Editor's Note: Corrigendum released on December 20, 2010. Original judgment has been corrected with text of corrigendum appended.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands),* 2010 BCSC 1699

Date: 20101201
Docket: S090848
Registry: Vancouver

Between:

Chief Robert Chamberlin, Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation, on his own behalf and on behalf of all members of the Kwicksutaineuk/Ah-Kwa-Mish First Nation

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Agriculture and Lands and Attorney General of Canada

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page and at paragraphs 19, 22, 23, 27, and 94 on December 20, 2010.

Before: The Honourable Mr. Justice Slade

Reasons for Judgment

In Chambers

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Place and Date of Hearing:	Vancouver, B.C. April 13-16 & 19-21, 2010

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I. INTRODUCTION

[1] This is an application for certification of this proceeding as a class action. The proposed representative plaintiff, Chief Robert Chamberlin, is the elected chief of an aboriginal collective known as the Kwicksutaineuk/Ah-Kwa-Mish First Nation ("KAFN"). Members of this community, like their ancestors, are said to be sustained by their access to the fishery in an area known as the Broughton Archipelago.

[2] Numerous other aboriginal collectives, constituted as Bands under the *Indian Act*, and generally known as "First Nations" are sustained by the marine resources of the Broughton Archipelago.

[3] The KAFN and the other First Nations which assert aboriginal fishing rights in the Broughton Archipelago and rivers that drain into the Archipelago, constitute the proposed class.

[4] The plaintiff alleges that the Province's licensing of fish farms and exercise of regulatory authority over their operation has resulted in sea lice infestations in wild salmon stocks, and that this constitutes an infringement of the fishing rights of proposed members of the class.

[5] The threshold issue sought to be determined, as one of the common issues, is whether wild salmon stocks returning to the Broughton Archipelago are adversely affected by sea lice infestation attributable to the many open pen fish farms operating there.

[6] The defendants raise many arguments in opposition to certification.

[7] The Province challenges Chief Chamberlain's standing to serve as a representative plaintiff. It contends that First Nations are generally barred by s. 41 of the *Class Proceedings Act* from class action proceedings. It contends that a class action is not the preferable procedure, and that the challenges the First Nations would face in establishing the fishing rights said to have been infringed would

overwhelm the litigation. The challenges include the existence of territorial overlaps among the proposed members of the class.

[8] Canada raises similar objections to those raised by the Province. It also contends that the evidence on this application fails to establish a colourable claim to adverse impacts on wild salmon stocks attributable to sea lice contamination from fish farms.

[9] The defendants say, in addition, that a finding on the common issues in favour of the plaintiff would not materially advance the litigation, as every member of the class would then be required to prove the existence of an aboriginal fishing right. This, they say, would involve independent determinations of the fishing rights, if any, of each member of the class. As the process for determination of aboriginal rights involves findings on issues of infringement and justification, and in the present matter, overlapping claims of territory, the damages phase would be almost endless.

II. COMMON ISSUES

[10] These are the common issues proposed by the plaintiff:

(a) To what extent are the Wild Salmon populations in the Broughton Archipelago in decline?

(b) To what extent has the Province of British Columbia (the "Province") purported to authorize and regulate the Salmon Farms under the *Land Act*, R.S.B.C. 1996, c. 245 and the Fisheries Act, R.S.B.C. 1996, c. 149?

(c) To what extent, if at all, did the Province have the constitutional authority to authorize and/or regulate the Salmon Farms in the manner that it did?

(d) Has the manner in which the Province purported to authorize and regulate the Salmon Farms:

(i) failed to prevent or adequately manage the concentration of parasites, including sea lice, at the Salmon Farms and the transmission of these parasites from the Salmon Farms to the Wild Salmon;

(ii) failed to prevent or adequately manage the concentration of infectious diseases at the Salmon Farms and the transmission of these infectious diseases from the Salmon Farms to the Wild Salmon;

(iii) allowed the farming of non-indigenous Atlantic salmon species at the Salmon Farms and failed to prevent or adequately manage escapes of Atlantic salmon from the Salmon Farms that compete with the Wild Salmon for habitat and food;

(iv) permitted the Salmon Farms to be located in areas that encounter significant runs of Wild Salmon, particularly as vulnerable juvenile Wild Salmon;

(v) permitted Salmon Farms to operate without requiring fallowing in a manner that effectively protects Wild Salmon during critical periods when Wild Salmon stocks, particularly juvenile Wild Salmon, are known to be passing in close proximity to Salmon Farms;

(vi) permitted Salmon Farms that allow the transmission of parasites and disease to Wild Salmon by the use of permeable cages causing free flow of contaminated water and waste between the Salmon Farms and the marine environment; and

(vii) made other decisions about, among other things, the location of the farms, size of the farms, concentration of the non-indigenous salmon permitted in the farms, the application of pest and disease treatments and the timing of harvesting

operations, which have significant negative impacts on the populations of Wild Salmon?

(e) To what extent have the actions or omissions of the Province caused or materially contributed to the decline of the Wild Salmon populations in the Broughton Archipelago?

(f) Did the Province have knowledge, real or constructive, of the existence or potential existence of any Fishing Rights within the Broughton Archipelago?

(g) Did the Province contemplate, or ought the Province have contemplated, that any Fishing Rights within the Broughton Archipelago could be affected by the manner in which the Province authorized and regulated the Salmon Farms?

(h) Are Section 11(2) of the Land Act and Sections 13(5) and 14(2) of the Fisheries Act of no force and effect because they purport to confer on the Minister of Land and Agriculture the discretion to authorize salmon aquaculture and this discretion is not structured to accommodate any Fishing Rights?

(i) Are the Class Members entitled to an award of aggregate damages and, if so, in what amount?

[11] Certain of the common issues are sub-sets of the following questions:

1. to what extent, if at all, has salmon aquaculture impacted on Wild Salmon stocks in the Broughton Archipelago; and

2. whether the Province's authorization and regulation of salmon aquaculture has caused or materially contributed to the impact.

III. THE PROPOSED CLASS: SECTION 4(1)(b) - IS THERE AN IDENTIFIABLE CLASS OF TWO OR MORE PERSONS?

Objections

[12] According to Canada and the Province, there is no workable class which can be ascertained in this case, because:

1. The term “First Nations” has no legal meaning;

2. It is not clear whether the proposed class comprises aboriginal collectives or members of these collectives;

3. There can be no species specific fishing rights; aboriginal rights are defined by reference to an activity, not a particular species of fish such as wild salmon;

4. There is no identifiable class because to have a class, the persons forming that class need to be ad idem in desiring to prosecute their respective claims.

Law

[13] On this issue, the inquiry is directed to two questions:

a) Can two or more persons be identified?

b) Can the class be defined by reference to objective criteria?

[14] A leading statement on the law pertaining to the identifiable class requirement is found in *Western Canadian Shopping Centers v. Dutton*, [2001] 2 S.C.R. 534, where McLachlin C.J.C. stated:

> 38 … the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class

> member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria…
>
> [Citations omitted.]

[15] On the requirement of objective criteria to determine whether a person is "in or out" of the class, in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, McLachlin C.J.C. stated:

> 17 … The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b)…
>
> [Citations omitted.]

[16] More recently, in *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.), leave to appeal ref'd [2009] O.J. No. 402 (Div. Ct.), the proposed class consisted of all persons who had farmed cattle as of May 20, 2003. The defendant argued that this definition failed to state any objective criteria for class membership. Lax J. disagreed, finding that cattle farmers know who they are. So too did the defendant; even though the industry was not homogeneous, all members of the intended class had "a relationship to the farming of cattle from which they earn their livelihood in whole or in part". In finding there was an identifiable class, Lax J. stated the following general principles regarding the identifiable class requirement:

> 19 In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.) at para. 10, the three purposes of a class definition were described as: (a) to identify the persons who have a potential claim for relief against the defendants; (b) to define the parameters of the lawsuit so as to identify those persons who are bound by its result; and (c) to describe who is entitled to notice pursuant to the *Act*. It is well-established that a claimant's probability of success cannot be a factor in determining whether a class has been adequately defined. This would offend the rule against merit-based criteria and require the court to determine the outcome of the litigation on the merits prior to class membership being ascertained. *Hollick* requires only that class members have a common interest in the resolution of the common issues.

> 20 In determining whether a putative class action meets the statutory definition of an identifiable class consisting of two or more persons who would be represented by the representative plaintiff in the action, Ontario courts have been guided by two principles: (1) the need to identify the class by objective criteria, and (2) a rational connection between the class definition and the common issues to be decided in the action.
>
> …
>
> 28 At the margins, there may be some questions about class membership, but the CPA permits the Court to enter upon a "relatively elaborate factual investigation in order to determine class membership": *Serhan v. Johnson and Johnson*, [2004] O.J. No. 2904 (S.C.J.) at para. 52. As Cullity J. said, "The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable": *Risorto v. Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 (S.C.J.) at para. 31. I think it very unlikely that a process to determine class membership will be required for the overwhelming majority of class members as most, if not all, will know whether they farmed cattle as at May 20, 2003. The definition of "person" will assist those in doubt. It clarifies that employees and family members of cattle members and cattle agents, brokers or shippers are not included as they do not farm cattle within the meaning of the *Income Tax Act*. The "host of unanswered questions" is addressed by the amendment.
>
> …
>
> 30 The CPA is a procedural statute and a rigid approach would defeat its purpose: *Hollick* at para. 21. The class here is defined with reference to a particular activity (cattle farming) at a particular place (Canada, but not Quebec) at a particular time (May 20, 2003). I have explained that cattle farming may have diverse characteristics, but the diversity of cattle farming operations does not negate the commonality shared by proposed class members as they are all cattle farmers. I am satisfied that the class cannot be defined more narrowly without arbitrarily excluding some members. In *Hollick*, the court accepted a class definition of 'persons who owned or occupied property,' although occupation can be a difficult concept legally and factually. In *Bywater*, the court accepted a class definition of 'persons exposed to smoke.' The proposed class definition here is at least as objective, and arguably more so, than in those cases.

[17] Wilson J. denied leave to appeal from this decision, explicitly endorsing Lax J.'s analysis:

> 30 Lax J. confirms that "Class membership identification is not commensurate with the elements of the cause of action. There simply must be a rational connection between the class member and the common issue".
>
> …
>
> 33 I agree with Lax, J's common sense analysis of this criterion. It must not be forgotten, as confirmed by McLachlin J. in *Hollick*, *supra* at paras. 14-

> 15, that the CPA is a procedural statute designed to promote access to justice and should be interpreted with practicality and generosity, as opposed to technical rigidity…

[18] To fall within the class definition in the present matter, a "person" must have or assert s. 35 salmon fishing rights in the Broughton Archipelago. Whether or not a person falls within this class is something is to be determined without reference to the merits of the action.

[19] Here, the entities are variously described in the pleadings and evidence as "Nations", "First Nations", "Tribes", and "Bands". The element that would establish each as a potential member of the class is the ability to claim an aboriginal right to harvest wild salmon in the environs of the Broughton Archipelago. This calls, at this stage, for a preliminary determination of the factors that would bear on the identification of holders of fishing rights in the Broughton Archipelago. Are the "persons" for the purposes of s. 4(1)(b) the nation, the tribes, or the bands? If the commonly used descriptor "First Nations" is to have any meaning in the context of a discussion of aboriginal rights, it must, in my opinion, refer to an aboriginal collective that can fairly assert itself as having an ancestral connection to an identifiable collective which, historically, engaged in practices that found the basis for the asserted right.

[20] It does not assist this determination that the proposed class is comprised of Bands. The *Indian Act* was not on the radar before contact, and band membership may not necessarily establish an ancestral connection with the members of the same indigenous aboriginal collective for which fishing was an integral aspect of a distinctive culture at contact.

[21] A discussion of the evidence and the resulting factors that go to establish the proper identity of the potential members of the class follows.

Aboriginal Peoples

[22] Paragraph 1 of the Further Amended Statement of Claim, as amended in the course of the certification hearing, says:

> This is a proposed class action on behalf of all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social, and ceremonial purposes within the Broughton Archipelago (the "Class Members"). …

[23] The Notice of Motion, brought under the *Class Proceeding Act*, as amended, describes the proposed class as:

> … all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social, and ceremonial purposes within the Broughton Archipelago (the "Class Members") or such other class definition as the court may ultimately decide on the motion for certification. …

[24] Chief Chamberlin describes the process by which the plaintiff, KAFN, came to be known as a single collective. In his affidavit #1, sworn April 30, 2009, Chief Chamberlin deposes:

> 2. I am the elected Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation ("KAFN") and bring this claim on my own behalf and on behalf of all members of the KAFN. I am a registered Indian and a registered member of the Kwicksutaineuk Ah-Kwa-Mish Indian Band under sections 6 and 11 of the I*ndian Act*, .R.S., 1985, c. 1-5 (the "*Indian Act*"). My lineage in the KAFN is through my mother, Stella Chamberlin, whose name in our language was Hayli-thlu-wayga. My mother's mother was Pearlie Smith, whose name in our language was Gu-gwa-yay. Gu-gwa-yay's father was a hereditary Chief of the Kwicksutaineuk. My mother's father was Charles Smith, whose name in our language was Kli-kla-mo-gilowx, who was a hereditary Chief of the Ah-Kwa-Mish and the Tsawataineuk.
>
> 3. The members of the KAFN are part of the traditional tribal grouping of the Musgamagw Tsawataineuk and the Kwakwaka'wakw people who, at the time of European contact, were organized as two tribes known as the Kwicksutaineuk and the Ah-Kwa-Mish. These two tribes shared a common language, culture arid historical experience. The two tribes were amalgamated for the purposes of the Indian Act in 1947 and are now collectively referred to as the KAFN.
>
> [Emphasis added]

[25] It can be gleaned from the affidavit material that the two collectives described in the pleadings as the Kwicksutaineuk/Ah-Kwa-Mish First Nation (KAFN) were, prior to amalgamation, constituted as “bands” as that term has been defined in numerous iterations of the *Indian Act* between 1876 and the present.

[26] In paragraph 12 of Chief Chamberlin's affidavit, he deposes that he is aware of "at least eight other Nations who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social and ceremonial purposes within the Broughton Archipelago". Reference is made to the following "First Nations":

First Nations Name	Registered Population
Kwicksutaineuk/Ah-Kwa-Mish	269
Tsawataineuk	509
Namgis	1,594
Gwawaenuk	40
Da'naxda"xw	160
Kwakiutl	671
Mamalilikulla	384
Tlowistsis	376
TOTAL	4,003

[27] It is deposed in affidavit #1 of Lori Walker, sworn January 28, 2010 and filed by Canada, that the "First Nations" listed in paragraph 12 of Chief Chamberlin's affidavit appear in the records of the Department of Indian Affairs and Northern Development (DIAND) as "bands" under the *Indian Act*, R.S.C. 1985, c. I-5.

[28] Several aboriginal collectives not mentioned in Chief Chamberlin's affidavit, but which may assert territorial and fishing rights within the Broughton Archipelago and rivers and streams that drain into the Broughton Archipelago, are identified in the above-mentioned affidavit of Lori Walker, and her affidavit #2, sworn March 29, 2010. All but one, namely the Tsilhqot'in, appear in the DIAND records as Bands. The collectives identified in the Walker affidavits are:

First Nations Name	Registered Population
Gwa'Sala-Nakwaxda'xw	851
We Wai Kai Nation	932
Wei Wai Kum Nation	678
Kwiakah Nation	19
Homalco	458
K'omoks	276

Tsilhqot'in	
Ulkatcho	969

[29] It is evident that the term "First Nation" as used by Chief Chamberlin in his affidavit and as reflected in the Statement of Claim is used as a descriptor for "bands" that appear in the registry of DIAND. This is consistent with the general usage of the term "First Nation", of which I take judicial notice. I am informed, in part, by a review of the foundation documents for three prominent aboriginal political organizations: the entity known as the Assembly of First Nations (AFN), the British Columbia-based First Nations Summit (FNS) and the Union of B.C. Indian Chiefs (UBCIC). The constitution of UBCIC establishes *Indian Act* bands as entities that qualify for membership. Foundation documents for the AFN and the FNS use the term "First Nations" to describe their members, and are organized to take direction from the chiefs of bands, in assembly.

Infringement of Aboriginal Rights

[30] The Statement of Claim asserts, in paragraph 3, that: "[t]he conduct of the Minister and Province has infringed and continues to infringe the Fishing Rights in violation of s. 35 of the *Constitution Act*, 1982". Remedies are claimed, in paragraph 19: "[a]s a direct result of the unconstitutional infringement of the Fishing Rights".

Aboriginal Rights and Aboriginal Peoples

[31] The *Constitution Act*, *1982*, s. 35 provides as follows:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[32] The New Oxford Dictionary of English defines "peoples" as follows:

> "peoples" [treated as sing. or pl.] the men, women and children of a particular nation, community or ethnic group: *the native peoples of Canada.*
>
> [italics in original]

[33] While the term "peoples" in s. 35 speaks of aboriginal peoples in the broadest sense, the jurisprudence defines the holders of aboriginal rights as collectives of peoples with distinctive attributes, which may include a common language, culture, and social organization. The asserted right must be based on a pre-contact practice. When the asserted right is title, the relevant date is that of the assertion of British sovereignty.

