No. S-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

RESPONDENT

APPLICATION RESPONSE

Filed by: THE FRIENDS OF FAIRY CREEK SOCIETY

THIS IS A RESPONSE TO the Notice of Application of the Attorney General (British Columbia) filed on July 5, 2023.

Part 1: ORDERS CONSENTED TO

The Application Respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: **NIL.**

Part 2: ORDERS OPPOSED

The Application Respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **ALL.**

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **NIL.**

Part 4: FACTUAL BASIS

1. The Respondent agrees with paragraphs 1-6 of the factual basis of the Attorney General of British Columbia, repeated here for convenience:

    1. Under the *Forest Act*, R.S.B.C. 1996, c. 157, a "tree farm licence" is an area-based tenure that grants the licensee the right to harvest timber and the obligation to manage and conserve forest resources within the area.

    2. Tree Farm Licence 46 ("**TFL 46**"), located on southern Vancouver Island, is held by Teal Cedar Products Ltd. ("**Teal Cedar**").

    3. The forest practices of licensees like Teal Cedar are regulated by a wide variety of provincial and federal legislation, including the federal *Migratory Birds Regulations, 2022*, SOR/2002-105 (the "***MBR***").

    4. Section 5 of the *MBR* prohibits, except in certain circumstances, the harassment of certain species of birds and the destruction of their nests.

    5. Contravening s. 5 of the *MBR* is an offence that is punishable, on conviction by indictment, by imprisonment of up to three years, a fine of up to $1 million, or both (see *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, s. 13). Alleged offences under the *MBR* are prosecuted by the Public Prosecution Service of Canada.

    6. The marbled murrelet is one of the species of bird protected by the *MBR*.

2. The AGBC asserts that "[t]he petition does not allege that Teal Cedar has engaged in the "indiscriminate destruction" of marbled murrelet nests or otherwise contravened the MBR. The petitioner has not named Teal Cedar as a respondent in the proceeding."

3. This is true. The Petition alleges that British Columbia and Canada have allowed Teal Cedar to destroy marbled murrelet nests and to harass marbled murrelets, in contravention of the MBR. Permission to destroy nests in contravention of the federal MBR cannot be granted through provincial permits, absent some federal-provincial agreement to that effect.

4. The AGBC, AGC, and Teal Cedar are proceeding on the basis that provincial permits can provide an exemption to the prohibitions contained in the MBR. This motion to strike is a means to avoid explaining how this is legally possible.

5. The following are facts of which the Court may take judicial notice (the legal element of which is addressed at the end of the next section):

a. Logging of old-growth forests in TFL 46 has been the subject of significant controversy and litigation over the last three years. This has led to a number of litigation matters before the BC Supreme Court and BC Court of Appeal, and BC Small Claims Court, including injunction applications, contempt proceedings, small claims court matters, complaints regarding RCMP conduct, and most recently a civil claim for conspiracy.

b. The above litigation involves Teal Cedar and the Attorney Generals for Canada and British Columbia, both of whom support what they refer to as Teal Cedar's lawful right to log old-growth trees. Both of whom have also supported the prosecution of people protesting the logging of old-growth forests in TFL 46.

c. The dispute over old-growth logging in Fairy Creek has resulted in the largest number of arrests for civil disobedience in Canadian history. It is commonly compared with the "war in the woods" of the early 1990's, which previously held that record, and was a similar dispute.

d. The question of whether Teal Cedar's logging of old-growth in TFL 46 is in compliance with the MBR is a critical part of a significant public dispute.

Part 5: LEGAL BASIS

1. The application before the court must fail on three grounds:

    a. It is not plain and obvious that the claim cannot succeed;

    b. The ruling requested by the Petitioner would have practical utility; and

    c. The ruling requested by the Petitioner would make a tangible difference to the rights of the parties.

Rule 2-1(2)(c) mandates proceeding by petition

2. Under Rule 2-1(2)(c) a petition is the appropriate manner to proceed where "the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document."

The test for striking pleadings

3. The Applicant does not mention the test to be applied in an application under R. 9-5(1)(a). It was recently clarified by the British Columbia Court of Appeal in (*Union Road Properties Ltd. v. British Columbia (Agricultural Land Commission)*, 2019 BCCA 302 (CanLII), <https://canlii.ca/t/j20mv>, at para. 9), as;

> [9] The appellants agree the judge applied the correct test for striking a pleading under R. 9-5(1)(a). He adopted (at para. 2) the description of the test set out in *Willow v. Chong*, 2013 BCSC 1083 at para. 18:
>
> > [18] The test for striking a claim as disclosing no reasonable claim under rule 9-5(1)(a), set out in *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 and reiterated more recently in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, is whether it is "plain and obvious," assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or if the action is "certain to fail." If there is a chance that the plaintiffs might succeed, then they should not be "driven from the judgment seat." No evidence is admissible on an application under rule 9-5 (1)(a).

