No. 231620
BC-Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

THE FRIENDS OF FAIRY CREEK SOCIETY

Petitioner

AND

THE ATTORNEY GENERAL OF CANADA, AND THE MINISTER OF THE ENVIROMENT AND CLIMATE CHANGE

AND

THE ATTORNEY GENERAL OF BRITISH COLUMBIA, AND MINISTER OF FORESTS

Respondents

NOTICE OF APPLICATION

NAME OF APPLICANT: Attorney General of Canada ("**Canada**")

TO: The Petitioner, The Friends of Fairy Creek Society (the "**Society**")

AND TO:

Attorney General of British Columbia, and Minister of Forests
c/o Deputy Attorney General
Ministry of Attorney General
PO Box 9290 Stn. Prov. Govt.
Victoria, BC V8W 9J7

Teal Cedar Products Ltd.
2800 – 666 Burrard Street
Vancouver, BC V6C 2Z7

Pacheedaht First Nation
Kalaid St, Port Renfrew, BC
V0S 1K

Dididaht First Nation
PO Box 340,
Port Alberni, BC
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Cowichan First Nation
313B Deer Rd, Lake Cowichan, BC
V0R 2G0

Cowichan Lake Community
Forest Co-Operative Ltd.
P.O. Box 428
97 South Shore Road
Cowichan Lake, BC
VOR 2GO

Attorney General of the United States of America
Merrick B. Garland
c/o U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

TAKE NOTICE that an application will be made to the presiding judge or master at the courthouse at 850 Burdett Avenue, Victoria, British Columbia on the assize list for September 5, 2023 at 9:45 am for the order(s) set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order striking the amended petition filed April 24, 2023 (the "**Petition**"), without leave to amend.

2. Costs of this application.

Part 2: FACTUAL BASIS

Overview

1. The Petition does not disclose the type of claim that may be brought by petition.

2. The Petition seeks no relief, recourse, or remedy as against Canada or anyone.

3. The Petition impugns no action or inaction on the part of Canada or anyone.

4. The Petition challenges no federal legislation nor any provincial legislation.

5. The declaration requested, if granted, would settle no live controversy between the Society and Canada.

6. The Petition should be struck pursuant to Rule 9-5(1) because:

   (a) it discloses no reasonable claim. The Petition does not seek any enforceable relief, recourse, or remedy as against Canada or anyone;
   (b) it is unnecessary, scandalous, frivolous or vexatious. The granting of the declaration will have no practical effect on Canada or the Society; and
   (c) it constitutes an abuse of process. The Petition is a colourable attempt to enforce criminal sanctions privately.

Background

7. On April 24, 2023, the Society initiated this proceeding by filing an amended petition seeking, in part, the following declaration:

   > An order declaring that the *Migratory Birds Act Regulations 2022* (SOR/2022) prohibit the indiscriminate destruction of the Marbled Murrelet nests by the logging of old growth trees in TFL 46.

8. Canada and the Province of British Columbia are named as respondents. The environment is a subject matter of shared federal and provincial jurisdiction. The *Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [***Constitution Act***] provides no explicit jurisdiction over the environment or migratory birds to either order of government. The jurisdiction of the federal government over migratory birds originates from the *Convention for the Protection of Migratory Birds in the United States and Canada* [the *Migratory Bird Convention*].

9. Teal Cedar Product Ltd., ("**Teal Cedar"**) a forestry company, is incorporated under the laws of British Columbia.

10. Teal Cedar holds Tree Farm License 46 ("**TFL 46**"), at the pleasure of the Province of British Columbia. TFL 46 entitles Teal Cedar to harvest British Columbia Crown timber from an area on south-west Vancouver Island, known as Fairy Creek.