[34] In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, Lamer C.J., for the majority, cited, with approval, the statement of general principles in the decisions of Marshall C.J., of the U.S. Supreme Court (at paras. 35-37).

[35] In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), Marshall C.J. discussed the relations existing between the European "discoverer and the natives". He said, in part:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as <u>independent nations</u>, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> [Emphasis added]

[36] In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Marshall C.J. repeated his earlier characterization of indigenous peoples, collectively within their discrete societies, as "nations":

> The <u>Indian nations</u> had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.
>
> [Emphasis added]

[37] In *Van der Peet*, the Court wove the concept of distinct aboriginal groups into its test for identifying aboriginal rights protected by of s. 35:

> In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[38] In this test the aboriginal group is relevant as both the modern claimant of the right, and as the vessel of distinctive culture in which a qualifying historical activity must be located. The Court did not discuss how aboriginal societies are delineated, and adjudicated the claim on the basis that the Sto:lo were a qualifying aboriginal group.

[39] In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 the Court referred to an "aboriginal nation" as the holder of the collective right of Aboriginal title (at para. 115):

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests.

[40] In addition to the identification of the indigenous aboriginal collective whose pre-contact practices are said to found the right, a claimant must establish a current connection with the pre-sovereignty group. McLachlin C.J.C. stated the following in *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, at para. 67:

> The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this

> establishes the required "central significance": *Delgamuukw*, per Lamer C.J.C., at paras. 150-51.

[41] It was held in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 that the proper claimant is the "First Nation" that existed at the time of the assertion of British sovereignty (para. 445). The creation of bands (*Indian Act*) did not alter the true identity of the people. Their true identity lies in the Tsilhqot'in lineage, shared language, customs, traditions, and historical experiences (para. 469). Vickers J. thus used the term "First Nation" to refer to the "aboriginal nation" as discussed in *Delgamuukw*.

[42] A pan-Tsilhqot'in decision making body did not historically control the rights of the Tsilhqot'in community. Vickers J. compared "the search for a pan-Tsilhqot'in decision-making institution" to the *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518, test for an "organized society". The need for finding a historic "organized society" was rejected (at para. 453):

> Such an approach is weighed down with superficial value judgments about Aboriginal ways of life. The need to measure traditional Aboriginal societies against the legal ideals and institutions of a "civilized society" has passed.

[43] Vickers J. concluded that the determination of the rights holder should focus on "the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person", rather than shifting political structures (at para. 457):

> The political structures may change from time to time. Self identification may shift from band identification to cultural identification depending on the circumstances. What remains constant are the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person. The Tsilhqot'in Nation is the community with whom Tsilhqot'in people are connected by those four threads.

The British Columbia Treaty Commission Process

[44] The defendants say that the participation of several members of the proposed class in the B.C. Treaty Process illustrates the difficulty inherent in identifying the aboriginal collective that is capable of asserting aboriginal rights.

[45] The We Wai Kai, Wei Wai Kum and Kwiakah nations above are currently engaged in negotiations with Canada and British Columbia under the British Columbia Treaty Commission process. They are affiliated for treaty negotiation purposes in an organization known as the Laich-Kwil-Tach Council of Chiefs.

[46] Several of the other First Nations named by Chief Chamberlin, and named in the Walker affidavits, are engaged in the British Columbia treaty process. The British Columbia Treaty Commission Act defines “first nation” as follows:

> "first nation" means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, that has been mandated by its constituents to enter into treaty negotiations on their behalf with Her Majesty in right of Canada and Her Majesty in right of British Columbia;

[47] The B.C. Treaty Commission follows a six-stage treaty process. The treaty process is based on negotiations between the federal and provincial governments and First Nations governing bodies. The definition of First Nation is set out in s. 1.1 of the B.C. Treaty Commission Agreement. A First Nation is:

> an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia

[48] Stage 1 of the treaty process requires a First Nation’s governing body to submit a Statement of Intent to Negotiate a Treaty that meets the Commission’s criteria. The Commission’s criteria include identifying (1) the name of the First Nation and (2) how the governing body of that First Nation is organized and established for the purposes of treaty negotiations by the aboriginal people it represents.

[49] In regard to meeting the second criteria above, the Commission explains:

> The organization and establishment of a governing body for treaty negotiations is a decision to be made by the aboriginal people it represents, namely the constituents of the First Nation. "Constituents" are all the members of the First Nation, on and off reserve or wherever they reside. The governing body must describe its organizational structure and how it was established.

[50] To help First Nations' formulate descriptions of their governance structures, the Commission has set out four types of governance structures, one of which is a "band":

> B. band
>
> A band is established under the *Indian Act*. Its authority is limited to the powers granted by that legislation. In order for a band to meet the definition of First Nation, it must, among other things, be a governing body "organized and established by aboriginal people." In order to meet this criterion, the constituents must specifically approve the band as the appropriate governing body to conduct treaty negotiations. (Further explanation is provided under criterion 3 below.)

[51] Bands that pursue negotiations in the B.C. treaty process are not required to establish the legal validity of their claims to aboriginal rights, including title. Nor are they required to establish the legal ground on which they assert that they descend from the collectives present before and at contact, or at the date of assertion of British Sovereignty.

[52] The claims presented for negotiation in the treaty process identify many of the collectives named in the Chamberlin and Walker affidavits as claimants of fishing rights in the Broughton Archipelago.

[53] Materials filed with the British Columbia Treaty Commission in relation to territorial claims asserted by various of the above-named collectives reveal overlapping claims, as follows:

1. between Da'naxda'xw and Tsilhqot'in;
2. between Da'naxda'xw and Ulkatcho;
3. between Tlowistsis and Laich-Kwil-Tach;
4. between Tlowistsis and K'omoks;
5. between Laich-Kwil-Tach and Ulkatcho;
6. between Laich-Kwil-Tach and K'omoks; and
7. between K'omoks and Homalco.

[54] For the purposes of acceptance into the British Columbia Treaty Commission negotiation process, maps appended to the First Nations' Statement of Intent are meant to describe the general area over which the First Nations claim aboriginal rights and title.

Fishing Rights in the Broughton Archipelago: Disputed Existence of the Kwicksutaineuk/Ah-Kwa-Mish First Nation as a Holder of Aboriginal Fishing Rights

[55] Canada argues that the evidence on this application further illustrates the complexity of determinations of the claims of the numerous aboriginal collectives of the Broughton Archipelago.

[56] Affidavits sworn by Daisy May Sewid-Smith, filed by Canada, challenge Chief Chamberlin's assertion that the Kwicksutaineuk/Ah-Kwa-Mish First Nation has aboriginal fishing rights in the Broughton Archipelago. She deposes that she is a member of the Qwe'Qwa'Sot'Enox Nation. She says that Kwicksutaineuk is an alternate spelling of the name of her nation. She denies membership in the Kwicksutaineuk/Ah-Kwa-Mish First Nation, and says that the latter is a merged group which came into being post-contact, and as such has no traditional claim to the fishing rights of the Qwe'Qwa'Sot'Enox Nation.

[57] In an affidavit previously filed in the Federal Court, Ms. Sewid-Smith deposes that she is a great-granddaughter of Olsiwite, who was one of the survivors of the massacre of the Qwe'Qwa'Sot'Enox people at Gilford Island in or about 1856. There were 24 survivors of the massacre of the Qwe'Qwa'Sot'Enox people by the Noxalk (Bella Coola) peoples in 1856. The few survivors fled their homeland territory, Gwayasdums (Gilford Island), but never relinquished their ownership of their traditional territory. Her ancestors went to a Mamalilikulla village to live, but retained their distinct identity as Qwe'Qwa'Sot'Enox, and retained their ownership and use of their traditional territories.

[58] Ms. Sewid-Smith traces the history of the allocation of *Indian Act* reserves for the benefit of the indigenous peoples of the Broughton Archipelago. This led, she

deposes, to the establishment of reserves within the traditional territory of the Qwe'Qwa'Sot'Enox for the benefit of related tribal groups with no ancestral connection to the land, including the group now comprising the Kwicksutaineuk/Ah-Kwa-Mish First Nation.

Historical and Ethnographic Writings

[59] Ms. Sewid-Smith's affidavit exhibits the following historical and ethnographic material:

1. *Historical and Ethnographic Review of the Allotment of Reserves in the Village Island Area,* dated October 4, 1999 by Linda K. Mattson, Ph.D.; and

2. Excerpt from *The Jesup North Pacific Expedition: Memoir of the American Museum of Natural History*, New York, Volume III - Kwakiutl Texts, dated 1905 by Franz Boas and George Hunt.

[60] There is a considerable body of published literature that describes, based on historical, anthropological, and ethnographic research, the indigenous peoples occupying the geographical area we now know as the Broughton Archipelago. I have, in addition to the material described immediately above, considered the following:

1. Robert Galois, *Kwakwaka'wakw Settlements 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994);

2. Helen Codere, Kwakiutl: Traditional Culture, in Wayne Suttles ed., *Handbook of North American Indians*, vol. 7 Northwest Coast, (Washington: Smithsonian Institution, 1990) ;

3. Kennedy and Bouchard, Northern Coast Salish, in Wayne Suttles ed., *Handbook of North American Indians*, vol. 7 Northwest Coast, (Washington: Smithsonian Institution, 1990); and

4. Rohner & Rohner, *The Kwakiutl Indians of British Columbia* (New York: Holt, Rinehart and Winston, 1970).

[61] The literature generally credits the investigations of the renowned anthropologists, Franz Boas and Wilson Duff, who both worked with Kwakiutl historians, with original research that revealed, to the non-indigenous public, the territories, geographical names, and political organization of the Kwakiutl peoples. Boas first visited the region in 1886 and, in an extended working relationship with George Hunt, a Kwakiutl historian, visited the region numerous times up to 1930.

[62] Duff's research was largely informed by his work with Mungo Martin, a Kwakiutl historian (Mattson, *supra* at p. 12).

[63] The Mattson thesis, and the additional material, places primary reliance on the Kwakiutl ethnography as revealed by the work of Boas and Hunt. The latter is exhibited to the Sewid-Smith affidavit. The additional material renders the basic information elicited by Boas and Hunt in a more condensed and convenient form, hence its use in these reasons.

[64] The Kwicksutaineuk peoples are one of a number of aboriginal collectives who share a common language, knows as the Kwak'wala language. Members of that language group are known as the Kwakwaka'wakw, more generally today referred to as Kwakiutl (Mattson, *supra* at p. 14-15).

[65] Mattson, at p. 14, says:

> According to noted anthropologist Wilson Duff …, the Kwakwala-speaking communicates were traditionally comprised of well-defined social and political units which "we call "tribes" or "local tribes"." Territorial exclusivity was characteristic of Kwakwala-speaking communities…. Individual '"tribes" possessed their own territory, winter village, and several seasonally-occupied sites, and each "tribe" was comprised of a number of numayms…. Numayms were important social units, each tracing its "descent from an original ancestor and a single place of origin"…. Individual numayms possessed their own resource sites, houses in the winter village, as well as their own myths and crests. … According to Qwe'Qwa'Sot'Enox artist Mungo Martin, the "Southern Kwakiutl tribes were ranked as follows:

1	Kwakiutl (4 tribes)	10	Hahuamis
2	Mamalilikulla	11	Nakwoktak
3	Nimpkish	12	Tlatlasikwala
4	Talwitsis	13	Naumgilisala
5	Tenaktak (and Awaetlala)	14	Gwasilla
6	Matilpi	15	Koskimo
7	Tsawatainuk	16	Giopino
8	Kwiksootainuk	17	Quatsino
9	Gwawaenuk	18	Klaskino

[66] Galois says, at p. 13:

> Kwak'wala is the language of those Native groups referred to as Kwakiutl. However, there are many groups that speak Kwak'wala, and the Kwakiutl are only one of those groups - the one that lives at Fort Rupert. Early officials and ethnographers came to refer to all of the speakers of Kwak'wala as Kwakiutl. Making matters even more confusing, the related languages of neighbouring groups (the Bella, Oweekeeno, and Haisla) came to be referred to as "Kwakiutlan". So, in order to distinguish Kwak'wala speaking 'Kwakiutls' themselves from the 'Kwakiutlans who were not Kwakiutls', it became common to speak of the Kwakiutls as the "Southern Kwakiutl". This made little sense in that (1) the "Northern Kwakiutl" were not speakers of Kwak'wala, and (2) only one group of the "Southern Kwakiutls", the Ft. Rupert people, were Kwakiutls, and all other groups had their own names. This inaccurate terminology has resulted in confusion and indignation among the people to whom these names refer. In 1980, the U'mista Cultural Center in Alert Bay urged that the term Kwakwaka'wakw (meaning "those who speak the Kwak'wala language") be used instead of Kwakiutl or Southern Kwakiutl.

[67] The Lekwiltok or Lach-Kwil-Tach were the southernmost Kwakiutl, who waged war against the Northern Coast Salish, driving them out of their lands and villages between the Salmon River and Cape Mudge (Codere, *supra*).

[68] In Galois, the "fluid and extremely complex relationships between the different Lekwiltok peoples" is described at p. 223:

> The history of the Lekwiltok is one of dramatic social and geographic change. At least seven different subgroups have constituted the Lekwiltok during the contact period: the Weewiakay, the Weewiakum, the Tlaaluis, the Walitsima, the Hahamatsees, the Kweeha, and the Komenox. Two of these groups (the Weewiakum and Walitsima) were formed by a process of splitting off from existing Lekwiltok peoples; the final three groups (the Kweeha, the Komenox,

> and the Hahamatsees) have origins , in part, among non-Lekwiltok groups and the Tlaaluis have been described as having split from the Kweeha and having Salish origins. By the end of the nineteenth century, the number of Lekwiltok groups had been reduced to four: the Komenox, the Tlaaluis, and the Hamatsees had ceased to exist as separate entities.

[69] The currently constituted K'omoks Indian Band appears to be a hybrid nation. In Kennedy and Bouchard, *supra* at p/ 441, the Comox and Homalco nations are described as members of the North Coast Salish nation. The Lekwiltok Kwakiutl people throughout the 1800's were at war with the Comox, taking over their territory in a southern expansion on Vancouver Island. As a result, "by the late 1800's the Island Comox had been acculturated into the Kwakiutl. The Comox band is considered a Kwakiutl band. By the 1980's, there was only one speaker of the Island Comox dialect."

[70] In Rohner & Rohner, *supra* at p. 77, the organization of the Kwakwaka'wakw people is described as:

> During the potlatch period from about 1849 until almost 1930 the Kwakiutl were, in principle, totally rank stratified; each tribe was ranked in relation to each other tribe; each major tribal subdivision, the numima, was ordered in relation to other numima, and each individual within each numima was ranked in relation to every other individual.

[71] At page 87, the numima and tribe structure is described in greater detail, demonstrating a fluid, shifting structure:

> Numimas were not always stable. Dissatisfied nuclei of closely related kinsmen sometime spalled off from larger numimas to form their own. Of course they had to publically validate the new numima by giving a potlatch. On other occasions, internal dissensions were generated when a chief failed in generosity, became overbearing, or was faulted on other counts. Here too a numima could disintegrate into two or more numimas.

The information contained in Ms. Sewid-Smith’s affidavits may reflect a continuation of post-contact fluidity in the constitution of the numimas of the Kwakiutl peoples in the area of the Broughton Archipelago.

[72] While there is much in the literature which suggests that each tribe had its exclusive territory, some resource sites were common property. Codere, *supra* at p. 364 notes:

> ... the members of each tribe exploited the food resources of a wide area travelling in canoes to herring spawning places, berry patches, clover-root fields, halibut fishing grounds, and salmon streams. Claims to many of these resource areas were hereditary and based upon numaym membership which meant that a man and wife could each have claims to different sites of the same resource and the members of a tribe would have multiple claims. Other resource sites were common property. One of the largest food-getting expeditions was the trip to the head of Knight Inlet for the spring eulachon run. Twenty-one numayms of 9 different tribes had claims to dip net sites, viburnum patches, mountain-goat hunting grounds and other resource sites at Knight Inlet. The Kwakiutl of Fort Rupert travelled by canoe about 250 miles there and back to get this supply of eulachon oil. This expedition forms a model of Kwakiutl food production - travel to the site of the resource; application of an effective technology; and preparation for storage by processing and placing in containers... the mobility afforded to them by their canoes gave them a range and flexibility in their food quest.

[73] Appendix A to Galois, *supra*, sets out a “rank-ordered list of the villages and ‘nami’ma of the Kwakwaka’wakw, given to Wilson Duff by Mungo Martin.

