IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hwlitsum First Nation v. Canada (Attorney General),* 2017 BCSC 475

Date: 20170324
Docket: S-148643
Registry: Vancouver

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Between:

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

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

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for Plaintiffs:	J. Rath D. Khan P. Reid
Counsel for the Attorney General of Canada:	E. Tully N. Claridge
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	G.R. Thompson M. Akey

Counsel for the Corporation of Delta and Islands Trust:	S. Ratjen (A/S)
Counsel for the Capital Regional District:	R. Macquisten
Counsel for Tsawwassen First Nation:	G. Plant, QC F. Sheppard
Counsel for Penelakut Tribe:	G. Kosakoski
Counsel for Musqueam Indian Band:	C. Reeves
Place and Date of Hearing:	Vancouver, B.C. December 5-9, 2016
Place and Date of Judgment:	Vancouver, B.C. March 24, 2017

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I: INTRODUCTION

[1] The plaintiff, Hwlitsum First Nation (the "HFN"), is one of several plaintiffs who are bringing this representative action on behalf of the HFN.

[2] Certain of the plaintiffs also advance individual claims for alleged breaches of their *Charter* rights pursuant to sections 2 (fundamental freedoms) and 15 (equality rights). While these claims are briefly referenced in the pleadings, there are no particulars provided to indicate the basis on which these claims are advanced.

[3] This proceeding, which has been assigned to me for judicial case management and trial, was commenced by notice of civil claim (the "NOCC") on November 7, 2014. An amended notice of civil claim (the "Amended NOCC") was filed on June 14, 2016.

[4] Underlying the HFN's many claims, which include seeking compensation in the billions of dollars, are declarations of Aboriginal title and rights to what is claimed to be HFN's traditional village sites and territories.

[5] Specifically, the plaintiffs claim that HFN is the modern day continuation of the Lamalcha Tribe of Indians who are also identified as Lilmache/Lamalchi.

[6] The HFN asserts its ancestry can be traced back to Si'nuscutun, who was a prominent member of the Lamalcha.

[7] In 1877, the Indian Reserve Commission amalgamated (the "Amalgamation"), for administrative purposes, the Lamalcha, Penelakut and Yonkulahs tribes as the Penelakut Indian Band (the "Penelakut"), which continues to this day.

[8] None of the individually named plaintiffs are members of the Penelakut.

[9] The defendants deny that the HFN are synonymous with the Lamalcha, and in any event, deny that the plaintiffs meet the necessary criteria to proceed as a representative action.

[10] On this application the defendant Attorney General of Canada ("Canada"), supported by the other defendants, seeks orders that the plaintiffs do not have standing to bring the action as a representative proceeding (the "Representative Action Relief"). Canada is also supported by certain of the defendants in seeking an order that the action is an abuse of process and should be struck (the "Abuse of Process Relief"). These applications will collectively be referred to as the "Standing Application".

[11] According to Canada, the Amalgamation is relevant only to the abuse of process relief and it does not rely on it with respect to its position regarding the Representative Action Relief.

[12] The parties have filed many affidavits in support of their respective positions, including expert opinion evidence on the anthropological and ethnographical history of the Coast Salish First Nations.

[13] Objections were taken by the defendants to portions of the materials filed by the plaintiffs, and I heard submissions in that regard on February 19 and March 1, 2016.

[14] In my reasons for judgment indexed at 2016 BCSC 476, I summarized the objections and my ruling at paragraphs 12-16:

> **II: THE ADMISSIBILITY OF EVIDENCE APPLICATIONS**
>
> [12] For the purposes of these reasons for judgment, I need not summarize the various arguments advanced both in support and in opposition to these applications except for the following.
>
> [13] The applicants' objections relate to many paragraphs of various affidavits filed by HFN in opposition to the Standing Application including:
>
> - portions of the affidavits should be struck on the basis that they contained inadmissible hearsay, inadmissible opinion evidence, failed to identify the source of certain documents and gave subjective descriptions of reactions;
> - were irrelevant to the issues to be decided on the Standing Application;

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- contained inadmissible evidence relating to the British Columbia Treaty Commission process including what the applicants alleged to be without prejudice discussions.

> [14] HFN claimed that portions of the impugned evidence was beyond reasonable attack while acknowledging that other aspects, while admissible, may well be given little weight by the Court.
>
> [15] I found it of assistance to hear these substantive submissions on the affidavit evidence prior to the hearing of the Standing Application. In light of the fact that several submissions both for the applicants and HFN focussed on the relevance of the affidavits and exhibits in question to the issues to be considered on the Standing Application itself, I have decided to reserve judgment on these applications and will provide my ruling as part of my reasons for judgment on the Standing Application.
>
> [16] I do direct, however, that HFN in their submissions on the Standing Application make it clear to the applicants and the Court which portions of the impugned affidavits and exhibits relate to specific issues or submissions they make on the Standing Application.

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[15] Evidentiary objections were also taken at a later date by the defendants to additional affidavits upon which the plaintiffs sought to rely at the Standing Application.

[16] At the hearing of the Standing Application, pursuant to the direction set out in paragraph 16 of 2016 BCSC 476, the plaintiffs only referred to a very limited number of the affidavits and exhibits which were challenged by the defendants.

[17] In my view these references did not substantively affect the submissions which were made by any of the parties, and accordingly, I did consider them in formulating these reasons for judgment.

[18] For the reasons that follow:

- the Representative Action Relief is granted;
- the Abuse of Process relief is denied on the basis that it is unnecessary.

II: THE PROCEDURAL BACKGROUND

[19] On August 30 and 31, 2016, I heard several applications which related to the Standing Application and which included applications by the plaintiffs relating to:

- a deposition of a former chief of the Penelakut;
- a request they be granted leave to file additional affidavits in relation to the addition of the Penelakut and the Musqueam Indian Band (the "Musqueam") for the purposes of the Standing Application;
- a request that HFN be granted leave to have its expert witnesses give *viva voce* evidence at the hearing of the Standing Application; and
- a request that any party be granted leave to rely on evidence obtained at the depositions of two individuals, Mr. Jack and Chief Wilson.

