

Third Further Amended Notice of Civil Claim Pursuant to the Order of Madam Justice Griffin
pronounced on September 11, 2014
Second Further Amended Notice of Civil Claim Pursuant to the Order of Madam Justice Griffin
pronounced on February 18, 2014
Further Amended Notice of Civil Claim filed February 22, 2012
Amended Notice of Civil Claim filed April 5, 2011
Original Writ of Summons and Statement of Claim Filed November 20, 2007.

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
SEP 12 2014

No. S077807
Vancouver Registry

In the Supreme Court of British Columbia

Between: 

BARRY JIM BURNELL and LORNE NELS DAVID IVERSON

Plaintiffs

and:

ATTORNEY GENERAL OF CANADA

Defendants

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

THIRD FURTHER AMENDED NOTICE OF CIVIL CLAIM

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

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

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

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

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

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

Time for response to civil claim

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

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

PART 1: STATEMENT OF FACTS

1. The plaintiff Barry Jim Burnell is a fisherman and resides at 21976, 86A Avenue, Langley, British Columbia, V1M 3S7.
2. The plaintiff Lorne Nels David Iverson is a fisherman and resides at 7950 Hunter Street, Burnaby, British Columbia V5A 2B9.
2. 3. The defendant, the Attorney General of Canada, as represented by the Minister of Fisheries and Oceans ("Minister"), is the government of Canada.
3. 4. The Pacific Halibut Management Association of B.C. ("PHMA") is a society incorporated pursuant to the **Society Act** of British Columbia and has an office and place of business at Suite 118, 1-5765 Turner Road Nanaimo BC V9T 6M4.
4. 5. PHMA was incorporated on October 29, 1997 by representatives of BC coastal halibut fishers at the instigation of the Minister.
5. 6. The plaintiffs says that at all material times PHMA acted as agent for the Minister.

6. 7. In the alternative, the plaintiffs says at all material times PHMA acted as the partner of the Minister.
7. 8. In bringing this action on behalf of a class of halibut fisherman in British Columbia who held halibut fishing licenses in the years between 2001 and 2006 inclusive, and a subclass of halibut fisherman as defined below, such class and subclass to be further defined in the motion for certification the plaintiffs pleads and relies upon the provisions of the *Class Proceedings Act*, R.S.B.C. 1996. c.50 and amendments thereto.
8. 9. At all material times the plaintiff Barry Jim Burnell was the joint owner (with his spouse) of Motor Vessel (M/V) "Island Gale" VRN 24753 and joint holder (with his spouse) of licence #L0057 issued to him by the Minister ("Licence") permitting him to fish for halibut in the waters of British Columbia. The licence was issued to him under the *Fisheries Act* R.S.C. 1985, c. F-14 and associated regulations.
10. At all material times the plaintiff Lorne Nels David Iverson was the owner of Motor Vessel "Autumn Venture" VRN 26859 and holder of license #L0087 issued to him by the Minister permitting him to fish for halibut in the waters of British Columbia. The license was issued to him under the Fisheries Act, R.S.C. 1985, c. F-14 and associated regulations.
9. 11. The Licence entitled each of the plaintiffs to receive each year from the Minister an individual vessel quota (hereinafter the "quota") that was assigned to him from the Total Allowable Catch for halibut for Canada, as determined by the Minister ("TAC"). The quota represented the amount of halibut that each of the plaintiffs could catch and sell in that year. The Each of the plaintiffs had to pay a fee to the Minister for the quota.
10. 12. The proportion of the TAC allocated to each licence by way of quota holding associated with that licence was set by the Minister in the early 1990's. It has remained unchanged until today. When setting up the halibut fisheries

management scheme under review below, the Minister still respected those allocations.

The Fisheries Management Scheme:

- ~~41.~~13. The Minister, by agreement with PHMA, established a scheme whereby 10% of the allocation for each licence was diverted through PHMA and was offered for reallocation only to the licensee from whom it had been diverted upon payment of the Additional Fees as defined below at paragraph ~~23~~ 25 ("Scheme").
- ~~42.~~14. During the year 2001 the Minister instituted the practice of withholding 10% of the entire quota to be granted to the holders of halibut licences in British Columbia and assigning it to the PHMA.
- ~~43.~~15. During the year 2001, the Minister issued a halibut licence, No. 437, the name of PHMA representing the 10% of the entire withheld halibut quota.
- ~~44.~~16. Each of ~~the~~ plaintiffs, if he wished to avail himself of his portion of the 10% of his quota, was required to purchase it from the PHMA by paying an additional levy.
- ~~45.~~17. This practice continued in each year from 2001 through to 2006. In each year each of the plaintiffs paid the Minister for his quota and then paid the PHMA an additional levy to access the 10% of his quota assigned to the PHMA.
- ~~46.~~18. On February 6, 2001 the Minister and the PHMA entered into a "Joint Project Agreement" the purposes of which were expressed to be (*inter alia*):
- (a) Ensure the proper management of the commercial halibut fishery;
 - (b) Provide adequate funding and resources; and,
 - (c) Carry out all other activities necessary in support of the fishery ...
- ~~47.~~19. Under the agreement the obligations of the PHMA included both paying funds to the Minister and performing various activities ("representing payments in kind") under the heading "FISHERIES MANAGEMENT" including (*inter alia*):

