

CANADA / JUDGMENT

Fleming v. British Columbia (Forests, Lands Natural Resource Operations and Rural Development)

2024 BCSC 2370

COURT

Supreme Court of British Columbia

DECIDED

17 September 2024

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2024 BCSC 2370 Fleming v. British Columbia (Forests, Lands Natural Resource Operations and Rural Development)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fleming v. British Columbia (Forests, Lands Natural Resource Operations and Rural Development),

2024 BCSC 2370

Date: 20240917

Docket: S1813609

Registry: Vancouver

Between:

Ronald Gordon Fleming and Love Bros. & Lee Ltd.

Plaintiffs

And

His Majesty the King in Right of the Province of British Columbia (as represented by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, as it was then known)

Defendant

Before: The Honourable Justice E. McDonald

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs appearing by videoconference:

J.M. Young

D. Crimeni

A. Levine

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W.F. Wagner

M.J.J.W. Wagner

V. Locke, A/S

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 11-12 and 17, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 17, 2024

- [1] THE COURT: As there is urgency in having the parties' respective applications determined in advance of the trial set for October 2024, I am giving my reasons on the applications orally. These reasons have since been edited for distribution and publication.
- [2] On March 1, 2023, I certified the action as a class proceeding. I approved four common issues, and the class definition proposed by the plaintiffs was included in the certification order.
- [3] At the heart of this proceeding alleging negligent misrepresentation is the 2017 decision of the Provincial Government to ban grizzly bear hunting in British Columbia. The common issues trial is scheduled for October 15, 2024. With the trial date fast approaching, the parties now bring these three applications.
- [4] The application materials are voluminous, consisting of six volumes of record that include at least nine new affidavits and a multi-volume book of authorities. I will begin by addressing the general background, followed by a consideration of the plaintiff's application and then the defendant's applications.
- [5] As mentioned, on March 1, 2023, the claim for negligent misrepresentation was certified as a class proceeding. In the certification order, the current class definition states:

All persons resident in British Columbia who held guide outfitting territories as of December 15, 2017, and who had an allocation and quota for guiding resident and non-resident hunters to hunt grizzly bears.

(the "Current Class Definition").

[6] The certified common issues are:

- did His Majesty the King in Right of the Province of British Columbia owe a duty of care to the class members;
- did His Majesty the King in Right of the Province of British Columbia make the representations as set out at paras. 46-48 of the amended notice of civil claim which were untrue, inaccurate, or misleading, if so, what were the untrue, inaccurate, or misleading misrepresentations made by His Majesty the King in Right of the Province of British Columbia, when, where, and how;
- did His Majesty the King in Right of the Province of British Columbia make the representations described above negligently, if so when, where, and how were the representations made; and
- did His Majesty the King in Right of the Province of British Columbia make the representations intending the class members rely on them.

[7] The representations the defendant is alleged to have made are set out in the further amended notice of civil claim filed on June 26, 2024 (the "Claim"):

46. The Government and the Minister represented to Fleming in the five year allocation letter issued to Fleming, and to each class member, in writing that the only time an allocation or yearly quota would change would be because of wildlife management reasons such as "changes in population estimates or other conservation matters" or "changes in population or permissible harvest rates" or First Nations' for the exercise of Aboriginal rights. The wording of all of the letters from Government to the class members were the same or substantially similar.
47. Fleming and class members reasonably relied on these representations.

The Representations

48. The Government represented to the Plaintiffs and class members by (a) conduct and by (b) oral and written statements that the Government would implement and maintain a scheme that would permit the Plaintiffs and class members to harvest wildlife, including grizzly bears, on a preferential or exclusive basis indefinitely, which scheme would only be modified for valid wildlife management or First Nations reasons, and not for political, social or public opinion reasons. Particulars of the Representations include, but are not limited to, the following are as follows:

- a. The adoption of the guide outfitting scheme , which included the exclusive territories, the license, the allocation and quotas system for licensed guide outfitters and criminal or quasi-criminal sanctions for those who were unlicensed, which did provide and was intended by the Government to provide assurances to the Plaintiffs and class members that they should purchase Guide Territory Certificates, invest in the guide outfitting industry and that the Government would provide a long-term scheme to protect their financial investments.
- b. the Government published policy manuals to provide information to the Plaintiffs and class members on the principles and direction of the Government regarding hunting and intended that the Plaintiffs and class members rely on such statements. The Commercial Hunting Interests policy published effective March 29, 2007 specifically represented to the Plaintiffs and class members that:
 - (a) That guide outfitters' commercial interests in the harvest of big game species will be addressed by:
 - (i) requiring non-resident hunters to hire a guide outfitter to hunt big game in the province, except when permits to accompany have been issued;
 - (ii) providing guided hunters with predictable, fair shares of the allocations of category A species in certificated areas;
 - (iii) supporting the viability of the guide outfitting industry by committing to: a. the timely application of decision making processes regarding the transfer and disposition of guide territories; b. the timely review of the status of uncertificated areas; c. creating and maintaining a regulatory framework that maximizes guided hunters' success, enjoyment, and participation; d. the maintenance of exclusive guided hunting rights for guide outfitters; and
 - (iv) removing unnecessary barriers to achievement of allocation prior to reducing allocation.
- c. The Big Game Harvest Management policy further represented the Government's approach to hunting regulation making and its policy of involving stakeholders in decisions:

4.1 Stakeholder involvement in game harvest policy issues and provincial regulatory decisions will be encouraged and facilitated through a provincial hunting regulation and policy committee.

- d. The Government represented that the allocation of available species for harvest would adhere to certain principles, which included that:
 - i. Regional allocation splits to be in keeping with the principle of 'resident priority' whereby resident hunters continue to receive priority shares of the wildlife allocation, with a stable and predictable percentage.
 - ii. A commitment to maintain vacant areas and areas not currently allocated to guides as unguided areas, available for First Nations and resident hunting only.

