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June 21, 2023

FILE NUMBER: 077728-00070

**DELIVERED BY EMAIL**

Steven M. Kelliher  
Kelliher & Turner  
Suite 16-21 Dallas Road  
Victoria, BC V8V 4Z9

Dear Mr. Kelliher:

**Re: The Friends of Fairy Creek Society v. The Attorney General of Canada et al  
SCBC Action No. S231620, Victoria Registry**

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We enclose for service upon you, the Response to Petition filed on behalf of Teal Cedar Products Ltd. in the above-noted action.

Sincerely,  
**DLA Piper (Canada) LLP**  
Per:

A handwritten signature in blue ink, appearing to read 'D Dalke', written over a horizontal line.

Dean Dalke  
Partner

DXD:pea  
Encl.  
cc: Client

FIRMDOCS: 44429631.1



No. 231620  
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE FRIENDS OF FAIRY CREEK SOCIETY

PETITIONER

AND:

THE ATTORNEY GENERAL OF CANADA, THE MINISTER  
OF THE ENVIRONMENT AND CLIMATE CHANGE, THE  
ATTORNEY GENERAL OF BRITISH COLUMBIA and  
MINISTER OF FORESTS

RESPONDENTS

### **RESPONSE TO PETITION**

**Filed by:** Teal Cedar Products Ltd. ("**Teal Cedar**" or the "**petition respondent**")

THIS IS A RESPONSE TO the Amended Petition filed **April 24, 2023**.

#### **Part 1: ORDER(S) CONSENTED TO**

The petition respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Amended Petition: none.

#### **Part 2: ORDERS OPPOSED**

The petition respondent opposes the granting of the orders set out in paragraphs 1, 2, 3, and 4 of Part 1 of the Amended Petition.

### **Part 3: ORDER ON WHICH NO POSITION IS TAKEN**

The petition respondent takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the Amended Petition: none.

### **Part 4: FACTUAL BASIS**

#### **Overview**

1. The within petition proceeding is an abuse of process and bound to fail. It ought to be struck under Rule 9-5.
2. The only substantive relief the petitioner seeks is a declaration. Making that declaration would serve no practical purpose, nor resolve any matter at issue between the parties to this proceeding. Courts do not grant declarations in such circumstances.
3. The petitioner was incorporated just months ago, seemingly for the sole purpose of bringing this petition proceeding. The petitioner is neither responsible for enforcing, nor accused of breaching, the regulations at issue. It is a mere vehicle for litigation with no real interest in the relief sought. That is fatal to the petitioner's request for declaratory relief and its standing to bring these proceedings.
4. Granting the declaration sought would be tantamount to amending federal regulations by judicial decree—a clear intrusion on powers delegated to the federal Governor in Council by Parliament.
5. Far from resolving a dispute, the declaration sought would *create* disputes by introducing ambiguity into the interpretation of federal regulations.

#### **The petitioner**

6. The petitioner was incorporated on January 23, 2023. The petition is not supported by any evidence regarding the petitioner's membership, activities, or funding.

## **Teal Cedar**

7. Teal Cedar is a company incorporated under the laws of British Columbia. It is in the business of harvesting timber and manufacturing primary lumber products.
8. Teal Cedar owns Tree Farm Licence 46 (“**TFL 46**”), which grants it the exclusive right to harvest Crown timber within the area described in the licence for a period of 25 years (beginning on July 1, 2022). Teal Cedar obtains cutting permits and road permits, which permit it to harvest trees and construct roads in TFL 46.
9. Teal Cedar harvests timber and engages in related forestry activities in TFL 46 under the terms of a Forest Stewardship Plan dated July 6, 2022 (the “**FSP**”).
10. The petitioner did not name Teal Cedar as a party in the style of proceeding. If necessary, Teal Cedar reserves the right to apply to be added as a party and, if granted party status, to file affidavits and take any other step a party may take.
11. Teal Cedar requires notice of all steps in this proceeding in accordance with the *Supreme Court Civil Rules*.

## **Marbled murrelet conservation in TFL 46**

12. Teal Cedar is subject to and complies with all laws governing the management of marbled murrelet habitat and nests, including the *Migratory Birds Regulations, 2022* (SOR/2022-105) (the “**MBR, 2022**”).
13. Teal Cedar does not indiscriminately destroy marbled murrelet nests or harass marbled murrelet. None of the petitioner’s evidence establishes that it does.
14. On the contrary, large swaths of potentially-harvestable area in TFL 46 are not harvestable precisely because those areas have been designated as marbled murrelet nesting habitat.