- (a) Fund Fisheries and Oceans Canada activities as identified in the agreement;
- (b) Fund and ensure the operation of an independent dockside monitoring program; and,
- (c) Fund and ensure independent data entry ... of validated landings and other data as requested by DFO.

48. 20. During the period March 31, 2001 to March 31, 2002, the PHMA agreed to pay the sum of \$836,635 directly to the Minister and to expend \$400,000 to third parties on the independent dockside monitoring program.

49. 21. In each year between 2002 and 2006 the PHMA agreed to pay further sums directly to the Minister and it agreed to expend funds to third parties for programs directed and requested by the Minister.

20. 22. In other words, part of the funds paid to the PHMA by halibut licence holders was remitted by PHMA directly to the Minister and used to fund government fisheries management activities.

24. 23. A further part of the funds paid by each of the plaintiffs was used by the PHMA to pay for fisheries management activities that it conducted as agent for (or partner of) the Minister.

22. 24. The plaintiffs says that the Minister was unjustly enriched at the expense of the plaintiffs as follows.

Deprivation to the Plaintiffs:

23. 25. Those licensees who accepted the offer to access their 10% through PHMA had to pay more to obtain it than they had when it came directly from the Minister. In particular they had to pay, in addition to that they would have had to pay to the Minister, additional fees, including:

- (a) Cost Recovery Fees; and,

(b) Rockfish Research Fund Fees. (collectively, "Additional Fees").

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

Enrichment to Minister:

25.27. The extra funds generated by the Additional Fees under the Scheme were disbursed by PHMA in accordance with its agreement with the Minister. Some of the extra funds went to fund fisheries management activities which are the legal responsibility of the Minister, while some of the funds went to the Minister in cash.

26.28. Since the fisheries management activities would have had to be carried out by the Minister in any event, the Minister benefitted both from the funding of those activities and from the direct cash payments. Hence the Minister was enriched by the Scheme to the full extent of the Additional Fees referred to above.

Lack of Juristic Reason:

27.29. The Minister used the sale of the fisheries resource to fund its management activities, contrary to the legal principle that Canada's fisheries are a common property resource belonging to all the people of Canada, as established by the Federal Court of Appeal in ***Larocque v. Canada (Minister of Fisheries and Oceans)*** 2006 FCA 237. That "use" by the Minister was not authorized by statute nor approved by parliament, and was in contravention of the *Financial Administration Act*, R.S.C., 1985, c.F-11.

28.30. In short, the Minister has been enriched by the receipt of extra funds or benefits generated by the Additional Fees, either by receiving cash payments from PHMA under the Scheme, or by saving inevitable fisheries management expenses that would have incurred but for the Scheme; the plaintiffs and other class and sub-class members have suffered a corresponding deprivation. There was no juristic

reason for the enrichment, as the Minister's receipt of the benefits of Additional Fees under the Scheme is unlawful.

29.31. The plaintiffs say that in assigning 10% of the quota to the PHMA for resale to the plaintiffs, and contracting with PHMA to either remit the funds or use them for fisheries management, the Minister:

- (a) Appropriated a public resource that did not belong to him to finance fisheries management activities;
- (b) Violated the provisions of the *Financial Administration Act* R.S.C. 1985, c.F-11, in particular sections 19 and 32;
- (c) Levied a tax unauthorized by parliament;
- (d) Collected monies from each of the plaintiffs without legislative or constitutional authority; and,
- (e) The Minister was unjustly enriched at the expense of the plaintiffs.

30.32. The plaintiffs say that the PHMA was the agent or partner of, or joint venturer with, the Minister and is therefore jointly liable for those activities.

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

The Class

32.34. It is known by the plaintiffs that there are 435 holders of commercial halibut licences in British Columbia.

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

34. 36. This action is brought as a proposed class action by the ~~named~~ plaintiff Barry Jim Burnell pursuant to the *Class Proceedings Act*, 1996, c. 50, as amended, S.B.C. 1998, s.96, on behalf of all holders of owners of fishing vessels with a Category L

Commercial Halibut ~~License~~ to fish for halibut issued by the ~~MINISTER OF FISHERIES AND OCEANS~~ (the "Minister") 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. ~~license holders who acted as directors of PHMA.~~

(the "class")

~~35.~~37. There are questions of law and fact common to the class. The claims of the plaintiff Barry Jim Burnell are typical of the claims of the class and the plaintiff Barry Jim Burnell will adequately represent and protect the interests of the class.