- iii. Clear splits for each allocated hunt resulting in less discretion in the hands of regional managers - and therefore more certainty for all user groups.
- iv. Targeted increased shares of allocation for guide outfitters to help ensure the guide outfitter industry remains economically viable.
- v. No additional mitigation measures for guides beyond the increased harvest percentages as noted.

(Collectively, the "Representations.")

The Plaintiff's Application

- [8] In an application filed July 19, 2024, and heard on August 29, 2024, the plaintiffs seek, pursuant to Rule 6-1 of the Supreme Court Civil Rules, to amend the class definition in the certification order and to file a second further amended notice of civil claim. The new class definition proposed by the plaintiffs in their application is the following:
- (a) All persons who held a Guiding Territory Certificate . . . as of December 15, 2017 whose GTC area was part of an area in which an allocation and quota for guiding resident and non-resident hunters to hunt grizzly bears in British Columbia was issued; and
 - (b) All guide outfitters who as of December 15, 2017 held licences with an allocation and quota for guiding resident and non-resident hunters to hunt grizzly bears in British Columbia.
- [9] (the "New Class Definition").
- [10] The plaintiffs submit that the class definition ought to be amended because it currently does not include all those who have a claim and it inadvertently excludes them. It should be noted that the Current Class Definition contained in the certification order is the one that was proposed by the plaintiff at the certification hearing.
- [11] The plaintiffs point out that the threshold to amend pleadings is low and the same principles apply to amending certification orders. The plaintiffs further submit that since their application does not amount to seeking certification of a new cause of action, the amendment does not need to be assessed under s. 4 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA]. However, even if that submission is not accepted, the plaintiffs state that the proposed amendments, including the class definition, meet the statutory requirements in s. 4.
- [12] The defendant opposes the application to amend the class definition and the claim. The defendant says the claims of the new proposed class members are statute-barred. The defendant submits that the plaintiffs have not supported with evidence their assertion that the Current Class Definition inadvertently left out the proposed new class members. The defendants also say that the plaintiffs have not shown a sufficient connection between the proposed new class members and the common issues and that the New Class Definition would prejudice the defendant because there has been delay which is unexplained, and the

defendant would not know the case it must meet at trial because the defendant will be denied standard pretrial procedures.

- [13] The plaintiffs' evidence supporting the application to amend the class definition consists of affidavits from a paralegal and a legal administrative assistant at the law firm of counsel representing the plaintiffs, as well as a July 19, 2024, affidavit #3 from Mr. Ellis, who is the chief executive officer of the Guide Outfitters Association of British Columbia ("GOABC"). That evidence indicates that as of early October 2023, individuals began contacting class counsel's office indicating that they had not received notice of the class action. Mr. Ellis states that after a notice of certification went out in the summer and fall of 2023, he began receiving communications from members of the GOABC that they did not get the notice.
- [14] In October of 2023, Mr. Ellis states that he raised concerns with class counsel that potential class members had been inadvertently left out of the class definition and the notice process.
- [15] The defendant opposes the application, including because:
- a) the application is brought close to trial, resulting in prejudice to the defendant;
 - b) the New Class Definition reinvents and greatly expands the plaintiff class, the certification order, the scope of the action, and the common issues to be decided at trial.
- [16] The defendant also submits that the New Class Definition and the proposed further amendments raise a limitation defence for those brought in by the New Class Definition.
- [17] In reply, the plaintiffs say a limitation defence is not an issue for certification. Rather, it is an issue for the inevitable individual trial process.
- [18] The defendant objects to parts of Mr. Ellis's affidavit #3, including the following paragraphs where he summarizes what the "omitted class members" told him and why they may not meet the Current Class Definition :
13. I cannot recall the specific details of each discussion with each individual guide outfitter or Guiding Territory Certificate holder. In general, the Omitted Class Members informed me that while they may not meet the class definition in the Notice of Certification - either due to their residency status or because they did not hold both a Guiding Territory Certificate and license with an allocation and quota for grizzly bears as of December 17, 2017 - they believe they have a valid claim against the Province based on the same allegations of negligent misrepresentation brought on behalf of the class.
 14. The Omitted Class Members also informed me that, like the current class, they had an expectation that the opportunity to offer guide outfitter services for grizzly bear hunters would persist, given the longstanding government-sanctioned framework for these regulated services in British Columbia. As a result, they invested substantial time and resources in developing their skills and businesses, which included, among other efforts:
 - (a) receiving education and training specific to hunting grizzly bears;