[20] In reasons for judgment indexed at 2016 BCSC 2104, I dismissed, for the most part, HFN's applications. At paragraphs 67-86 of those reasons, I set out some of the salient procedural background facts relating to setting the Standing Application down for hearing. I will not repeat this background in these reasons.

[21] What is germane to the Standing Application from those reasons is what I stated at paragraphs 96-98:

> [96] The Standing Application is brought on a limited basis, being whether HFN has the standing to advance its claims as a representative proceeding pursuant to Rule 20-3 and/or whether pursuant to Rule 9-5 (1)(d) the action should be struck as being an abuse of process.
>
> [97] Whether Canada succeeds or fails on the Standing Application can only be determined within the context in which Canada has chosen to frame it.
>
> [98] The Standing Application is not a summary trial. If Canada succeeds on the basis upon which it has chosen to proceed, the action as presently constituted will fail. If Canada is unsuccessful, then the Action will proceed to trial. In fact, as Canada states in its response to the Viva Voce and Deposition Evidence Application:
>
> > If, at the Standing Application, the Court determines that the question cannot be settled on the evidence available, the matter likewise proceeds to trial.

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III: WHO ARE THE HFN AND ITS MEMBERS?

[22] The Amended NOCC describes the plaintiffs this way:

> Part 1: STATEMENT OF FACTS
>
> A. The Parties
>
> i. Plaintiffs
>
> 1. The Plaintiff Hwlitsum First Nation, also known as the Lamalcha Tribe of Indians (herein the"Hwlitsum" or "HFN"), is an identifiable group of indigenous people who trace their ancestry back to "The Lamalcha Tribe of Indians". The Aboriginal rights and title of the Plaintiffs were "Affirmed" by Governor Douglas as described further herein. HFN have been continuously recognized as an identifiable group of indigenous people by Her Majesty Queen Victoria in Right of Great Britain, and her successors the Defendants Canada and British Columbia, since prior to Confederation.
>
> 2. The Plaintiffs:
>
> (a) Chief Raymond Wilson,
>
> (b) Councillor Lindsey Wilson,
>
> (c) Councillor Janice Wilson,
>
> (d) Councillor Jim Hornbrook, and
>
> (e) former Councillor Danny Wilson
>
> are or were the duly elected members of Chief and Council of the HFN. Each is a registered Indian pursuant to the *Indian Act*, R.S.C. 1985, c.1-5 (the "*Indian Act*"), and a member of the HFN. In the most recent HFN election newly-elected are Councillors Doug Wilson and Regan McGovern Wilson.
>
> 3. 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".
>
> 4. The Plaintiff First Nation is a "Band" within the meaning of ss. 3 and 61-63 of the *Indian Act*, S.C. 1876, c.18 (the "*Indian Act*, 1876"), and the *Indian Act*.
>
> 5. Prior to the destruction of their village at Lamalcha Bay by the British gunboat "Forward" on April 23rd, 1863, the "Lamalcha Tribe of Indians" took their name from the site of their winter village at Lamalcha Bay. The destruction of the village was an unprovoked and unlawful attack constituting both a war crime and a breach of express trust which will be detailed further herein.
>
> 6. The Aboriginal rights and title of the Lamalcha Indians, including but not limited to lands in and around Tl'uqtinus village, Xway Xway, Hwlitsum, including all the lands at Brunswick Point, Westham Island, and all or some of the lands at Salt Spring Island, Gabriola Island, Valdes Island, Galiano Island,

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> Saturna Island, North and South Pender Island, Mayne Island, the San Juan Islands, the Lamalcha portions of Penelakut Island, Lummi and other locations throughout their traditional territory, including Musqueam, Chemainus and Coquitlam, were repeatedly affirmed by Governor James Douglas, then Governor of Vancouver Island and British Columbia prior to Confederation.
>
> 7. The "Lamalcha Tribe of Indians" and their rights and title were well-known and notorious to colonial officials who had recognized and affirmed the Lamalcha Tribe's Aboriginal rights and titles from the earliest periods both prior to and following the assertion of conflicting and unrecognized British jurisdiction in 1846.
>
> [Emphasis added.]

[23] Paragraphs 104 and 105 of the Amended NOCC provide:

> 104. The Plaintiffs share customs, laws, cultural practices and an identity as descendants of and successors to the Lamalcha Tribe of Indians and Lamalcha Indian Band
>
> 105. Citizenship is determined by a number of factors including but not limited to:
>
> > a. Self-identification of lineage or descendant of Si'nusuctun and with the winter village at Lamalcha Bay.
> >
> > b. Proof of ancestral connection.
> >
> > c. Community acceptance or ongoing participation in HFN culture, customs and traditions.

[24] One of the plaintiffs, Janice Wilson, in her affidavit #1 sworn March 17, 2015, swears that:

> 2. I am a status Indian pursuant to the *Indian Act*, R.S.C. 1985, c. I-5.
>
> 3. I am the Hwlitsum First Nation ("HFN") citizenship clerk. I have held this position since approximately 2011.
>
> 4. I have assisted HFN by compiling names for consideration for inclusion on the Hwlitsum citizenship list. Developing a comprehensive citizenship list at HFN has been problematic due to the number of bureaucratic hurdles and obstacles placed by Aboriginal Affairs and Northern Development Canada ("AANDC") and the Registrar of the Indian Register on Hwlitsum citizens with respect to recognition of their status as ancestral Indians. A number of Hwlitsum citizens are still in the process of obtaining Indian status.
>
> 5. The HFN as it exists today is a continuation of, and successor to the "Lamalcha Tribe of Indians" as it existed at time of contact. The HFN today continues to hold Aboriginal rights and title that the "Lamalcha Tribe of Indians" held at the date of contact - including full control over citizenship.

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6. Common HFN family names of those descended from the apical ancestor (the last common ancestor) Si'nuscutun include (but are not limited to): Wilson, Ordano, Larden, Hornbrook and Harris. Descent from Si 'nusuctun is one of the elements of the basis for consideration for inclusion as a citizen of HFN.

