COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Friends of Fairy Creek Society v. Canada (Attorney General),* 2025 BCCA 243

Date: 20250709
Docket: CA50174

Between:

The Friends of Fairy Creek Society

Appellant
(Petitioner)

And

Attorney General of Canada, Ministry of the Environment and Climate Change, Attorney General of British Columbia, and Minister of Forests

Respondents
(Respondents)

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Iyer
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated September 4, 2024 (*The Friends of Fairy Creek Society v. Canada (Attorney General)*, 2024 BCSC 1630, Victoria Docket S231620).

Counsel for the Appellant:	S.M. Kelliher D. Redman
Counsel for the Respondent, Attorney General of Canada and Ministry of the Environment and Climate Change:	A.C. Gatti S.I. Bahen
Counsel for the Respondent, Attorney General of British Columbia and Minister of Forests:	T. Bant S.R. Kay-Reid
Place and Date of Hearing:	Vancouver, British Columbia May 15, 2025
Place and Date of Judgment:	Vancouver, British Columbia July 9, 2025

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Justice Iyer
The Honourable Justice Mayer

Summary:

The appellant challenges a Supreme Court order striking its petition for declaratory relief relevant to the authorization of timber harvesting rights in TFL 46, a block of land on southern Vancouver Island. The appellant argues: (a) the judge asked the wrong question in deciding whether the petition advanced a reasonable claim; (b) underestimated the practical utility of the proposed declaration; and (c) mistakenly concluded that the petition sought a finding that Teal Cedar Products Ltd. has acted in contravention of federal legislation. HELD: Appeal dismissed. The appellant has not established reversible error that would allow for appellate interference. The judge asked the correct question under R. 9-5(1)(a) of the Supreme Court Civil Rules; did not err in concluding that the proposed declaration would not settle a live issue between the parties; and it was reasonably open to him to view the petition as an attempt to challenge the lawfulness of Teal Cedar's conduct.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] The Friends of Fairy Creek Society (the appellant) is a non-profit society that seeks to preserve all remaining old growth forests in TFL 46, a block of land on southern Vancouver Island for which Teal Cedar Products Ltd. ("Teal Cedar") has been granted timber harvesting rights under provincial legislation.

[2] In April 2023, the appellant filed an (amended) petition in the British Columbia Supreme Court asking for:

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

[3] Marbled Murrelets are seabirds that nest in old growth forests. The petition alleges that the logging of old growth trees in TFL 46 has "destroyed large numbers of [Marbled Murrelet] nests". The petition further alleges that under the existing "Management Plan" for TFL 46, "logging will continue with the consequent elimination of many of the remaining old growth trees … and with them many of the remaining Marbled Murrelet nests".

[4] The Marbled Murrelet is a migratory bird species protected by federal legislation, including: the *Migratory Birds Convention Act*, *1994*, S.C. 1994, c. 22, *Migratory Birds Act Regulations*, *2022*, SOR/2022-105 [*Regulations*], and one or more other enactments not directly engaged by the appeal. Section 5(1) of the *Regulations* prohibits harassing these birds or damaging, destroying, removing, or disturbing their nests without a permit. However, s. 5(2) of the *Regulations* provides that certain conduct is exempted from the prohibitions and can occur without a permit, including (but not limited to), damaging, destroying, removing, or disturbing a "nest shelter" that "does not contain a live bird or a viable egg".

[5] In its petition, the appellant asserts that old growth logging in TFL 46 "is not exempted from the prohibitions" in the *Regulations*. It says provincially granted authority to harvest does not constitute a "permit" within the meaning of s. 5(1) of the *Regulations*, and that any logging in TFL 46 must therefore abide by the prohibitions. The appellant says its proposed declaration will provide the parties (and the public) with clarity on this issue by delineating the boundaries between federal and provincial law. Issuing the declaration would require that the Supreme Court interpret the *Regulations*, and importantly, the scope of any exemptions—based on a permit or otherwise. That interpretation would thereafter define the nature and extent of harvesting that the provincial government can lawfully authorize for TFL 46. In written submissions filed in the Supreme Court, the appellant said its petition raises the "critical" question of whether the provincial government can "issue permits which allow the contravention of the federal [*Regulations*]".

