COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hwlitsum First Nation v. Canada (Attorney General),* 2018 BCCA 276

Date: 20180710
Docket: CA44365

Between:

Hwlitsum First Nation, as represented by its Chief and Council Chief Raymond Wilson and Councillors Lindsey Wilson, Janice Wilson Jim Hornbrook and Danny Wilson on their own behalf and on behalf of the members of Hwlitsum First Nation

Appellants
(Plaintiffs)

And

The Attorney General of Canada, Her Majesty the Queen in the Right of the Province of British Columbia, The City of Vancouver, The Vancouver Park Board, The City of Richmond, The Corporation of Delta, The Capital Regional District, The Islands Trust, Tsawwassen First Nation, Penelakut Tribe, and Musqueam Indian Band

Respondents
(Defendants)

Corrected Judgment: The text of the judgment was corrected at paragraph 22 on July 12, 2018.

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated March 24, 2017 (*Hwlitsum First Nation v. Canada (Attorney General)*, 2017 BCSC 475, Vancouver Docket S148643).

Counsel for the Appellants: J.R.W. Rath, P.E. Reid, D. Martin

Counsel for the Respondent Attorney General of Canada: E.M. Tully, N. Claridge

Counsel for the Respondent Her Majesty the Queen in right of the Province of British Columbia:	G.R. Thompson H. Cochran
Counsel for the Respondents The City of Vancouver and The Vancouver Park Board:	M.S. Kerwin
Counsel for the Respondents The Corporation of Delta and Islands Trust:	R. Harding
Counsel for the Respondent Capital Regional District:	R. Macquisten
Counsel for the Respondent Tsawwassen First Nation:	G. Plant, Q.C.
Counsel for the Respondent Penelakut Tribe:	G. Kosakoski D. Moriarty
Counsel for the Respondent Musqueam Indian Band:	C. Reeves
Place and Date of Hearing:	Vancouver, British Columbia February 27–28, 2018
Place and Date of Judgment:	Vancouver, British Columbia July 10, 2018

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders

Summary:

In the underlying action, the appellants sought declarations of Aboriginal title and rights on behalf of the Hwlitsum First Nation, which they assert is the modern day continuation of the Lamalcha. Canada applied to strike the claims on a number of grounds, including on the basis that the appellants lack standing because the group they purport to represent is not determinable by stated, objective criteria. The chambers judge granted the application and dismissed the representative claims. Held: appeal dismissed. The judge identified the correct test and made no errors in applying it. The appellants failed to put forward a clear definition of the collective of rights-bearers on whose behalf they purport to act, despite having had ample opportunity to do so. They cannot advance a claim to historic and communal Lamalcha rights by purporting to represent a group that by definition excludes descendants of the Lamalcha.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] This appeal concerns the standing of the appellant Hwlitsum First Nation (the "HFN") to advance a representative action claiming Aboriginal rights and title.

Background

[2] The HFN filed a representative action in November 2014 seeking declarations of Aboriginal rights and title over the lower mainland of British Columbia, southern Vancouver Island, the Gulf Islands and lands and waters related to those areas. The claim was made against the respondents Canada, the Province of 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. The HFN also sought damages of $1 billion from each of Canada and the province. The individual appellants asserted breaches of *Charter* rights which claims were not dismissed and are not in issue on this appeal.

[3] Between 2014 and 2016, three First Nations whose traditional territories were affected by the claims asserted by the HFN applied to be added as defendants: Tsawwassen First Nation, Penelakut Tribe, and Musqueam Indian band.

[4] The HFN asserts that its members are the modern descendants and heirs of the historic pre-colonization Lamalcha Tribe of Indians, also known as the Lamalchi,

and as such are the inheritors of all the Aboriginal rights and title of the Lamalcha. That follows, says the HFN, because as it exists today it is a continuation of, and successor to, the Lamalcha as it existed at time of first contact. The Penelakut Tribe disputes the latter assertion—it commenced an action in the British Columbia Supreme Court in 2003 claiming Aboriginal rights and title to the land held by the Lamalcha Tribe of Indians prior to the assertion of sovereignty and first contact.

[5] Canada, supported by all respondents, brought an application in 2015 to strike this proceeding on the basis that the appellants do not have standing to bring the action as a representative proceeding under R. 20-3 and on the basis that the action is an abuse of process under R. 9-5(1)(d).

The Standing Application

[6] The judge began by noting that the issue of standing to advance a claim may be addressed as a preliminary matter in order to avoid unnecessary litigation, citing *Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448 at paras. 84–90 and 133, aff'd 2012 BCCA 274. The judge then observed:

> [58] The rights asserted by the plaintiffs are collective rights. As such, proceedings to assert or enforce those rights must be brought on behalf of a group that is capable of advancing such a claim under s. 35 of the *Constitution Act*, 1982, which recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada: *Campbell* at paragraph 9.