11. TFL 46 is not a federal license.

12. TFL 46 is not on federal land.

Part 3: LEGAL BASIS

British Columbia Supreme Court Civil Rules

13. Rule 9-5(1) provides:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> …
>
> (d) it is otherwise an abuse of the process of the court…

14. Pursuant to Rule 9-5(2) evidence is inadmissible on an application under Rule 9-5(1)(a) but may be considered on an application under the remaining paragraphs of Rule 9-5(1).

Rule 9-5(1)(a): The Petition discloses no reasonable claim.

15. The Petition does not disclose the type of claim that may be brought by Petition. The test under Rule 9-5(1)(a) is somewhat modified when the application is to strike a petition rather than a notice of civil claim. In *B. (E.) v. British Columbia (Director of Child, Family and Community Services),* 2016 BCCA 66, at paragraph 42 the Court of Appeal stated:

> …A petition need not disclose a "cause of action", but must set out a foundation for a type of proceeding authorized to be brought by petition. Accordingly, **the correct inquiry under Rule 9-5(1)(a) in this case is whether the petition disclosed the type of claim that may be brought by petition**. [emphasis added]

16. The Petition seeks a declaration with no practical utility. Granting the declaration sought will have no effect on Canada or the Society.

17. Declaratory relief is granted by the court on a discretionary basis and may be appropriate where:

a. the court has jurisdiction to hear the issue;
b. the dispute is real and not theoretical;
c. the party raising the issue has a genuine interest in its resolution; and
d. the responding party has an interest in opposing the declaration being sought: *Interfor Corporation v. Mackenzie Sawmill Ltd*., 2022 BCCA 228, para 25.

18. These criteria are necessary but not in themselves sufficient for declaratory relief to be awarded. In *Daniels v. Canada (Minister of Indian Affairs and Northern Development),* 2016 SCC 12, at paragraph 11, the Supreme Court of Canada stated:

> …A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties.

19. As set out above, the Petition does not seek any relief, recourse, or remedy as against Canada or anyone. The petition does not seek a declaration that Canada, or anyone, do anything. The granting of the declaration would not solve any conflict or dispute as between the Society and Canada.

Rule 9-5(1)(b): The Petition is **unnecessary, scandalous, frivolous or vexatious**

20. The wording of the Petition suggests that it seeks a finding of this Court to enlist Canada in the Society's effort to halt logging on TFL 46. If so, in the circumstances of this matter an order for *mandamus* against Canada would fall within the jurisdiction of the Federal Court of Canada and not the BCSC.

21. The lack of clarity in the Petition precludes a determination as to whether this Court has proper jurisdiction or whether the matter is in the exclusive jurisdiction of the Federal Court of Canada.

22. According to the Supreme Court of Canada, a pleading is unnecessary, scandalous, frivolous or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known to law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Nevsun Resources Ltd v Araya,* 2020 SCC 5, para 65.

23. In *Willow v. Chong*, 2013 BCSC 108, at paragraph 20, Justice Fischer noted, "…if a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious".

24. Additional case law in British Columbia provides further details on the types of pleadings which will be considered frivolous, vexatious, embarrassing or prejudicial. For example, "where it is obvious that an action cannot succeed … or if no reasonable person can reasonably expect to obtain relief, the action is vexatious": *Simon v Canada (Attorney General),* 2015 BCSC 924, para 97.

25. Pleadings are prejudicial as well as vexatious when they fail to identify the cause of action, contain irrelevant material or are intended to confuse: *Camp Development Corp v Greater Vancouver Transportation Authority*, 2009 BCSC 819, para 27.

26. Sections 17 and 18 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 provide what matters are subject to the Federal Court's exclusive original jurisdiction and what matters are subject to the concurrent jurisdiction of provincial courts. The Federal Court has exclusive jurisdiction over administrative remedies, including the

jurisdiction to issue an injunction, writ of *mandamus* or grant declaratory relief; and to hear and determine any application or other proceeding for such relief, including any proceeding brought against the Attorney General of Canada for relief against a federal administrative decision maker.