	U'mista orthography	**Anglicized rendering**
1	Kwagu'l	Kwakiutl
2	Mamalilikala	Mamalilikulla
3	'Namis	Nimpkish
4	lawit'sis	Tlawitsis
5	Da'naxda'w	Tenaktak
6	Ma'amtagila (Madilbe')	Matilpi
7	Dzawada'enuxw	Tsawatainuk
8	Kwikwasut' inuxw	Kwiksootainuk
9	Gwawa'entixw	Gwm,vaenuk
10	Haxwa'mis	Hahuamis
11	'Nak'waxda'pv	Nakwoktak
12	Tlatlasikwala	Tlatlasikwala
13	Nakamgalisala	Nakumgilisala
14	Gwa'sala	Gwasilla
15	Gusgimukw	Koskimo
16	Gop'inuxw	Giopino
17	Gwat'sinuxw	Quatsino
18	T'latsinuxw	Klaskino
19	Wiweka'yi	Weewiakay (Assu — 20)
20	Wiwek'am	Weewiakum (Assu — 21)
21	Walitsma	Walatsama (Assu — 19)
22	Kwixa	Kweeha

Tribes and Bands

[74] The eight First Nations referred to in the Chamberlin affidavit are registered under the *Indian Act* and "bands". Each name corresponds with the name of a tribe, as described in the ethnographic material.

[75] It is of some interest, although not necessarily determinative, of the connection between a distinct "tribe" in times past, and a "band" as defined in *The Indian Act, 1876*, S.C. 1876, c. 18:

> The term "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term "the band" means the band to which the context relates; and the term "band," when action is being taken by the hand as such, means the band in council.

[76] The definition of "band" included the term "tribe" until 1951. *The Indian Act*, S.C. 1951, c. 29 defined "band" in these terms:

> "band" means a body of Indians
>
> (i) for whose use and benefit in common, lands, the legal title to which is vested in His Majesty, have been set apart before or after the coming into force of this Act,
>
> (ii) for whose use and benefit in common, moneys are held by His Majesty, or
>
> (iii) declared by the Governor in Council to be a band for the purposes of this Act...

The Indian Act, 1876, did not define the term "tribe". If the term "tribe" describes an aboriginal collective that is ethnographically distinct, the 1951 change in the *Indian Act* definition of "band" could not have changed the true nature of the collective into an entity that was, in effect, created by the *Indian Act*.

[77] The aboriginal collectives listed in the two Walker affidavits include four bands (Gwa'Sala-Nakwaxda'xw, We Wai Kai, Wei Wai Kum, and Kwiakah) are also *Indian Act* bands, with names that correspond to tribes listed in the ethnographic material. They, together with all the First Nations listed in the Chamberlin affidavit, are from

the Kwak'wala language group. As such, they would be Kwakwaka'wakw (herein referred to as Kwakiutl).

[78] The remaining four aboriginal collectives set out in the Walker affidavits, Homalco, K'omoks, Tsilhqot'in, and Ulkatcho, do not appear to have corresponding Kwak'wala tribal names. Homalco, K'omoks, and Ulkatcho are, according to Walker, registered as *Indian Act* bands. The K'omoks are said to have North Coast Salish origins, but are considered a Kwakiutl band due to Kwakiutl territorial expansion up to the late 1800s. In their filed Statement of Intent in the British Columbia Treaty Process, the K'omoks self-identified as both Kwakiutl and Salish. This appears to reflect the K'omoks history as suggested by Kennedy and Bouchard.

Other Actions

[79] Actions brought by several of the aboriginal collectives identified in the Chamberlin and Walker affidavits reveal overlapping claims of fishing rights in the Broughton Archipelago.

[80] On April 22, 2003 a Writ of Summons was filed in the B.C. Supreme Court, BCSC Action No. S032165, by the council of the Kwicksutaineuk/Ah-Kwa-Mish First Nation. This action alleged that fish farming has infringed an aboriginal right to fish in the Broughton Archipelago. The action was discontinued.

[81] Several of the aboriginal collectives named in the Chamberlin and Walker affidavits have filed actions in which they claim aboriginal rights. All are described in the Walker affidavit as "protective writs":

1. The Namgis and the Gwawaenuk tribes commenced actions in B.C. Supreme Court as well, which actions have also been discontinued.

2. The We Wai Kai, Wei Wai Kum, and Kwiakah nations are plaintiffs in .BCSC Action No. L033498 under the collective name Laich-Kwil-Tach Nation. This is a claim of aboriginal title and fishing rights to an area that takes in a portion of the Broughton Archipelago.

3. The Homalco have commenced litigation with respect to their claim of interests in the Broughton Archipelago, including fishing rights, in BCSC Action No. S036688.

4. The K'omoks have commenced litigation claiming title and rights in the Broughton Archipelago in BCSC Action No. 03-5093.

5. The Ulkatcho have commenced litigation claiming an area of land that includes a portion of the Klinaklini River, in BCSC Action No. L033523. This claim extends to a portion of the Franklin River, which also drains into the Broughton Archipelago.

[82] With the exception of the Tsilhqot'in, no further steps have been taken in these actions.

[83] There is no listing of an *Indian Act* band with the name Tsilhqot'in. The aboriginal title claim of the Tsilhqot'in, the subject of BCSC Action No. 03-5112, includes a portion of the Klinaklini River, which drains into the Broughton Archipelago. The claim does not include any saltwater portion of the Broughton Archipelago. The action went to trial, and was dismissed on a technical ground, albeit with findings supportive of the claim.

[84] With the exception of the Tsilhqot'in and Ulkatcho, the territorial claims of all of the First Nations listed in the Chamberlin and Walker affidavits, as revealed by territorial maps introduced in the British Columbia Treaty Process, in statements of claim filed in the B.C. Supreme Court, and in some cases both, reveal extensive overlapping territorial claims within the Broughton Archipelago.

[85] None of the aboriginal collectives named in the Chamberlin and Walker affidavits have concluded a treaty. Their participation in the British Columbia Treaty Commission process calls for a statement of the territory over which rights are asserted. This, however, is not determinative of the legal validity of their claims of aboriginal title at common law. Moreover, the proof of location-specific fishing

practices before contact, in support of a claim to existing fishing rights, need not reveal occupation to a degree that would establish a claim of aboriginal title.

Aboriginal Rights: The Proper Claimant

[86] In *Tsilhqot'in Nation*, supra, Vickers J. rejected the idea that the proper claimant in an aboriginal title case would be a band, as constituted under the *Indian Act*. As noted above, he found that a group sharing common threads of language, customs, traditions, and a shared history defined the "First Nation" (at para. 455).

[87] In *Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494, the plaintiffs were five aboriginal collectives, each of which was constituted as an *Indian Act* band. Garson J. said, at para. 299:

> The evidence is clear that the plaintiffs share a common Nuu-chah-nulth language, culture and history. They do not now have, nor have they ever had, a single overarching governing Nuu-chah-nulth authority. Each plaintiff self-identifies as an autonomous nation and each claims it is the proper aboriginal group for the purpose of holding aboriginal rights and title.

At para. 303, Garson J. said:

> In order to address the issue of whether the plaintiffs are the proper claimant groups, I will examine the history of each plaintiff. To place that history in some context it may be helpful to first note the evidence of population decline. It is this significant population decline that seems to be at least part of the cause of the shift from local groups to amalgamated entities.

[88] Garson J. concluded that, while each of the claimant bands were part of the Nuu-chah-nulth linguistic and cultural group, the antecedents of each band as presently constituted were sufficiently distinct from the larger collective that each could sustain claims of aboriginal rights at law. As such, each could satisfy the requirement of the law that the present day aboriginal collective establish both descent from the rights holder at contact, and continuity of the practices said to found an aboriginal right.

[89] The ethnographic material referred to above establishes each of the collectives listed in the Chamberlin affidavit, and four of the aboriginal collectives listed in the Walker affidavits, namely Gwa'Sala-Nakwaxda'xw, We Wai Kai, Wei Wai

Kum, and Kwiakah, as Kwakiutl. Each are present within a geographical area, largely co-extensive with the Broughton Archipelago, used and occupied at contact by the Kwakiutl. At contact, each had territorial interests within the larger geographical area, and enjoyed access to some resources, in common, within the larger territory with which the Kwakiutl, as a linguistic group (i.e. speakers of Kwak'wala), were associated.

[90] Each of the collectives referred to in the above paragraph is a band with antecedents in the tribal divisions among the Kwakiutl. Each, as a band, occupies one or more *Indian Act* reserves. The reserves front on the waters of the Broughton Archipelago. It would be most unusual to suppose that, as fishing peoples, they do not use their reserves for staging their fishing activities.

[91] The evidence on this application is sufficient to support a finding that there is an identifiable class that have an interest in the proposed common questions. Each of the Kwakiutl bands has an ancestral connection with a distinct tribe of Kwak'wala speakers.

First Nations Aquaculture Projects

[92] The Province and Canada appear to contend that the participation of some members of the proposed class in agricultural fisheries, fish farming, created by government action, go contrary to the notion that they, while otherwise qualifying as members of the class, have an interest in the resolution of the proposed common issues.

[93] One of the First Nations listed in Chief Chamberlin's affidavit, the Mamalilikulla, operates twelve fish farms in the Broughton Archipelago. Mamalilikulla is associated with Marine Harvest Canada Inc., a corporation engaged in the business of selling farmed salmon grown at various marine net pen sites located on the British Columbia coast between Klemtu and Duncan. In an affidavit filed by the Province, Clare Backman, Director of Environmental Relations for Marine Harvest Canada Inc., deposes that:

1. he is "aware that some or all of the Da'naxda'xw, Kwakiutl, Mamalilikulla, and Tlowistsis First Nations are in fact supporting of salmon farming operations in their territories…";

2. Marine Harvest has an agreement with the Kwakiutl First Nation that provides for the support of the latter for salmon farming in the Kwakiutl First Nation's traditional territory. This agreement provides the Kwakiutl with employment and business opportunities;

3. Marine Harvest has a contract for service agreement with a corporate entity called Qwe'Qwa'Sot'Em Faith Aquaculture Ltd. under which the latter provides services, including those provided by the owner of the vessel "MV Atlantic Harvester", owned and operated by the Chief of the Mamalilikulla-Qwe'Qwa'Sot'Em band;

4. Marine Harvest "has support of the following other First Nations through current written agreements: i) Kitasoo Eai'xais First Nation (BC central coast); ii) Quatsino First Nation (Northwest Vancouver Island) iii) Gwa'Sala-Nakwaxda'xw First Nation (Northeast Van. Island); iv) Homalco (Xwemalhkwu) First Nation (Lower Johnstone Strait/ Campbell River)" [the latter two First Nations are listed in Chief Chamberlin's affidavit];

5. Marine Harvest is "actively developing agreements with the following First Nations: v) We Wai Kai Indian Band (Johnstone Strait/Quadra Island); vi) Wei Wai Kum Indian Band (Johnstone Strait/Campbell River); vii) Kwiakah Indian Band (Johnstone Strait/Phillips Arm); viii) Tlatlasikwala First Nation (Queen Charlotte Strait/Port Hardy); ix) K'omoks Nation (Vancouver Island/Northern Georgia Strait)" [the above, except the Tlatlasikwala First Nation, are listed in the Walker affidavits as First Nations that claim aboriginal rights in the Broughton Archipelago].

[94] In an affidavit filed by Canada, Chief John Smith of the Tlowistsis tribe, and Chief of the Band Council of the Tlowistsis Indian Band, deposes that:

> 1. the Tlowistsis traditional territory includes the Broughton Archipelago;
>
> 2. the Broughton Archipelago forms a fundamental part and is a core area within the tribe's claimed territory;
>
> 3. the tribe has an economic interest in the aquaculture industry within the Broughton Archipelago, and supports salmon aquaculture.

[95] It is apparent that some of the First Nations which claim aboriginal fishing rights in the Broughton Archipelago, and now have economic interests in fish farming, have not always been unqualified supporters of the industry. In an affidavit filed by Canada, George Bates, a Treaty Negotiator with the Department of Fisheries and Oceans, deposes that:

> 4. The Kwakiutl Territorial Fisheries Commission (the "KTFC"), was formed in 1994 with 15 member First Nations/Bands. The member First Nations/Bands were:Gwa'sala-Nakwaxda'xw, Da'naxda'xw/Awaetlala, Mamlilikulla, Quatsino, Tlatlasikwala, Namgis, Kwakiutl, Gwawaenuk, Tsawataineuk, Kwicksutaineuk-Ak-kwaw-Ah-Mish, Tlowitsis, Kwiakah, Wei Wai Kum. We Wai Kai and the K'omoks First Nation.
>
> 5. The role of the KTFC was to represent the member First Nations in Fisheries related matters including the management- of their food, social and ceremonial fisheries within their territory.
>
> 6. The Mamalilikulla left the KTFC in 2003 because of the KTFC's "zero tolerance policy" regarding aquaculture. …

[96] The affidavit of Gavin Last sworn December 24, 2009, and filed by the Province, includes material that indicates a qualified support for fin fish aquaculture by some of the above-named First Nations, for example:

> 1. letter from the Mamalilikulla-Qwe'Qwa'Sot'Em band to the Provincial Ministry of Land and Water, dated July 8, 2005, approving a document of that ministry entitled "Amendment to Fin Fish Facility" subject to the condition "that no environmental damage is done to the area and that all cultural areas be respected";

2. letter from the Mamalilikulla- Qwe'Qwa'Sot'Em band to the Province's Ministry of Agriculture and Lands dated August 18, 2008 stating that "we have no concerns regarding the five year fin fish aquaculture reissues" for numerous sites operated by Marine Harvest Canada Inc., reserving "the right to raise objections … if we discover impacts on our rights or interests that we had not foreseen";

3. reasons for the decision of the British Columbia Supreme Court in *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283, in which the second respondent was Marine Harvest Canada, which reveal, in para. 30, the concern of the Homalco over potential adverse impacts on wild salmon arising from the introduction of Atlantic salmon, including "[t]he potential spread of sea lice from farmed Atlantic salmon to migrating wild Pacific salmon smolts causing significant declines in those stocks". This concern as indicated in para. 60 of the reasons, relates to "concerns about sea lice infestation in the Broughton Archipelago in June 2001".

[97] Exhibits to the affidavit of Shelley Meadows, Aquaculture Referral Officer, Department of Fisheries and Oceans, sworn January 5, 2010, include:

1. letter dated May 8, 2000 from Chief Robert Sewid, on behalf of the "Wiumasgum-Qwe'Qwa'Sot'Em First Nation" confirming their consent to relocation of an aquaculture site operated by Stolt Sea Farm Inc., on condition that "your company will take all measures that are necessary in order to protect natural fish species";

2. letter dated April 27, 2001 from Chief Robert Sewid from the Mamalilikulla-Qwe'Qwa'Sot'Em band to Stolt Sea Farm Inc., stating that the band has no objection to the relocation of its fish farm operations. It is apparent that this reference to the Mamalilikulla-Qwe'Qwa'Sot'Em band is to the same aboriginal collective as the

Wiumasgum-Qwe'Qwa'Sot'Em First Nation mentioned in Chief Sewid's May 8, 2000 letter.

[98] The affidavit of Shelley Jepps, Shellfish Aquaculture Officer, Department of Fisheries and Oceans, sets out the following:

1. letter from Tlowistsis First Nation to Grieg Seafood B.C. Ltd. dated March 11, 2005 expressing its wish to pursue opportunities in fin fish aquaculture, containing an assertion that "they have also assured us that the work being undertaken by them or their consultants will not harm our territory in any way…";

2. letter from Gwa'Sala-Nakwaxda'xw council dated June 30, 2009 approving of four applications from Marine Harvest Canada for a "commercial fin fish amendment", in which the right to raise objections "if we discover impacts on our rights or interests that we had not foreseen" is reserved.

[99] The qualified engagement of these First Nations in fish farming is explicitly on terms that reserved to the participants their grounds to object if the fish farm industry results in an infringement of their common law aboriginal rights. There is, in my view, no inconsistency with their taking advantage of economic opportunities that are not rights-based, and preserving their ability, if the scheme in which they participate is proven to infringe upon traditional rights, to object.

[100] The question at this stage is not whether collectives that may be within the proposed class are interested in participating as members of the class, but rather whether they have interests that qualify them as members of the class. They plainly do.

[101] My conclusions on the identification of the Kwakiutl tribes, and related fishing rights, are made for the sole purpose of the application of the requirements of the *Class Proceedings Act*. As such, my conclusions are not determinative of their tribal identities or their fishing rights for any other purpose.

IV. OTHER CERTIFICATION CRITERIA

[102] The following is an overview of each of the remaining certification criteria set out in the *Class Proceedings Act*, R.S.B.C. 1996, c. 50; a list of the defendants' objections to these criteria; and, the leading cases on point. The defendants have raised over thirty objections to certification based on the statutory criteria.

Certification Criteria

[103] The requirements that must be satisfied in order to certify a class proceeding are found in s. 4 of the *Act*:

> 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.
>
> (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.

Section 4(1)(a): Do the Pleadings Disclose a Cause of Action?