- (b) marketing their guide outfitting services for grizzly bear hunts;
 - (c) obtaining Guiding Territory Certificates necessary for grizzly bear hunting;
 - (d) acquiring or constructing camps and associated infrastructure for grizzly bear hunts; and
 - (e) procuring equipment and gear essential for grizzly bear hunting.
15. The decision to ban the grizzly bear hunt resulted in financial losses to the Omitted Class Members, including diminished business, investment in redundant assets, and/or devaluation of their Guiding Territory Certificates.
- [19] The defendant objects to these paragraphs because they say Mr. Ellis's evidence is hearsay and it contains argument and opinion. Mr. Ellis does identify the individuals by name who contacted him and, as such, what he says they told him is attributed. While he cannot recall the exact date or content of his conversation with the individual, he is able to provide a timeframe of approximately August 2023 to November 2023, and a general summary of their discussions. In general, he says the people contacting him were concerned that they did not receive notice of the class proceeding in circumstances where they wish to participate.
- [20] Mr. Ellis describes concluding that the Current Class Definition excluded the individuals who were contacting him because it "only encompassed residents of British Columbia who held both a Guiding Territory Certificate and a guide outfitter license in their own name" and it left out "non-residents of British Columbia who held these qualifications and potential members who did not meet both criteria."
- [21] In my view, this conclusion is intended to explain why Mr. Ellis passed along the information or why he directed the people to class counsel.
- [22] On November 14, 2023, the plaintiffs' counsel contacted the defendant to advise as follows:
- Further, it has come to our attention that the Current Class Definition may also exclude some guide outfitters that were intended to be included in the class definition. Specifically, individuals/companies who own a Guiding Territory Certificate were omitted from the class if the guide outfitter with quota was not the same individual as the Guiding Territory Certificate holder. It is our position that these GTC holders and/or guide outfitters should be included in the class. Thus, we anticipate filing a Notice of Application to amend/refine the class definition in the coming weeks.
- [23] There is no explanation about why it took the plaintiffs until July 19, 2024, to file their application when Mr. Ellis states that he had notified class counsel about the omitted class members by mid-October 2023.
- [24] By January 2024, the defendant's counsel had confirmed that they regarded the "omitted class members" as properly excluded by the Current Class Definition.

- [25] The plaintiffs submit that seeking to amend the class definition in the certification order does not require analysis pursuant to s. 4 of the CPA. However, the defendant submits that the proposed New Class Definition raises a new cause of action because it significantly increases the class size and contradicts the claim that the impugned core written Representations was made to all class members.
- [26] The defendant also submits that a mere six weeks from the common interest trial, the plaintiffs seek to submit and expand the class definition to include persons who are not resident in B.C. and persons, including corporations, who held only one but not both of a GTC and a GOL with a grizzly bear quota as of December 17, 2017.
- [27] The defendants say that this expansion is significant, especially in light of the misrepresentations alleged in paras. 46-48 of the Claim, which specifically refer to written representations in a five-year allocation letter sent to each class member. The defendant says that if the application is granted, it will be prejudiced by denial of its right to standard pretrial procedures, including the inability, based on the evidence of Mr. Larden in his affidavit made August 18, 2024, to examine a proposed new class member about the written representations allegedly made to them if they did not hold both a GTC and a GOL.
- [28] What follows is my analysis of the plaintiffs' application filed on July 19, 2024.

Should the class definition and the claim be amended?

- [29] Again, the plaintiffs seek to amend the class definition defined in the certification order and leave to file a second further amended notice of civil claim containing amendments that support the proposed New Class Definition. For the reasons that follow, I have determined that the plaintiff's application should be dismissed with the exception of one amendment which I have concluded is appropriate.
- [30] The plaintiffs referred me to a number of authorities in support of their argument that the application to amend the class definition of the claim should be allowed.
- [31] In *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2016 BCSC 2021 [Coburn], Justice Weatherill considered an application by the plaintiff in a certified class action to further amend the claim pursuant to Rule 6-1. Specifically, the plaintiffs sought to amend the claim in ways that it described as clarifying, providing additional background and particulars related to the claim. The proposed amendments would also have deleted references to defendants with whom the plaintiff had settled. However, importantly, the proposed amendments did not involve a change to the class definition.
- [32] Justice Weatherill described the action in *Coburn* as large and complex, and at the time of the hearing of the application to amend, the lengthy trial of the action was not scheduled to begin for a further two years. The court also noted at para. 2 that the prosecution of the claim was still in its "infancy" with no defences filed and no examinations for discovery completed.

- [33] At paras. 24-28, the court set out the law regarding amendments, including by noting that the threshold to amend pleadings is a low one. The factors applicable to deciding whether to exercise discretion to allow an amendment includes the extent and reasons for the delay and the prejudice caused by the delay: citing *Chouinard v. O'Connor*, 2011 BCCA 161.
- [34] Ultimately, Justice Weatherill refused many of the proposed amendments, including because they did not disclose a cause of action. The plaintiff's appeal from the order refusing the application to amend was dismissed.
- [35] In *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 [Halvorson], the Court of Appeal considered an appeal from various interlocutory orders made in the course of case management of complex class proceedings that had languished for nearly 12 years. In that case, prior to the extant appeal, the Court of Appeal had previously allowed a first appeal from an order dismissing the application for certification.
- [36] Due to vague and uncertain language included in the formal order giving effect to the reasons on the first appeal from the denial of certification, unnecessary difficulties arose in the renewed Halvorson proceedings in the trial court. A key difficulty included disagreement about whether the action and petition had to be certified as is, or whether there were new pleas argued before the Court of Appeal to be considered anew by the trial court for purposes of certification. The differing positions were attributable to the plaintiff changing his approach on the first appeal. The case management judge was concerned that the plaintiff's arguments advanced before the Court of Appeal in the first appeal were not discernible in the pleadings.
- [37] In response to that concern, Justice Smith wrote:
- [23] With respect, the case management judge's concern that this Court departed from the pleadings and arguments initially placed before the chambers judge on the certification hearing is unwarranted. To hold plaintiffs strictly at the certification stage to their pleadings and arguments as they were initially formulated would in many cases defeat the objects of the Act - judicial economy, access to justice, and behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 26-29; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15. In *Bendall v. McGhan Medical Corp.* (1993), 1993 CanLII 5550 (ON SC), 14 O.R. (3d) 734 at 747 (Gen. Div.), leave to appeal ref'd [1993] O.J. No. 4210, in a passage adopted in *Endean v. Canadian Red Cross Society* (1997), 1997 CanLII 2079 (BC SC), 36 B.C.L.R. (3d) 350 at para. 58 (S.C.), appeal allowed in part (1998), 1998 CanLII 6489 (BC CA), 48 B.C.L.R. (3d) 90 (C.A.), the court described certification as "a fluid, flexible procedural process". There must be procedural flexibility in order to facilitate realization of the statutory purposes and, contrary to the view that has been causing the case management judge such consternation, there is nothing wrong with plaintiffs reformulating their approach on appeal. As was stated in *Markson v. MBNA Canada Bank* (2007), 2007 ONCA 334 (CanLII), 85 O.R. (3d) 321 at para. 39 (C.A.), leave to appeal ref'd [2007] S.C.C.A. No. 346,