[7] He noted that R. 20-3 of the *Supreme Court Civil Rules* governs the procedure for representative proceedings and provides:

> (1) If numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (10), the proceeding may be started 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.

[8] The judge then turned to the criteria to be applied on an application to determine whether plaintiffs are an appropriate collective to bring a representative action. After extensively reviewing the jurisprudence (at paras. 63–69), he concluded that in Aboriginal title and rights cases such as the one before him, the criteria to

apply are those identified by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 48. He then cited *Campbell* at para. 10, where Mr. Justice Willock provided a summary of those factors, modified slightly to address the context of Aboriginal representative claims:

> 1. whether the collective of rights-bearers on behalf of whom they purport to act is capable of clear definition;
> 2. whether there are issues of law or fact common to all members of the collective so defined;
> 3. whether success on the petition means success for the whole collective so defined; and
> 4. whether the proposed representatives adequately represents the interests of the collective.

[9] After noting the onus was on Canada to establish it was plain and obvious that the HFN and individual plaintiffs did not have standing to advance the communal rights at issue in the proceeding, the judge concluded the plaintiffs foundered on the first criterion: the proposed collective was not defined in a manner that permitted its membership to be determined by objective criteria. The judge gave the following reasons for that conclusion:

> [103] First of all, contrary to the Amended NOCC, the HFN now asserts that it is not the descendants of all the Lamalcha, but rather that it represents only some of them. By their amended definition the plaintiffs now seek to exclude all Lamalcha who may be members of other bands, as well as the Lamalcha who are not descendants of Si'nuscutun. This is contrary to their assertion that the HFN and the Lamalcha are synonymous terms. They 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. This is fatal to the action proceeding under Rule 20-3.
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> [104] As I noted at paragraphs 41 and 45 above, it was in May 2000 that the term "HFN" first appears in any formal sense. At that time the HFN described itself as "the HFN, formerly known as the Wilson Family of Canoe Pass Band", and yet it is clear that there are other families who may or may not be caught by the HFN rubric.
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> [105] There are other difficulties with the plaintiffs' definition of the proposed class which, contrary to principles set out in the authorities, include:
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> - five of the six classes identified appear to rely on ancestry alone; and while the plaintiffs allege they are the "modern continuation" and "successors" of the Lamalcha, they are descended from one single Lamalcha albeit one who enjoyed high status. Ancestry alone is

> insufficient to establish that a modern collective has a claim to the rights of a historic group: *Campbell* at paragraph 103;
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> - 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: *Campbell* at paragraphs 150-157; *Komoyue* at paragraph 41;
> - 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: *Campbell* at paragraphs 140-149;
> - as is seen by paragraphs 25-49 above, the HFN's self-identification is, at best, "of recent vintage": *Powley* cited in *Campbell* at paragraphs 116-120;
> - 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.
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> …
>
> [108] I have referred to the evidence where the HFN is described as "my family" or "the Wilson Family of Canoe Pass Band". I agree with Tsawwassen's submission that what the plaintiffs are attempting to accomplish by this representative proceeding is to construct a First Nation out of one family and to then assert s. 35 Aboriginal title claims.
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> [Emphasis added.]

[10] The judge noted that the HFN's reliance on allegedly objective criteria to determine membership in the collective could not cure the inherent conflicts in its claim pursuant to which it purported to act on behalf of all of the Lamalcha and at the same time on behalf of only the descendants of Si'nuscutun who are not members of other Indian bands (at para. 110).

[11] The judge concluded HFN's failure to meet one of the four mandatory criteria was sufficient to dispose of the standing application, but went on to address the remaining *Western Canada Shopping Centres* criteria:

> [116] While, based on my conclusion regarding the threshold criteria, I need not consider the others, I would add:

- the plaintiffs do not address the rights and membership of the descendants of the Lamalcha other than those who descend from Si'nuscutun. Despite the fact that other prominent Lamalcha ancestors are mentioned in the Amended NOCC, the plaintiffs also do not distinguish or explain why Si'nuscutun is the only ancestor from which the s.35 rights-bearing group is descended;
- the Penelakut also allege they are the descendants of the Lamalcha;
- the plaintiffs, based on the pleadings and the evidence, cannot demonstrate that all Lamalcha descendants will benefit from their representative claim; and
- there is no evidence of an agreement authorizing the plaintiffs to represent the Lamalcha Tribe of Indians and even if there were, this would conflict with the Penelakut's purported authority to represent the Lamalcha.

[Emphasis added.]

[12] In the result, he found the representative claims were bound to fail and dismissed them.

Standard of Review

[13] The issue of whether the judge identified the correct legal test to determine standing to bring a representative proceeding under R. 20-3 is a question of law reviewable on a standard of correctness. The judge's application of that test to the appellants' claim is a question of mixed fact and law and is, absent an extricable error of law, reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26, 36.

