

## PRECEDENT-SETTING FIRST NATIONS CLASS ACTION TAKES ON FISH FARMS<sup>1</sup>

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On Wednesday (December 1<sup>st</sup>), the Honourable Mr. Justice Slade certified a class action brought by the Kwicksutaineuk/Ah-Kwa-Mish First Nation against the Government of British Columbia. The class action 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.”*

Wow! It’s difficult to overstate the importance of this precedent setting decision (which is very likely to be appealed) for:

- environmental and First Nations class actions in British Columbia; and
- the campaign against fish farms, which will finally be able to get some tough questions about the legality of fish farms answered.

Let’s address those two points in turn.

### Class Actions in BC

Class actions are lawsuits brought not for one individual (or in this case one First Nation) but on behalf of a large group of people. By hearing a single case, the courts hope to resolve key questions common to the whole group, facilitating settlement of the many, many cases that would be too small or too complex to come before the courts one-by-one.

The first step in a class action is to have the action “certified”, which means that the Court accepts that there are enough common questions raised by the “class” that the case is best heard as a single class action. Class actions related to the environment are notoriously difficult to get certified. West Coast has written previously about *Smith v. Inco*, the first environmental class action to be certified in Canada. The Kwicksutaineuk case is the first environment-related class action to be certified in British Columbia. It’s also the first class action based on a constitutional claim by a First Nation to be certified anywhere in Canada. Indeed, the BC Attorney-General’s lawyers went so far as to argue, unsuccessfully, that a claim by an individual representing a First Nation could never be validly certified under BC’s *Class Proceedings Act*. Justice Slade, in holding that the case should be certified as a class action, rejected the many and varied objections of the province (and the federal government, which also appeared, although not named as a defendant). I’m not going to go through them all here.

I must admit to having some skepticism that this case would be certified when I first heard about it. I had thought that a court would have concerns that the legal issues raised by each of the individual First Nations would overshadow the issues they had in common. Notably, a claim based on the Aboriginal right to fish will require each First Nation to establish, on the basis of their own historic and cultural evidence, that they use the fisheries resource as an inherent part of their culture (while true for all coastal First Nations, the Court will nonetheless require

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<sup>1</sup> West Coast Environmental Law, December 07, 2010

distinct evidence for each nation). How, I wondered, would a class action proceed when each Nation needs to bring different evidence?

Slade J. answered this question by focusing on whether the common questions – related to the impacts of sea lice on wild stocks and similar issues – might remove the need for a court case to proceed at all:

*“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. ...”*

And later:

*“The proposed representative plaintiff is not seeking a declaration of rights as applicable to their ongoing exercise. ... 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. ... 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.*

*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.”*

Slade J.’s approach displays common sense – recognizing that the truly contentious legal issue is not whether the affected First Nations have rights to fish, but whether fish farms, and the province’s regulation of those fish farms, have impacted the wild stocks upon which the First Nations’ rights rely. That, and not the complex questions of proof involved in establishing Aboriginal rights, can and should be the focus of the Class Action as it moves forward. Slade J. is clearly very aware of the potential for this litigation to get bogged down. He repeatedly notes that the *Class Proceedings Act* allows judges to take an active role in managing class actions, to ensure that the correct issues are considered in an appropriate manner. It will be fascinating to see how this approach to certification, if it is upheld in any appeal, changes when and how claims based on Aboriginal rights and title are brought in Canadian courts.

## **Impacts For Fish Farms**

So now we have a class action that will place a question of huge importance, both from a legal and political point of view, squarely before the courts: “to what extent, if at all, has salmon aquaculture impacted on Wild Salmon stocks in the Broughton Archipelago.” The findings will be political dynamite, to the point that the province and the federal government might actually

choose to negotiate a resolution with the Kwicksutaneuk rather than have a court pronounce an answer to these questions.

Some may argue that the courts have no business wading in on political issues. Indeed, the province tried to suggest to Slade J. that this was what U.S. courts refer to as a political question. Fortunately, the Canadian courts have never accepted that they cannot examine a legal question that happens to have political dimensions.

West Coast Environmental Law says that these are not inherently political issues. They are only political because the province and the federal government, who are responsible for protecting both Aboriginal and public rights in respect of fish, have failed to take legal action, and have denied the existence of a legal problem. If all the science is correct, as we believe it is, that open net fish farming has been destroying wild stocks, then this is a violation not only of First Nations' rights in those salmon, but of the rights of all British Columbians to healthy salmon runs.