- [39] Provided the defendant is not prejudiced, it is open to a plaintiff to recast its case to make it more suitable for certification: see *Kumar v. Mutual Life Assurance Co. of Canada*, 2003 CanLII 48334 (ON CA), [2003] O.J. No. 1160, 226 D.L.R. (4th) 112 (C.A.), at paras. 30-34 and *Rumley v. British Columbia*, 2001 SCC 69 (CanLII), [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 205 D.L.R. (4th) 39, at para. 30.
- [38] Justice Smith explains that where a plaintiff recasts the claim to make it suitable for certification, a need to amend the claim may arise :
- [31] Undoubtedly, the broad issues identified by this Court must be grounded in the pleadings and, as Mr. Justice Mackenzie noted, these issues differ from the issues educed from the appellant's initial pleadings. It is readily apparent that, when a plaintiff recasts a claim to make it suitable for certification, it may be necessary to amend the statement of claim to support the reformulated claim. This follows from the general principle that all necessary amendments should be made to enable the real issues between the parties to be determined in order to facilitate the "just, speedy, and inexpensive determination of every proceeding on the merits": see *Langret Investments S.A. v. McDonnell* (1996), 1996 CanLII 1433 (BC CA), 21 B.C.L.R. (3d) 145 at 153 (C.A.).
- [39] Where a claim is recast, Smith J. further explains that the case management judge's focus should be to view the pleadings and the common issues as "mutually dependent parts to be synthesized to produce a common issues trial" rather than treating them as discrete sequential steps.
- [40] The plaintiffs submit, relying on *Asp v. Broughton Law Corp.*, 2014 BCSC 1124 [Asp] and *Felker v. Teva Branded Pharmaceutical Products*, 2022 BCSC 1813 [Felker], that to amend a class definition, they must show it is rationally connected to the common issues.
- [41] In *Asp*, the proposed amended class definition was considered as part of the certification application. However, the defendants submitted that even the amended class definition presented at the certification hearing was not rationally connected to the common issues and the court agreed.
- [42] At para. 49 of *Asp*, Justice Blok noted that despite the ability to place limitations on the class definition to make the litigation more manageable, "the class as defined must still bear a rational connection to the claims made and [the] relief sought, and the definition . . . itself [must not] create other problems such as actual or potential conflicts within the class."
- [43] Justice Blok said that the proposed class definition failed on both counts and ultimately the application to certify was dismissed.
- [44] In *Felker*, Justice Douglas considered an application to certify an action as a class proceeding. As the proposed class definition was found to be overly broad, and because she found that one of the proposed class representatives was not a member of an appropriately defined class, Douglas J. granted the plaintiff's counsel leave under s. 5(6) of the CPA to file an additional affidavit to meet the condition of showing at least one other proposed class

member who met the narrow class definition. If that affidavit was not filed, the action would not be certified. The court also noted at paragraph 145 that the class definition could be amended if new evidence should arise.

- [45] Neither Asp nor Felker involved applications brought shortly before the common issues trial to amend class definitions in a certification order and to further amend the claim. In fact, in each of these cases, the amendment proposed to the class definition was considered as part of the certification application. I do not find that these cases are authority for the general principle that amending a class definition in a certification order and making consequential amendments to a claim to support the amended class definition amount to a routine pleading amendment that does not engage the test under s. 4 of the CPA.
- [46] While the plaintiff characterizes the present application as a routine low-threshold application to amend pleadings, I am of the view that this characterization downplays the significance of changing the class definition and the pleadings at this juncture, and in light of all of the circumstances. The court's task, as explained in Halvorson, is to view the pleadings of the common issues as mutually-dependent parts to be synthesized to produce a common issues trial. The problem is that in viewing the claim and the application in their whole context, the proposed amendments in the New Class Definition may not synthesize with the core Representations pleaded in paragraphs 46 to 48 of the claim.
- [47] I find that the proposed amendment of the class definition and further amendments to the claim does require analysis under s. 4 of the CPA. When the plaintiffs' claim and the Current Class Definition are considered as a whole and in light of the circumstances, in my view the plaintiffs' application goes well beyond a mere pleading amendment.
- [48] The claim in its present form sets out a number of key factual statements, including that Mr. Fleming holds a GOL, which provided him with a five-year allocation that, at all material times, included an allocation for big game such as grizzly bear, referring to paragraphs 44 and 45 of the claim. The claim also states that the government representative, Mr. Fleming, "in the five year allocation letter issued to [Mr.] Fleming, and to each class member, in writing that the only time an allocation or yearly quota would change would be because of wildlife management reasons" and it states, "The wording of all of the letters . . . to the class members were the same or substantially similar", referring to paragraph 46 of the claim.
- [49] The plaintiffs' proposed further amendments to the claim do not propose any alteration to these key factual statements or the description of the Representations allegedly made to the plaintiffs and class members in paragraphs 46 to 48, except for changing the word "guide" to "guiding" in paragraph 48(a). Again, the plaintiffs characterize the modification for class definition to include non-residents of British Columbia and persons, including corporations, who held only one, not both, of a GTC and/or a GOL with grizzly bear quota as of December 17, 2017, and the related amendments to the claim as inconsequential.