Objections

[104] According to Canada and the Province, the material facts supporting a claim have not been pled, as:

1. The plaintiff does not define what he means by “sustenance” rights;

2. The plaintiff simply pleads conclusions of law, namely, that the first nations assert or have constitutionally protected rights to fish for “sustenance” purposes;

3. The issues proposed for certification are not justiciable;

4. Injunctive relief is not available against the Crown;

5. No cause of action giving rise to damages has been pled, as damages are not available for harm suffered as a result of an enactment that is subsequently declared unconstitutional, absent bad faith or breach of fiduciary duty which has not been pled;

6. The plaintiff lacks standing to advance the claims pled, as a declaration for an aboriginal right must be sought by the collective possessed of the right. Chief Chamberlin cannot assert a claim on behalf of other collectives, as aboriginal and treaty rights are collective rights that can only be enforced by way of a representative action;

7. The plaintiff’s claim is a collateral attack and should properly be the subject of JRPA proceedings (the Province raises this under the preferability analysis, but in my view it more appropriately fits here).

Law

[105] The test to apply to the cause of action requirement is the "plain and obvious test". Evidence is not considered at this stage and the Court assumes the facts alleged in the pleadings are true: *Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90 (C.A.), appeal discontinued, [1998] S.C.C.A. No. 260. This is not a preliminary merits test. As Winkler J. (as he then was) stated in *Edwards v. Law Society of Upper Canada*, [1995] O.J. No. 2900 at para. 3, "there is a very low threshold to prove the existence of a cause of action… the court should err on the side of protecting people who have a right of access to the courts".

[106] Turning to the more specific objections raised, the following legal principles are of some assistance:

Conclusions of Law, Sustenance Rights and Inadequate Description of Claims:

[107] The cause of action analysis is focussed on the representative plaintiff's cause of action. The plain and obvious test is used to determine whether the representative plaintiff has set out his or her claim with sufficient particularity to withstand a motion to strike. As such, the particulars of each absent class members' claim are not required: *Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 at para. 19 (S.C.J.). Similarly, Ward Branch, *Class Actions in Canada*, looseleaf, notes at ¶4.120:

> Courts should accept that it is not always possible for the plaintiff to plead the claim on behalf of each class member with the same particularity required in individual cases. However, at a minimum, the material facts must be pleaded for the representative plaintiff. In addition, the statement of claim should identify the relief requested for the class.

[108] Section 7(d) of the *Act* provides that the Court must not deny certification simply because "the number of class members or the identity of each class member is not known". If this is not a bar to certification, it is logical to hold that the specific and individual cause of action possessed by each and every class member need not be set out in the pleading. Additionally, in *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 at para. 45 (C.A.), leave to appeal ref'd, [1998] S.C.C.A. No. 13,

Cumming J.A. noted that the "typicality" requirement in American class proceedings legislation (which has been interpreted to mean that the representative plaintiff must have the same cause of action against the defendants as all members of the class) is not a part of the law in this Province. In any case, the right contended for by the proposed representative plaintiff is the right to fish for wild salmon for sustenance. The proposed class members are the First Nations of a geographically defined territory, the Broughton Archipelago. It is highly unlikely that any of the First Nations named in the Chamberlin and Walker affidavits would not claim aboriginal fishing rights.

[109] While the plaintiff has pled a right to fish for wild salmon for sustenance, food and ceremonial purposes, I do not understand the claim to fish for "sustenance" expands upon the particular purpose of fishing for salmon, namely for food and ceremonial purposes. If the use of the term of "sustenance" is intended to refer to a particular practice, integral to the distinctive culture of the plaintiff and the proposed members of the class, particulars may be required. If not, a simple amendment to the statement of claim would remedy the matter.

Justiciability: Declaration and Injunction

[110] Chief Chamberlin seeks a declaration that fish farming has caused damage to the wild salmon fishery.

[111] On this point, Canada submits that:

> 104. The Courts have been reluctant to grant declarations when it comes to scientific questions on which there is no consensus and on which there is no suitable criteria to apply

[112] This argument goes to the merits, not whether there is a cause of action.

[113] Canada's argument on this point suggests that the claim of the plaintiff, and others in the proposed class, should be resolved within a policy framework in which government takes competing interests, including the aboriginal interest, into account. Canada contends that this framework would include the Cohen Commission, with its mandate to inquire into the apparent disappearance of vast numbers of sockeye

salmon to their spawning rivers. This argument appears to invoke the "political question" theme, which is addressed in the following quote from Binnie and LeBel JJ.'s dissenting reasons in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, is apposite:

> 183 The Attorneys General of Canada and Quebec argue that the claims advanced by the appellants are inherently political and, therefore, not properly justiciable by the courts. We do not agree. Section 52 of the *Constitution Act, 1982* affirms the constitutional power and obligation of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution. Where a violation stems from a *Canadian Charter* breach, the court may also order whatever remedy is "appropriate and just" in the circumstances under s. 24. There is nothing in our constitutional arrangement to exclude "political questions" from judicial review where the Constitution itself is alleged to be violated.

[114] The relief sought by the proposed representative plaintiff includes a mandatory injunction, requiring that the Province remediate the damage said to have been caused by fish farming.

[115] The Province argues that injunctive relief should not be granted, although there may technically be jurisdiction to do so where a breach of the constitution is alleged: *Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205 at para. 48. Groberman J. (as he then was), noted that the *Crown Proceeding Act* cannot shield unconstitutional conduct from judicial review, at paras. 53-54.

[116] This reasoning could apply to government conduct which breaches s. 35 of the Constitution. This was in fact the conclusion reached by the Quebec Court of Appeal in *Lord v. Canada (Attorney General)*, [2000] 3 C.N.L.R. 69, leave to appeal ref'd [2000] S.C.C.A. No. 315, where it was held that the courts have the power to issue mandatory or prohibitive orders against the Crown where a breach of s. 35 aboriginal or treaty rights is at issue. The court held that the principles of crown immunity are subject to the Constitution; where a violation occurs, "there must be a means by which to call authority to account".

[117] Additionally, in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 12-14, McLachlin C.J. held that it was open

to plaintiffs like the Haida Nation to seek an interlocutory injunction against the government.

[118] These authorities suggest it is not plain and obvious that the pleading for injunctive relief is doomed to failure.

Damages

[119] The Province argues that damages are not available on the sole basis of the invalidity of legislation. However, the plaintiff's claim for damages is not premised solely on the invalidity of legislation. It is premised on the infringement of constitutional rights. The infringement of s. 35 rights resulting in damages discloses a reasonable cause of action, if the plaintiffs establish facts demonstrating that they had a legal right, that the Crown had a concomitant duty and that this duty was breached, with damages arising from the breach of duty: *Kelly Lake Cree Nation v. Canada*, [1998] 2 F.C. 270 at paras. 26-27 (T.D.). Also see the discussion in *Delgamuukw v. British Columbia* at para. 169, in relation to the availability of damages where aboriginal title, as an aboriginal right, is infringed.

Collateral Attack

[120] The Province submits that:

> 177. The policies established by the Province respecting the authorization and regulation of salmon aquaculture are the result of much scientific and political consideration by the Province. The only permissible attack on the policy decisions of the Province with respect to salmon aquaculture is that which can be made at the ballot box. The plaintiff's claim against the Province constitutes a collateral attack on the policy decisions, and by extension, the legislative function of the Province.

[121] In my view, this argument is without merit. The Provincial aquaculture regime is attacked on constitutional grounds. This Court has the ability to adjudicate on the validity of a legislative scheme where a plaintiff seeks declaratory relief. For example, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, the majority stated:

> 33 This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government

> behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of function among the legislative, judicial and executive branches. While our Constitution does not expressly provide for the separation of powers (see *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714, at p. 728; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 601; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 15), the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. (See, for example, *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70.) In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:
>
> > Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.
>
> …
>
> 36 Deference ends, however, where the constitutional rights that the courts are charged with protecting begin. As McLachlin J. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136:
>
> > Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.
>
> Determining the boundaries of the courts' proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case.

[122] The plaintiffs are not attacking individual fish farm licences or asserting a breach of the *Haida* consultation duty. Rather, they assert that the Province's conduct as a whole in relation to finfish aquaculture has violated their constitutional rights, causing damages and loss. Accordingly, there is no collateral attack on a particular exercise of administrative discretion or licensing decision.

Standing

[123] In order for there to be a cause of action, the plaintiff in a class action must have standing in the same manner that would be required if the case were an individual claim. This requirement is also governed by the plain and obvious test: *Soldier v. Canada (Attorney General)*, 2009 MBCA 12 at paras. 32 and 41, [2009] 2 C.N.L.R. 362.

[124] In *Soldier*, the Court appeared to indicate that if class actions are ever appropriate for s. 35 rights, it will only be where each member of the class has an individual claim arising from the group right in question, and that a class action is likely inappropriate for a right such as aboriginal title, which is truly enjoyed collectively (at paras. 46-49).

[125] Here, however, Chief Chamberlin is not proposing an action for a class comprised of the members of a single aboriginal collective. His standing is that of a representative of a distinct First Nation. The proposed class action is on behalf of several aboriginal collectives, each a First Nation. Each, it is contended, have their own collective interests in the wild salmon fishery.

Species Specificity

[126] The right asserted in the Statement of Claim specifies “wild salmon”. The Province contends that the right is not correctly pled, as aboriginal fishing rights focus on the activity of fishing, not the particular species of fish taken in the exercise of the right. The Province argues:

> 86. The B.C. Court of Appeal recently addressed the “species specificity” issue in a more recent decision and applied greater latitude in determining whether an aboriginal right could ever be limited to a particular species. The court confirmed that a contextual approach was necessary in delineating the right, and accepted the intervenors’ characterization of the question as follows:
>
> > The question in each case is whether the “practice, custom or tradition” can be accurately described without reference to a specific species - “where to omit the reference to the species is to mis-describe the practice, custom or tradition that is integral to the aboriginal culture or way of life.”

> *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593 at para. 37.

[127] The foregoing passage from *Lax Kw'alaams* does not support an argument that an infringement of an aboriginal right to engage in the activity of fishing cannot be established in circumstances in which one genus of fish, here salmon, has been adversely affected by actions of government.

[128] Additionally, in *R. v. Nikal*, [1996] 1 S.C.R. 1013, Cory J. expressly approved of the trial judge's finding that the defendant had a s. 35 right to fish for steelhead, a specific species of fish:

> 104 These conditions are prima facie infringements of the appellant's aboriginal rights, which were specifically and correctly found to include:
>
> (i) the right to determine who within the band will be the recipients of the fish for ultimate consumption;
>
> (ii) the right to select the purpose for which the fish will be used, i.e. food, ceremonial, or religious purposes;
>
> (iii) the right to fish for steelhead;
>
> (iv) the right to choose the period of time to fish in the river.

[129] It should be borne in mind that the proof of aboriginal fishing, and hunting rights, generally focus on the activity of fishing and hunting, and not necessarily the particular genus or species of fish harvested, or the particular animal hunted (*Tsilhqot'in*, *supra*, and *Ahousaht*, *supra*). Proof of the practice of these activities would naturally involve evidence of the harvest of particular species of fish and animals.

[130] On a certification application, the plaintiff only needs to establish "some basis in fact" to satisfy the certification criteria. Chamberlin Affidavit #1 describes the centrality of salmon to Kwakwaka'wakw culture, and notes how wild salmon are required for all major rites of passage and ceremonies, including naming ceremonies. This would seem to establish "some basis in fact" that the fishing rights belonging to the Kwakwaka'wakw people cannot be defined without reference to the harvest of wild salmon in a particular exercise of a right more generally defined as

the activity of fishing. While "salmon" is not exhaustive of their asserted fishing rights, it is clearly an integral portion.

Dissention Among the Class

[131] Canada cites no authority for the proposition that "to have a class, the persons forming that class need to be ad idem in desiring to prosecute their respective claims". This is not surprising, as in my view it is incorrect. This concern is addressed by the presence of opt-out provisions within the *Class Proceedings Act*. As Cullity J. noted in *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.):

> [68] I am satisfied that conflicts of the first kind [from the possibility that some members of the class may not be in favour of the litigation] can be adequately addressed by the opting out process. This is designed to permit putative class members to divorce themselves from the litigation, for whatever reason, and, by so doing, to preserve their rights. The possibility that some members of the putative class may be concerned that -- irrespective of its resolution -- the litigation may provoke an unfavourable reaction from the defendant should not be permitted to prevent members who do not choose to opt out from proceeding with the action as a class proceeding.

Section 4(1)(c): Do the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members?

Objections

[132] According to Canada and the Province, the proposed common issues are not common issues that can be certified, because:

1. The issues in relation to the Province's jurisdiction are moot and should not be certified as a result of the Morton decision;
2. The issues relating to remediation and restoration are not within the Province's jurisdiction;
3. There is no possibility the plaintiffs' will be entitled to aggregate damages, as purely individual questions of fact and law regarding the scope and existence of the fishing rights of each First Nation would be involved;

4. The "sea lice" issues are so broadly framed as to be incapable of focussed and proper determination;

5. The action is premature and incapable of proof;

6. It is impossible to lump the numerous salmon populations together for a global determination, as each one forms a separate common issue;

7. On a related point, there is no evidence that each of the class members has access to all of these populations, and "no evidence that each such aboriginal collective asserts a shared or non-exclusive claim to its fishing sites";

8. There is no basis in fact or workable scientific methodology to show that sea lice from fish farms have caused decreases in each or any of the many salmon populations that return to the several rivers and streams that drain into the Broughton Archipelago;

9. The issues proposed for certification are not a substantial ingredient of the claims of the aboriginal collectives within the class, or, their resolution is not necessary to the resolution of any claims of the class members;

10. Common issues alleging an infringement of an aboriginal right cannot be determined in advance of the aboriginal right in question; essentially, the argument goes that a right cannot be defined in the absence of a limitation, and the proposed common issues are academic and moot until the scope of the right has been defined. This militates against any possibility of the aggregation of damages.

Law

[133] Section 1 of the CPA defines "common issues":

> "common issues" means
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[134] In *Dutton*, McLachlin C.J.C. said the following about common issues:

> 39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.
>
> 40 Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[135] However, in relation to the "substantiality" requirement which the Province relies on, it is important to keep in mind that *Dutton* originated in Alberta, where there was an absence of comprehensive class legislation at the time. As s. 4(1)(c) of the *Class Proceedings Act* makes clear, the common issues inquiry in this Province is limited to determining whether common issues of fact or law exist. It is not an exercise of weighing the common issues against the individual issues; the examination of the predominance of individual issues is statutorily precluded at this stage. In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, McLachlin C.J.C. noted:

> 33 …The British Columbia *Class Proceedings Act* explicitly states that the commonality requirement may be satisfied "whether or not [the] common issues predominate over issues affecting only individual members": s. 4(1)(c). (This distinguishes the British Columbia legislation from the corresponding Ontario legislation, which is silent as to whether predominance should be a factor in the commonality inquiry.) While the British Columbia *Class Proceedings Act* clearly contemplates that predominance will be a factor in the preferability inquiry (a point to which I will return below), it makes equally clear that predominance should not be a factor at the commonality stage. In my view the question at the commonality stage is, at least under the British Columbia *Class Proceedings Act*, quite narrow.

[136] It is clear that the common issues test creates a low threshold in British Columbia. Common issues need only be issues of fact or law that move the litigation forward; they do not need to be determinative of liability: *Campbell v. Flexwatt Corp*. (1997), 44 B.C.L.R. (3d) 343 at 359 (C.A.), leave to appeal ref'd, [1998] S.C.C.A. No. 13. Neither do they have to be determinative of damages: *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*, 2010 ONCA 466. The B.C. Court of Appeal has held that s. 4(1)(c) will be satisfied if the resolution of a common issue will: i) move the litigation forward and; ii) be capable of extrapolation to all class members: *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, leave to appeal ref'd [2001] S.C.C.A. No. 21. In *Harrington*, Huddart J.A. (for the majority) noted at para. 20 that "it would be rare for plaintiffs to state a question for consideration as a common issue that did not move the litigation forward in a legally material way."

[137] The question whether fish farming has resulted in an increase in the incidence of sea lice infestations, or disease, on wild salmon stocks would move the litigation forward in a legally material way.

Prematurity

[138] Canada submits that this action is "premature" and uncertifiable because the core common issue is not capable of proof at this time.

[139] Canada says that given the state of science, the question of to what extent fish farms have contributed to the decline of wild salmon, and, more importantly, whether the manner in which the Province has regulated the farms has contributed to the decline, cannot be determined.

[140] But in the course of making this submission, Canada points to the following statement by Dr. Whoriskey: "This is exactly what I have proposed can and should be studied within the Broughton Archipelago to answer the questions that were posed to me in this case".