~~36.~~38. Separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to individual members of the class which would establish incomplete standards of conduct for the defendants.

~~37.~~39. Questions of law and fact common to the members of the class with respect to the relief claimed predominate over questions affecting individual members. A class action is superior to other available methods for a fair and efficient adjudication of this controversy.

~~38.~~40. The plaintiff Barry Jim Burnell, who is a member of the proposed class, has sustained financial loss as a result of the unlawful conduct of the defendants as alleged in this Notice of Civil Claim and has no conflict with other members of the proposed class.

~~39.~~41. In the absence of a Class Proceeding, the defendant will retain the benefits of its wrongful conduct because class members are likely to bring, and have not

brought, separate individual lawsuits due to the size of individual class members' claims and their limited resources as compared with the cost of litigation and the resources of the defendants.

THE SUBCLASS

42. This action is brought as a proposed class action by the plaintiff Lorne Nels David Iverson pursuant to the *Class Proceedings Act*, 1996, c. 50, as amended, S.B.C. 1998, s. 96, on behalf of:

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") 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.

(the "subclass")

43. There are questions of law and fact common to the subclass. The claims of the plaintiff Lorne Nels David Iverson are typical of the claims of the subclass and the plaintiff Lorne Nels David Iverson will adequately represent and protect the interests of the subclass.

44. Separate actions by individual members of the subclass would create a risk of inconsistent adjudications with respect to individual members of the subclass which could establish incomplete standards of conduct for the defendant.

45. Questions of law and fact common to the members of the subclass with respect to the relief claimed predominate over questions affecting individual members. A class action is superior to other available methods for a fair and efficient adjudication of this controversy.
46. The plaintiff Lorne Nels David Iverson, who is a member of the proposed subclass, has sustained financial loss as a result of the unlawful conduct of the defendant as alleged in this Notice of Civil Claim and has no conflict with other members of the proposed subclass.

PART 2: RELIEF SOUGHT

The plaintiffs seeks and claims on his their own behalf and on behalf of all class and subclass members:

- (a) A declaration that the Minister's practice of withholding 10% of the entire quota to be granted to the holders of halibut licences in British Columbia and assigning it to the PHMA and in turn receiving funds or payments in kind from PHMA's sale of that quota is unlawful;
- (b) A declaration that all funds and payments-in-kind received by the Minister from the PHMA from sale of quota constitute either: (i) unjust enrichment by the Minister; or ~~(iii)~~ (ii) an unlawful tax collected and used without legislative or constitutional authority by the Minister.
- (c) An accounting and an order of restitution to the plaintiffs and each class member on account of the Additional Fees collected by the Minister and the PHMA on behalf of the Minister from each of the plaintiffs and the class and subclass members for the period January 1, 2001 to December 31, 2006;
- (d) Restitution monies collected from each of the plaintiffs by the Minister without legislative or constitutional authority; and/or restitution for unjust

enrichment of the amounts by which the Minister was unjustly enriched at the expense of the class and subclass;

- (e) An order certifying this action as a class action and appointing the plaintiffs as class and subclass representatives and other appropriate orders under the provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 as amended;
- (f) An order that monetary relief be an aggregate award on behalf of all members of the class and subclass under Part 4, Division 2 of the *Class Proceedings Act*, R.S.B.C. 1996, c 50;
- (g) Interest pursuant to the *Court Order Interest Act*;
- (h) Costs of this action on a solicitor and client basis; and
- (i) Such further and other relief that this court deems appropriate.

PART 3: LEGAL BASIS

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

Plaintiff's~~ss'~~ Address for service for the plaintiff, Barry Jim Burnell:

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Tel: (604) 696-9828

Fax: (888) 575-3281

Place of trial: Vancouver Law Courts

Address of the registry: 800 Smithe Street, Vancouver, BC V6Z 2E1

Date: 11/September/2014



Signature of lawyer
for the plaintiff Barry Jim Burnell

David G.A. Jones

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

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

APPENDIX

CONCISE SUMMARY OF NATURE OF CLAIM:

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

THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

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

A dispute concerning:

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

THIS CLAIM INVOLVES:

- ☒ a class action
- ☐ maritime law

- ☐ aboriginal law
- ☒ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

1. *Fisheries Act* R.S.C. 1985, c.F-14
2. *Financial Administration Act* R.S.C. 1985, c.F-11