- [50] However, as mentioned, I disagree with that submission, except as it relates to the matter of residency requirement, which I will now address. The plaintiffs' evidence indicates that class counsel has heard from persons who are not resident of British Columbia, but who would otherwise fully meet the Current Class Definition because they were holders at the relevant time of both a GOC [sic] and GOL with quota for guiding resident and non-resident hunters to hunt grizzly bears.
- [51] The defendant opposes the plaintiff's application, but the defendant does not explain how specifically adding non-residents of British Columbia who otherwise fully meet the Current Class Definition would significantly change the class composition or cause significant prejudice in the sense of leaving the defendant unable to know the case to be met with a common issues trial.
- [52] I agree with the plaintiffs that modifying the class definition to eliminate the requirement that all persons be resident of British Columbia is an appropriate amendment to make under the applicable legal principles and based on the evidence. I therefore grant the plaintiffs' request to modify the class definition in paragraph 3 of the certification order made March 1, 2023, to remove the words "resident in British Columbia" and to now read as follows: All persons who held guide outfitting territories as of December 15, 2017, and who had an allocation and quota for guiding resident and non-resident hunters to hunt grizzly bears.
- [53] I will next address the other aspect of the plaintiffs' request to modify the class definition and to file a second further amended claim. I agree with the defendant that the amendments significantly expand the class, including beyond natural persons who held both a GTC and GOL with grizzly bear quota.
- [54] The plaintiffs submit that the proposed amendments, including the New Class Definition, disclose a cause of action within the meaning of s. 4(1)(a) of the CPA. The plaintiffs point out that the court has already, in making the certification order, determined that the claim established the requirements for a reasonable cause of action.
- [55] In my view, the main challenges for the plaintiffs' application arise due to the requirements of s. 4(1)(c) through (e) of the CPA. Based on the application evidence tendered by the plaintiffs, which includes general descriptions of the circumstances of the potential new class members they call the "omitted class members", the defendant says it lacks the necessary information respecting who the potential new class members are and what their circumstances are related to the need for commonality in s. 4(c) of the CPA.
- [56] The application states that the omitted class members have "the same common issues as the class members" including that the defendant made the Representations in paras. 46-48 of the claim to them. It must be kept in mind that the certified common issues ask whether, among other things, the defendant made the Representations set out in paras. 46-48 of the Claim and intended for the class members to rely on them.

- [57] The facts pled in the claim at paras. 45-46, which are assumed to be true for the purpose of this application, include that the GOL issued to Mr. Fleming provided him with a five-year allocation, including for grizzly bear. Further facts pled are that the defendant represented in writing to Mr. Fleming and each class member in the five-year allocation letter issued certain assurances respecting what appears to be the core representation that the only time an allocation of yearly quota would change would be because of "wildlife management reasons": referring to para. 46 of the Claim.
- [58] In short, the facts pled in the Claim are clearly focused on class members who held both a GTC and a GOL. While the plaintiffs say that the other proposed new class members were inadvertently left out of the class definition, that does not, in my view, provide a sufficient basis, in fact, capable of connecting their claims to the same factual background, including core representations pleaded in the claim for the representative plaintiffs and the certified common issues.
- [59] I am not satisfied on the evidence before me, which is devoid of any direct evidence from a proposed new class member, that there is any basis of fact connecting the claims of the other proposed new class members to the certified common issues.
- [60] There is also the requirement in s. 4(1)(d), including the matters described in s. 4(2), to show that the class proceeding as proposed to be amended by the plaintiffs would be a preferable procedure for the fair and efficient resolution of the common issues, having regard to all of the individual or common issues arising in the context of the factual matrix pled.
- [61] As Justice Winkler explains in *Carom v. Bre-X Minerals Ltd.* (1991), 44 O.R. (3d) 173, 1999 CanLII 14794 (ON SCDC) [Carom]:

The proper approach to be taken in considering whether a class proceeding is the preferable procedure for resolving the common issues is to have regard to all of the individual and common issues arising from the claims in the context of the factual matrix. A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.

- [62] In my view, the plaintiffs' application brought at this juncture and in light of the overall circumstances, including the issue respecting the common issues already addressed, has not shown that the common issues trial and hence the class proceeding is the preferable procedure to advance the litigation consistently with the goals of the CPA. It raises many questions that I find unanswered in the application material regarding the relevant matters under s. 4(2) of the CPA, such as whether the administration of the proceeding, assuming it was amended as sought, would create greater difficulties than relief sought by other means.

- [63] The defendants express well-founded concern that they lack information connecting the omitted class members to the common issues and to the allegations in the claim. I agree that the defendant is not to be deprived of normal pretrial substantive rights to know the case that is to be met.
- [64] I find that the plaintiffs' application puts a fair, efficient, and manageable method at risk in a manner and consistent with the requirements of the CPA. In short, when I consider all of the individual and common issues arising from the factual matrix, I do not conclude that a class proceeding based on the New Class Definition and the amendment sought by the plaintiff in the second further amended claim would advance the litigation in a manner consistent with the goals of the CPA. In my view, the lateness of the plaintiffs' application, coupled with the proposed changes to the present class action, raise real concerns about whether the class proceeding would present a fair, efficient, and manageable method for determining the common issues or advancing the litigation consistent with the goals of the CPA.
- [65] A final difficulty based on the evidence in the application concerns satisfying the requirement that there is a representative plaintiff in s. 4(1)(e) of the CPA. The current representative plaintiffs, Mr. Fleming and his corporation, meet the Current Class Definition in the sense that at the relevant time, they held both a GTC and a GOL. While a representative plaintiff need not be typical of a class, the plaintiff must be taken to be representative of the class: citing .
- [66] Here, the factual allegations concerning the representative plaintiffs reveal the importance of the core representation made to them and to each current class member in the five-year allocation letter. It is not evident that the requirements of s. 4(1)(e) is met where the certified common issues, such as determining whether the representation was made in paras. 46-48, were made to the class members depends on a particular characteristic of the representative plaintiff; in other words, they held both a GTC and a GOL and received a five-year allocation letter, which is unlike those included in the New Class Definition.
- [67] It is difficult to see, in all of the circumstances, how the representative plaintiffs can be taken to be representative of the New Class Definition or to fairly and adequately represent the class, especially in light of the core representations pled in the claim.
- [68] Therefore, I am not satisfied that the requirement in s. 4(1)(e) is met on all of the material before me. For the reasons that I have explained, I decline to grant the orders sought by the plaintiff in the July 19, 2024, notice of application, with the exception that I grant the request to amend para. 3 of the certification order by removing the words "resident in British Columbia" from the class definition.