[141] The plaintiff submits that all that is required at this stage of the proceeding is that he demonstrate the proposed common issues are amenable to analysis and that there is some basis in fact for his assertions. This statement is in accordance with the Court's decision in *Pro-Sys Consultants Ltd. v. Infineon*, 2009 BCCA 503, leave to appeal ref'd [2010] S.C.C.A. No. 32, where the Court decided that a plaintiff need only show a "credible or plausible methodology" for proving class-wide issues. This threshold is a low one and conflicting expert evidence is not to be given the level of scrutiny to which it would be subject at a trial.

[142] Dr. Whoriskey says it is scientifically possible to determine whether fish farming has an adverse impact on wild salmon stocks on a system-wide basis. The "system" is the Broughton Archipelago. Experts relied upon by the defendants challenge this contention.

[143] The defendants also challenge the admissibility of Dr. Whoriskey's reports. They raise two concerns.

1. Dr. Whoriskey's direct experience and research is concentrated on the impact of fish farming on Atlantic salmon; and

2. Dr. Whoriskey relies on research conducted by other scientists that points to a potential for adverse effects of fish farming in the Broughton Archipelago.

[144] I am satisfied that Dr. Whoriskey's education and experience enables him to offer an opinion going to the potential for adverse impacts on wild salmon stocks due to sea lice infestations that may have their origin in fish farms in the Broughton Archipelago. He is, I think, entitled to extrapolate information on impacts from one fishery to another, taking into account published work of scientists who have studied local conditions.

[145] The experts relied upon by the defendants challenge Dr. Whoriskey's assertion that the impact, if any, of fish farming on wild salmon stocks can be determined on a system-wide basis. The defendants rely on the evidence of their

experts to say that Dr. Whoriskey has not provided a plausible methodology for the determination of the central common question. It is neither possible, nor appropriate, to weigh the conflicting expert opinions at this stage of the proceeding.

[146] The defendants argue that the opinions of the experts they rely upon militate against Dr. Whoriskey's opinion that impacts can be assessed on a system-wide basis on the grounds that the stocks of wild salmon that originate in spawning streams and rivers in the Broughton Archipelago, and that return to these rivers, are numerous and varied. The Broughton Archipelago is home to several species of salmon. Different spawning environments may support different species. In all, it is contended that 229 separate stocks of wild salmon would have to be studied in order to make a determination of the impact of fish farming. The defendants argue that this is the scientifically sound approach, and that it is necessary in this case as each proposed member of the class has asserted fishing rights that may be site specific. This is contended on the basis that members of the proposed class have delineated discrete territories within the Broughton Archipelago, both through their participation in the B.C. Treaty Process, and in maps presented as part of their statements of claim in the protective actions.

[147] While it is true that some members of the proposed class have asserted rights within discrete territories, it is not apparent at this stage that their respective claims to fishing rights are limited to discrete territories within the Broughton Archipelago to which they claim aboriginal title.

[148] The eight First Nations identified by Chief Chamberlin are of the Kwakiutl peoples. Several of the First Nations identified in the Walker affidavits are also of the Kwakiutl. It cannot be determined at this stage whether fishing rights that may be found to exist for each proposed member of the class are exercisable within only a discrete territory over which aboriginal title is asserted, or over the entire territory frequented by Kwakiutl peoples generally.

[149] In *Ahousaht*, *supra*, Garson J. spoke of the fishing practices of the Nuu-chah-nulth people generally, then considered the particular claims, which included

aboriginal title, of the individual First Nations plaintiffs, all of which are Nuu-chah-nulth peoples.

[150] Garson J., while finding that the proper claimants were bands, as constituted under the *Indian Act*, they, as tribes, were part of a larger linguistic and cultural group, in particular the Nuu-chah-nulth peoples. She explained, at para. 383, that:

> ... The activity in question here is fishing, and to require the plaintiffs to prove that right in respect to each species is inconsistent with the evidence regarding their way of life. The Nuu-chah-nulth people followed a seasonal round which corresponded to the seasonal availability of various species of fish. Species gained and lost importance depending upon their abundance. That was the pattern during both pre- and post-contact periods, and it has continued to modern times. ...

[151] Garson J. found further, at para. 411:

> I am satisfied that despite the relative absence of archaeological records (and there has not been extensive archaeological research in most parts of the plaintiffs' territories) of faunal deposits of cod and halibut, there is evidence that the Nuu-chah-nulth's traditional territories and fishing in those territories extended beyond the rivers and sounds to the offshore waters. The evidence, however, is sparse as to how far offshore the Nuu-chah-nulth regularly fished. Doing the best I can with the evidence available, I would accept that the plaintiffs' fishing territories include the rivers, inlets, and sounds within each plaintiff's territory ....

[152] While the rights found by Garson J. may not extend throughout the totality of the traditional territories of the Nuu-chah-nulth peoples, it is apparent that the historical fishing practices of Nuu-chah-nulth peoples informed the rights determined to exist for the plaintiff bands.

[153] The ethnographic literature reveals that the First Nations referred to in Chief Chamberlin’s affidavit as prospective members of the proposed class are all part of the Kwak'wala linguistic group. The same is true of several of the First Nations referred to in the Walker affidavits. The ethnographic literature reveals that the tribal structure of the Kwakiutl was somewhat fluid. Tribes, or more correctly numimas, would split, or recombine in new and distinctive collectives, in response to pressures both from within and without. The literature also indicates that, while each tribe had a territory, some resource sites were common property to the Kwakiutl.

[154] The evidence on this application is sufficient to establish the possibility that the fishing rights of the proposed members of the class, to the extent that they are of the Kwak'wala language group, and are therefore Kwakiutl, may extend throughout the Broughton Archipelago. That possibility tends to lend credence to the methodology proposed by Dr. Whoriskey, which I find plausible.

[155] If there is to be a trial of the central common question, the defendants will, of course, be free the challenge any opinion evidence adduced by the representative plaintiff. Such evidence may tend to undermine the methodology proposed by Dr. Whoriskey. This is a matter for trial.

Aggregation of Damages

[156] If harm to wild salmon can be scientifically assessed on a system-wide basis, and the aboriginal fishing rights of the Kwakiutl may be identified as activities integral to the distinctive culture of the Kwakiutl generally, the door may be open to an aggregation of damages. This approach may conform to the following provisions of the *Class Proceedings Act* (ss. 29 and 30):

> 29(1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> …
>
> 30(1) For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

[157] Even if the approach suggested by Dr. Whoriskey would not answer the question of damages sustained by each First Nation in the proposed class, this is

not an insurmountable problem. Section 31 of the *Class Proceedings Act* allows the Court to award a proportional share of an aggregate damages award to the class members:

> 31(1) If the court makes an order under section 29, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if
>
> (a) it would be impractical or inefficient to
>
> (i) identify the class or subclass members entitled to share in the award, or
>
> (ii) determine the exact shares that should be allocated to individual class or subclass members, and
>
> (b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.
>
> (2) If an order is made under subsection (1), any member of the class or subclass in respect of which the order was made may, within the time specified in the order, apply to the court to be excluded from the proposed distribution and to be given the opportunity to prove that member's claim on an individual basis.

[158] Provisions which are almost identical to ss. 29, 30, and 31 were discussed at length by Rosenberg J.A. in *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, leave to appeal ref'd [2007] S.C.C.A. No. 346. *Markson* was a class action over transaction fees and compound interest charged by the defendant credit card company on cash advances. In some, but not all cases, the fees and interest added up to an effective interest rate that exceeded the 60% threshold for a criminal rate under s. 347(1) of the *Criminal Code*. The defendants opposed the motion for certification on the basis that only a subset of the members of the class were actually charged the criminal interest rate, and in order to find out which members of the class had been victimized, a detailed analysis of their individual account activity needed to be undertaken.

[159] The aggregate damages provisions of the Ontario legislation at issue stated:

> 23(1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was

> compiled in accordance with principles that are generally accepted by experts in the field of statistics.
>
> 24(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.
>
> (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

[160] At para. 41, Rosenberg J.A. held that "liability and entitlement to a remedy are sufficient to trigger the application of ss. 23 and 24." At para. 44, the Court held that at the certification stage, the plaintiff need only establish that "there is a reasonable likelihood that the preconditions in s. 24(1) of the *Class Proceedings Act* would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues", in order for aggregate damages to be certified as a common issue.

[161] The Court noted the condition precedent to an award of aggregate damages (found in s. 29(1)(b) of our *Act*), that "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability". In the context of *Markson*, this was a problem, as all members of the class were at risk of being charged a criminal interest rate, but only some unknown number of the class were actually victims of the defendant's practice and thus, entitled to damages and restitution.

[162] Regarding this difficulty, the Court pointed out that such a problem only existed because there was a need for individual assessments of each class member's credit card account, and that the result of not allowing the class action to proceed would be contrary to public policy: "Large institutions allegedly receiving large amounts of illegal profits from millions of small transactions will effectively be immunized from suit".

[163] The solution, according to the Court, was to read s. 24(1)(b) [the equivalent of s. 29(1)(b) of our legislation] in harmony with the other provisions of the Ontario *Class Proceedings Act*, particularly s. 24(3) [the equivalent of s. 31(1)], which reads:

> In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award.

[164] The section contemplated that aggregate awards might be necessary in cases where it would be impractical or inefficient to determine the amount of liability on a case-by-case basis. By reading the entire section harmoniously, condition (b) would be satisfied "where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments." (para. 48). The Court went on to say, at para. 49:

> In the context of this case, if the plaintiff can establish that the defendant administered its cash advances in a manner that violated s. 347 and/or breached its contract with its customers, it will have established potential liability on a class-wide basis. Each member of the class would be entitled to declaratory and injunctive relief. The only matter remaining would be the application of the decision on the common issues to the specific account activity of each class member to determine that class member's entitlement to monetary relief. Section 23 can be used to calculate the global damages figure. Section 24 can be used to find a way to distribute the aggregate sum to class members. It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) because "it would be impractical or inefficient to identify the class members entitled to share in the award".

[165] In *Pro-Sys*, the Court of Appeal did not find it necessary to review *Markson* at length, but did state the following regarding the s. 29(1)(b) condition precedent:

> 44 The second requirement is that "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability". As I have explained, the admissions inherent in the guilty pleas and the plea agreements in the U.S. criminal proceedings, if proven, would establish liability in the restitutionary claims, leaving nothing to be determined except the assessment of the amount of the respondents' gain attributable to this particular class, if any, and its distribution. Accordingly, the second precondition is satisfied.

[166] In *Lee Valley Tools Ltd. v. Canada Post Corp.*, [2007] O.J. No. 4942 at paras. 31-37 (S.C.J.), Lax J. held that no expert or other evidence is required to support the conclusion at the certification stage that there is a reasonable likelihood that the conditions for applying the aggregate damages provisions would be satisfied. An analysis of the claim as a whole can provide the necessary basis in fact for accepting as a common issue an aggregate assessment of damages for the determination of losses on a class-wide basis.

[167] The reasoning in *Markson*, *Lee Valley*, and *Pro-Sys* supports the view that if it is determined that members of the proposed class, as Kwakiutl, have rights throughout the Broughton Archipelago, each individual class member may qualify for a *pro rate* share of the global damages calculated on the basis of statistics. On the pleadings and evidence as they stand, there appears to be "a reasonable likelihood that the preconditions in section 29(1) of the *Class Proceedings Act* would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues", sufficient to certify the damages claims as a common issue.

Sections 4(1)(d) and 4(2): Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

Objections

[168] According to Canada and the Province, assuming the other criteria for certification are met, a class proceeding is not appropriate, because:

1. There are several alternatives to a class proceeding, including a representative action, alternative dispute resolution processes

(including negotiation and treaties), Haida Nation consultation processes, development of industry organizations, direct negotiations with industry, legislation, and judicial review;

2. The cause of declining wild salmon stocks in British Columbia is already being determined in a public inquiry through the Cohen commission;

3. The resolution of the proposed common issues would play such a minimal role in the resolution of the individual claims that trying them is useless, as the individual issues to a significant degree predominate over the common;

4. Class members have a valid interest in separate actions, and have in fact commenced litigation;

5. There are conflicts between the various named collectives;

6. The present claims have been and are the subject of other proceedings;

7. A representative proceeding is clearly preferable, and is no less practical or efficient than a class proceeding;

8. Class members are unable to opt-out of the proceedings where collective rights are at issue;

9. Class proceedings are inappropriate where declaratory relief is sought;

10. The administration of this class proceeding would not be manageable;

11. Access to justice, behaviour modification, and judicial economy, the policy considerations underlying the preferability analysis, do not support certification, as each class member's claim is sufficiently large that it could be brought on an individual basis; the Province is no longer involved in finfish farming regulation and the Cohen commission has been set up; and, a class action will needlessly expand the

litigation to encompass collectives who are not interested in pursuing a claim.

Law

Preferability: General Principles

[169] The inquiry as to whether a class proceeding is a preferable procedure is directed to two separate questions; preferability in a qualitative sense, and preferability in a comparative sense. In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, McLachlin C.J.C. stated:

> 35 The question remains whether a class action would be the preferable procedure. Here I would begin by incorporating my discussion in Hollick as to the meaning of preferability: see *Hollick*, *supra*, at paras. 28-31. While the legislative history of the British Columbia *Class Proceedings Act* is of course different from that of the corresponding Ontario legislation, in my view the preferability inquiry is, at least in general terms, the same under each statute. The inquiry is directed at two questions: first, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of preferable to other procedures" (*Hollick*, at para. 28). I would note one difference, however, between the British Columbia *Class Proceedings Act* and the corresponding Ontario legislation… the British Columbia legislation provides express guidance as to how a court should approach the preferability question, listing five factors that the court must consider: see s. 4(2). I turn, now, to these factors.

[170] When conducting this analysis, the Court must look to the specific factors in s. 4(2), and all other "relevant matters", as s. 4(2) is not exhaustive. It must also consider the three principal advantages of class actions (judicial economy, access to justice and behaviour modification), and the degree to which each would be achieved by certification: *Pro-Sys* (C.A.) at para. 71.

[171] "Other relevant matters" were described in *Nanaimo Immigrant Settlement Society v. British Columbia*, 2001 BCCA 75, as including:

> 20 … the question is not whether the class action is necessary - i.e., whether there are other alternatives - but whether it is the "preferable procedure" for resolving the plaintiffs' claims. Section 4(2) of the *Act* states that that question involves a consideration of "all relevant matters" - a phrase that includes the practical realities of this method of resolving the claims in comparison to other methods. In the plaintiffs' submission, what makes a

> class action preferable in this case are the practical advantages provided by the Act for the actual litigation process. Some of these advantages accrue only to the plaintiffs: as Mr. Branch noted, if the claims are aggregated, contingency fee arrangements are likely to be available for the plaintiffs. The claims can be pursued by one counsel or a few counsel rather than by many. A formal notification procedure is available. Generally, it is more likely that those charities that have paid provincial licence fees in connection with bingo and casino games can pursue the matter to completion - something very few individual charities could do on their own. Other advantages arising under the Act are beneficial to both parties - the assignment to the action of one case-management judge, and the attendant elimination of lengthy Chambers proceedings before different judges. From the Province's point of view, none of these considerations prejudices its ability to defend the action fully, except to the extent that financial constraints on the plaintiffs are eased. Those constraints are not an "advantage" the Province should wish to preserve.

[172] Finally, the Court must keep in mind the fact that the *Class Proceedings Act* has unique tools aimed at assisting in the resolution of both common and individual issues. In *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, leave to appeal ref'd [2008] S.C.C.A. No. 15, Winkler C.J.O. stated:

> 60 … While the common issues trial is obviously an essential component of a class proceeding, it is not the whole of the proceeding. The statute is a powerful procedural mechanism that permits the court to take a variety of approaches in resolving the claims of class members.

[173] Similarly, in *Pro-Sys*, the Court stated:

> 76 I do not minimize the potential difficulties of proof arising out of the complexities involved in the marketing and distribution of DRAM. However, the *CPA* is a powerful procedural statute. It gives the case management judge flexible tools to deal with such complexities and if, despite this flexibility, it should turn out that a common issues trial is unmanageable, it gives the judge the power to decertify the action.

The Three Goals of Class Proceedings

[174] Class actions have a social dimension, and are premised upon underlying policy objectives and considerations. Accordingly, the Supreme Court of Canada has repeatedly held that class actions legislation should be construed flexibly and generously: *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 16.

i) Access to Justice

[175] Canada submits that this is not a valid consideration here, as each collective has a sufficiently large claim to justify bringing their own individual action. It refers to the fact that many lawsuits have in fact been commenced regarding rights and title in the Broughton Archipelago.

[176] None of these protective writs have moved forward since their initiation.

[177] In *Soldier v. Canada (Attorney General)*, 2009 MBCA 12, the Court did say:

> 71 The second objective is to provide improved access to the courts for those whose actions might not be asserted without the economy of scale afforded by class actions. See *Abdool v. Anaheim Management Ltd.* (1995), 121 D.L.R. (4th) 496 (Ont. Div. Ct.) and Hoy, at para. 51. This is not a significant issue in this case, where the choice is between a representative action and a class action not between a class action and an action by an individual.