27. Because the Petition does not seek any relief, it is unclear what practical result the Society seeks to achieve through the instant proceeding. If that relief is indeed *mandamus*, then it can be properly brought as such.

28. Declarations should not be disguised as *mandamus*. In *Canada v. Boloh 1(a),* 2023 FCA 120, the Federal Court of Appeal stated:

> 60 Declarations are supposed to be declarations of rights held by those seeking them. But, in reality, what the Federal Court awarded were not declarations. They were disguised mandatory orders or disguised *mandamus* remedies against the Government of Canada.
>
> *61* The established legal prerequisites for **administrative law remedies cannot be avoided simply by applying a different label to the remedy, such as "declaration"**: *Schmidt* at paras. 21-22; *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada*), 2015 FCA 4, 379 D.L.R. (4th) 737. Instead, the court must determine the essential character and real essence of the remedy being sought: *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50. Once that is done, the court must first identify the legal prerequisites for it. Only then can it decide whether it is able to grant the remedy and, if so, whether it should.
>
> 62 The essential character and real essence of the remedy the Federal Court awarded was the imposition of mandatory obligations upon the Government of Canada, something akin to *mandamus*…[emphasis added]

29. Declarations disguised as *mandamus* will be struck. In *Lyn/Gor Developments Inc. v. Canada (Attorney General*), 2008 NBQB 92, the Court stated:

> 14 What the Applicant requests is that the Court make an order declaratory of the rights of the parties under the contract, which in effect would stand as a declaration that the federal Crown is required to act in a certain manner pursuant to the contract. The Applicant admits that the government would not be required to act as a matter of law as a result, but it suggests that such a declaratory order would exercise considerable moral suasion on the government to act in accordance with the declaration.
>
> 15 That is not the intended purpose of the legislation which precludes this Court from issuing mandamus against the federal Crown. Further, it is not a judicial role that this Court is inclined to undertake.

16 For the reasons stated the Application is dismissed.

Rule 9-5(1)(d): The Petition is an abuse of process

30. Abuse of process is defined broadly, without closed categories. In considering the predecessor to the present Rule 9-5(1)(d), the Court stated as follows in *Babavic v. Babowech*, [1993] B.C.J. No. 1802:

> [17] Rule 19(24) is a codification of the court's inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: *Hunt v. Carey Canada Inc*. (1990), 74 D.L.R. (4th) 321 at 327 (S.C.C.). The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose…
>
> [18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression…

31. The Society's declaration seeks a finding from this Court that the logging of old growth trees in TFL 46 causes the destruction of the nests and harassment of Marbled Murrelet and is a contravention of section 5(1) of the *Migratory Birds Regulations, 2022(*SOR/2022 – 105) ("***MBR 2022***").

32. The Marbled Murrelet is among 26 migratory bird species protected under [Listed Migratory Birds] the *Migratory Birds Convention Act, 1994,* S.C. 1994, c. 22 ("***MBCA***")*.* The Marbled Murrelet is also listed as Threatened on Schedule 1 of the Species at Risk Act S.C. 2002, c. 29 ("***SARA***")*.* The combined operation of the *SARA*, the *MBCA* and the *MBR* 2022 - offers protection to the *SARA* Listed Migratory Birds, including the Marbled Murrelet.

33. Contraventions of the *MBCA* and *MBR 2022* can result in criminal sanctions.

34. The Society, a private society, may not use this Court to enforce the offences and penalties under the *MBR 2022* and the *MBCA*. The Society may not use this Court to compel prosecution under these federal statutes.

35. In British Columbia, the Public Prosecutions Service of Canada ("**PPSC**") is the authority responsible for prosecuting offences under the *MBR 2022* and *MBCA*. The PPSC has prosecutorial discretion with respect to prosecuting offences under the *MBR 2022* and *MBCA*.

36. Should this Court allow the Petition to proceed, the Court would wade into the jurisdiction of criminal prosecutions.