The Defendant's Applications

- [69] The defendant filed two notices of application on August 19, 2024, returnable on August 29, 2024. As there was insufficient time to hear the defendant's applications at the same time as the plaintiffs' application on August 29, 2024, they were scheduled for September 11, 2024.
- [70] The defendant seeks various orders, for example, authorizing amendment of the response to civil claim, production of documents, and responses to a demand for particulars and the adjournment of the trial. The plaintiff opposes the defendant's application, alleging that essentially there is no basis to adjourn the trial or to order production of documents and particulars.
- [71] Since I have largely dismissed the plaintiffs' application, I will only address the matters in the defendant's applications that were not dependent on the plaintiff succeeding in their request for the New Class Definition and leave to file a further amended claim.

Application for leave to file further amended response to civil claim

- [72] The defendant seeks to file a further amended response. The defendant points out that its request is timely since, pursuant to the Litigation Plan Number 3, the parties consented to a deadline for exchanging proposed amended pleadings and under that plan, the defendant's deadline was June 27, 2024, which was later extended by consent.
- [73] The defendant provided its further amended response to the plaintiffs' counsel by the extended deadline. However, the plaintiffs do not consent to certain of the proposed amendments; namely, those proposed for paras. 16 and 18 in Part 1, and para. 2.1 in Part 3 of the further amended response.
- [74] The court should take a generous approach to requests to amend pleadings to allow the real issues to be determined and tried: *Smithies Holdings v. RCV Holdings Ltd.*, 2017 BCCA 177. However, approaching the question of amendments generously does not require the court to sanction amendments that violate the rules. While evidence is not required to support an amendment, the court may consider evidence that contradicts the pleading:

Where a party states facts in evidence that are pivotal and essential, it cannot then change its pleadings to directly or indirectly contradict those facts.

Citing *Navarro v. Doig River First Nation*, 2016 BCSC 2006.

- [75] The proposed amendments to para. 16, Part 1, and 2.1 of Part 3, seek to include a statement that an action by the defendant was "consistent with the purpose and intent of the Wildlife Act." The plaintiffs submit that no such allegation has been made by the defendant to date and these amendments would require them to address, possibly through expert evidence, that issue at trial when previously it was not an issue.

- [76] The defendant points out that in the amended response, the defendant denies paras. 69, 71, and 72 of the amended claim. That includes denying the allegation in para. 69 of the amended claim that the defendant knew the 2017 decision was not related to wildlife management or sustainability, but rather was made for political or an otherwise improper purpose unrelated to the legislative scheme.
- [77] The plaintiffs oppose the amendments to these paragraphs because they say the amendments contradict the evidence of Ms. Psyllakis in para. 25 of her affidavit #1 made January 1, 2022, and the amendments represent the defendant changing its position.
- [78] The plaintiffs referred me to *McGrath Rentcorp v. Unity Wireless Systems Corporation*, 2008 BCSC 1106 [McGrath] where Associate Judge Baker denied adding a party and amendments proposed to a pleading where the amendments were obviously "at variance" with sworn evidence.
- [79] In my view, the proposed further amended response in para. 16, Part 1 and 2.1 of Part 3, are merely affirmative pleadings of what the defendant has already denied. That is, the decision was not related to wildlife management and that it was for an improper purpose that is not related to the legislative scheme. Therefore, I disagree with the plaintiffs that the amendment to these particular paragraphs are prejudicial to them or that they are improper or impermissible amendments under the Rules.
- [80] Regarding the proposed amendment to para. 18 of the further amended response, the defendant proposes an explicit admission that the grizzly bear hunt was sustainable in many regions, but a denial that there was no wildlife management reason for the changes made. Again, the plaintiff is concerned that prior to this proposed further amendment, the defendant has never put them on notice that the scope of a wildlife management reason was at issue.
- [81] The defendant points out that it has always denied the content of para. 62 of the further amended claim, including the absence of a wildlife management purpose for the decision to end the grizzly bear hunt. Therefore, it submits that nothing in the proposed further amendments is inconsistent with anything in its earlier response.
- [82] I have considered whether the defendant's proposed amendments offer facts "obviously at variance with sworn evidence" as in *McGrath*. Sworn evidence that the plaintiffs referred me to is Ms. Psyllakis's statement in para. 25 of her affidavit #1 that:
- ... conservation concerns were not a prominent factor in the 2017 decision to end the grizzly bear hunt ... While there were ongoing concerns about loss of habitat, the Province's data did not preclude an ongoing hunt ... for conservation reasons.