7. There are several classes of potential Hwlitsum citizens:

a. Those who are direct descendants of Si'nusuctun per the genealogy attached as Exhibit B to the Third Affidavit of Chief Raymond Wilson.

b. Those who are direct descendants of Si'nusuctun per the genealogy attached as Exhibit B to the Third Affidavit of Chief Raymond Wilson and are not on any other Band lists.

c. Those who are direct descendants of Si'nusuctun per the genealogy attached as Exhibit B to the Third Affidavit of Chief Raymond Wilson and are on other Band lists. The members of this class were put on other Band lists by AANDC due to a number of factors including (but not limited to): marriage and joining the spouse's Band, parents registering a child or children under the other parent's Band etc. A number of people in this class have indicated their interest in joining Hwlitsum, but do not want their identifying information disclosed, out of concern for privacy reasons.

d. Those who are direct descendants of Si'nusuctun per the genealogy attached as Exhibit B to the Third Affidavit of Chief Raymond Wilson presently in the process of applying to the Registrar of the Indian Register for "Indian Status". This class is either in the process of filling out an application, or is presently awaiting a decision on their application, or is in dispute over the status of their application.

e. Those who are direct descendants of Si'nusuctun per the genealogy attached as Exhibit B to the Third Affidavit of Chief Raymond Wilson who are not entitled to be registered as an "Indian" by the Registrar of the Indian Register, but who may be entitled to be a citizen of HFN.

f. Those who are adopted by or who are status Indians and marry a citizen of HFN.

9. There are specific privacy concerns that apply to all classes or potential classes of citizenship which preclude me from releasing names other than as set on this affidavit. Privacy concerns arise especially amongst those who are presently members of another First Nation and do not wish their names to be shared out of concern that punitive action could be taken against them by Indian Act Bands they are members of or by Canada with respect to benefits, fishing opportunities or otherwise being curtailed or interfered with as a result of being identified as Hwlitsum.

10. The current Council is comprised of a Chief and four (4) Councillors including myself. All members of Chief and Council are status Indians pursuant to the *Indian Act*, R.S.C.1985, c. I-5.

11. As the keeper of citizenship information, I can advise that of Chief and Councils' five (5) families alone, just counting immediate family (our living

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> parents, our siblings our children, our grandchildren) there are approximately eighty-five (85) people.
>
> …
>
> 13. HFN Chief and Council are capable of identifying who our members are or who is entitled to become a citizen.
>
> 14. The rights of Hwlitsum citizens do not overlap as Hwlitsum citizens cannot be members of other First Nations.

[25] Chief Wilson's personal history of attempting to gain registered status for himself and of advancing the interests of what is now known as the HFN, is relevant to some of the issues raised on the Standing Application.

[26] The affidavit #2 of Jillian Wong, a legal assistant with Canada, sets out the pertinent time line and documentation. It identifies a lengthy time frame commencing in April 1989 when then Mr. Wilson first filed his application for registration under the *Indian Act,* R.S.C. 1985, c. I-5 ("*Indian Act*").

[27] A letter from the Acting Registrar for Indian and Northern Affairs Canada ("IANA") to Mr. Wilson dated June 27, 1989 states:

> I have conducted a search of records for the Musqueam and Katzie Bands and have not been successful in identifying you or any members of your family as ever being registered as Indians.

[28] The letter also provided:

> Please also be advised that although your uncle, Michael Wilson's name appeared on the Musqueam Census List, this does not confirm that he or your father were entitled to be registered. Subsequent census had indicated that Michael Wilson and his wife Emma Sparrow were removed from the Census on the basis that Michael Wilson was considered a non-Indian.

[29] In February 1990 in correspondence with IANA, Mr. Wilson advises that his father (Andrew Wilson) and paternal grandfather (Henry Clayton Wilson) were members of the Coquitlam Band and that he "will continue to do research on my family tree".

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[30] In April 1990 Mr. Wilson is advised by IANA that a search of records had:

- "failed to reveal any evidence that any family members … were ever members of, or affiliated with, the Coquitlam Indian Band";
- that a search of records again indicated that "the only Wilson's shown were removed from Musqueam Band membership in 1927"; and
- that there was no record of Mr. Wilson's "maternal grandparents or … mother ever having been members of the Katzie Band."

[31] Over the next several years, Mr. Wilson continued to maintain that he should obtain status as a Coquitlam band member through his father and paternal grandfather, or be included on the Katzie band list through his mother and maternal grandmother. His position with respect to being a member of the Coquitlam band was maintained in his then legal counsel's letter to IANA dated April 26, 1996.

[32] By way of a letter dated February 4, 1997, the Registrar for IANA advised Mr. Wilson that his application for registration on the Indian Register was denied. In a lengthy response letter to IANA dated June 2, 1997, Mr. Wilson states in the section entitled "Argument":

> My family's heritage is Penelakut, Katzie, Cowichan, Musqueam and Coquitlam. The reason I know this to be true is that I have combined our family's oral history, a written genealogy that traces our lineage from 1790 forward (please see enclosed document…) and government records.
>
> From time immemorial until 1899, the males of my family were born in Penelakut. Proof of this comes from the mouths of my elders.

[33] On January 19, 1998, Professor Hamar Foster of the Faculty of Law at the University of Victoria corresponded with IANA on Mr. Wilson's behalf. He referred to Kuper Island being the home of two Aboriginal groups, the Penelakut and the Lamalcha, and that documents created in 1881 noted that Andrew Wilson and Charlie Wilson had been "admitted by the Penelakuts to be members of their Band". Professor Foster found these documents to "constitute compelling evidence that Andrew Wilson was admitted to full membership in the Penelakut band in 1881…"

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[34] Professor Foster's letter formed part of a package of documents submitted by Mr. Wilson at that time to IANA, in which he requested that his application for registration be reviewed on the basis that his ancestors were members of the Penelakut Band.

