Aboriginal Title Claim Dismissed Due To Lack Of Standing: Hwlitsum First Nation V. Canada (Attorney General), 2017 BCSC 475, Supreme Court Of British Columbia (Abrioux J.), 24 March 2017

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The B.C. Supreme Court dismissed an Aboriginal title claim on the basis that the plaintiffs lacked standing to bring this action as a representative proceeding. The Court held that the proposed class or collective asserting Aboriginal rights and title was not defined in a manner that permits its membership to be determined by objective criteria. Ancestry alone is insufficient to establish that a modern collective has a claim to the rights of a historic group. In this case, the plaintiffs defined themselves as being the descendants of only one member of the relevant historic group (the Lamalcha Tribe). The alleged objective criteria for membership of the Hwlitsum First Nation depended entirely upon the discretion of the Chief and Council. The Court therefore held that the representative claim based upon section 35 rights were bound to fail and must be dismissed on that basis.

The underlying action was commenced in November 2014 by members of the Wilson family, purportedly on behalf of the "Hwlitsum First Nation". The plaintiffs claim that the Hwlitsum First Nation is a recognizable Aboriginal group that is descended from the Lamalcha Tribe of Indians.

The plaintiffs seek a wide array of remedies in their action, including $2 billion in damages, and a declaration of Aboriginal title to a large area of southwestern British Columbia, including most of the southern Gulf Islands and the Lower Mainland. They also sought an order that 160 acres of land within Stanley Park be transferred to each of six members of the Hwlitsum First Nation.

The defendants in this action were initially Canada, British Columbia, the City of Vancouver, the Vancouver Park Board, the City of Richmond, the Corporation of Delta, the Capital Regional District, and the Islands Trust. During the litigation, three First Nations were added as co-defendants: the Tsawwassen First Nation, the Penelakut First Nation and the Musqueam First Nation.

At an early stage in the litigation, Canada applied to strike out the plaintiffs' claim on the basis that they lacked standing or that the claim represented an abuse of process. Mr. Justice Abrioux was appointed as the case management judge for this proceeding in April 2015. The hearing of the “standing application” was adjourned several times, and many interlocutory applications followed. See the decisions indexed as 2015 BCSC 1341, 2015 BCSC 2100, 2016 BCSC 476, and 2016 BCSC 2104.

The standing application was heard in December 2016. Canada argued that the Hwlitsum plaintiffs did not satisfy the criteria for a "representative action". Further, Canada took the position that this litigation constitutes an abuse of process since there is already an Aboriginal title claim brought by the Penelakut First Nation. There was evidence that the remaining members of the Lamalcha Tribe had been amalgamated into the Penelakut Indian Band in 1877 by the Indian Reserve Commission.

Abrioux J. held that the representative claims in this action are bound to fail, and must therefore be dismissed on that basis. It was unnecessary to consider whether the litigation constituted an abuse of process.

The Court agreed that the issue of standing can be addressed as a preliminary matter in order to avoid unnecessary litigation. The issue of standing arises with regards to the plaintiffs' claims under section 35 of the *Constitution Act*, 1982 that they hold Aboriginal rights and title as the descendants of the Lamalcha Tribe of Indians. Such rights are collective in nature.

The parties agreed that the applicable test for whether a representative action is appropriate is set out in *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46. Abrioux J. noted that Dutton is a class action proceeding, and that the law on representative proceedings in British Columbia may be governed by *Hayes v. British Columbia Television* (1990). However, it was unnecessary to decide the point since the tests in both cases contained the following requirement: is the purported class capable of clear and finite definition?

Abrioux J. held that the *Hwlitsum* plaintiffs failed to satisfy the requirement that the proposed class or collective is defined in a manner that permits its membership to be determined by objective criteria. The pleadings filed by the plaintiffs contain a definition of Hwlitsum citizenship. During the hearing of the application, the plaintiffs amended the class definition to include "all members of the Lamalcha Tribe, being the descendants of Si'nuscutun, who are not members of any other Indian Band". Abrioux J. held that the plaintiffs cannot define themselves as descendants of only one member of the ancestral group, and at the same time submit that they are the descendants of all the Lamalcha. The Court held that this was “fatal” to the action proceeding as a representative action. Abrioux J. listed other problems with the plaintiffs' definition of the proposed class:

- … Ancestry alone is insufficient to establish that a modern collective has a claim to the rights of a historic group
- some of the alleged descendants of Si'nuscutun are members of other bands. The interrelationship of the HFN and other First Nations will make it virtually impossible to ascertain whether that descendant is one who supports the objectives of the plaintiffs or favours the positions advanced by the Band of which he or she is a member …

- while the revised class definition excludes those individuals who are members of other bands, membership in the HFN may depend entirely upon the exercise of the discretion of the Chief and Council who are plaintiffs in this proceeding …
- … the HFN's self-identification is, at best, “of recent vintage”the fact certain organizations may have recognized the HFN does not mean the representative claim is not bound to fail. In fact, there is no evidence that these organizations are even aware of the new class definition proposed for the first time during the hearing of the Standing Application. And, in any event, Canada's application is supported by Tsawwassen, Penelakut and the Musqueam.

Abrioux J. held that it appeared that the plaintiffs were attempting to construct a First Nation out of one family, and then assert s. 35 Aboriginal title claims. He further held:

With respect, the HFN's alleged objective criteria for membership are more akin to those of a private members' club where selection is dependent on the board of directors' ultimate discretion, rather than on proving membership in a recognized collective with the standing to advance a claim for s. 35 rights and remedies.

And in any event, the HFN are faced with an inherent conflict in their proposed class definition, which cannot be cured by reference to purported objective criteria.

Abrioux J. rejected the arguments of the Hwlitsum plaintiffs that standing was an issue of mixed fact and law that could not be decided on a summary basis. He also rejected the application of Powley principles to the plaintiffs in this case.

The Court therefore dismissed the representative claims in this action as being bound to fail. Abrioux J. noted that the Amended Notice of Civil Claim also contains individual claims for alleged breaches of sections 2 and 15 of the Charter of Rights. The pleadings fail to provide any specific details regarding these claims. In the circumstances, Abrioux J. was not prepared to stay or dismiss the Charter claims at this stage. He held that it was appropriate to allow the plaintiffs the opportunity to decide whether they want to advance those claims. Abrioux J. seized himself of any application to amend the pleadings to particularize the basis of the individual Charter claims.

[Editor's note: Patrick G. Foy, Q.C. and Scott Kerwin of BLG represented The City of Vancouver and the Vancouver Park Board in this proceeding]

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