- [83] However, I am unable to agree that Ms. Psyllakis's statement contradicts or is "obviously at variance" with the amendments proposed. The explicit admission that the defendant proposes, including in the amendment, is consistent with Ms. Psyllakis's sworn statement and she does not say that no "wildlife management reason" existed for the 2017 decision. In my view, this does not involve the kind of obvious variance that the court addressed in McGrath by denying the proposed amendment.
- [84] The purpose and function of pleadings is to clearly define the issues of fact and law to be determined by the court: *Sahyoun v. Ho*, 2013 BCSC 1143. In my view, the proposed amendments are consistent with the purpose and function of the pleadings. The proposed amendments do not involve a situation where the defendant has previously admitted the plaintiff's allegation that the decision was not related to wildlife management or sustainability as required by the legislative scheme, but the defendant is not affirmatively asserting the opposite.
- [85] Again, the defendant has always denied the allegations in paras. 69, 71, and 72, including of an improper purpose not related to the legislative scheme. I am not convinced that there is a basis to deny the proposed amendments, because the proposed amendments are bound to fail, and the court is to err on the side of permitting an arguable defence to proceed to trial: *B.C. (Director of Civil Forfeiture) v. Violette*, 2015 BCSC 1372.
- [86] For the same reasons that I concluded that the proposed amendments to para. 16 of Part 1 and para. 2.1 of Part 3 are appropriate, I conclude that the proposed amendment to para. 18, Part 1, is also appropriate.
- [87] I understand that the other proposed amendments are agreed to by the plaintiffs. Therefore, the defendant has leave to file the document attached as Schedule A to its August 19, 2024, notice of application.

Demand for Particulars

- [88] The defendant demanded particulars from the plaintiffs on July 15, 2024, respecting the allegations contained in paras. 46, 48, 50, 51, 53, and 80 of the claim. The defendant's application in the fall of 2019 seeking particulars was dismissed, but the defendant was granted leave to apply for further particulars at a later time. The defendant has now done so.
- [89] In the meantime, Mr. Fleming has been examined for discovery. Requests for information made to Mr. Fleming have been responded to. Mr. Fleming was questioned in detail about the particulars, including those stated in paras. 46-48 of the claim. There is no suggestion that Mr. Fleming was non-responsive or that he failed to inform himself for purposes of the examination for discovery.

- [90] The plaintiffs agree they have not responded and they owe the defendant a response to the demand for particulars respecting the allegations in para. 46. However, in respect of the balance of the demand for particulars, the plaintiffs have responded either by referring the defendant to the particulars set out in the further amended notice of civil claim or by objecting on the basis that a response would call for evidence and/or legal argument but not material facts.
- [91] The defendant is concerned that without the particulars demanded, it cannot know what the defendant intends to prove and it lacks sufficient detail to know the case to be met or to avoid the risk of trial by ambush. For example, the defendant refers to *Iannarella v. Corbett*, 2015 ONCA 110 where the Ontario Court of Appeal found an error by the trial judge in allowing a previously undisclosed document to be admitted as evidence at trial for impeachment purposes.
- [92] As Justice Baker notes in *Sidhu v. Hiebert*, 2018 BCSC 401 [Sidhu] the guiding principle on an application for particulars is whether they are "necessary" to achieve one of the functions summarized in *Cansulex Ltd. v. Perry* (1982), 37 B.C.L.R. 397, which includes to know the nature of the case they have to meet as distinguished from the mode in which the case is to be proved.
- [93] In *Sidhu*, Justice Baker set out that for particulars of alleged misrepresentations, Rule 3-7(18) requires full particulars of each instance on which the allegation of misrepresentation was made.
- [40] Rule 3-7(18) requires that a party alleging misrepresentations provide full particulars of each instance on which an alleged misrepresentation was made. This requires providing the factual underpinnings of the misrepresentations, which are: the nature of the misrepresentations, the circumstances in which they were made, when, how and by whom they were made, and how they were relied on to the detriment of the plaintiff.
- [94] In *David v. Her Majesty The Queen in Right of Canada*, 2004 BCSC 1306, Justice Cohen considered an application by the plaintiffs for particulars with respect to various allegations found in the statement of defence. The application was resisted, including on the basis that it required the defendants to provide evidence, not material facts. In addressing that submission, Cohen J. refers to *Hoy v. Medtronic Inc.*, 2004 BCSC 440 where Justice D.M. Smith states at para. 45, "particulars are provided to disclose what one party intends to prove against the other; how the party intends to prove his case is a matter of evidence."
- [95] A demand for particulars is not intended to entitle the demanding party to ascertain the precise evidence to be used at trial or the evidentiary basis of a party's case.
- [96] With these legal principles in mind, I turn to the demand for particulars.

Demand #1: Particulars of letter issued to Mr. Fleming and to each class member referred to in para. 46 of the claim

- [97] The defendant asks whether the letters referred to include ones other than those described and, if there are others, it asks for full particulars, including copies of the documents, the identity of the person who issued or were privy to the letters, and dates of same, and those who received the letters.
- [98] The plaintiffs acknowledge that this has not been responded to. I find that this is an appropriate demand for particulars, as it seeks full particulars contemplated by Rule 3-7(18) and it does not seek evidence as opposed to material facts.
- [99] As for the request for the plaintiff's position on whether there are material differences among the letters, in my view that calls for disclosure of the plaintiffs' argument, which is not the purpose of a demand for particulars. That aspect of Demand #1 need not be responded to.

Demand #2: Particulars of representations made by conduct referred to in para. 48 of the claim

- [100] The defendant requests to know whether there are further representations by conduct beyond those given by Mr. Fleming in his discovery and, if so, the defendant seeks particulars of the conduct, including the person within the government who engaged in the conduct, the dates, the nature of the conduct, and to whom the representations by conduct was made.
- [101] In response to this, the plaintiffs' response seems to suggest that "yes", there are further representations by conduct which they say are particularized in paras. 48(a) through (d) of the claim. Those subparagraphs refer to adopting the guide outfitting scheme, the published policy manuals, the big game harvest management policy, and the government representations that the allocation of available species for harvest would adhere to certain principles. In my view, simply referring the defendant to the claim does not adequately provide the particulars demanded in respect of para. 48(d) respecting the representation that the allocation of available species for harvest would adhere to certain principles.
- [102] Therefore, the plaintiffs must confirm whether, in respect to that, there are more representations by conduct beyond those given by Mr. Fleming at his examination, specifically for the representation that the allocation of available species for harvest would adhere to certain principles. However, I find that the balance of the response which refers to the particulars in paras. 48(a) through (c) is a sufficient response that allows the defendant to know what the plaintiff intends to prove at trial.