[35] In May 1998 Mr. Wilson's application for registration was accepted by IANA, and his name was placed on the General List for British Columbia. At this time Mr. Wilson was registered in accordance with section 6(1)(f) of the *Indian Act*, which provides entitlement to registration if "that person is a person whose parents are, or, if no longer living, were at the time of death entitled to be registered under this section".

[36] By Band Resolutions dated December 9, 1997 and October 21,1998, the Penelakut:

- recognized "that on January 2, 1881 Charlie Wilson and his nephew John Andrew Wilson were "admitted to full membership" of the Penelakut First Nation"; and

- reaffirmed "that the present day family of Wilson's headed by Raymond Wilson" were the direct descendants of Charlie and Andrew Wilson who lived and owned land on Kuper Island and who were Chief and Constable for the Penelakut.

[37] In 1999, Mr. Wilson appealed the May 1998 determination to this court. He sought registration under section 6(1)(a) of the *Indian Act*, which provides entitlement to registration if "that person was registered or entitled to be registered immediately prior to April 17, 1985".

[38] In reasons for judgment rendered November 5, 1999, Justice Sigurdson allowed the appeal and remitted the issue to the Registrar for reconsideration. Mr. Wilson's position on the appeal was that his ancestor Culaxtun ("Jim Wilson"):

> was born and had died in Penelakut on Kuper Island in British Columbia. He claims that Culaxtun satisfied the definition of Indian under the Acts of 1868,

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> 1876, and 1880 as he was "a male person of Indian blood reputed to belong to a tribe," namely the Penelakut Tribe: *Wilson v. Canada (Indian Registry, Registrar)*, [1999] B.C.J. No. 2510 at paragraph 33.

[39] I would note that Culaxtun (Jim Wilson), who was born about 1827, was the son of Si'nuscutun. Chief Wilson was Si'nuscutun's great-great-great-grandson.

[40] On April 4, 2000 the Acting Registrar at IANA amended Mr. Wilson's registration so that it was pursuant to paragraph 6(1)(a), rather than paragraph 6(1)(f), of the *Indian Act*. The Registrar advised that Mr. Wilson could not be associated with any one specific band since:

> [Culaxtun] Jim Wilson lived on land belonging to the Penelakut Band, however John Andrew Wilson was associated with Chemainus, Coquitlam and Penelakut First Nations.

[41] On May 1, 2000, the HFN submitted a formal request to the Minister of Indian Affairs and Northern Development ("IAND") that HFN be formed as a "new band" in accordance with section 17(1)(b) of the *Indian Act*. The letter was written on HFN stationery and stated in its introduction:

> We are writing this letter as the duly elected chief and council of the Hwlitsum First Nation (HFN). The HFN (formerly known as the Wilson Family of Canoe Pass Band) is comprised entirely of the descendants of Caluxtun (Jim Wilson).
>
> [Emphasis added.]

[42] The letter went on to refer to the Acting Registrar's amended registration of April 4, 2000 and indicated:

> Ms. MacDonald's decision simply confirms what our family has argued for over seventy five years - that we are members of the Coast Salish Community.
>
> [Emphasis added.]

[43] The letter also referred to the need for the HFN to live together on the same land if they were to survive as a family, and asked for prompt attention to the request in light of the ongoing British Columbia Treaty Process.

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[44] Mr. Raymond Wilson, by then Chief Wilson, was designated as the primary contact for the HFN.

[45] The May 1, 2000 letter to the Minister of IAND appears to be the first mention of the HFN to the IAND or its predecessors.

[46] Over the next several years correspondence passed between the HFN and/or its legal counsel with IAND and its successors in furtherance of the HFN's application to become a new band under the *Indian Act*. On December 5, 2003, in a letter to IAND, Mr. John Gailus, legal counsel, stated:

> We have recently been retained by the Wilson family to assist them with their Section 17(1)(b) application for Band status.

[47] In a letter dated February 9, 2004 to IAND, Mr. Gailus asserts that "most Hwlitsum, all of whom are direct descendants of [Si'nuscutun]" were entitled to the same registration as Chief Wilson. In a letter dated February 10, 2004, Mr. Gailus refers to his clients "being the Wilson family (also known as the Hwlitsum First Nation)".

[48] The process for Aboriginal Affairs and Northern Development Canada's ("AANDC"), a successor to IAND, consideration of a request to create a new band is set out in the affidavit of Tasha Cloutier. In a letter dated May 27, 2014 from AANDC to Mr. Gailus, it was advised that AANDC would hold HFN's application for new band status in abeyance until a complete submission was received.

[49] Janice Wilson's affidavit outlines what the HFN considers to be AANDC's lack of cooperation in its attempts to obtain new band status.

[50] One of the HFN's expert witnesses, Dr. Bruce Granville Miller, is of the opinion that the Hwlitsum are an identifiable group of indigenous people. At pages 13-14 of his report of December 12, 2014 he states:

> It is evident that, as is the case with other federally non-recognized bands among the Coast Salish peoples whose members persist in claiming affiliation (see Miller 2004 for a detailed study) the Hwlitsum cannot be conveniently slotted into membership with another band because they retain

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> the memory of their ancestor's identity. While individual members of these bands (or tribes, as they are known in the U.S.) sometimes peel off in order to join other bands and claim benefits accruing to recognized bands, Coast Salish notions of identity and affiliation nevertheless persist over long periods.
>
> In anthropological terms, Chief Si 'nusuctun is the apical ancestor of the Hwlitsum from whom the present-day Hwlitsum trace descent and a member of the Lamalchi (Hul'qumi'nun) and Musqueam (Hunquminum) groups. He acquired membership rights in the former by taking a Lamalchi wife. As indicated, they had two sons Chliraminsit (Charlie Wilson) in 1825 and Culaxtun (Jim Wilson) in 1827. Chliraminsit and Culaxtun chose to be connected to Lamalchi because of their mother's ancestry at Lamalchi. Guerin (1999) observes that Hul'qumi'num people refer to this principle as *"lelumpunup,"* which means that as people grow up, they will choose to live in the longhouse of one side of the family.
>
> **Why Hwlitsum instead of Lamalchl**
>
> The term Hwlitsum rarely appears in historical records or anthropological studies. This is because the Hwlitsum's ancestors are, in accordance with Coast Salish tradition, usually referred to in historical and anthropological materials as Lamalchi. Prior to 1863, the Lamalchi had a winter village at Lamalchi Bay on what is now known as Kuper Island (sometimes Penelakut Island). ...
>
> The Lamalchi shared Kuper Island with two other distinct groups, the Penelakut and Yekaloas, who occupied their own villages.