[6] In June 2023, the respondent Attorney General of Canada and federal Minister of the Environment and Climate Change ("Canada") filed an application asking that the petition be struck under R. 9-5(1) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009. The Attorney General of British Columbia and provincial Minister of Forests ("British Columbia") filed a similar application one month later, in July 2023.

[7] In September 2024, a judge of the Supreme Court granted the applications, struck the petition without leave to amend, and dismissed the proceeding. He awarded costs to the Attorneys General.

[8] The appellant appeals from that order, alleging multiple errors.

Chambers Judgment

[9] The Supreme Court reasons for judgment are indexed as *The Friends of Fairy Creek Society v. Canada (Attorney General)*, 2024 BCSC 1630.

[10] In asking that the petition be struck, the respondents argued that the petition: (a) discloses no reasonable claim; (b) is unnecessary, scandalous, frivolous, or vexatious; and (c) is otherwise an abuse of process: R. 9-5(1)(a), (b) and (d). Teal Cedar is not named as a respondent to the petition. However, it filed a response as an affected party. At the strike applications, the respondents' materials included a letter from Teal Cedar stating its view that the petition is bound to fail, constitutes an abuse of process, and should be struck: at para. 22.

[11] The appellant opposed the applications to strike, arguing it is not plain and obvious that the claim for declaratory relief cannot succeed. It said the declaration will have practical utility and make a "tangible difference to the rights of the parties": at para. 23.

[12] The judge disagreed.

[13] For purposes of his analysis, he accepted that in the years preceding the petition, "… logging operations in TFL 46 ha[d] been the subject of public protests disrupting logging operations, and there ha[d] been associated litigation with numerous cases including injunction applications and contempt proceedings …": at para. 43, internal citations omitted.

[14] He also accepted that the appellant meets the test for public interest standing (not disputed by the respondents). He found that the petition raises a "serious justiciable issue" and the appellant has a "genuine interest in it": at paras. 52–53.

[15] However, after reviewing the pleadings as crafted by the appellant, the judge concluded:

- the proposed declaration is “vague”, “abstract”, and “disassociated” from material facts pleaded in the petition: at para. 61;
- the appellant has used “loaded” phraseology in the petition (specifically, the term “indiscriminate destruction”), leaving the impression that the sought-after relief has been “… intentionally worded to enlist the Court to make a boldly worded declaration in an attempt to apply pressure on the federal and provincial governments on the issue of logging in TFL 46”: at paras. 62, 82, 96, 105;
- the petition seeks an “abstract interpretation” of the *Regulations*: at paras. 64, 81;
- it “… suggests an effort by the [appellant] to have [the] Court make a comment or statement beyond establishing a right, power, duty or status”: at para. 65;
- the petition has “internal inconsistencies”, making it difficult to discern a “clear understanding of the nature of the claims advanced”: at paras. 66, 68, 77;
- in essence, the petition seeks to have a court determine whether the authorized logging in TFL 46 is lawful: at para. 75;
- the declaration “will have no practical utility” because it “will not settle any controversy associated with the logging in TFL 46”: at paras. 81, 88; and,
- in its practical effect, the declaration would amount to a statement by the court that “the logging operations in TFL 46 constitute an offence under the [*Regulations*]”: at para. 132.

[16] With these findings, the judge concluded there is no reasonable prospect the appellant will succeed in obtaining the sought-after relief: at paras. 89–90. He also

considered the petition to be unnecessary: at paras. 95, 117. Finally, he viewed it as an abuse of process: at para. 132.

[17] The appellant did not apply for leave to amend the petition. Consequently, no proposed amendments were provided to the judge. Nonetheless, the judge instructed himself that before striking a pleading, a "court is well advised to first consider whether [it] can be preserved by amendment": at para. 91, citing *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited,* 2011 BCCA 149 at para. 28. Consequently, he turned his mind to that issue: at para. 133.