[178] Of particular importance on the access to justice issue is the fact British Columbia adopts a “no-costs” approach to class proceedings. Barring any special order, no costs will be awarded to either party in relation to an application for class certification, the common issues stage of the proceeding, or any appeals of these decisions: *Class Proceedings Act*, s. 37.

[179] In the context of aboriginal rights litigation, this consideration is of considerable importance, as many smaller collectives do not have the resources to mount expensive litigation (Chief Chamberlin notes the high unemployment levels in his community, which he says have arisen from loss of employment in the salmon fishery) where they run the risk of a negative costs award that could drain scarce resources from other community requirements. It is apparent that extensive and presumably very expensive scientific research is required no matter which procedural form this litigation takes.

ii) Behaviour Modification

[180] Canada claims that this is not an issue in this case, because the Morton decision has already established that the Province lacks jurisdiction to regulate

aquaculture. Canada notes that it is engaged in significant public consultation concerning the new regulations it intends to enact, and also references the Cohen commission as a forum where public discussion and investigation will occur.

[181] While I do not consider this policy consideration to be of great significance in this case, it is important to note that the claim isn't just about federalism, regulation, and management in the future; rather, it is primarily about past conduct which has allegedly caused irreparable harm to a finite resource. One of the heads of relief sought is an order for remediation of the wild salmon stocks; public consultations and a new regulatory regime on a going forward basis will not cure harm which has already occurred, and may have caused damage to the First Nations in the exercise of fishing rights.

iii) Judicial Economy

[182] Canada submits that a class proceeding will needlessly expand the scope of this litigation, bringing in class members who would not litigate their claims in the absence of this action.

[183] The plaintiff's submissions on this point are persuasive. The plaintiff notes that the core issues of this litigation should only be heard once by this Court; this is particularly the case when one looks at the complicated scientific evidence that will be adduced at trial.

[184] It is important to keep in mind that Part 4 of the *Class Proceedings Act* provides effective tools for addressing problems in managing individual claims that would not be available outside the *Act*. The management power in s. 12 and the simplified structures which can be designed pursuant to s. 27 are relevant:

> 12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.
>
> …
>
> 27 (1) When the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be

> determined under section 32, that are applicable only to certain individual members of the class or subclass, the court may
>
> (a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court,
>
> (b) appoint one or more persons including, without limitation, one or more independent experts, to conduct an inquiry into those individual issues under the Rules of Court and report back to the court, or
>
> (c) with the consent of the parties, direct that those individual issues be determined in any other manner.
>
> (2) The court may give any necessary directions relating to the procedures that must be followed in conducting hearings, inquiries and determinations under subsection (1).
>
> (3) In giving directions under subsection (2), the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties and, in doing so, the court may
>
> (a) dispense with any procedural step that it considers unnecessary, and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

4(2)(a): Do the common issues predominate over individual issues?

[185] Canada and the Province's submissions on this point are in large part premised on the assumption that a system-wide finding of liability cannot be made. For reasons previously stated, it is not clear that this is the case.

[186] A class proceeding is not preferable where subsequent individual trials will overwhelm any advantage to be derived from the trial of a few minor common issues, and the resolution of the common issue would play such a minimal role in resolution of the individual claims that the potential members of the class would be faced with the same costs to litigate their claim as if they were bringing the claims as individuals: *Williams v. Mutual Life Assurance Co.* (2003), 226 D.L.R. (4th) 112 at paras. 53-54 (Ont. C.A.).

[187] However, as Bennett J. (as she then was) noted in *Gregg v. Freightliner Ltd. (c.o.b. Western Star Trucks)*, 2003 BCSC 241:

> 82 It is clear that when considering whether a class proceeding is preferable, the fact that other individual issues are also important to the litigation of each claim should not lead the court to refuse the application. A class action with "multi-staged proceeding[s], with trials of both common and individual issues" is contemplated by the *Act*: See *Harrington v. Dow Corning Corp.* (2000), 193 D.L.R. (4th) 67 (B.C.C.A.), 2000 BCCA 605 at para. 63-67.

[188] Based on the analysis of the common issues set out above, it seems that this class action may have the ability to resolve the entirety of the litigation, if the procedural tools provided in the *Class Proceedings Act* are utilized. In any event, a finding that fish farms do not affect wild salmon would dispose of this litigation in favour of the defendants, obviating the need for any further proceedings.

[189] The defendants say that the proceedings that would be required to establish the fishing rights of each member of the proposed class would place such an onerous burden on each such member that the trial of the threshold central issue has little potential to advance the proceeding generally. This argument rests on the proposition that the proof of fishing rights of each First Nation would be akin to proceedings in which declarations of rights are sought. Rights, they say, cannot be defined in the absence of limitations.

[190] The principle that s. 35 aboriginal rights cannot be properly defined separately from the limitation of those rights, and that the latter are needed to refine and ultimately define the former, has its genesis in three decisions of the Supreme Court of Canada. In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, Lamer C.J. stated:

> 30 In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> 31 More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must

> be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

[191] In *R. v. Nikal*, [1996] 1 S.C.R. 1013 at 1057-8, Cory J. stated the following in connection with treaty rights:

> It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:
>
> > ... Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of *Charter* rights must be justified as reasonable in a free and democratic society.

[192] A third decision released by the Court in 1996 further emphasizes the importance of context and a case-by-case approach to s. 35 rights claims. In *R. v. Pamajewon*, [1996] 2 S.C.R. 821, a case in which the right to self-government was asserted in the context of a criminal gaming charge, the majority emphasized the importance of specificity, at para. 27:

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve Lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, supra, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.
>
> [Emphasis added]

[193] Where a claim to aboriginal fishing rights is advanced, the appropriate level of specificity focuses on the activity of fishing. Evidence of fishing would, of course, refer to species of fish harvested.

[194] *Van der Peet* and *Nikal* were cited as authority for the proposition that a s. 35 declaration of right should not be granted without a pleading of infringement in the leading case on this point, *Cheslatta Carrier Nation v. British Columbia* (1999), A.C.W.S. (3d) 966 (B.C.S.C.), aff'd 2000 BCCA 539, leave to appeal ref'd [2000] S.C.C.A. No. 625]. In *Cheslatta*, the plaintiff's statement of claim was struck on the ground that it disclosed no reasonable cause of action. The pleading alleged that the plaintiffs had historically fished for food and ceremonial purposes, a practice which had and continued to be integral to their distinctive culture. Specific locations and species which constituted the subject matter of these fishing rights were also alleged. On this basis, the following relief was claimed:

> a) a declaration that the Cheslatta have an existing aboriginal right to carry out the Cheslatta Fisheries;
>
> b) a declaration that the Cheslatta's existing aboriginal right to carry out each of the Cheslatta Fisheries includes the right to fish for each of the following fish: ...

[195] The defendants sought dismissal of the action pursuant to Rule 19(24)(a) on the basis that the pleadings had failed to allege any infringement, present or threatened, of the plaintiff's alleged fishing rights. The Court stated that "the central question is whether the Council's failure to plead an actual or apprehended infringement of the aboriginal right claimed disentitles it to declaratory relief". A preliminary issue concerned whether the fact that the Province's statement of defence had denied the existence of the fishing rights alleged and put the plaintiff to the strict proof thereof was a relevant fact to consider. The Court implicitly held that this was insufficient: Even where its existence is denied, a right cannot be dealt with in the abstract, that is to say, in the absence of a claim that the aboriginal right has been, or will be, infringed. Lysyk J. granted the defendants' motion after a review of

the law relating to declaratory orders generally, and in the particular context of s. 35. Mr. Justice Lysyk noted that generally speaking a declaration will not be granted where there is no real or apprehended dispute between the parties, citing an article which stated:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties. The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise.

[196] In relation to declaratory relief in the context of aboriginal rights, Lysyk J. noted that although most of the cases applying the "four-step" Sparrow analysis arose out of regulatory proceedings, essentially the same approach was taken by Lamer C.J.C. in *Delgamuukw*, a civil case. After distinguishing *Montana Band v. Canada*, [1991] 2 C.N.L.R. 88 (F.C.A.), leave to appeal ref'd (1991) 136 N.R. 421n, Lysyk J. also noted the "close attention" paid by the Supreme Court of Canada in *Marshall* to the particular infringement of the asserted rights, and the emphasis placed in the second *Marshall* decision ([1999] 3 S.C.R. 533), on the factual context of the right and alleged infringement. Accordingly, the Court held that the requirement of an infringement also applied to civil proceedings where declaratory relief was sought, citing the following policy consideration:

> 36 By analogy, counsel for Canada and the Province submit that a bare declaration as to the existence of an aboriginal right on the part of the Cheslatta to take certain species of fish in specified waters is apt to be no more useful than the agreement between the Crown and the accused in Seward that there was an aboriginal right to hunt deer for sustenance and ceremony. In other words, a dispute will not attain the requisite "reality" to ground declaratory relief until one or both of the defendants to this action, through an enactment or governmental action, seeks to impose a limitation on the aboriginal right asserted. In my view, there is merit in that submission.

[197] Newbury J.A. (for the Court) framed the sole issue arising on the *Cheslatta* appeal (2000 BCCA 539) as follows:

> 9 On appeal, the sole question is whether the Chambers judge erred in ruling against the proceeding in the absence of an allegation of infringement or threatened infringement of a legal right. This raises the interrelated

> considerations of "utility" - whether the declaration sought would serve a useful purpose - and "reality" - the extent to which the proceeding must raise a "live controversy" (per Sopinka J. in *Borowski*, *supra*, at paras. 29-36) as opposed to a hypothetical or moot point.

[198] In *Kaska Dena v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69, the Court reaffirmed the *Cheslatta* approach. In *Kaska Dena*, a land and resource management plan was being M prepared, which would designate a portion of lands which the plaintiff asserted to be their traditional territory as a protected area. The plaintiff had entered into a letter of understanding with the Province dealing with the management of lands and resources in the area. The plaintiff brought a petition, asking the Court to construe the letter of understanding in the following manner:

> The petitioner maintains that the correct construction of the Letter of Understanding of September 24th, 1997, is that:
>
> (a) the "rights" of the Kaska Dena therein referred to are "existing aboriginal rights" within the meaning of sections 25 and 35 of the Constitution Act, 1982; and
>
> (b) the "rights" of the Kaska Dena therein referred to also constitute an "Interest other than that of the Province" within the meaning of s. 109 of the Constitution Act, 1867 in respect of that portion of the Kaska traditional territory located within the "Letter of Understanding (LOU) Area".
>
> The petitioner wishes to confirm the correct construction of the Letter of Understanding of September 24th, 1977, in respect of the "rights" of the Kaska Dena therein referred to.

[199] The petition was dismissed. On appeal, Newbury J.A. (for the Court) held that it was important to note that the petition disclosed no breach or threatened breach or violation of the letter or understanding by the Province or any other person, and that no right or interest of either party was said to be in jeopardy. Madam Justice Newbury cited her earlier decision in *Cheslatta*, holding that in these circumstances, the chambers judge should not even have engaged in a construction of the letter of understanding, as there was no actual or threatened infringement. As such, regardless of the merits of the case, the petition should not have been entertained.

[200] In *Cheslatta*, *supra*, Lysyk J. considered, but distinguished, the decision of the Federal Court of Appeal in *Montana Band v. Canada*, [1991] 2 F.C. 30 (C.A.), leave to appeal ref'd [1991] S.C.C.A. No. 164. In that case, the appellants were occupants of the area formerly known as Rupert's Land. A resolution of the Senate and House of Commons relating to the admission of Rupert's Land into Canada stated that "it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer". The appellants pled that this resolution was incorporated into the Constitution of Canada. On this basis, they sought the following relief:

> (a) that the undertaking given by Canada in 1869 was incorporated by reference in the Rupert's Land Order of 1870 and is therefore part of the Constitution of Canada;
>
> (b) that the undertaking given by Canada in 1869 entails a fiduciary obligation to the appellants; and
>
> (c) that article I and article 27 of the United Nations International Covenant on Civil and Political Rights are binding on Canada and that they apply to the appellants.

[201] The claim had been struck on the basis that as there was no grievance or lis between the parties, it did not disclose a reasonable cause of action. On appeal, Heald J.A. reversed this decision and reinstated the claim, making the following important observations:

> This is also a case where counsel for the appellants has stated clearly that if the declarations sought are obtained, they might well be used in support of "extra-judicial claims." In such an eventuality, there might never be a second phase to the process as visualized by the Associate Chief Justice. Negotiated settlements of aboriginal claims are a distinct possibility in today's reality.
>
> ...
>
> The issues raised by these appellants are certainly real and not theoretical since, at bottom, the central issue raised is the very large question of aboriginal rights. The appellants most certainly have a vital and real interest in those issues since they are Chiefs, Councillors and members of the Indian Bands resident in the areas of Canada encompassed by the Rupert's Land Order. Finally, the respondent Crown is most certainly the proper contradictor, with a true interest in opposing the declarations being sought.
>
> As pointed out by counsel for the appellants, there was no breach in the Russian Bank case. I agree with counsel that in the case at bar, these appellants need not in this action for a declaratory judgment point to a

> specific breach of the 1869 undertaking. The necessary requirements for a declaratory action have been satisfied and, in my view, it is not necessary for the appellants to establish or rely upon a breach. The issues here are real, the appellants have a substantial interest therein, and the logical and proper contradictor is in place.

[202] This is the basis on which Lysyk J., in *Cheslatta*, distinguished the decision in *Montana Band v. Canada*:

> 37 In support of its position, the Council referred to *Montana Band of Indians v. Canada*, [1991] 2 C.N.L.R. 88 (F.C.A.), leave to appeal to S.C.C. refused (1991) 136 N.R. 421n. That decision is, however, readily distinguishable. The declaratory relief sought in that case did not include a declaration as to existence of an aboriginal right and, presumably for that reason, s. 35(1) of the *Constitution Act, 1982* was not considered.

[203] The distinguishing factor raised by Lysyk J. in *Cheslatta* applies in the present matter. The proposed representative plaintiff is not seeking a declaration of rights as applicable to their ongoing exercise. This would apply equally to all members of the proposed class. The central question in this matter is whether fish farming has resulted in damage to wild salmon stocks. If this is established, proof of damages may turn on proof of aboriginal fishing rights, but that would not necessarily call for an analysis on questions of infringement and justification at the level required when aboriginal rights are raised as a defence to charges under regulatory statutes. The baseline for the harvest of wild salmon in an exercise of the rights of the representative plaintiff and members of the proposed class may, for example, be established by their level of harvest at a time in which their access to the fishery was subject to regulation under the *Fisheries Act*. This proceeding does not challenge those regulations. Here, the infringement is said to be a reduction in a fishery in which the First Nations have a constitutionally protected interest. There is nothing novel in the proposition that the aboriginal peoples of coastal British Columbia were, at and prior to contact, sustained by catching wild salmon. If the evidence should establish that fish farming is damaging that resource in a material way, the defendants' argument on justification would be interesting, to say the least.

[204] Finally, even if the common issues will not dispose of the entirety of aboriginal rights, their adjudication may well provide the foundation for informed and useful

negotiations between the parties, a particularly important consideration in the context of this case.

4(2)(b): Do class members have a valid interest in controlling separate actions?

[205] The Province notes that seven of the eight collectives referred to in Chamberlin Affidavit #1 have commenced litigation with respect to the Broughton Archipelago, demonstrating their interest in proceeding with separate actions. Additionally, Canada takes the position that it would be patently unfair to force collectives who are supportive of aquaculture to be involved in these proceedings, implying that their interest in controlling the litigation is to have no litigation at all.

[206] The opt-out provisions provide an answer to Canada's submission. As noted in *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231, there is a difference between a desire to control your own litigation and a desire to disassociate oneself from litigation. Putative class members who wish to disassociate themselves from the proceeding should not prevent the remainder of the class from proceeding with the action as a whole. As the so-called dissenting First Nations have asserted aboriginal fishing rights in the Broughton Archipelago, it would seem to be in their interests not to disassociate themselves or interfere with the proceeding.

4(2)(c): Will the class proceeding involve claims that are or have been the subject of other proceedings?

[207] The Province and Canada point to the fact that the KAFN and three aboriginal collectives previously commenced an identical action in the form of a representative proceeding, which has been discontinued. They also point to the *Morton* decision, where some of the constitutional issues raised in this litigation were decided. Finally, the defendants point to the numerous protective writs and treaty statements of intent which have been filed by collectives who fall within the class.

[208] I was unable to find an explanation for why the original action was discontinued in favour of this proceeding; a reasonable inference may be that from the plaintiff's perspective a class proceeding is preferable.

[209] Regarding the protective writs and statements of intent, the plaintiff's submission that the present litigation is fundamentally different in nature and scope appears persuasive:

> 110. … The protective writs are land claims and do not interfere with the common questions in this case. Similarly, there is no evidence that the treaty negotiations address the question of depleting wild salmon stocks, the impact aquaculture is having on wild salmon stocks or whether the Provinces' authorization and/or regulation of fish farms has contributed to this impact. As such, it cannot be said that the claims in this case form part of the negotiations or the protective writs.