15. Teal Cedar is subject to and compliant with an order issued in November 2021 under s. 93.4 of the *Land Act*, RSBC 1996, c 245 intended to preserve marbled murrelet nesting habitat (the “**Marbled Murrelet Order**”).
16. The Marbled Murrelet Order requires that 11,032 hectares of marbled murrelet nesting habitat be preserved in the Renfrew Landscape Unit Aggregate, where part of TFL 46 is located. In the particular landscape unit portions in the Renfrew Landscape Unit Aggregate on which TFL 46 is situated (Cowichan WNVI, Caycuse WNVI, Gordon WNVI, Nitinat WNVI, San Juan WNVI, and Walbran), 8,196 hectares of marbled murrelet nesting habitat is to be preserved from timber harvesting.
17. Another part of TFL 46 is located in the East Coast Landscape Unit Aggregate, specifically within the Caycuse EVI, Gordon EVI, Nitinat EVI, San Juan EVI, and Cowichan EVI landscape unit portions. The Marbled Murrelet Order prohibits harvest of designated marbled murrelet habitat in the East Coast Landscape Unit Aggregate.
18. Further, in November 2021 the provincial government issued a notice under s. 7(2) of the *Forest Planning and Practices Regulation* (B.C. Reg. 14/04) and s. 9(3) of the *Woodlot Licence Planning and Practices Regulation* (B.C. Reg. 21/04) regarding marbled murrelet habitat (the “**Marbled Murrelet Notice**”).
19. The Marbled Murrelet Notice targets preserving 2,719 hectares of suitable marbled murrelet nesting habitat in Wildlife Habitat Areas and Old Growth Management Areas in the landscape unit portions in which TFL 46 is located. Wildlife Habitat Areas and Old Growth Management Areas are established by the provincial government. In TFL 46, Teal Cedar does not harvest timber or construct roads in Wildlife Habitat Areas or Old Growth Management Areas.
20. Teal Cedar has incorporated the requirements of both the Marbled Murrelet Order and the Marbled Murrelet Notice into its FSP for TFL 46.

21. Dr. Burger's analysis (which is not conceded to be admissible expert opinion evidence) assumes that whenever old growth trees are harvested in TFL 46, marbled murrelet nests are destroyed in equal proportion to the number of nests that Dr. Burger expects to be in their habitat area. That assumption is not supported by evidence. Dr. Burger ignores the fact that habitat suitable for marbled murrelet nesting has been identified and specifically exempted from timber harvesting in TFL 46.
22. There is no direct evidence that old growth logging in TFL 46 is responsible for any decline in the number of marbled murrelet on southern Vancouver Island. Dr. Burger's conclusion to the contrary is based on conjecture.

## **Part 5: LEGAL BASIS**

### **Legal principles governing declaratory relief**

23. The petitioner seeks a declaration that the "*Migratory Birds Act Regulations 2022 (SOR/2022)* [*sic*] prohibit the indiscriminate [*sic*] destruction of Marbled Murrelet nests by the logging of old growth trees in TFL 46".

Amended Petition, Part 1, para. 1

24. A declaration is not a mere observation or comment by the court on how it views a situation. Rather, it is a binding statement by the court establishing a right, power, duty or status.

*Pereira v. British Columbia (Workers' Compensation Board)*, 2023 BCCA 195 at para. 16 [*Pereira*]

25. A declaration is a discretionary remedy. Even if a person establishes the existence of a right, power, duty or status, a court will generally not grant the remedy unless it considers that it will have practical effect and resolve an extant legal dispute between the parties to the proceeding.

*Pereira* at paras. 16 and 17

26. Declarations may only be granted only where there are real, rather than fictitious or academic, issues raised. The person seeking the declaration must have a real interest in obtaining the declaration. There also must be a real issue between the parties to the proceeding that the declaration will resolve.

*Pereira* at para. 17, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821, 830-833

27. Declaratory proceedings should not be entertained where the declaration will serve little or no practical purpose.

*Pereira* at para. 18, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539 at para. 13

28. The Petitioner has failed to establish any basis for declaratory relief. Issuing the declaration sought by the petitioner is manifestly inappropriate.

**The petitioner has no real interest in the declaration sought**

29. The petitioner does not have a right, power, duty, or status at stake. It has neither plead nor provided evidence establishing how the declaration would affect its interests. The declaration sought would, if granted, have no effect whatsoever on the petitioner.

30. On a petition for declaratory relief, the question of the petitioner's interest in the relief sought is intertwined with the question of the petitioner's standing to seek the declaration. A petitioner is not relieved from the obligation to demonstrate standing just because it seeks declaratory relief.

*Ciarniello v. HMTQ*, 2006 BCSC 1671 at para. 52 [*Ciarniello*]

31. A simple claim to declaratory relief, in the absence of some adversely affected legal interest, does not give the court an overriding discretion to grant that relief, and to ignore the legal principles governing private interest standing.

