust enrichment is ill-suited to dealing with issues raised by a claim that a measure is *ultra vires*. However, *Kingstreet* leaves open the possibility of suing for unjust enrichment in other circumstances. The claim pleaded in this case is not for taxes paid under an *ultra vires* statute. It is not therefore precluded by this Court's decisions in *Kingstreet*. The pleading should be allowed to go to trial, at which point the propriety of the claim for unjust enrichment may be explored more fully in the context of the evidence adduced.

[105] The plaintiff drew his claim in this proceeding before the *Elder Advocates* case was decided. The question is whether or not the plaintiff has pleaded the necessary three elements of unjust enrichment: benefit to the defendant, deprivation of the plaintiff, and lack of juristic reason.

[106] Starting with the last element first, the plaintiff submits that the lack of juristic reason is based on the illegality of the fisheries management scheme.

[107] There is no question that the NOCC alleges that the fisheries management scheme was unlawful on the basis of the analysis in *Larocque:* Part 1, para. 20; Part 2, paras. b and e; and Part 3 of NOCC.

[108] I find that the lack of juristic reason is pleaded in the NOCC.

[109] As for the benefit and corresponding deprivation, the NOCC is less clear:

a) the NOCC pleads in Part 2, Relief Sought, item b(ii), that the funds and payments received by the Minister from PHMA from the sale of quota constitutes unjust enrichment. This conclusion would suggest that the plaintiff is alleging that the totality of the fees paid by PHMA to the Minister are the subject of the deprivation and benefit, not just the excess fees, and not the 10% of quota;

b) other paragraphs in the NOCC would suggest that the deprivation alleged is both the 10% quota assigned to PHMA and allegedly withheld from class members, and the additional fees paid by class members to PHMA: Part 1, paras. 9 through 13, 23, 24.

[110] The defendant argues that the law is clear that a fisher is not "entitled" to quota. The defendant submits:

> In addition to the failure to properly plead the material facts and legal basis for the alleged causes of action in this case, the Claim is premised on an alleged entitlement to a licence and quota, and on the Plaintiff having a proprietary right to quota. The law is clear that there is no legal right to any licence or to any particular amount of quota, neither of which are property, in any event, at common law. As such, on this basis alone, it is plain and obvious that the Claim cannot succeed.
>
> Sections 7 and 43 of the *Fisheries Act*;
>
> Section 19 of the *Pacific Fishery Regulations*;
>
> Section 22(1)(a) of the *Fishery (General) Regulations*;
>
> *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at paras 31-32, 49, 142 DLR (4th) 193 (SCC);
>
> *Arsenault v Canada (Attorney General)*, 2009 FCA 300 at para 57, 395 NR 223, leave to appeal to the SCCA refused, [2009] SCCA No 543;
>
> *Saulnier v Royal Bank of Canada*, 2008 SCC 58 at paras 35, 39 and 48, [2008] 3 SCR 166;
>
> *Radil Bros Fishing Co Ltd v Canada (Minister of Fisheries & Oceans)*, 197 FTR 169 at paras 28-29, 31-36, 29 Admin LR (3d) 159 (FCTD), reversed on other grounds 2001 FCA 317 at paras 25-30 and 35-39, 207 DLR (4^{th}) 82.

[111] Since there is no legal right to quota, the defendant submits therefore that there is no possible argument that a cause of action based on deprivation of quota can succeed. The flip-side of course is the argument that the Crown did not receive a corresponding benefit in relation to the 10% of quota.

[112] In oral submissions plaintiff's counsel seemed willing to narrow the notion of the benefit and deprivation to that portion of the "excess" fees that the class members were required to pay to PHMA to access that portion of their IVQ assigned to PHMA. In other words, the plaintiff seemed willing to change its claim and to not advance an argument that deprivation of quota was the deprivation element of unjust enrichment relied upon. However, no alternative pleadings were put forth on this basis.

[113] It seems to me that the plaintiff's intent to plead common law unjust enrichment of some sort is evident from the NOCC. The defendant clearly

understood this, as many paragraphs of its Response are directed to denying that there was any unjust enrichment:

a) at Part 1, para. 15, the Response pleads that class members were not deprived of quota because they have no entitlement to quota;

b) at Part 1, para. 16, the Response pleads that class members received a benefit from the fees they paid to PHMA;

c) at Part 1, para. 17, the Response pleads that the defendant was not enriched by any monies received from the PHMA. See also paras. 20, 21, 30 and 31.

d) at Part 3, the Response denies any deprivation, benefit, or unjust enrichment, and denies that the defendant collected monies from the plaintiff without legislative or constitutional authority.

[114] Nevertheless, the defendant has a valid point that the precise nature of the benefit and deprivation alleged to form the basis of the unjust enrichment claim needs to be more clearly pleaded. The current NOCC, when taken with submissions by plaintiff's counsel, is ambiguous and leaves the defendant guessing as to what is the alleged benefit and corresponding deprivation.

Conclusion re: Causes of Action

[115] The history of the British Columbia case of *Halvorson v. British Columbia (Medical Services Commission)* [*Halvorson*] illustrates that the courts in this province favour a flexible approach towards pleadings in proposed class action proceedings advancing novel claims. Our Court of Appeal recognized that pleadings of novel claims may have to be refined in the course of the certification process.

[116] In *Halvorson*, 2003 BCCA 264 [*Halvorson Appeal #1*], a plaintiff medical doctor commenced two separate proceedings against the provincial government. The proceedings alleged that the Provincial Medical Services Commission wrongly failed to refund physicians' fees for services rendered by physicians to a certain class of patients. One proceeding was a petition for judicial review, and the second

was an action claiming damages for breach of statutory duty or compensation for unjust enrichment. There were several challenges and changes to the plaintiff's pleading as he tried to frame a cause of action and remedy, and trips up to the Court of Appeal along the way.