[210] Given the submissions made by the defendants about how complex and unmanageable the scientific and other questions raised in this litigation are, it seems difficult to accept their argument that the issues raised in this proceeding will be litigated by someone else in a different forum, where there is no protection against costs, a lack of counsel to take matters on contingency, and less likelihood of spreading the expense of litigation over a larger pool of claimants.

4(2)(d): Are other means of Resolving the Claims More Practical or Efficient?

[211] Canada submits that "while aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 14. Additionally, Canada argues that the opt-out provisions are unavailable, meaning a class proceeding is impractical and unfair.

[212] The Province also submits that a representative action is the proper and mandatory course to follow if the present claims are to be litigated, particularly in light of the fact that declaratory relief is sought. In this regard, it points to s. 41(b) of the *Class Proceedings Act*, which it says bars the present proceeding. It also points to several other alternative mechanisms, such as negotiation and the Cohen commission.

Industry Organizations, Judicial Review, Negotiation, and the Cohen Commission

Preferability, and No Litigation

[213] In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), appeal dismissed (2004), 70 O.R. (3d) 182 (Div. Ct.), leave to appeal ref'd [2004] O.J. No. 2009 (C.A.), Winkler J. (as he then was) made it clear that the comparison called for in this section is not to be made between a class proceeding, on the one hand, and no litigation, on the other:

> 46 A&P also contended that there is a conflict because certification of the action would upset the existing arrangements with the franchisees and cause A&P to revisit each of these arrangements. In my view, this is effectively an argument that there should be no litigation at all rather than an attack on either the adequacy of the plaintiffs as representatives or the preferability of a class proceeding as opposed to individual actions…. The purpose of class proceedings legislation is to make the justice system accessible. To this end, the court must consider alternative procedures. However, as noted in Hollick at para. 16, the certification analysis is concerned with the "form of the action". Arguments that no litigation is preferable to a class proceeding cannot be given effect. If there is any basis to this argument, it is subsumed in the cause of action element of the test for certification.

[214] Additionally, Mr. Justice Winkler held that while the plaintiff bears the "some basis in fact onus", it is insufficient for a defendant to make a bald assertion that individual litigation or some other form of proceeding is preferable; this assertion must have an evidentiary foundation and be supported in reality:

> 27 However, despite the considerations that are engaged in determining whether a class proceeding is the preferable procedure, it would be antithetical to permit the defendants to defeat certification by simple reliance on bald assertions that joinder, consolidation, test cases or similar proceedings are preferable to a class proceeding. This is a simple shopping list of procedures that may be available in all cases. Mere assertion that the procedures exist affords no support for the proposition that they are to be preferred. The defendant must support the contention that another procedure is to be preferred with an evidentiary foundation. As stated in *Hollick*:
>
> > In my view, the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.
>
> Moreover, as the Court noted in *Hollick* in relation to the interaction of the factual matrix of issues, both common and individual, with the preferable

> procedure requirement, it cannot have been the case that "drafters intended the preferability analysis to take place in a vacuum." This statement is applicable with equal force to the consideration of the various types of procedures that may be available for the resolution of a claim.

[215] This was followed by Goepel J. in *Barbour v. University of British Columbia*, 2006 BCSC 1897 at para. 72, appeal allowed on other grounds 2010 BCCA 63, leave to appeal ref'd [2010] S.C.C.A. No. 135.

[216] Winkler J.'s statement in *1176560 Ontario Ltd.* that "arguments that no litigation is preferable to a class proceeding cannot be given effect," is a full answer to the alternative procedures the defendants point to, other than a representative proceeding or judicial review. However, if this is wrong, in my view these other procedures are not preferable in any event.

[217] In relation to the defendants' arguments that the Cohen commission is a preferable forum and that hearing this case may give rise to a danger of conflicting findings with that commission, the following points come to mind: A commission of inquiry cannot bar access to the Courts where plaintiffs seek to litigate constitutional rights. Additionally, the commission deals with Fraser River salmon, a different stock and geographic area. If site specificity is as important as Canada claims, this could not possibly be an adequate alternative.

[218] Regarding negotiation and the treaty commission, the following comments made by Rowles J.A. in *Tsilhqot'in Nation v. Canada (Attorney General)*, 2002 BCCA 434, appeal remanded [2002] S.C.C.A. No. 295, are instructive:

> 134 …Canada's argument that the Nisga'a Final Agreement is proof that the treaty negotiations process does work and can arrive at settlements does not mention that the Nisga'a final agreement was the result of 20 years of tripartite negotiations, 100 years of Nisga'a protest and activism, and landmark decisions in the courts.
>
> 135 In *Delgamuukw*, Chief Justice Lamer referred to the Crown's moral duty to enter into and conduct negotiations in good faith (para. 186):
>
> > Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.
>
> 136 I mention Chief Justice Lamer's observation because of the submission made by counsel for British Columbia during oral argument that

> the courts' oft-repeated urging to resolve aboriginal claims through negotiation rather than litigation is salutary in that it serves to avoid further decisions being made delineating aboriginal rights and title. Among other things, that submission misses the point of the duty to which Lamer C.J.C. referred. It seems to me that, at the least, negotiating in good faith requires that some cognizance be taken of legally determined or recognized rights.

[219] Chief Chamberlin's Affidavit #1 states he reluctantly initiated this litigation because of futile negotiations.

[220] On the issue of Judicial Review Proceedings, the Province notes that each and every fish farm tenure can be challenged on an annual basis, and is the subject of Haida Nation consultation. With respect, it cannot be seriously argued that it is more efficient to annually conduct dozens of judicial reviews than it is to litigate the entirety of these issues in one consolidated class action. In any event, the damages sought in this claim are not well suited to judicial review proceedings. When the common issues are looked at in their entirety, it is clear that a judicial review is a completely inadequate forum for this litigation.

Declaratory Relief and Preferability

[221] The Province notes that one component of the relief sought is a declaration that "the manner in which the province has authorized and regulated Salmon Farms has contributed to a significant decline in Wild Salmon stocks", and a declaration that the manner in which the Province has managed and regulated Salmon Farms has infringed the plaintiff's fishing rights. In the Province's submission, it is "generally undesirable" to pursue declaratory relief in a class proceeding.

[222] In *Sawridge Band v. Canada*, [2003] 3 C.N.L.R. 358 (F.C.T.D.), Hugessen J. noted that an action for declaratory relief may be brought as a class action, though generally speaking, this will not be a preferable manner of proceeding:

> 8 While these cases suggest that an action for declaratory relief can, in an appropriate case, be brought in a class action, such a manner of proceeding will be the exception, rather than the rule. There is, after all, no reason for an action that seeks solely to have a statutory provision declared invalid to proceed as a class action, since a declaration of invalidity can be sought as a rule by any person having the requisite interest to begin with.

[223] The Province cites *Marcotte v. Longueuil (City)*, 2009 SCC 43:

> 28 …When a request for nullity or for the quashing of an administrative act such as a municipal by-law is granted by a court, it does not benefit only the party that brought the action. The conclusion also applies in respect of all citizens and ratepayers in the municipality in question… According to the Court of Appeal, the effect of nullity, which applies in respect of all ratepayers, makes a class action utterly pointless. Although this Court has not explicitly adopted this theory, it did observe in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 20, that it was "generally undesirable" to pursue a class action to obtain a declaration of constitutional invalidity. In the case of an act such as a municipal by-law, the fact that a declaration of nullity applies in respect of everyone, even if it results from an individual action, is undisputed.

[224] However, the decisions in *Marcotte* and *Guimond* must be viewed in the Quebec civil law context within which they were decided. This is the approach Newbury J.A. took in *Nanaimo Immigrant Settlement Society v. British Columbia*, 2001 BCCA 75. There, relying on *Guimond*, the Province submitted that a class action was unnecessary for the resolution of constitutional questions and other issues that could be resolved by a declaratory judgment. Such a judgment would "bind the world", unlike a judgment on the common issues in a class proceeding which, under s. 26 of the *Class Proceedings Act*, binds only those members of the class who do not opt out.

[225] The Court rejected that argument. Newbury J.A. considered that the *obiter* comment in *Guimond* may be inapplicable to proceedings under the *Class Proceedings Act*. Quebec's *Code of Civil Procedure*, which governed the proceedings in *Guimond* (and in *Marcotte*) provides that a class action is to be used only when necessary because of the "difficulty" or "impracticability" of the alternatives. At para. 20, Madam Justice Newbury stated:

> ...the question is not whether the class action is <u>necessary</u> - i.e., whether there are other alternatives - but whether it is the "<u>preferable</u> procedure" for resolving the plaintiffs' claims. Section 4(2) of the *Act* states that that question involves a consideration of "all relevant matters" - a phrase that includes the practical realities of this method of resolving the claims in comparison to other methods.
>
> [Emphasis in original]

[226] In *Brogaard v. Canada (Attorney General)*, 2002 BCSC 1149, Allan J. followed *Nanaimo Immigrant Society*, and certified as a common issue an allegation that a provision of the *Canada Pension Plan Act* discriminated against the proposed class members on the basis of their sexual orientation in breach of s. 15(1) of the *Charter*, and that the breach was not saved by s. 1 of the *Charter*. A class proceeding was also held to be preferable, even though:

> 129 In this case, a declaratory judgment would only get the plaintiffs "half way home". The point of undertaking the challenge to s. 15 of the *Charter* is to obtain damages under s. 24(1) consequent to a *Charter* breach in the form of Survivors' Pensions to which they claim entitlement.

[227] In this case, the declarations sought are essential components of the plaintiffs' aggregate damages claim. Accordingly, they are inextricably linked with the proceedings as a whole, and the answer to these questions will materially advance the litigation. Thus, it is not "utterly useless" to pursue this relief in light of the totality of the issues raised.

Is a Representative Proceeding Mandatory and/or Preferable?

[228] The Province submits that the present proceeding is statutorily barred by s. 41(b) of the *Class Proceedings Act*. Section 41 provides:

> 41 This Act does not apply to
>
> (a) a proceeding that may be brought in a representative capacity under another Act,
>
> (b) a proceeding required by law to be brought in a representative capacity, and
>
> (c) a representative proceeding commenced before this Act comes into force.

[229] On the authority of *Oregon Jack Creek Indian Band v. C.N.R.* (1989), 34 B.C.L.R. (2d) 344 (C.A.), aff'd [1989] 2 S.C.R. 1039 the Province submits that cases in which aboriginal or treaty rights are asserted must proceed by way of a representative action. In that case, MacFarlane J.A. stated:

> It is a mistake, in my view, to conclude that aboriginal rights vest in an entity (which clearly does not exist today) and to ignore the historical fact that the rights are communal, and that they are possessed today by the descendants

> of the persons who originally held them. They are not personal rights in the sense that they exist independently of the community, but are personal in the sense that a violation of the communal rights affect the individual member's enjoyment of those rights. Individuals representing all other persons who can claim those rights must have status to do so if any claim is to be made. To hold that only the nation can make the claim is in reality to hold that no claim can be made.
>
> …
>
> In *Martin and Corbett v. R. in Right of British Columbia and MacMillan Bloedel Limited* (1986), 3 B.C.L.R. (2d) 60 (B.C.S.C.) at 65-66, Chief Justice McEachern (C.J.S.C. as he then was) suggested and it was agreed that the style of cause be:
>
> > "MOSES MARTIN, suing on his own behalf and on behalf of the CLAYOQUOT BAND OF INDIANS and on behalf of all other members of the said band, its tribes and nations."
>
> Thus, it appears that a representative action has been endorsed as the correct form in which to bring a claim involving aboriginal rights. The important thing is that all interests be represented at trial and that all persons who may have such a claim are bound by the result. It is only after evidence has been heard that any of the members of the class can be properly identified.
>
> [Emphasis Added.]

[230] In the Province's submission, *Oregon Jack* means that aboriginal and treaty rights claims are required by law to be brought as representative proceedings within the meaning of s. 41(b), on the basis that individual persons may not enforce rights held collectively by an aboriginal group.

[231] The Province also refers to *Jellema v. American Bullion Minerals Ltd.*, 2009 BCSC 1605, where Mr. Justice Pitfield held that as s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57, authorized a representative action, s. 41(a) of the *Class Proceedings Act* precluded certification of an oppression proceeding as a class action. The Province also points to Rule 5(11) of the *Rules of Court* (now Rule 20-3(1)), which provides:

> (11) Where numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (17), the proceeding may be commenced and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

[232] The Province's reliance on *Jellema*, Rule 5(11), and s. 41(a) of the *Class Proceedings Act* is misguided. In *Potter v. Bank of Canada* (2007), 85 O.R. (3d) 9 (C.A.), the Court held that the exact equivalent of s. 41(a) in that province did not bar certification of actions which were also authorized to be commenced under the *Rules of Court* as a representative proceeding. Goudge J.A. held that the legislative intent underpinning class proceedings legislation was to make it procedurally easier to bring actions that would otherwise have to be brought as representative proceedings:

> [38] Moreover, I think the legislative intent behind the *Act* is contrary to the respondent's position. It is beyond controversy that one of the primary objectives was to facilitate access to justice. An aspect of that was to reduce the legal and economic obstacles for actions that would otherwise have to be brought as representative proceedings under the *Rules of Civil Procedure*...
>
> [39] Given that the *Act* was designed in part to make it procedurally easier to bring actions that would otherwise have to be brought as representative proceedings under the rules, it would be anomalous to interpret s. 37(a) as automatically removing that remedial benefit for actions that could be brought as representative proceedings under Rule 10. Such an interpretation would make it impossible to do what the *Act* was designed to achieve.
>
> [40] Rather, in my view, the correct interpretation of s. 37(a) is that it precludes resort to the *Act* only where another piece of legislation provides expressly for representative proceedings. That is, in enacting s. 37(a) the legislature decided that only where it had elsewhere provided specific legislation authorizing representative proceedings in a particular context would that prevail over its legislation of general application, namely the *Act*...
>
> [41] This interpretation of s. 37(a) is consistent with the seminal research paper on class actions, Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982). At p. 846 of vol. 3 of that report, the Ontario Law Reform Commission reiterated that its primary concern was to provide a reformed procedure for actions that would otherwise be brought as representative proceedings pursuant to the *Rules of Practice*, R.R.O. 1980, Reg. 540 (as they were then called). The Commission was careful to say, by contrast, that its recommended class action legislation should not apply to any representative action authorized by any other *Act*.
>
> [Emphasis added]

[233] Turning to the Province's submission on *Oregon Jack* and s. 41(b), the question to be answered is this: As there is no statute on point, does the common law require this action to be brought only in a representative capacity? In my view, the answer to this question is no.

[234] It is true that most claims where aboriginal and treaty rights have been asserted have been brought as representative actions. But this may be a result of the historic uncertainty in the law as to the capacity of an Indian Band to sue in its own name. Does a customary and default practice used because there were no adequate alternatives give rise to a rigid and unflexible rule of law? In my view, the answer is no, particularly given the finding of the Court in *Potter* that one purpose of class actions legislation was to provide a reformed procedure for actions that would otherwise be brought as representative proceedings.

[235] Just because a class proceeding has never been attempted in circumstances analogous to the present does not mean a representative action is the only available procedure. In *Chandler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164 at 178 (C.A.), Denning L.J. rejected the submission that because something had never been done before, it ought not to be done now:

> Let me first be destructive and destroy the submissions put forward by Mr. Foster... no action, he said, had ever been allowed for negligent statements, and he urged that this want of authority was a reason against it being allowed now. This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected... Whenever the argument of novelty is put forward I call to mind the emphatic answer given by Pratt C.J. nearly two hundred years ago in *Chapman v. Pickersgill* when he said: "I wish never to hear this objection again..."

[236] Moreover, it has been held that *Oregon Jack* does not require representative actions for the assertion of aboriginal rights. In *Sawridge Band v. Canada*, [2003] 3 C.N.L.R. 358 (F.C.T.D.), in response to an argument by the Crown that an *Indian Act* band had no standing to sue, Hugessen J. noted:

> 10 [The Crown] cites *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 56 D.L.R. (4th) 404 at 410, [34 B.C.L.R. (2d) 344, [1990] 2 C.N.L.R. 85 at 89-90] where the British Columbia Court of Appeal appeared to cast doubt on whether a band was a legal entity in their discussion of whether the action was personal or derivative: ...
>
> 11 In that same case (*Oregon Jack Creek Indian Band v. C.N.R. (No. 2)*, [1990] 1 S.C.R. 117 at 118-119 [68 D.L.R. (4th) 478, 103 N.R. 235]), however, the Supreme Court of Canada made it clear that the above

> statement was *obiter*, and it refused to decide the issue in the context of the case before it: ...
>
> 12 In specifically declining to pronounce on this issue, the Supreme Court of Canada has left it open. I do not, however, interpret even the decision of the B.C. Court of Appeal in *Oregon Jack* as standing for the proposition that a band can never bring an action in its own right. At page 409 [D.L.R.; p. 88 C.N.L.R.] of the decision, the Court stated:
>
> > It is not necessary in this case to decide in what situations the band may be regarded as a legal entity for the purpose of commencing an action. It is sufficient to observe that a representative action may be brought by the members of the band council … or by a chief of a band for himself, and the majority of his band […]
> >
> > The question in this case is not whether a band, through the members of its council, can bring an action in trespass, but whether the chief of a band […] can bring a representative action on behalf of himself and all other members of the band to enforce their communal rights.
>
> 13 In the context of that case, I think the Court of Appeal was saying that, while rights are communal, they can still be asserted by individual members of the band. It was not saying that the band cannot bring its own action. Wewayakum, in my view, clarifies the latter issue by determining in clear language that a band, as a legal entity, can sue in its own right. With respect, that seems to me to be good law as well as sound common sense. Subject to what is said below, it also accords well with the realities of these cases.