*District of Kitimat v. Alcan Inc.*, 2006 BCCA 75 at para. 92

32. A litigant seeking declaratory relief must demonstrate that it has a right which has been infringed by, or requires protection from, another party. If the right cannot be demonstrated, the party does not have standing and the court does not have jurisdiction to issue a declaration.

*Ciarniello* at para. 53, citing *Fraser v. Houston*, [1996] B.C.J. No. 2096 (S.C.) at para. 29 [*Fraser*]

33. There must be some privity in law between the parties to the proceeding before the court will grant a declaratory judgment. There must be an existent right and an interference or dispute concerning the right. A petitioner who has no right in the nature of a claim capable of being enforced or redressed in a civil action cannot seek a declaration because the petitioner cannot take advantage of or suffer the consequences of the declaration.

*Ciarniello* at para. 54, citing *Fraser* at para. 31

34. The petitioner does not have any right in the nature of a claim capable of being redressed in a civil action. Nor does it have any right that has been infringed or in respect of which it requires protection.
35. The petitioner is not responsible for enforcing the *MBR, 2022*, and it is not alleged to have breached those regulations. The declaration sought is meaningless to the petitioner.
36. Moreover, there is no extant legal dispute between the petitioner and the other parties to this petition proceeding. The petitioner has not alleged or demonstrated any real legal dispute between itself and the federal or provincial government.
37. To the extent the petitioner attempts to found its standing on an extant legal dispute with Teal Cedar, that argument fails for two reasons:
- (a) First, there is no legal dispute between Teal Cedar and the petitioner. The petitioner does not allege, and its evidence does not establish, that Teal Cedar breached the *MBR, 2022*. In fact, the petitioner concedes that the lawfulness of Teal Cedar's logging is not at issue (see the Amended



Petition, Part 3, p. 8). Even if Teal Cedar did breach the *MBR, 2022* (which is not the case), such a breach would not be a legal issue between the petitioner and Teal Cedar; and

(b) Second, the petitioner has elected not to join Teal Cedar as a party to these proceedings. An extant legal dispute between the petitioner and a non-party cannot found a claim for standing to seek declaratory relief, which requires an extant legal dispute between the parties to the proceeding.

38. What the petitioner seeks is an abstract interpretation of the *MBR, 2022* without demonstrating any real stake in the question at issue, and in the absence of the necessary adversarial context. For that reason alone the petition must be struck.

#### **Granting the declaration sought is beyond the proper role of the Court**

39. The petitioner asks this Court to write a new provision into the *MBR, 2022*, namely, that those regulations prohibit the “[indiscriminate] destruction of marbled murrelet nests by the logging of old growth trees...”. This prohibition is not found anywhere in the text of the *MBR, 2022*.

40. The federal Governor in Council promulgated the *MBR, 2022* in May 2022 pursuant to s. 12(1) of the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, ss. 16(1) and 17 of the *Canada National Parks Act*, S.C. 2000, c. 32, and s. 5(1) of the *Environmental Violations Administrative Monetary Penalties Act*, S.C. 2009, c. 14, s. 126. Parliament delegated the authority to make these regulations to the federal Governor in Council, not to this Court.

41. Courts must be sensitive to their proper law-making function and avoid trenching on the role of other branches of government. It would be inappropriate for the Court to legislate from the bench by effectively amending the *MBR, 2022* via declaration.

See *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at 362

### **Granting the declaration would create, not resolve, disputes**

42. Rather than resolve a real dispute between the parties to this proceeding, the declaration sought would create disputes by introducing ambiguity into the *MBR, 2022*.
43. If the Court issued the declaration sought, persons subject to the *MBR, 2022* would—in addition to considering the actual language chosen by the federal Governor in Council—also have to consider whether their conduct resulted in the “indiscriminate destruction” of marbled murrelet nests.
44. The phrase “indiscriminate destruction” is imprecise. It would confuse, rather than guide, persons subject to the *MBR, 2022*. That result is antithetical to the purpose of issuing declarations, which is to resolve ambiguity and bring an end to real legal disputes.

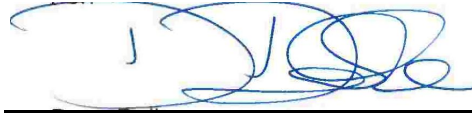
### **Part 6: MATERIAL TO BE RELIED ON**

1. Such material as counsel may advise and this Court may allow.

The petition respondent estimates that the hearing of the petition will take two days.

June 21, 2023

Dated



Signature of  lawyer for petition  
respondent, Teal Cedar Products Ltd.  
DLA Piper (Canada) LLP (Dean Dalke)

Name of the petition respondent's  
lawyer is:

Dean Dalke  
DLA Piper (Canada) LLP  
Barristers & Solicitors  
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N/A

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**RESPONSE TO PETITION**

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