[18] He found the petition was "deficient to a high degree". He did not consider those deficiencies to be "capable of being addressed, or of straightforward amendment": at para. 135. The judge acknowledged the appellant would be prejudiced by striking the petition and that the petition raised issues of "some significance to the parties, with a potentially broader impact": at para. 137. However, given the deficiencies, an "… amendment to the existing pleadings would not assist in determination of the proceeding in a just, speedy and inexpensive determination on its merits": at para. 137.

[19] Accordingly, the petition was struck under R. 9-5(1)(a), (b) and (d).

Issues on Appeal

[20] In asking to set aside the Supreme Court order, the appellant raises several issues. Given the focus of submissions at the hearing of the appeal, I consider it appropriate to combine and state those issues as follows:

a) the judge erred in law by failing to ask the correct question under R. 9-5(1)(a), namely, whether the declaratory relief sought by the appellant is the "type of claim" that can be brought by petition;

b) the judge misunderstood the meaning of the term "indiscriminate destruction" and because of that misunderstanding, he erroneously

viewed the petition as incapable of achieving its stated intent, of no practical utility, motivated by an improper purpose, and an abuse of process; and,

c) the judge erroneously interpreted the petition as seeking a declaration that the logging operations in TFL 46 constitute an offence contrary to s. 13 of the *Migratory Birds Convention Act*.

Discussion

[21] As noted, the judge struck the petition under each of R. 9-5(1)(a), (b) and (d). I do not consider it necessary to address the subsection (b) and (d) rulings or their related grounds of appeal. In my view, the appellant has not established reversible error specific to the order under R. 9-5(1)(a) and that is sufficient to dispose of the appeal.

Standard of review

[22] The standard of appellate review for an order to strike under R. 9-5(1)(a) is well established. As explained in *Chung v. British Columbia (Minister of Health)*, 2023 BCCA 294, leave to appeal to SCC ref'd, 40921 (18 April 2024):

> [61] … the standard of review on an appeal from an order striking pleadings pursuant to R. 9-5(1)(a) is generally viewed to be correctness … Our task is, therefore, to determine whether the judge was correct to conclude that it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action or, in other words, that the claim has no reasonable prospect of success. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial …
>
> [Emphasis added, internal references omitted.]

[23] Before us, appellant's counsel suggested that the question a chambers judge must ask under R. 9-5(1)(a) in a petition proceeding is different from the one identified in *Chung* and should focus on the nature or "type of claim" sought to be advanced. As I explain below, I disagree with the appellant's position on this point. In my view, the question identified in *Chung* is the correct question to ask and the

standard of review articulated in that case properly governs our resolution of the appeal.

Arguments advanced in the Supreme Court

[24] In support of its R. 9-5(1)(a) application, Canada argued the petition was bound to fail because: it sought no enforceable relief against Canada or any other party; challenged no action (or inaction) on the part of Canada or another party; did not seek to challenge federal or provincial legislation; and, if granted, the declaration would not settle a live controversy between the parties: at para. 13.

[25] British Columbia supported Canada's position under R. 9-5(1)(a), submitting it was:

> [15] … plain and obvious the Petition [could not] succeed as a matter of law because it amount[ed] to an abstract legal opinion that [would] not have any practical utility in any live controversy between the parties …

[26] In response to these submissions, the appellant argued that the petition could succeed, the declaration would have practical utility, and if granted, it would "[make] a tangible difference to the rights of the parties": at para. 23.

Judge's analysis of the parties' submissions

[27] The judge reviewed the legal principles relevant to R. 9-5(1)(a). Citing *Union Road Properties Ltd. v. British Columbia (Agricultural Land Commission)*, 2019 BCCA 302 [*Union Road Properties*] at para. 9, he instructed himself on the applicable test, namely: assuming the pleaded facts are true, was it plain and obvious the petition disclosed no reasonable claim, had no reasonable prospect of success, or was certain (bound) to fail: at para. 27.

[28] The judge also instructed himself on the principles that govern declaratory relief, which is the only form of relief sought in the petition. He noted that declarations are generally only granted when they will have practical utility by either settling a live controversy between the named parties or by clarifying their rights, "at least to some extent": at para. 31, citing *Daniels v. Canada (Indian Affairs and*

Northern Development), 2016 SCC 12 at para. 11 and *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at paras. 308–314, 331, leave to appeal to SCC ref'd, [2020] S.C.C.A. No. 252.