[51] At page 30 of his report, Dr. Miller describes the Amalgamation, which his report indicates occurred in 1881:

> In 1880, the Rev. R. J. Roberts, an Anglican missionary, bought Conn's farm and began to proselytize the Lamalchi and Penelakut. On January 2, 1881, Roberts, at the request of Dr. Powell, organized the inaugural election of the First Nations resident on Kuper Island. The DIA, for bureaucratic purposes, had amalgamated the Lamalchi, Penelakut and Yonkulahs and then reserved Kuper Island for their use. From this point forward, the three tribes have been referred to as Penelakut.
>
> The Lamalchi drove a hard bargain. In exchange for agreeing to the merger, Chilarmninset was elected sub-chief and John Andrew Wilson was elected constable; both men were "admitted to full membership of this tribe or band, and to all the rights and privileges pertaining to this or any other reservation belonging to the Penelakuts". It is important to note that the Lamalchi acquired additional rights, they did not surrender their existing rights (Roberts letter to Powell1881).
>
> [Emphasis added.]

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[52] Canada's expert witness, Dr. John Dewhirst, describes the Amalgamation this way in his March 9, 2015 report:

> 22. In 1877, the Joint Indian Reserve Commission recognized three traditional local groups on Kuper Island, each with its own village. The Commission enumerated each group. The largest group was the "Pa-nult-a-kuts" [Penelakut] (total population 194) at "Clam Bay." The next largest traditional local group was the "Ya-kwa-lass" [Yekoloas] (total population 28). The third traditional local group was the "Kwil-la-malth-sa (Lamalacha)" [Lamalchi] (total population 17). Sproat called the Yekoloas and the Lamalchi "sub-tribes" of the Penelakut, however, all three traditional local groups were not in a political hierarchy, but operated independently of each other. It is noteworthy that the Penelakut Indian Band is based on three traditional local groups that were extant before the Indian Band was created. Most Indian Bands in British Columbia are based on such recognized traditional local groups or tribes that were extant in a village or place for generations. The same pattern was followed at Kuper Island, except the two small groups (Lamalchi and Yekoloas) were not set up as separate Indian Bands, but were combined with the large Penelakut local group into one Indian Band.

[53] Dr. Dewhirst also makes the following comments with respect to some of Dr. Miller's key findings:

> 49. Dr. Miller states that the Hwlitsum are part of the larger Coast Salish people, but are "their own distinct Nation" (his Par. 11) and a sovereign nation" (his Par. 23). I am of the opinion that the Hwlitsum include Coast Salish people, but the full membership and criteria for membership are not known. However, I am not sure what Dr. Miller means by "their own distinct Nation" and "a sovereign nation." Whether the Hwlitsum are a "'Nation" and "a sovereign nation" appear to be legal opinions. In my opinion, the Hwlitsum are not a traditional local group that later became an Indian Band and First Nation in the usual historical pattern in British Columbia. Rather the Hwlitsum are self-proclaimed a modern group formed around some descendants of the Lamalchi traditional local group. Those descendants left the Lamalchi local group on Kuper Island In the late 19th century. The Lamalchi local group on Kuper Island continued until about 1916… By 1916 the Lamalchi local group had dwindled to a handful of people, and they appear to have joined the Penelakut. For this reason, the Hwlitsum, as a group, are not a continuation of the Lamalchi as a traditional group.
>
> 50. Dr. Miller states in his Par. 9: in this affidavit, I may use any of the terms Hwlitsum, Lamalcha or Lamalchi interchangeably." His interchangeable use of these terms assumes that the Hwlitsum as a group and the Lamalcha/Lamalchi as a group are one and the same, when in fact they are two distinctly different groups significantly separated in time. Dr. Miller assumes both groups are one and the same.
>
> [Emphasis added.]

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IV: THE LEGAL FRAMEWORK FOR THE STANDING APPLICATION

[54] The issue of standing may be addressed as a preliminary matter in order to avoid unnecessary litigation: *Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448 at paragraphs 84-90 and 133, aff'd 2012 BCCA 274 [*Campbell*].

[55] There can be no cause of action if a plaintiff has no standing: *Campbell* at paragraph 79.

[56] Two separate causes of action are advanced by the plaintiffs.

[57] The first relates to collective rights founded upon alleged Aboriginal title and rights which the plaintiffs seek to assert on behalf of the HFN as the alleged descendants of the Lamalcha Tribe of Indians: see the Amended NOCC, Part 1 at paragraphs 1, 3, 46, 89, 104 and 108.

[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.

[59] The second cause of action relates to discrimination and alleged violation of the plaintiffs' individual *Charter* rights pursuant to sections 2 and 15: see Amended NOCC, Part 1 at paragraph 87. As noted above at paragraph 2, the Amended NOCC fails to provide any specific details regarding the basis for these claims.

[60] The issue of standing arises only in relation to the plaintiffs' assertion of the alleged collective Aboriginal title and rights claims.

[61] Rule 20-3 of the *Supreme Court Civil Rules*, BC Reg 168/2009 (the "*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.

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[62] Until the hearing of the Standing Application, the parties appeared to be in agreement that the criteria to be applied on the application to determine whether the plaintiffs are an appropriate collective to bring a representative action is as outlined by the Supreme Court of Canada in *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 [*Western Canadian Shopping*].

[63] In *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 [*Nevsun*], I considered the application of the *Western Canadian Shopping* criteria in representative proceedings involving Rule 20-3 commencing at paragraph 494:

> [494] British Columbia has both a representative action rule and the *CPA* [*Class Proceedings Act*]. Accordingly, the first issue to be decided is whether the [*Western Canadian Shopping*] criteria apply to a representative action in this province. The plaintiffs say they do and those criteria are satisfied in this case. Nevsun argues that they do not and that the criteria for a representative proceeding are far more limited than under the *CPA*. In the alternative, Nevsun submits that the [*Western Canadian Shopping*] criteria are not satisfied in this case.