Demand #3: Particulars of representation by written statements in para. 48 of the claim

[103] The defendants request particulars of whether there are written statements containing representations other than those referred to by Mr. Fleming at his examination. In response, the plaintiff says the other written representations are particularized in paras. 48 through (d) of the claim.

[104] My conclusion in respect of this demand is the same as for Demand #2, and in respect of paragraph 48(d) respecting the representation of the allocation of available species for harvest would adhere to certain principles, the plaintiff must respond to this demand.

Demand #4: Particulars of the transaction between the government and the plaintiffs and class members referred to in para. 50 of the claim

[105] The plaintiffs object to this on the basis that it calls for evidence and not material facts. Keeping in mind the purpose of particulars being to disclose what the party intends to prove, not how the party intends to prove it, I am of the view that disclosing the "transactions" the plaintiff intends to prove at trial beyond those that may already have been described by Mr. Fleming is an appropriate purpose of particulars.

[106] I therefore order the plaintiff to provide particulars of the transactions in para. 50 of the Claim.

Request #5: Particulars of the government's active promotion of hunting and trapping industries referred to in para. 50 of the claim

[107] The plaintiffs object to this on the basis that it calls for evidence and not material facts. For the same reasons provided respecting Request #4, I find that this is an appropriate request for particulars and the plaintiffs must provide particulars of the "promotion" by the government beyond those already given by Mr. Fleming in his examination.

Request #6: Particulars of the government's encouragement of investment referred to in para. 50 of the claim

[108] The plaintiffs object to this on the basis that it calls for evidence and not material facts. For the same reason provided respecting Requests #4 and 5, I find that this is an appropriate request for particulars, and the plaintiffs must provide particulars of the "encouragement" by the government beyond those already given by Mr. Fleming in his examination.

Request #7: Particulars of how the Government assumed a role more than that of a regulator in para. 51

[109] The plaintiffs object on the basis that this request calls for legal argument and I agree. In light of the particulars that the plaintiffs are required to provide, I regard this request as seeking to know the legal arguments the plaintiffs will make and not a request to enable the defendant to know what the plaintiff intends to prove at trial. There is no need for the plaintiffs to respond to Request #7.

Request #8: Particulars of the "factual basis" for the reasonableness of the expectations referred to in paras. 53 and 80 of the Claim

[110] The plaintiffs object to this request stating that it calls for evidence and argument, and also because it is not relevant to the common issues at trial. I agree that the issue of reasonable reliance of the class members is not relevant to the common issues to be determined at the common issues trial. This demand for particulars may be appropriate if the plaintiffs succeed at the common issues trial, but at this juncture, I conclude it is not relevant.

[111] An application for particulars respecting paragraphs 58 and 80 may be revisited after the common issues trial has been completed, and in the event there will be any individual trials.

Demand for Documents

[112] On July 19, 2024, the defendant demanded certain documents in the possession, control, or power of the plaintiffs. The plaintiff responded to the effect that the demanded documents were irrelevant to the common issues trial. I agree that the documents requested relate mostly to the limitation defences that do not arise due to the decision regarding the plaintiffs' application or matters for the individual trials if the plaintiffs are successful at the common issues trial.

[113] Therefore, the demand for documents or the application related to the demand for documents is dismissed.

Additional Examination for Discovery

[114] The defendants seek further examination of Mr. Fleming or up to five additional class members. The defendants submit that the court should exercise its discretion to order further discovery. Most of the grounds for this relief appear related to the possibility of the amendment to the class definition which has been denied. However, the application is devoid of grounds for the court to grant further discovery where the class definition remains unchanged. I appreciate that this application could not have been brought prior to the examination of Mr. Fleming. However, the application was brought a mere five or six weeks out from the common issues trial.

[115] To potentially adjourn the trial to allow additional examination to take place, there would need to be at least some explanation of why it was necessary. As the plaintiffs point out, there is no allegation that Mr. Fleming was unable to answer questions at his discovery or that he said the defendants needed to ask the other class members for information. The

application does not specify what questions are relevant to the common issues that the other class members, as opposed to Mr. Fleming, could answer, or what information the other class members might have that Mr. Fleming could not supply.

[116] Therefore, I deny the request for additional examination for discovery, given that the application contains no relevant explanation as to why such relief is required.

Request for an Unredacted Copy of a Document

[117] There is a request for an unredacted copy of a document from a potential new class member. It was redacted due to relevance. The relevance of the document is diminished by the fact that the plaintiffs' application to amend the class definition has been denied. However, I have reviewed the unredacted copy of the specific document in issue and concluded that the redacted portion is not relevant, even if I had allowed the amendment to the class definition. There is no requirement to produce an unredacted copy of the document attached to Ms. Intalan's affidavit #1, Exhibit L.

[118] For clarity, with respect to the plaintiff's application, para. 1 is granted only to the extent of amending the class definition to remove the words "resident in British Columbia". All other relief is denied.

[119] Regarding the defendant's application for miscellaneous relief, paras. 1, 2, 4, and 5 of the notice of application is dismissed, and para. 3 regarding particulars is granted to the extent provided in my reasons.

[120] Regarding the defendant's application seeking leave to file a further amended response to notice of civil claim, that relief is granted.

"E. McDonald J."

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