

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burnell v. Canada (Fisheries and Oceans)*,
2013 BCSC 1874

Date: 20131011
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

Second 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

Written Submissions of the Plaintiff:

Dated September 3, 2013

Written Submissions of the Defendants:

Dated September 23, 2013

Place and Date of Judgment:

Vancouver, B.C.
October 11, 2013

INTRODUCTION

[1] The plaintiff is a commercial halibut fisher who seeks to bring a class action against the federal government in relation to a now defunct fisheries management scheme.

[2] The first requirement of a class proceeding is that the pleadings disclose a cause of action. Unfortunately, the pleadings of the plaintiff have been a moving target, making this aspect of the application difficult to determine.

[3] This is the second interim ruling on the causes of action pleaded by the plaintiff, as part of the plaintiff's application to certify the proceeding as a class action pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[4] In the first interim ruling made July 30, 2013 ("First Interim Ruling"), indexed at 2013 BCSC 1354, I concluded in relation to the Further Amended Notice of Civil Claim ("NOCC") at paras. 125-126:

[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.

[5] In the First Interim Ruling, I indicated that the outcome of the certification application should await the plaintiff's proposed amendments to the NOCC.

[6] The plaintiff has now filed a written submission, with attached proposed Second Further Amended Notice of Civil Claim ("SFNOCC"), in support of his application that the proceeding be certified as a class proceeding. The defendant has filed written submissions in response.

[7] I conclude that the proposed amendments in the SFNOCC ought not to be allowed and the plaintiff is required to submit further proposed amendments before the certification application can be determined.

Second Further Amendments to Notice of Civil Claim

[8] The plaintiff has improved his pleading of the unjust enrichment claim.

[9] However, there are several key deficiencies in the plaintiff's current proposed pleading which can be summarized as follows:

1. rather than narrow the proposed class, as the plaintiff's counsel had submitted would be done in the original hearing of the certification motion, the plaintiff now seeks to expand the class, but without any evidentiary support;
2. there are a number of deficiencies of a more minor nature that ought to be cleaned up.

Unjust Enrichment Claim

[10] One improvement in the proposed claim is in respect of the pleading of the unjust enrichment claim.

[11] In the First Interim Ruling, I held that the plaintiff had not made clear in the NOCC two aspects of his pleading based on the cause of action of common law unjust enrichment, namely, what was the alleged benefit and corresponding deprivation.

[12] The current draft SFNOCC now identifies the alleged benefit and corresponding deprivation.

[13] The plaintiff has described the deprivation to the plaintiff (and potential plaintiff class) as those "Additional Fees" required to access the 10% of the Total Allowable Catch ("TAC") of halibut in Canada, a quota of 10%, given to Pacific Halibut Management Association ("PHMA") by the Minister of Fisheries and Oceans (the "Minister").

[14] The plaintiff claims that the Additional Fees include: (a) Cost Recovery Fees; and, (b) Rockfish Research Fund Fees.

[15] In the plaintiff's proposed newly pleaded claim, it is alleged that these Additional Fees were disbursed by PHMA in accordance with its agreement with the Minister. The pleading alleges that some of the extra Additional Fees were designated to fund the management of fisheries activities, which was the legal responsibility of the Minister, and some of these Additional Fees went directly to the Minister in cash. As such, the claim pleads that these Additional Fees constitute an enrichment of the Minister.

[16] With regard to the third element of unjust enrichment, the lack of a juristic reason for the deprivation, I have already found in my First Interim Ruling that it has been adequately pleaded in the NOCC.

[17] Based on the proposed changes to the pleading, and my earlier Reasons, I am satisfied that the plaintiff is able to plead the necessary elements to establish a cause of action in unjust enrichment.

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

Expanded Class

[19] As of the First Interim Ruling, the proposed class was described at para. 36 as follows:

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");

[20] In the First Interim Ruling, I noted that the proposed class did not include a group of First Nations fishers.

[21] As well, in the First Interim Ruling at para. 40, I noted that the plaintiff in oral submissions submitted that he would narrow 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.