4. The Applicant relies on *Yang v. Real Estate Council of British Columbia*, 2019 BCCA 43, but that case is regarding the motion to strike of a judicial review.

5. The case before the court is not a judicial review, but a request for the court to clarify the boundaries between the application of federal and provincial law by statutory interpretation. This is a key function of declaratory relief, as discussed below.

6. The Applicant also relies on *Independent Contractors and Businesses Association v. British Columbia (Attorney General)*, 2020 BCCA 245, but in that case, on a 2018 BC referendum, the referendum had already passed, and the key issue was whether the case was moot, the court finding that it was. The issue here is not moot – old-growth trees which are the sole nesting habitat for the marbled murrelet, a species protected under the MBR, are falling every day. This is a live issue.

The declaration would have practical effect

7. This ties into two other cases the Applicant relies on, *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 (at para. 310); *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36. The Applicant states that these cases stand for the proposition that "a court looks at the practical value of the declaration" and asks "whether a useful purpose would be served" by the declaration.

8. We agree. In Applications to strike a petition seeking a declaration the test is refined with a further test (*West Moberly First Nations v. British Columbia*, 2020 BCCA 138 (CanLII), <https://canlii.ca/t/j7t7m>), para. 45 (West Moberly));

> (1) the dispute must be real and substantial, such that it is not moot, academic, or may not arise; and (2) if the dispute is real, the court must determine whether granting the declaration requested would have any practical effect of resolving the issues in the case.

9. And here it clearly does. This is related to a long-standing and very public conflict over the logging of old-growth in southern Vancouver Island and particularly in TFL 46. Hundreds of people have been arrested for protesting (contempt) or other violations of the law, while trying to stop the logging of old-growth trees. Teal Cedar's claim to having a 'lawful right to log' and the applcaiton of 'The rule of Law' have repeatedly been raised as a central issues in this dispute.

10. It is an established role for declarations to delineate boundaries between the application of federal and provincial law. The federal and provincial governments have diligently prosecuted protestors, and protected Teal Cedar's "lawful right to log" old growth trees, at least in part, on the misguided assumption that Teal Cedar is in compliance with the MBR.

11. A key issue in this case, which both Applicants seek to avoid, is - does the rule of law apply with the same vigour to those that regulate the logging of old growth trees in TFL 46 as it does to those who protest against it.

The history of declaratory relief – distinguishing between federal and provincial powers

12. The BCCA has also noted, in allowing an appeal and remitting a case on striking of a request for a declaration, that "the broad nature of declaratory relief and the varied circumstances in which a court may exercise its discretion to grant, or refuse, such relief." (*Whitechapel Estates Ltd. v. Canada (Ministry of Transportation and Highways*), 1998 CanLII 6006 (BC CA), <https://canlii.ca/t/1dxsw>, para. 45).

13. In (*Kourtessis v. M.N.R.*, 1993 CanLII 137 (SCC), [1993] 2 SCR 53, <https://canlii.ca/t/1fs46>) the SCC reviewed the history of requests for declaratory relief, noting that they were opposed in the British courts of Chancery until legislation was brought in, and that in British Columbia and Canada:

> … partly in response to the statutory changes, the courts came to realize the value of the declaration as a remedy in the modern law; see Zamir at pp. 4-6. The landmark decision of Dyson v. Attorney General, [1911] 1 K.B. 410 (C.A.), signalled the awareness in the courts of the utility of the declaration as a remedy for contesting Crown actions. This proved of great value in Canada as a means of determining whether laws fell within federal or provincial powers; see *Canada (Attorney General) v. Law Society (British Columbia)*, 1982 CanLII 29 (SCC), [1982], 2 S.C.R. 307 [[1982] 5 W.W.R. 289, 37 B.C.L.R. 145], and it seems quite natural that it should also be used as a means of testing the conformity of legislation with the Charter in appropriate cases.

14. A critical issue here is – can the province issue permits which allow the contravention of the federal MBR? The Applicant wishes the court to avoid this issue which encourages the perception that the rule of law only applies to those who oppose old growth logging. This undermines the rule of law and with it the reputation of the administration of justice.

15. The AGBC argues that there is no live issue, or if there is, that it amounts to a prosecution of Teal Cedar, which is not a permissible use of a declaration. The request for a declaration is not the equivalent of seeking a conviction. It is at heart a question of statutory interpretation which does not touch on whether Teal Cedar is otherwise authorized to log or whether – even if it were not otherwise authorized – it is in compliance with the federal avoidance guidelines.

16. Even if the central issue were not on a contest of federal and provincial laws, our Court of Appeal has held that in the face of a significant public controversy it is appropriate for the court to interpret a statute to provide clarification of the powers of the Province. (*The Association for the Protection of Fur-Bearing Animals v British Columbia (Minister of Environment and Climate Change Strategy)*, 2017 BCSC 2296 (CanLII), <https://canlii.ca/t/hp9tg>).