[14] Absent an error of law, an order under R. 20-3 is a discretionary order that is entitled to deference: *Kish v. Sobchak Estate*, 2016 BCCA 65 at para. 34.

On Appeal

[15] The HFN raise a number of issues on appeal which I will group into two main grounds of appeal:

(i) Did the judge err in law by identifying an incorrect test to determine the appellants' standing?

(ii) Did the judge err in his application of the test for standing?

[16] For the reasons that follow, I am of the view that the judge did not make the errors contended for by the appellants. I would accordingly dismiss the appeal.

1. Did the judge identify the correct test?

[17] The HFN submits the judge did not use the correct test. First, they submit that, because their claim involves Aboriginal rights, the judge was required, in light of *Guerin v. The Queen,* [1984] 2 S.C.R. 335, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, to recognize the *sui generis* nature of those rights and to adopt a "functional", "purposeful", "flexible and generous" approach in considering the standing issue. The HFN further contends the importance of reconciliation between the Crown and Aboriginal peoples required the judge to consider the *Western Canadian Shopping Centres* criteria globally rather than as discrete factors.

[18] The HFN did not identify any cases supporting this approach on an application to determine standing. In my view, that is not surprising. The approach identified by the HFN applies to the substantive resolution of claims to Aboriginal rights and title, and not to the preliminary question of who has the legal capacity to advance them. The criteria are to be applied taking into account the nature of Aboriginal rights and title, but must still be met.

[19] Second, the HFN submits the judge used the wrong test because he failed to take the facts pleaded in the amended notice of claim as proven. As a result, they submit the judge raised a low threshold to a much higher threshold, and denied access to justice by driving the appellants from the judgment seat. I would not accede to either submission.

[20] The appellants rely on *Hunt v. Carey Canada Inc*. [1990] 2 S.C.R. 959, for the proposition that its pleadings must be taken as true. However, *Hunt* involved an application to strike a claim under what is now R. 9-5(1)(a) on the basis that the pleadings did not disclose a reasonable cause of action. Evidence is not permitted on such an application and consequently the pleadings are taken as true. The

application before the judge in the present case was brought in relation to R. 20-3. The jurisprudence dealing with standing does not preclude the use of evidence to assess compliance with the Rule.

[21] Although the judge's decision ultimately "drove the appellants from the judgment seat", it cannot sensibly be argued that they were denied access to justice. The hearing of the application on standing was the culmination of a large number of interlocutory proceedings over two years. During that time, the appellants were given numerous opportunities to adduce evidence in support of their position.

[22] The judge, in my view, correctly determined that the test to be applied was set out in *Western Canadian Shopping Centres*. Courts in this province have applied the *Western Canadian Shopping Centres* criteria in cases involving challenges to standing of Aboriginal litigants: *James v. British Columbia,* 2007 BCCA 547; *Te Kiapilanoq v. British Columbia*, 2008 BCSC 54; *Campbell; Quinn v. Bell Pole,* 2013 BCSC 892. In applying this test, in my view courts have not ignored the *sui generis* nature of Aboriginal rights and title claims. They have, however, noted that there is no meaningful difference between the tests applied for representative actions and class actions with respect to whether the collective or class is capable of clear definition. If anything, the need to clearly define the collective in an Aboriginal rights or title case is even more important given the collective nature of the *Constitution*-protected rights at issue.

[23] In summary on the first ground of appeal, in my view the judge did not err in his determination of the test to be applied. I turn now to the second ground of appeal.

2. Did the judge incorrectly apply the test?

[24] The HFN raises two main submissions in support of this ground of appeal. First, they say the judge erred by limiting his analysis to the definition of the collective they provided in their amended notice of civil claim. Second, they say the judge erred in any event in concluding the definition provided did not meet the first

criterion in *Western Canadian Shopping Centres*. I will address each submission in turn.

(a) Did the judge err by limiting his analysis to the appellants' definition

[25] Canada submits that HFN's position is based on a fundamental misunderstanding of the first criterion in *Western Canadian Shopping Centres*. I agree. It is clear from *Campbell* that it is for plaintiffs and not the court to define the group they purport to represent. As Justice Willcock noted in *Campbell* at para. 100, referring to comments by Justice Vickers in *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700, it "should always be the aboriginal community that determines its own membership." The court's role is to decide if the group members are determinable by clear, objective criteria.

[26] I note that in this case, even though the jurisprudence requires the criteria for membership to be specified at the outset of litigation, the judge exercised his discretion during the hearing of Canada's application to allow the appellants to restate their definition in a written document, approximately two years after the litigation had commenced. During oral argument, the judge also reviewed and considered another list of membership criteria.