37. The *MBR 2022* were made pursuant to section 12(1) of the *MBCA*.

38. Contravening section 5(1) of the *MBR 2022* constitutes an 'offence' under section 13 (1) of the *MBCA*.

39. Sections 13(2)-(4) of the *MBCA* impose penalties for offences committed under section 13(1) of the *MBCA*. These offences can be based on either a 'conviction on indictment' or 'summary conviction'.

40. Section 13(3)(a)(i) of the *MBCA* provides that the penalty for certain corporations, for a second or subsequent offence, can be a fine of not less that $1,000,000 and not more than $12,000,000.

41. Section 13.1(1) of the *MBCA*, titled "sentencing principles", states that the court is required to consider, in part, the principles and factors set out in sections 718.1 to 718.21 of the *Criminal Code* when sentencing a person convicted of an offence under the *MBCA*.

42. Section 13.17 of the *MBCA* states that a person that establishes that they exercised due diligence to prevent the commission of an offence under the *MBCA* "shall not be found guilty of an offence".

43. In *Reece v. Edmonton (City),* 2010 ABQB 538, the applicants, including the People for the Ethical Treatment of Animals, Inc., sought a declaration that the City of Edmonton was in violation of the Alberta *Animal Protection Act* in relation to the treatment of an elephant at the zoo. The Court struck the declaration on the basis that it was an abuse of process. The Court found the declaration was an abuse of process because the applicants attempted to enforce criminal law with a civil action:

> 42 Based on these authorities, I agree with the City when it argues that the Applicants' declaration seeks a statement of the Court that the City is acting contrary to section 2 of the Act, which creates an offence and imposes penalties. **A declaration is not appropriate, as the Applicants**

> **are attempting to act as private prosecutors, which is an abuse of the criminal process of the courts**. [emphasis added]

44. The trial decision in *Reece* was appealed, *Reece v. Edmonton (City)*, 2011 ABCA 238. In dismissing the appeal, the ABCA stated, in part:

> 20 The cases on abuse of process have tended to fall into a number of categories, such as the re-litigation of settled issues, fairness of trial procedures, delay in proceedings, and so forth. One such category is **where proceedings are used to enforce or engage punitive penal statutes,** other than by charging the party allegedly responsible with the applicable offence. **Such proceedings are generally found to be an abuse of process.** Sometimes the court reaches that result by finding that the applicant has no standing to apply for the requested relief. [emphasis added]

45. In the *Reece* appeal decision, the ABCA stated that there are a number of reasons why courts are reluctant to grant a declaration that someone is in breach of a penal statute, or other similar civil remedies:

> 29… For one thing, the burden of proof in civil proceedings is on a balance of probabilities, whereas the burden of proof in penal regulatory proceedings is proof beyond a reasonable doubt: *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.) at paras. 40, 49; *R. v. Lobbins (No. 2)*, [1940] 3 W.W.R. 301, 74 C.C.C. 274 (Alta. S.C. (App. Div.)). The presumption of innocence in penal proceedings is lost or undermined in a declaratory action. In penal proceedings the respondent has the right to remain silent, and has no obligation to call evidence; in civil proceedings the respondent is often compelled to call evidence, or disclose its defence. Other evidentiary and procedural protections of the criminal process are lost: *Gouriet* at pp. 481, 487-9, 498-9; *Shore Disposal* at para. 25; *Manitoba Naturalists Society* at paras. 24-6; *R. c. Richard*, [1996] 3 S.C.R. 525 (S.C.C.) at para. 19; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (S.C.C.) at p. 554. Where a person is charged with a penal offence the protections of ss. 7 and 11 of the *Charter* are engaged, and they should not be undermined by changing the form of the procedure.