[64] Having referred to *Hayes v. British Columbia Television Broadcasting Systems Ltd.* (1990), 46 B.C.L.R. (2d) 339 (C.A.) [*Hayes*] (which predated the British Columbia *Class Proceedings Act,* R.S.B.C. 1996, c. 50) and *Western Canadian Shopping*, I stated in *Nevsun*:

> [515] Considering the "history and purpose" of the representative proceeding rule and the circumstances in which it applied both prior and subsequent to [*Western Canadian Shopping*] and the enactment of the *CPA*, I conclude that common law class actions under [*Western Canadian Shopping*] are only available in the absence of comprehensive class action legislation. Non *CPA* proceedings are governed by Rule 20-3 and the way that rule and its predecessors have been interpreted by the courts of this province. This includes the test set out in *Hayes*, although the [*Western Canadian Shopping*] criteria may well be of assistance in some circumstances.

[65] In *Hayes*, McDonald J.A. described the test as follows at p. 340:

> In deciding whether a case is appropriate for a representative action, tests were laid down by Chief Justice McEachern of this Court, then Chief Justice of the Supreme Court, in *Kripps et al v. Touche Ross & Co*. (1986), 7 B.C.L.R. (2d) 105. The tests are stated in the form of three questions to be answered:

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> (1) Is the purported class capable of clear and finite definition?
>
> (2) Are the principal issue of fact and law essentially the same with regard to all members?
>
> (3) Assuming liability, is there a single measure of damages applicable to all members?

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[66] In *Nevsun*, however, I recognized that representative action proceedings in this province under Rule 20-3, and its predecessors, have consistently applied the *Western Canadian Shopping* criteria in Aboriginal title claims: see paragraph 499.

[67] In *Campbell*, for example, at paragraphs 10-12, Justice Willcock, as he then was, stated:

> [10] The Minister says that in order to address the petitioners' capacity to bring a representative claim on behalf of the Sinixt, the court must consider the criteria described by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 48 [*Western Canadian Shopping Centres*], as follows:
>
> > 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.
>
> [11] These criteria have been used to analyze claims brought on behalf of First Nations in British Columbia in *Komoyue Heritage Society v. British Columbia (AG),* 2006 BCSC 1517, and *Te Kiapilanoq v. British Columbia*, 2008 BCSC 54.
>
> [12] Further, the Minister says the court must be satisfied in the exercise of its discretion that there are no countervailing considerations that outweigh the benefits of allowing an action to proceed as a representative action.

[68] In *Komoyue Heritage Society v. British Columbia*, 2006 BCSC 1517 [*Komoyue*], Justice Davies stated at paragraph 35 that:

> [35] After having considered the totality of the evidence and the submissions of all counsel, I have concluded that the decided case law does not support the petitioners' assertion that self-appointed aboriginal persons have, in the past, and should in this case, be allowed standing as individuals to assert collective treaty or other collective aboriginal rights on behalf of an aboriginal community. In my view, the weight of authority is to the contrary

> and underlies the reason why representative proceedings will only be sanctioned when the putative representative proceeding and representative plaintiff meet the four criteria established by the Supreme Court of Canada in *Western Canadian Shopping*.

[69] Justice Fisher reached a similar conclusion in *Quinn v. Bell Pole*, 2013 BCSC 892 at paragraph 19.

[70] For the reasons stated in *Nevsun*, including the decision of the Court of Appeal in *James v. British Columbia*, 2007 BCCA 547 where Justice Huddart noted at paragraph 34 that, "… the approach in *Western Canadian* is helpful where it does apply", I am of the view that the *Western Canadian Shopping* criteria are not of mandatory application in all proceedings under Rule 20-3. But I also conclude that they should be applied in this putative Aboriginal title and rights case in light of the decisions of this court to which I have just referred.

[71] I would add that in many, if not most cases, the same result will likely arise if the *Hayes*, as opposed to the *Western Canadian Shopping* criteria, is applied.

[72] The next question in relation to the legal framework is whether standing should be decided as a preliminary issue and, if so, what is the test and which party bears the burden of proof.

[73] Canada's position is that, although it brought the Standing Application, now that it has done so, it is for the plaintiffs to satisfy the Court that all the *Western Canadian Shopping* criteria have been satisfied in order for the representative action to procced.

[74] In their filed response to application, the plaintiffs appeared to acknowledge that the *Western Canadian Shopping* criteria applied.

[75] During the hearing of the application the plaintiffs modified their position somewhat. Relying on certain authorities from the Supreme Court of Canada, they argued that the Court should adopt a "functional", "purposeful" or "flexible and generous" approach in its consideration of the standing issues: see *Papaschase*

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Indian Band (Descendants of) v. Canada (Attorney General), 2004 ABQB 655, rev'd 2006 ABCA 392, aff'd 2008 SCC 14 [*Papaschase*]; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Metis*]; and *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 [*Daniels*]. In particular, the plaintiffs argued this Court should conclude that, at the very least, whether the plaintiffs were an appropriate collective to bring a representative proceeding raised triable issues of mixed fact and law, which should not be determined summarily. The plaintiffs' position is that the question of standing should proceed to trial with the other issues raised by the pleadings.

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[76] In the alternative, the plaintiffs submitted that they meet all the *Western Canadian Shopping* criteria.

[77] The issue of standing was addressed in *Campbell*.

[78] *Campbell* concerned the issuance of a timber license issued by the Queen in Right of the Province of British Columbia. The petitioners sought judicial review of the issuance of the license, claiming that they represented an indigenous group of people who had historically identified themselves as the Sinixt. The petitioners claimed to speak for the Sinixt. In proceedings commenced by petition they sought a declaration that they had Aboriginal title to land to which the license in question had been issued. They sought an interim injunction preventing logging activities in relation to that license until their claims for Aboriginal title had been heard.