[22] When I allowed the plaintiff the opportunity to seek to amend the pleading, I noted that I expected the proposed amendments to address the changes in the description of the class (First Interim Ruling, at para 126).

[23] In the proposed SFNOCC, the plaintiff has now changed his position. The plaintiff now proposes an expanded class, including First Nations fishers and including the two categories of people that the plaintiff's counsel previously indicated would be excluded.

[24] The plaintiff has provided no explanation in his written submissions for this expansion of the proposed class, and has provided no evidence in support of it.

[25] One purpose of pleadings is to commit a party to their theory of the case, so that the opposite party can know with certainty the case it has to meet. The plaintiff cannot keep equivocating on what the claim is that he is going to advance for the proposed class.

First Nations Commercial Halibut Fishers

[26] Addressing the now proposed inclusion in the class of First Nations commercial halibut fishers, the plaintiff pleads that "it is unknown" whether this group of fishers was affected by the fisheries management scheme at issue (SFNOCC, at para. 33). This is akin to a concession that the plaintiff does not know any facts that

would support such a claim. This means the material facts to support such a claim have not been pleaded.

[27] The plaintiff addresses no evidence or submissions to support the expansion of the claim to include First Nations fishers.

[28] The initial claim was filed in 2007. The plaintiff has had plenty of time to research and make inquiries as to whether a group of First Nations fishers should be included in this proposed class action. For all this Court knows, the plaintiff has not even spoken to any First Nations fishers who might be sought to be included in the expanded class.

[29] I do not know whether the First Nations fishers are in a similar position in terms of rights and remedies as the larger class of commercial fishers and clearly the plaintiff has no idea either at this point, or if he does, he is not willing to share this information.

[30] There may be prejudice to the First Nations fishers to include them in this proposed class action, as the results of the case will bind them. In my view, it would be irresponsible to include them in the proposed class when absolutely no effort has been expended on the part of the plaintiff to figure out how this group might have been affected and whether it makes practical and legal sense to include their claims or not.

[31] The plaintiff's proposed amendments, seeking to include the First Nations fishers as part of the proposed class, are not allowed.

Fishers Who Did Not Purchase 10% of Quota

[32] Dealing with the proposed inclusion in the class of fishers who did not purchase the additional 10% quota and so who did not pay the "Additional Fees", the plaintiff now proposes to plead that:

1. these fishers were deprived of their 10% quota (SFNOCC, at para. 34(b));

[39] The previous position of the plaintiff seemed to agree that it would be appropriate to exclude the directors of PHMA from the class.

[40] The plaintiff's counsel has said nothing about this in his latest submissions and seemingly includes these people in the new proposed class in the proposed SFNOCC.

[41] The defendant is quite correct in pointing out that the plaintiff has not provided submissions as to whether the plaintiff concedes there could be a conflict between other members of PHMA and the directors of PHMA, and if so, how this conflict is proposed to be addressed. The plaintiff has also not addressed this issue in the proposed common issues.

[42] The plaintiff has to make up his mind: is he seeking to have former directors of PHMA form part of the class or not; does the plaintiff argue that directors and members of the PHMA are in equal positions in the litigation, and the issues will be common to all of them?

[43] The plaintiff needs to clarify his position on including the former directors of PHMA in the proposed claim.

Other Pleading Deficiencies

[44] There are other pleading deficiencies in the proposed SFNOCC that need to be cleaned up by the plaintiff in any new proposed amended pleading.

[45] The defendant alleges that the plaintiff made a number of mistakes in the SFNOCC, including listing the address, vessel, and license number of a previous potential representative plaintiff for the proposed class and not the address, vessel, and license number of the current potential representative plaintiff for the proposed class. These errors seem apparent to me when I compare the claim to the earlier version. These errors should be fixed.

[46] Also, the plaintiff continues to list PHMA as a defendant despite discontinuing direct actions against PHMA over two years ago on June 27, 2011. Any application

to file a new pleading should also seek to remove PHMA as a defendant in the style of proceeding. As well, the pleading should not describe PHMA as a defendant, which it does currently.