46. Civil courts should not be used to enforce legislation that involves penal consequences if breached.

47. In *R. v. Shore Disposal Ltd. (1976),* 16 N.S.R. (2d) 538*,* the applicant (a private company) sought a declaration that another private company was operating freight vehicles without holding a licence pursuant to the *Motor Carrier Act*, R.S.N.S. 1967, c. 190, s. 6. The *Motor Carrier Act created* offences and carried penalties. The trial Court granted the declaration. In setting aside the trial decision, the Nova Scotia Court of Appeal stated:

> 24 This matter might be approached, as we have seen, on the basis that the respondents have no standing to take the action or on the closely related basis that they have no rights which would be protected, defined or declared by the declaration sought. It is better, however, to base our judgment on the principle that **the Court, in proceedings where the plaintiffs are virtually private prosecutors, should not grant a declaration that the defendant has committed an offence.** Such a declaration is gratuitous and almost impertinent advice to the summary conviction court and to the Public Utilities Board, and may also be in effect an injunction disregard of which may visit upon the defendant penalties harsher far then the legislature ordained. [emphasis added]

There are robust administrative law mechanisms protecting the Marbled Murrelet

48. The Court should not grant declaratory relief where a statute provides a mechanism to address the grievance: see *Friesen v. Hammell* (1997), 45 B.C.L.R. (3d) 319 at paragraph 12.

49. In *Ewert v. Canada*, 2018 SCC 30 at paragraph 30, the SCC stated:

> 83 A declaration is a discretionary remedy. Like other discretionary remedies, declaratory relief should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question.

50. The jurisdiction of the federal government over migratory birds originates from the the *Migratory Bird Convention*. The *Migratory Bird Convention* was signed in 1916 by the United States and the United Kingdom, which was acting on behalf of Canada pursuant to its Empire Power in s. 132 of the *Constitution Act*, and was later incorporated as Schedule I to the *Migratory Birds Convention Act, 1994,* S.C. 1994, c. 22.

51. *MBCA, MBR 2022,* and *SARA* provide various legal protections for Marbled Murrelet. Specifically, the bird species is protected on federal and provincial lands, which fulfils Canada's international obligations under the *Migratory Bird Convention*. In light of the wording of the *Migratory Bird Convention*, federal jurisdiction in relation to migratory birds is limited and does not provide unlimited powers to encroach on non-federal lands for the protection of migratory bird habitat.

52. There is a robust legislative scheme designed to prevent migratory birds species from becoming extirpated or extinct, to provide for the recovery of migratory bird species that are extirpated, endangered or threatened as a result of human activity

and to manage migratory species of special concern to prevent them from becoming endangered or threatened.

Part 4: MATERIAL TO BE RELIED ON

1. The pleadings filed herein;
2. Affidavit #1 of Qi Yu Dai, made on June 29, 2023; and
3. Such further and other material as counsel may advise and the court may permit.

The applicant(s) estimate(s) that the application will take one day.

☐ This matter is within the jurisdiction of a master
☒ This matter is not within the jurisdiction of a master

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that
(i) you intend to refer to at the hearing of this application, and
(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
(i) a copy of the filed application response;
(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: June 29, 2023

Signature of

☐ applicant ☒ lawyer for applicant

ATTORNEY GENERAL OF CANADA

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File: LEX-500136811

Solicitor/counsel for Respondent
Attorney General of Canada

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs *[specify]* of Part 1 of this notice of application

☐ with the following variations and additional terms:

_____

_____

_____

Dated:_____ _____

Signature of

☐ Judge ☐ Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

☐ discovery: comply with demand for documents

☐ discovery: production of additional documents

☐ other matters concerning document discovery

☐ extend oral discovery

☐ other matter concerning oral discovery

☐ amend pleadings

☐ add/change parties

☐ summary judgment

- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☐ none of the above

THIS NOTICE OF APPLICATION is prepared and served by the Attorney General of Canada whose place of business and address for service is the Department of Justice Canada, British Columbia Regional Office, 900 - 840 Howe Street, Vancouver, British Columbia, V6Z 2S9, Telephone: (604) 666-0235, Facsimile: (604) 666-7713, Attention: Andrea Gatti.