A contradictor

17. Another critical element in considering whether a case should be struck is having a contradictor, or someone who opposes the request for a declaration (*Whitechapel Estates Ltd. v. Canada (Ministry of Transportation and Highways*), 1998 CanLII 6006 (BC CA), <https://canlii.ca/t/1dxsw>, para. 44, relying on *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 (Solosky)).

18. Here Teal Cedar has filed a Response, and stated a willingness to become a party, filling the role of contradictor.

Not a declaration that TC has committed an offence

19. The Applicant states that it is improper to seek a declaration that anyone (here TC) has committed an offence. That is not the declaration sought. Notwithstanding noncompliance with the MBR Teal Cedar's actions could be completely legal depending if there is federal authorization or compliance with avoidance guidelines. The declaration sought is regarding the relationship between the MBR, as a federal law, and the provincial licenses which Teal Cedar has which both the AGBC and AGC seem to argue (again, without saying directly) somehow permits violation of the MBR.

The Migratory Birds Convention and the Vienna Convention

20. Canada signed and ratified the Migratory Birds Convention in 1916 (then called the Migratory Bird Treaty). Its purpose was stated as "… being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have

resolved to adopt some uniform system of protection which shall effectively accomplish such objects."

21. In order to implement the Treaty Canada enacted the Migratory Birds Convention Act (MBCA) in 1917, and updated in 1994. The stated purpose of the MBCA is to "implement the Convention by protecting and conserving migratory birds — as populations and individual birds — and their nests" (underlining added).

22. Canada states in their "[f]acts" section that "TFL 46 is not on federal land." Canada does not clarify the relevance of this statement. But in the context of Canada's and the Province's Responses to the Petition there is the lingering implication that somehow provincial jurisdiction operates to render ineffective the MBR in TFL 46.

23. The AGBC seems to be making an argument similar to that of Canada, that provincial permits can provide an exemption to the application of a federal statute, except in a slightly different form, by suggesting that the MBCA does not apply on provincial land. Like the AGBC, this argument is made by implication, without saying it directly – and it is also false.

24. If this is the AGBC's position, as the basis for their argument that the action is "certain to fail," it is countered by the MBCA, which clearly states that it applies The MBCA applies "in Canada and in the exclusive economic zone of Canada." (MBCA s. 2.1).

25. The AGBC's argument has an additional contortion to Canada's – they seem to argue, again without saying directly, that a provincial permit on provincial land is sufficient to excuse violations of a federal statute.

26. This violates the Vienna Convention on the Law of Treaties, which says in Article 27, and which Canada has also signed and ratified "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

27. The two together purport to create a regulatory scheme at odds with the Constitutional division of powers, Canada's international commitments to protect the marble murrelet, and common sense.

Judicial notice

28. The law regarding judicial notice was succinctly summarized *Johnson v. Brielmayer*, 2021 ONSC 1245 (CanLII), <https://canlii.ca/t/jd7lg>, as "[j]udicial notice is the acceptance of a fact without proof. The Supreme Court stated that it applies to two kinds of facts: "(1) facts which are so notorious as not be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy": *R. v. Williams*, 1998 CanLII 782 (SCC), [1998] 1 S.C.R. 1128, at para. 54" (at para. 46).

29. In that case the court refused to take judicial notice of predicted future events, but found that it could take judicial notice that "we are experiencing a terrible global pandemic, caused by a novel coronavirus that is highly transmissible and has tragically caused deaths and illness across Canada, that "the virus affects people of all ages and that Toronto has experienced a higher number of cases than other parts of Ontario" and that "Canada has approved two vaccines that are in the process of being administered across Canada" (at para 47).

30. In *British Columbia (Attorney General) v. Alberta (Attorney General)*, 2019 FC 1195 (CanLII), [2020] 2 FCR 124, <https://canlii.ca/t/j2kgx>, a case where BC was seeking a declaration of unconstitutionality regarding Alberta's *Preserving Canada's Economic Prosperity Act*, and Alberta had moved to strike, the FC took judicial notice of "the extent to which our society is dependent on petroleum products, in particular gasoline and diesel, for its daily functioning" (at para 145).

31. This case engages Charter values, the interpretation of statutes, and the division of powers between the federal and provincial governments. The facts which are subject of judicial notice are "so notorious as not be the subject of dispute among reasonable persons" and "capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy." These facts are ideally suited for judicial notice.

Part 6: MATERIAL TO BE RELIED ON

1. Pleadings and such other material as counsel may advise.

The Application Respondents estimate that the application will take 1 day

[X] The Application Respondents have filed in this proceeding a document that contains the Application Respondents' address for service.

Date: July 25, 2023

Steven M. Kelliher

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Signature of Lawyer for Application Respondents, Friends of Fairy Creek Society