[79] The issues were summarized this way in the reasons for judgment:

> [3] The evidence before me speaks of the existence of a historic rights-bearing community, the Sinixt. Some of the petitioners have long laboured to obtain recognition of the rights of a contemporary community they consider to be descended from and so connected with that historic community as to be entitled to rights protected by s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. The first question before me is whether the petitioners have sufficiently defined the contemporary rights-bearing collective for whom they purport to act. The second question is whether they can appropriately act as representatives of that community.

[80] In Part 3: Legal Basis of the notice of application, Canada refers to Rule 20-3 stating in paragraph 3 that:

> Under this provision the court has discretion as to whether or not a representative action should be continued.

[81] There then follows, as was the case in Canada's written submission, a discussion of *inter alia* the *Western Canadian Shopping* criteria.

[82] In *Campbell*, Justice Willcock reviewed many of the authorities to which I was referred on this application and considered the question as to whether the issue of standing should be considered at the outset of the proceeding.

[83] He referred to the earlier case of *Nemaiah Valley Indian Band v. Riverside Forest Products* (1999), 37 C.P.C. (4th) 101, to differentiate between two ways standing issues may arise in the context of Aboriginal rights:

> [89] Of course, the aboriginal title is a communal right shared by all members pf the group by virtue of their membership in the group. Chief Williams was a member of the Tsilhqot'in and had the same interests as all other members, and his claims could benefit all members of the class equally. The issue of standing in that case was not whether the underlying claim was being advanced by an identifiable group or whether that group was potentially entitled to advance a claim for a collective, but the authority of the named plaintiff to act for that collective. The court, citing *Oregon Jack Creek*, held at para. 13 that: "The issue of authority to bring the action, like the issue of personal entitlement, is a question of mixed fact and law, best determined by the trial judge".

[84] He then provided a detailed analysis of, *inter alia*, *Papaschase* and *Komoyue* and proceeded to consider the applicable test on the standing application, having set out the parties' positions this way:

> [136] There is an issue with respect to the standard the Minister should meet on the application to dismiss the claim. The Minister argues that the claim should be dismissed if the petitioners cannot establish standing; that is, if they cannot establish that they represent an aboriginal community that can claim s. 35 rights. The petitioners say this is an inappropriate test at this stage. They say the Minister has not sought a summary trial on an issue, but rather has applied to strike a claim as an abuse of process. On such an application, which would ordinarily be brought pursuant to Rule 9-5, the Minister should be obliged to show that it is plain and obvious that the petitioners cannot represent a collective entitled to a right to be consulted.

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> They say the court should bear in mind that by their injunction they seek only to protect the right to be consulted and they do not seek adjudication of their underlying claim for rights or title. The right to consultation may be asserted by aboriginal groups with weak or dubious claims. The weakness of their claim affects the depth of the requisite consultation and not whether there is a duty to consult. They say the threshold to establish a right to consultation is low and the onus should fall on the Minister on this application to establish that it is clear and obvious that they cannot meet that low threshold. I agree with that submission. In order to succeed on this application, the Minister must establish that it is clear that the petitioners have no standing to advance the Sinixt's right to consultation. To hold otherwise would be to undermine the objectives described in *Haida*.

[85] While the positions of the parties on this application are similar to those in *Campbell*, they are not identical. In particular, the plaintiffs submit that there are triable issues or questions of mixed fact and law that relate to their standing which can only be determined at a trial.

[86] Justice Willcock reached the following conclusions in *Campbell*:

> [137] Some issues of standing, for example, authority of the petitioners (as in *Oregon Jack Creek*) or agency (as in *Labrador Métis Nation*) may not be capable of determination on a summary application. Except in clear cases, aboriginal rights claimants have a right to be consulted by governments pending the determination of even weak or dubious claims. Consultation is intended to preserve the honour of the Crown in its relations with aboriginal people and contributes to reconciliation. These objectives are as desirable in cases where there is doubt with respect to the aboriginal community's status as in cases where the nature and extent of the aboriginal right or title is in issue.
>
> [138] In *Western Canadian Shopping Centres* the court described the appropriate approach on an application to dismiss a representative proceeding under Alberta's equivalent provision. The court held that nothing in the rules suggested that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. In that case, however, the dismissal of the representative claim did not prevent the plaintiff from advancing the claim in an individual capacity, and the challenge to standing did not drive the plaintiffs from the judgment seat. In the case at bar, the petitioners cannot proceed as individuals. They seek to protect the rights of a collective. They must act as a collective and bring a derivative claim, and for that reason I am of the view that it is correct to require the Minister to establish that it is plain and obvious that the petitioners do not have standing.
>
> [Emphasis added.]

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[87] I am mindful that the proceedings in *Campbell* were commenced by petition as opposed to a notice of civil claim which commenced the action in this case. But in my view this is not a material distinction such that I should not follow the reasoning in *Campbell*.

[88] Here the principal claims advanced by the plaintiffs are of a collective nature and the challenge to standing with respect to those claims, if successful, will "drive the plaintiffs from the judgment seat".

[89] Accordingly, I have concluded that it is for Canada to establish that it is plain and obvious, based on the class or collective definition selected by the plaintiffs themselves, that they do not have standing to advance the communal rights at issue in this proceeding.

[90] This means that Canada, in order for me to find that the plaintiffs do not have standing to advance the collective claims, must establish that it is plain and obvious that not all of the *Western Canadian Shopping* criteria have been met.

V: APPLICATION OF THE *WESTERN CANADIAN SHOPPING* CRITERIA

(a) The class of plaintiffs must be capable of clear definition.

[91] In *Western Canadian Shopping*, Chief Justice McLaughlin stated at paragraph 38:

> [38] … 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.
>
> [Internal citations omitted.]

[92] The HFN's stated objective criteria for membership are set out in paragraph 23 above.

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[93] As I have noted, according to the Amended NOCC the HFN identifies itself as the successor of the Lamalcha Tribe of Indians and brings this action on behalf of all other descendants of the Lamalcha.