[237] In the present matter, Chief Chamberlin stands as a representative plaintiff for the Kwicksutaineuk/Ah-Kwa-Mish First Nation. The basis for the claim is infringement of a right held collectively by members of the First Nation. The proposed members of the class, all First Nations that exercise fishing rights in the Broughton Archipelago, stand on the same footing. Each is to a significant extent distinct while associated with the larger grouping of Kwakiutl. There is no indication of either a contemporary or historical overarching Kwak'wala authority. Hence, a conventional representative action on behalf of all Kwak'wala would not appear, on the material before me, to be suited to a representative proceeding. As a representative action on behalf of all Kwak'wala peoples, it does not appear to conform to their mode of social organization. Accordingly, s. 41(b) of the *Class Proceedings Act* could not preclude this matter proceeding under the *Class Proceedings Act*.

The opt-out provisions

[238] Even if a representative action is not mandatory, the Province and Canada submit that it is the preferable form of proceeding in this case. A large portion of their submissions on this point are devoted to the unworkability of the opt-out provisions found in s. 16 of the *Class Proceedings Act*. Both Canada and the Province submit that in the context of an aboriginal/treaty rights case, there cannot be more than one interpretation of an aboriginal right, as it is shared communally amongst an identifiable group.

[239] This proceeding is concerned with the exercise of fishing rights as an activity, in particular the right to fish for wild salmon for sustenance. While the precise scope of the rights of members of the proposed class may vary among them, this would go the question of the quantum of damages for each First Nation if liability is established. Differing entitlement to damages among the class is not a bar to a class proceeding.

Unfairness to Fish Farming First Nations

[240] Canada submits that even if the opt-out provisions are workable in this case, this litigation is "totally unfair" to those aboriginal collectives who benefit from aquaculture in the Broughton Archipelago, as:

> 65. ...Obviously, they are not going to opt out of a class proceeding in order to conduct the action on their own, because they are fundamentally opposed to the relief sought. The only options open to these Aboriginal Collectives, should this action be certified, would be to opt out (however such a decision would be made) and then sit and watch these proceedings that are contrary to their interests proceed or to seek to be added as intervenors or parties in order to oppose the relief sought by the plaintiff. This would be totally unfair to those Aboriginal Collectives.
>
> ...
>
> 69. Given that there is no way to protect the interests of any proposed class members that do not support this proceeding or are contrary in interest to this proceeding, it would be manifestly unjust for it to be certified... Contrary to the plaintiff's assertions, there is a principled reason why this case cannot proceed to certification and that is because of the inherent injustice and trampling on the rights of the other Aboriginal collectives and its members that results from them being unable to exercise their opt out right in a meaningful way.

> ...
>
> 71. ... The fairer approach is for this Court to dismiss the certification application and allow the plaintiff to proceed with a representative action.
>
> 72. [The plaintiff's submission that a class proceeding fosters access to justice by spreading the costs of litigation amongst class members]... demonstrates once again the sheer injustice that is being caused to the majority of the Aboriginal Collectives who not only do not want to proceed with this litigation but would be asked to pay for the costs of the litigation that is contrary to their very interests. Nothing could be more unfair than that.

[241] To begin with, a declaration against the Province granted in a representative action brought by two people is no different than a declaration granted in a class proceeding where there are thousands of plaintiffs. If the plaintiff wants to "shut down fish farming" (which in any event misconstrues the common issues), this detriment to the other collectives would occur regardless of the form of proceeding utilized.

[242] Secondly, the class members are not being asked to pay for this litigation: Schedule B to the Notice of Motion clearly provides that counsel fees and disbursements will come out of any ultimate settlement or award of damages on a contingent basis, unless class members enter into individual arrangements with counsel. If class members opt-out, they will have no share in the award, so nothing will be ventured or lost.

4(2)(e): Would the administration of a class proceeding be manageable, or would it create greater difficulties than those likely to be experienced if the relief were sought through other means?

[243] In Caputo v. Imperial Tobacco Ltd. (2004), 236 D.L.R. (4th) 348 (S.C.J.), Winkler J. (as he then was) stated:

> [62] To paraphrase McLachlin C.J., a two-part test is to be applied on a preferable procedure determination. As such, it is not enough for the plaintiffs to establish that there is no other procedure which is preferable to a class proceeding. The court must also be satisfied that a class proceeding would be fair, efficient and manageable.

[244] In *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.), leave to appeal ref'd [2009] O.J. No. 402 (Div. Ct.), Lax J. held at para. 64 that "the Court

should strive to find ways to use the powerful tools of the *Class Proceedings Act* to meet the preferability requirement.". In doing so, the Court should keep in mind that:

> 66 ... The defendant has remedies if its dire forecast of unmanageability is borne out, but refusing certification denies class members any opportunity to pursue claims for their losses. The assessment of individual damages is not an easy issue and the aggregate assessment plan needs work, but at this point, I consider that the ghostly spectre of unmanageability underlying the arguments presented against certification is unconvincing. As with most ghosts, it will either vanish in the daylight of case management, the direction of the trial judge, or agreement of the parties or it will return in the night to haunt this proceeding, in which case the defendant may move under section 10 of the *CPA* for decertification...

[245] In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50, Goudge J.A. stated:

> 89 The respondents also attack Cullity J.'s preferability finding by saying that a class action would be unfair to them and would create an unmanageable proceeding. I do not agree. The common issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials. Nor, at this stage, is there any reason to think that a single trial would be unmanageable. The common issues centre on the way the respondents ran the School and can probably be dealt with even more efficiently in one trial than in fourteen hundred.
>
> 90 That conclusion is not altered even if one takes into consideration the individual adjudications that would follow. The fact of a number of individual adjudications of harm and causation did not render the action in *Rumley* unmanageable and does not do so here. Moreover, the *CPA* provides for great flexibility in the process. For example, s. 10 allows for decertification if, as the action unfolds, it appears that the requirements of s. 5(1) cease to be met. In addition, s. 25 contemplates a variety of ways in which individual issues may be determined following the common issues trial other than by the presiding trial judge. Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim.

[246] The common issues in this case require resolution one way or the other. The administration of this proceeding will not present greater difficulties than those likely to be experienced if relief were sought by other means; this will be complex litigation no matter what form of proceeding is adopted.

[247] It is, in addition, clear that all of the same issues would need to be considered in any individual litigation, but in a less controlled procedural environment, without

the simplified tools and procedures to address individual issues found in the *Class Proceedings Act*.

Section 4(1)(e): Is there a representative plaintiff who will fairly represent the class, has produced a workable litigation plan, and does not have a conflict with other class members on the common issues?

[248] Canada and the Province submit that Chief Chamberlin is not an adequate representative plaintiff, because:

1. He lacks authority to bring the claim on behalf of the proposed class members;
2. His claim is in direct conflict with and opposed to the interests of many of the class members who actively support and rely upon aquaculture;
3. Many of the class members reject this litigation and his authority to proceed with it;
4. There are overlapping and mutually exclusive claims within the Broughton Archipelago.

[249] In Canada and the Province's submission, for these reasons, Chief Chamberlin would not fairly and adequately represent the interests of the class; additionally, he is disqualified from acting as a representative plaintiff as his interests on the common issues conflict with other class members.

Law

General Principles

[250] I do not understand Canada and the Province to have taken issue with the proposed litigation plan. In any event, a litigation plan is a preliminary projection and may be adjusted. It is not to be unexpected that a litigation plan may undergo change as the matter progresses: In *Fakhri v. Alfalfa's Canada Inc. (c.o.b. Capers Community Market)*, 2003 BCSC 1717, aff'd 2004 BCCA 549, Gerow J. stated:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a

> clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members. *Hoy v. Medtronic*, at ¶ 81-82; Scott v. TD Waterhouse Investor Services, ¶ 164-167.

[251] van Rensburg J. summarized the law on this point in *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.):

> 223 In *Griffin v. Dell Canada Inc.*, Lax J. identified the purposes and requirements for a workable litigation plan (at para. 100):
>
> > The production of a workable litigation plan serves a two-fold purpose: (a) it assists the court in determining whether the class proceeding is the preferable procedure; and (b) it allows the court to determine if the litigation is manageable... The plan must provide sufficient detail that corresponds to the complexity of the litigation. The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed...
>
> 224 At the certification motion, the litigation plan must necessarily be preliminary. Not all procedural details need to be particularized. The purpose of the litigation plan at the certification motion is to assist the motions judge to determine whether the action is manageable and whether the goals of the *CPA* will be served by certification of the action as a class proceeding. As the litigation progresses, the litigation plan can be modified as required...

[252] Turning to the adequacy and conflict requirements, in *Dutton*, Chief Justice McLachlin stated the following general principles on this point:

> 41 ...In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class...

[253] The Quebec Court of Appeal has held that the court may consider the fact that the group whom the plaintiff seeks to represent has declared itself against a class action in determining the suitability of the representative plaintiff: *Gagnon v.*

Ratelle, [1988] Q.J. No. 2262 (C.A.). However, from the Court of Appeal's brief reasons in that case, it appears to have been clear at the certification hearing that the proceedings would turn into a class action by a single person, as it was known from the outset that all of the other members of the putative class would dissociate themselves from the litigation. That is not the case here.

[254] Additionally, the Quebec Courts have accepted that some level of objection from certain segments of the class is not fatal: *Bernèche v. Canada (Procureur général)*, 2007 QCCS 2945.

[255] Courts in British Columbia have required only that the representative plaintiff have an interest in common with the other members of the class and an intention to pursue the claim vigorously. The language of the statute and the authorities in this Province establish that if differences between the representative plaintiff and the proposed class do not impact on the common issues, then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest.

[256] As all proposed members of the class have an interest in the assertion and exercise of aboriginal fishing rights, and the proposed class action does not challenge their economic interest in fish farming, their differences are more apparent than real. There are, therefore, no differences between the representative plaintiff and the proposed class that impact on the common issues.

[257] In *Fakhri*, Gerow J. provided the following overview of the s. 4(1)(e) requirements:

> [74] Section 4(1)(e) of the *Class Proceedings Act* mandates that the representative plaintiff must be able to fairly and adequately represent the class, has developed a plan for proceeding and does not have a conflict with the interests of the class on common issues. The representative plaintiff must be prepared to vigorously represent the interests of the class. *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.) at ¶ 75.
>
> [75] The inquiry about whether the representative plaintiff adequately and appropriately represents class members and potential conflicts of interest is focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common

> issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest. *Hoy v. Medtronic*, ¶ 83-85; *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (S.C.) at ¶ 66.
>
> [76] There is no indication that Mr. Aylon has any interest in conflict with the class members on the proposed common issues. If such a conflict were to arise, sub-classes are available to deal with differences. See, for example, *Anderson v. Wilson* at 24; *Endean v. Canadian Red Cross Society* (SC) at ¶ 66; *Hoy v. Medtronic*, at ¶ 83-85.

Conflicts and Dissent

[258] Canada relies on the decision of Bauman J. (as he then was) in *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790, aff'd 2003 BCCA 87, in support of its submission that certification must be denied on the basis that Chief Chamberlin's interests on the common issues conflict with those of the other class members. In *Samos*, the plaintiff sought to certify "on behalf of a single, diverse class, a proceeding which alleges a civil conspiracy spanning some five years and which includes a series of complex corporate transactions involving a widely traded public company."

[259] In that case, Bauman J. found that there was the possibility some of the impugned corporate transactions were within the conspiracy and some were not. Accordingly, shareholders from different periods would likely wish to advance different theories of the conspiracy to further their particular claims at the expense of shareholders from other periods. Additionally, he found that the potential for conflict between members of the proposed class also extended to the theory of damages that various shareholders may wish to advance.

[260] This case is not analogous to *Samos*.

[261] In this case, it is important to keep in mind what the representative plaintiff seeks to litigate as common issues, and what he does not. This is not a title case, or an attempt to exhaustively delineate fishing rights in the Broughton Archipelago between competing and overlapping claimants. No injunction is being sought against the existing fish farm operations, and no attempt is being made to "shut

down" the industry. Rather, Chief Chamberlin seeks to hold the Province accountable in damages for the decrease in wild salmon stocks (if any) attributable to the Province's conduct, and to force the Province to remediate the wild salmon stocks in the Broughton Archipelago.

[262] Canada has adduced evidence from some collectives suggesting they wish to take no part in the litigation. This is no bar to certification, and does not mean Chief Chamberlin is an inadequate representative. Conflicts over the desirability of litigation as a whole (as opposed to conflicts on the common issues) are not a bar to certification. As Cullity J. noted in *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.):

> [68] I am satisfied that conflicts of the first kind [from the possibility that some members of the class may not be in favour of the litigation] can be adequately addressed by the opting out process. This is designed to permit putative class members to divorce themselves from the litigation, for whatever reason, and, by so doing, to preserve their rights. The possibility that some members of the putative class may be concerned that -- irrespective of its resolution -- the litigation may provoke an unfavourable reaction from the defendant should not be permitted to prevent members who do not choose to opt out from proceeding with the action as a class proceeding.

[263] In my view, none of the evidence put forward by the defendants regarding the support various aboriginal collectives have expressed for aquaculture tenures and fish farming as a whole give rise to a conflict on these issues. The fish farm industry is not on trial in these proceedings. It is difficult to see how the interests of the class members and the representative plaintiff would conflict on the common issues as they are actually framed, not as they have been misconstrued by the defendants.

V. DISPOSITION

[264] This proceeding is certified as a class action. The common issues, except those set out in paragraph 10(c) and (h), are as framed by the Kwicksutaineuk/Ah-Kwa-Mish First Nation.

[265] The trial of the common issues, including a determination whether one or several of the common issues will be tried before others, will be addressed in case management.

"H.A. Slade J."
The Honourable Mr. Justice H.A. Slade

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands),* 2010 BCSC 1699

Date: 20101220
Docket: S090848
Registry: Vancouver

Between:

Chief Robert Chamberlin, Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation, on his own behalf and on behalf of all members of the Kwicksutaineuk/Ah-Kwa-Mish First Nation

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Agriculture and Lands and Attorney General of Canada

Defendants

Before: The Honourable Mr. Justice Slade

Corrigendum to Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J.J. Camp, Q.C. R. Mogerman K. Robertson
Counsel for the Defendant, Province of British Columbia:	J. Sullivan S. Knowles J. Oliphant
Counsel for the Defendant, Attorney General of Canada:	H. Wruck, Q.C. S. Postman

A. Semple

Place and Date of Hearing:	Vancouver, B.C. April 13-16 & 19-21, 2010
Further Written Submissions:	July 7 - 8, 2010 November 18, 22-24, 2010
Place and Date of Judgment:	Vancouver, B.C. December 1, 2010

[266] The reasons for judgment dated December 1, 2010 in these matters are hereby amended, as follows.

[267] On the front page of the judgment, the style of cause is amended to include the Attorney General of Canada as a defendant.

[268] On the front page of the judgment, counsel for the Attorney General of Canada are changed from T. Timberg and L. Lachance, to H. Wruck, Q.C., S. Postman, and A. Semple.

[269] On the front page of the judgment, further written submissions dates are amended to include November 18, and 22-24, 2010

[270] In paragraph 19 of the judgment, the reference to “fighting rights” is replaced by the phrase “fishing rights”.

[271] In paragraph 22 of the judgment, the quotation from the Further Amended Statement of Claim is changed to read as follows:

> This is a proposed class action on behalf of all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social, and ceremonial purposes ("Fishing Rights") within the Broughton Archipelago ("Class-). ...

[272] In paragraph 23 of the judgment, the quotation from the Amended Notice of Motion is changed to read as follows:

> The class be described as all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social, and ceremonial purposes within the Broughton Archipelago (the "Class Members") ....

[273] In paragraph 27 of the judgment, the reference to the affidavit #1 of Lori Walker is amended to reflect that it was filed by Canada, not by the Province.

[274] In paragraph 94 of the judgment, the reference to the affidavit of Chief John Smith is amended to reflect that it was filed by Canada, not by the Province.

The Honourable Mr. Justice H.A. Slade