Certification Application

[47] In his latest written submissions, the plaintiff proposes new common issues as follows:

- (1) When the Minister withheld a portion of the individual vessel quota for halibut ("IVQ") from each class member and assigned that portion of withheld IVQ from each class member to the defendant PACIFIC HALIBUT MANAGEMENT ASSOCIATION OF B.C. (the "PHMA"), and then used the funds generated from the assignment to directly or indirectly fund fisheries management ("the Scheme"), did the Minister:
 - a. Appropriate a public resource that did not belong to him to finance fisheries management activities?
 - b. Violate the provisions of the *Financial Administration Act* R.S.C. 1985, c. F-II, in particular sections 19 and 32?
- (2) If the answer to common issue (1) is yes, then do the additional fees that have been collected under the Scheme (the "Additional Fees") from class members who paid them constitute an unlawful or unconstitutional tax?
- (3) If the answer to common issue (2) is yes, then is Minister liable to account for and repay the "Additional Fees" to the class members who paid them?
- (4) In the alternative, if the answer to common issue (1) is yes, has the Minister been unjustly enriched by the collection [*sic*] the Additional Fees under the Scheme?
- (5) If the answer to common issue (4) is yes, then:
 - a. is the Minister liable to hold the benefit it received as result of this unjust enrichment in trust for those Class members who that [*sic*] benefit to the Minister by paying the Additional Fees under the Scheme?
 - b. Is the Minister liable to account to those Class members for the Additional Fees collected under the Scheme?
- (6) In the further alternative, if the answer to common issue (1) is yes, is the Minister liable in damages to those Class members who suffered loss or damage because they elected not to pay the Additional Fees to access their quota, and as a result, they were deprived of their quota.
- (7) If the answer to common issue (6) is yes, then was [*sic*] is the amount of general or special damages to be awarded?

[48] The plaintiff has not addressed any submissions as to why these proposed common issues are different than those proposed at the last hearing, as outlined in the First Interim Ruling at para. 41 as follows:

- 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,
 - i. restitution of an unconstitutional tax?

[49] The first new proposed issue is problematic as it assumes several facts as its premise: that the Minister did withhold quota; did assign that quota to PHMA; and then did use the funds generated from the assignment to directly or indirectly fund fisheries management schemes. Surely these are separate factual issues.

[50] Furthermore, nowhere has the plaintiff identified as an issue the question of whether or not the class members paid more to "access" quota under the impugned fisheries management scheme, than they otherwise would have paid. The newly pleaded allegations to support the claim that the class members were "deprived" by being charged "Additional Fees" is not identified as a common issue. Rather, the issues as stated seem to assume that "Additional Fees" were charged to fishers under the scheme.

[51] As well, the plaintiff has not thought to identify any common issues as to PHMA's role in the fisheries management scheme factually, and the legal implications of its role, which surely must be addressed (as it was in the previous version of common issues).

[52] It seems to me that the plaintiff has to devote more consideration to the proposed common issues.

Conclusion

[53] The plaintiff's application to amend his claim is not granted.

[54] It is well established that latitude will be shown to a plaintiff to allow for amendments to a claim where the defendant is not prejudiced. Here, the defendant has not argued there is any prejudice it will suffer as a result of the proposed amendments.

[55] While I do not grant the plaintiff leave to file the proposed SFNOCC, I will allow the plaintiff to make a new application to amend the claim addressing the matters that need to be addressed as highlighted in this ruling.

[56] As well, the plaintiff is given leave to file written submissions in support of a further application to amend. I will expect those submissions to address any issues that need to be addressed in relation to these amendments and the plaintiff's application for certification as a class action. At a minimum, it would be helpful if the plaintiff addressed submissions to the common issues and the class description.

[57] The defendant will have the opportunity to provide written submissions in response; and the plaintiff to file written reply submissions.

[58] I leave it to the parties to sort out between them a convenient and timely schedule for filing and exchanging the written submissions. If they cannot do so, they have liberty to apply in writing for directions.

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