[27] In summary on this issue, the appellants were required to define the collective they claim to represent and were given every opportunity to do so. As the Penelakut respondent points out, even if the appellants had been granted another opportunity, they could not have modified their class definition so as to comply with the relevant authorities. That is so because they have always defined themselves as descendants of Si'nuscutun, rather than as the descendants of Lamalcha, a point I will return to and address more fully in the next part of these reasons.

(b) Did the judge err in finding the definition did not meet the first criterion?

[28] I come now to the central issue on appeal: have the appellants defined the group they claim to represent with sufficient clarity? As Chief Justice McLachlin stated at para. 38 of *Western Canadian Shopping Centres*:

> … First, 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: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.
>
> [Emphasis added.]

[29] As the judge in the present case noted, the appellants put forward inconsistent definitions of the group they purport to represent. At paragraph 3 of the statement of facts in the amended notice of civil claim, the appellants claim to represent the entire Lamalcha:

> HFN and the members of HFN are the successor in rights and title, heirs, descendants or the modern continuation of the historic "Lamalcha Tribe of Indians" or "Lamalcha Indian Band" or Lamalcha indigenous people, nation, or group. The Plaintiffs each bring this action of their own behalf and as a representative on behalf of all other descendants of the "Lamalcha Tribe of Indians".

However, at the hearing they claimed to represent only some of the Lamalcha, excluding "all Lamalcha who may be members of other bands, as well as the Lamalcha who are not descendants of Si'nuscutun." As the judge noted:

> [103] … This is contrary to their assertion that the HFN and the Lamalcha are synonymous terms. They 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. This is fatal to the action proceeding under Rule 20-3.

[30] There is no dispute between the parties that the rights they assert are communal rights which belong to the Aboriginal community and not to any individual: *Delgamuukw* at para. 115; *R. v. Powley,* 2003 SCC 43 at para. 24. Legal action brought to determine communal Aboriginal rights must be brought on behalf of a group that is capable of advancing a claim under s. 35 of the *Constitution Act*, *1982*, which recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada: *Campbell* at para. 9.

[31] Aboriginal rights and title vest in the historic Aboriginal community at the time of contact in the case of Aboriginal rights, and at sovereignty in the case of Aboriginal title, which in British Columbia has been found to be 1846: *Delgamuukw* at paras. 145–146; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

[32] The historic Aboriginal community in issue in the present case is the Lamalcha Tribe of Indians. In order to assert a claim under s. 35 of the *Charter,* the HFN must be capable of advancing a claim to the historic and communal rights of the Lamalcha. In my view the HFN cannot assert such rights, because they define themselves as only one branch of the descendants of the Lamalcha Tribe, i.e., those Lamalcha who are descendants of Si'nuscutun and who are not members of any other Indian band.

[33] As articulated by Mr. Kosakoski, counsel for the Penelakut, the appellants' position is this: Si'nuscutun, at the time of contact, enjoyed Lamalcha rights, and thus his descendants must also enjoy those rights. However, Si'nuscutun himself, as an individual, never held and could never hold any of the claims for Lamalcha rights. Those rights belong to the Lamalcha community and Si'nuscutun only enjoyed the benefit of the rights by virtue of his membership in that community. It is settled law that Aboriginal title cannot be held by individual Aboriginal persons: *Delgamuukw* at para. 115.

[34] In summary on this point, the HFN claims to represent one historical Lamalcha member and his descendants, rather than the entire historical Lamalcha

collective. Since it is the historic community, and not one of its members, which holds the rights in issue, the appellants cannot represent the collective.

[35] On this appeal the appellants attempted to address this deficiency in their definition by asserting that "the evidence before the court was there were no other adult male members of the Lamalcha band living as at 1877, other than those descended from Si'nuscutun".

[36] It should be noted at the outset that this argument was not made to the chambers judge below. This Court does not generally consider submissions advanced for the first time on appeal unless it is a pure legal argument on uncontroverted factual findings or it is clear that, had the question been raised at the proper time, no further light could have been shed upon it: *Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2016 BCCA 457 at para. 44; *Pereira v. The Business Depot Ltd.*, 2011 BCCA 361 at para. 63, citing *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 32.

[37] This principle alone is sufficient to dispose of this issue. I would add that in any event, there are significant problems with the submission. The assertion that only Si'nuscutun's descendants were alive at the relevant time is contrary to the position the appellants took before the judge, was not supported by the appellants' own experts, and depends upon a strained and highly selective reliance on Canada's expert report.

[38] Further, even if the HFN could establish there were no other Lamalcha alive at the relevant time, the appellants' definition continues to exclude those descendants of Si'nuscutun who are now members of other bands.

[39] In my view, the judge correctly concluded that, since the appellants could not satisfy the first criterion in *Western Canadian Shopping Centres*, he need not go further and was compelled to dismiss their action as bound to fail.

Disposition

[40] In the result, I would dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"