[117] The Court of Appeal in *Halvorson Appeal #1* noted at para. 6:

> ... The appellant is seeking a monetary remedy in largely uncharted waters. It is unclear at this stage of the litigation whether, assuming success on the merits, any monetary remedy would be ancillary to a declaration or order in the nature of mandamus in the judicial review proceedings, or whether it would be regarded as compensation for unjust enrichment or damages for breach of statutory duty in the action. This uncertainty is the reason why separate proceedings were initiated. I think that it would be premature to attempt to analyze the remedy implications at this early stage...

[118] Like the plaintiff in *Halvorson*, here the plaintiff's claim for a monetary remedy is being advanced in largely unchartered waters due to the legal complexities confronting a person seeking to sue the government in relation to alleged government illegality.

[119] In the second appeal in *Halvorson*, 2010 BCCA 267 [*Halvorson Appeal #2*], the Court of Appeal found the pleadings to be seriously defective and made the following statements about pleadings generally, at paras. 35-36:

> The purposes of pleading include to define the issues of fact and law with clarity and precision, to give fair notice to the opposing parties of the cases they respectively have to meet so that they may prepare to meet them, and to create a record of the issues tried in the action so as to prevent future litigation upon the matter between the parties...
>
> ...A statement of claim "ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged"... the mere reference to a section of a statute without a plea of material facts that bring the section into play will not suffice – a statement of claim that fails to state a material fact is defective and fails to disclose a cause of action...

[120] However, in *Halvorson Appeal #2*, the Court of Appeal also noted that there was nothing wrong with the plaintiff reformulating the approach to the claim in order to facilitate certification, at para. 23:

> ...To hold plaintiffs strictly at the certification stage to their pleadings and arguments as they were initially formulated would in many cases defeat the objects of the *Act* - judicial economy, access to justice, and behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 26-29; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15. In *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 747 (Gen. Div.), leave to appeal ref'd [1993] O.J. No. 4210, in a passage adopted in *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 at para. 58 (S.C.), appeal allowed in part (1998), 48 B.C.L.R. (3d) 90 (C.A.), the court described certification as "a fluid, flexible procedural process". There must be procedural flexibility in order to facilitate realization of the statutory purposes....

[121] It will do a plaintiff and class members no favours to allow a claim to advance if it is sure to fail. This point was made by the Court of Appeal in *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, at para. 82. Such a process would cause much wasted expense on the part of the parties as well as a waste of judicial resources.

[122] In a class action context, the legislature's intention is that courts be procedurally flexible so as to best serve the goals of the *CPA* of increasing access to justice for people whose claims might on their own be too small to be economical to advance. In fulfilling that role, the courts must be open to hearing novel claims if they are at least arguable.

[123] Here, the Crown's challenge to the plaintiff's pleading largely has to do with the difficulties facing the plaintiff in establishing that alleged government illegal conduct (establishing the fisheries management scheme) can give rise to a private law cause of action in damages. I have no difficulty in concluding that it is a novel claim, but I do have difficulty in concluding at this stage that it is bound to fail.

[124] The combination of *Kingstreet* and *Elder Advocates* provides two alternative foundations for a claim against a government by a citizen for a return of unlawfully-charged fees, either on the basis of restitution of an unlawful tax or on the basis of unjust enrichment. I accept that the plaintiff has pleaded an arguable cause of action for restitution of an unlawful tax, and has evidenced the intention to plead an unjust enrichment claim. However, I find that the plaintiff needs to better plead the

common law unjust enrichment claim so that the defendant may have fair notice of the claim it has to meet.

[125] Given the differences between the existing pleading and the position advanced by the plaintiff in argument during the certification hearing in relation to its common law unjust enrichment claim, I am of the view that the plaintiff must prepare amendments to its NOCC to commit to a position on the elements of unjust enrichment, so that the Crown may know the case it has to meet and so that the common issues can then more easily be determined as flowing from the pleadings.

[126] As well, it would be appropriate for the plaintiff's amendments to address the changes in the description of the class and the abandonment of the claim in conversion identified during the certification hearing.

[127] I find that the Crown has already had sufficient notice of the nature of the plaintiff's claim which is and has always been based on the alleged illegal halibut fisheries management scheme. It is therefore unlikely that amendments to better refine the plaintiff's claim will prejudice the Crown. I have considered simply making an order that the plaintiff have liberty to amend.

[128] However, on reflection I will not grant such an order now. Rather, I will consider the plaintiff's application for certification to include an application to amend its NOCC. This will allow the plaintiff to propose the amendments and the Crown to make any specific objections to them.

[129] The outcome of the certification application should await the plaintiff's proposed amendments to the NOCC and the receipt of any fresh argument arising from the amendments.

[130] It is likely that any fresh argument can be addressed by written submissions. If the parties do wish to have a further oral hearing, they can request the same.

[131] Subject to the agreement of counsel to other dates (and I expect each to accommodate the other's convenience and possible summer vacations), I direct the following schedule:

a) within 14 days of this judgment, the plaintiff will provide to the defendant and to the court the plaintiff's proposed amendments to the NOCC;

b) at the same time, the plaintiff will provide a written submission addressing how the proposed amendments affect its application for certification, including such things as the proposed class and the common issues;

c) within 14 days of receipt of the plaintiff's above materials, the defendant will provide to the plaintiff and the court its written submissions in response; and

d) any party seeking an oral hearing must then immediately file a requisition with the court seeking the same, providing an explanation for the position that an oral hearing is necessary, and advising of the time estimate.

[132] I will not decide the outcome of the certification application, including any order granting leave to amend the NOCC, until the proposed amendments and further submissions are received.

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