[94] During the hearing of the application, the plaintiffs amended the class definition to include "all members of the Lamalcha Tribe, being the descendants of Si'nuscutun, who are not members of any other Indian Band".

[95] The plaintiffs' position is that "Indians" and "bands" are not the only groups capable of advancing claims under s. 35 of the *Constitution Act*, 1982 and that Constitutional protection is provided to all groups who can show continuous exercise of rights existing at the time of contact or sovereignty. They say that the HFN is a group capable of advancing a claim under s. 35 of the *Constitution Act*, 1982.

[96] They also say the expert evidence, in particular that of Dr. Miller to which I have referred in part above, is indicative of the fact that this first element of the *Western Canadian Shopping* test establishes a triable issue or, in any event, is not bound to fail. In particular, they assert that the alleged Amalgamation of the Lamalcha, Penelakut and Yonkulahs, discussed above at paragraphs 51-52, did not occur and therefore the Lamalcha, or their descendants, continue to be an identifiable and separate rights bearing community. The plaintiffs assert that this issue is a question of fact and law that must be proved.

[97] They point to what they allege are the clear objective criteria for membership (namely that an individual is descended from Si'nuscutun), that the HFN chief and counsel have the mandate and the ability to determine membership in a manner that preserves cultural identity and custom and that, as stated by Chief Justice McLaughlin in *Western Canadian Shopping*, "it is not necessary that every class member be named or known".

[98] In the alternative, they argue that if the Court were to conclude that this first component regarding objective criteria has not been met, then the factors in *R. v. Powley*, 2003 SCC 43 [*Powley*] which relate to the determination of a

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contemporaneous rights bearing community, *Manitoba Metis* and *Daniels*, militate in favour of the action continuing to trial as a representative proceeding.

[99] *Powley*, *Manitoba Metis* and *Daniels* all relate to the Metis people who were described this way in the introduction to *Manitoba Metis*:

> 4 The government policy with respect to the Métis population -- which, in 1870, comprised 85 percent of the population of what is now Manitoba -- was less clear. Settlers began pouring into the region, displacing the Métis' social and political control. This led to resistance and conflict. To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory. The result was the *Manitoba Act*, 1870, S.C. 1870, c. 3 ("*Manitoba Act*") which made Manitoba a province of Canada.
>
> 5 This appeal is about obligations to the Métis people enshrined in the *Manitoba Act*, a constitutional document. These promises represent the terms under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada. These promises were directed at enabling the Métis people and their descendants to obtain a lasting place in the new province. Sadly, the expectations of the Métis were not fulfilled, and they scattered in the face of the settlement that marked the ensuing decades.
>
> 6 Now, over a century later, the descendants of the Métis people seek a declaration in the courts that Canada breached its obligation to implement the promises it made to the Métis people in the *Manitoba Act*.

[100] Clearly the Metis people would satisfy the first of the *Western Canadian Shopping* criteria. I do not accept that the discussion and findings made with respect to the Metis in the context of contemporaneous rights bearing communities should be of assistance to me when I consider the first element on this application. I would also add that *Powley* was referenced in *Campbell* at paragraphs 114-120.

[101] As was the case in *Campbell*, I have concluded that I am bound to dismiss the representative proceedings since the proposed class or collective is not defined in a manner that permits its membership to be determined by objective criteria.

[102] In explaining the basis for this result, I will focus on certain of the principal submissions made on behalf of Canada, the Province, Tsawwassen and the Penelakut with which I am in substantial agreement.

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[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.

[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.

[105] There are other difficulties with the plaintiffs' definition of the proposed class which, contrary to principles set out in the authorities, include:

- 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;

- 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;

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- 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.

[106] During his submissions, counsel for the plaintiffs stated that the underlying rationale in *Campbell* and *Komoyue* was to prevent a "floodgate" of similar claims.

[107] I agree. And yet in my view that is very much in danger of occurring if this action proceeds as contemplated by the plaintiffs.

[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.

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

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

[111] While it is the case that there are some disagreements between the experts, some of which I identified above, this is not sufficient to establish, as the plaintiffs seek to have the Court do, triable issues or mixed questions of fact and law which should proceed to trial. Regardless, if an amalgamation of the Lamalcha, Penelakut, and Yonkulahs occurred, the fact remains that the plaintiffs have not provided objective criteria that would allow HFN members to be identified.

[112] The real question, based on the legal framework I have identified, is whether, based on the class definition advanced by the plaintiffs, the proceeding is bound to fail as a representative action. And neither expert evidence nor the contested evidence, to which the plaintiffs referred in their submissions in accordance with my reasons referred to at paragraph 14 above, assist them on this point.

[113] It is also inherently contradictory, in my view, for the plaintiffs to submit that they satisfy the first *Western Canadian Shopping* criteria such that the proceeding can move forward as a representative action while arguing, on the other hand, that a trial may be required to determine that very issue.

[114] Finally, for the reasons I have outlined, by following the analysis in *Campbell*, the same result that occurred in that case should occur here.

(b) The remaining *Western Canadian Shopping* criteria

[115] A class which is capable of clear definition is a prerequisite to the consideration of the remaining *Western Canadian Shopping* 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

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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.

(c) Conclusion

[117] The representative claims are bound to fail and are dismissed.

VI: OTHER ISSUES

[118] In light of my decision that the representative claims are bound to fail, I need not address Canada's abuse of process claim, which was essentially based on the argument that the representative relief which was sought, amounted to an attempt to circumvent the provisions of the *Indian Act*.

[119] There remains the issue of the plaintiffs' personal claims for alleged breach of their *Charter* rights.

[120] I am not prepared to stay or dismiss these *Charter* claims at this stage of the proceeding. What should occur, in my view, is that the plaintiffs have the opportunity, in light of these reasons for judgment, to consider whether they intend to continue to advance those claims. If so, then substantial amendments will need to be made to the Amended NOCC, which will include particularizing the basis for the personal claims. I will seize myself of any application that is brought in relation to those proposed amendments.

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[121] The parties have leave to make submissions regarding costs.

"Abrioux J."

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