[29] Turning to the petition, the judge found that the pleaded facts did not allege the "indiscriminate destruction" of Marbled Murrelet nests in TFL 46: at para. 58. Instead, the petition only went so far as to assert that old growth logging in TFL 46 has destroyed a large number of nests, and that continued logging under the "Management Plan" in place for TFL 46 will eliminate many of the remaining nests. From the judge's perspective, the absence of pleaded facts supporting an allegation of "indiscriminate destruction" meant that the proposed declaration was "disassociated" from its factual foundation: at paras. 61, 69.

[30] The judge also found the proposed declaration was "vague" and the petition was internally inconsistent, rendering it difficult to clearly understand the nature of the claim: at paras. 61, 66–68, 77.

[31] The language chosen for the declaration was found to carry the "appearance of rhetoric". The declaration appeared to have been "intentionally worded" in a way that would enable the appellant (and presumably other parties), to "apply pressure on the federal and provincial governments on the issue of logging in TFL 46": at paras. 62, 65, 82.

[32] The judge decided the petition sought an "abstract interpretation" of the *Regulations* which would only serve to "introduce ambiguity" into the application of the *Regulations* and "confuse rather than guide those" who may be subject to that statutory regime: at paras. 64, 81. Additionally, he found that in essence, the petition sought a judicial determination on whether the logging activity in TFL 46 is lawful, without an informing factual context: at para. 75.

[33] Finally, the judge found that the proposed declaration would have no practical utility. He was alive to the appellant's position that it would "delineate boundaries between the application of federal and provincial law": at para. 79. However,

he disagreed about whether the declaration would have that effect: at para. 81. Citing *Three Stars Investment Ltd. v. Narod Developments Ltd.* (1981), 33 B.C.L.R. 164, 1981 CanLII 696 (S.C.), the judge held that the declaration would not settle all issues between the parties. Even with a declaration, no tangible relief could be granted. There would have to be a civil action or some other form of court-based or administrative proceeding before the declaration could be applied and given meaningful effect: at paras. 85–88.

[34] Given these factors, considered cumulatively, the judge decided it was "plain and obvious" the petition would not succeed: at para. 90. In summarizing his findings under R. 9-5(1)(a), he said this:

> [89] Considering all of the above, I conclude that there is no reasonable prospect of success of the Society in this Court granting the declaratory relief sought by the Society. The pleadings of the Petition do not provide the parties and the Court with a clear understanding of the nature of the claim advanced. The pleadings of the Petition do not support the declaratory relief sought as a binding statement of the court in establishing a right, power, duty or status. Given the wording of the declaration, if granted it would likely cause more uncertainty regarding the [*Regulations*]. As a result, the declaration sought by the Society will not have a practical effect, it will not settle a live controversy, and it will not resolve an extant legal dispute.
>
> [Emphasis added.]

Analysis on appeal

[35] I agree with the judge that the petition, read generously, carries no reasonable chance of success: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 451, 1985 CanLII 74. As such, he correctly struck the petition under R. 9-5(1)(a) and the appellant has not persuaded me of reversible error in that conclusion.

a) Did the judge ask the wrong question?

[36] The main argument advanced on appeal is that the judge failed to ask the correct question under R. 9-5(1)(a). The appellant says the judge erroneously approached the pleadings as a notice of civil claim rather than a petition. The appellant contends that in the petition context, the judge was mandated to ask

whether the "type of claim" sought to be advanced is properly the subject matter of a petition proceeding. Instead, he focused on other things.

[37] In making this argument, the appellant relies heavily on this Court's decision in *E.B. v. Director of Child, Family and Community Services*, 2016 BCCA 66 [*E.B.*]. In that case, the Court described the "correct inquiry under Rule 9-5(1)(a)" in the context of a petition as being whether the pleading "disclosed the type of claim that may be brought by petition": at para. 42. No one disputes that the appellant's claim is for declaratory relief based on statutory interpretation and that this type of claim is ordinarily brought by way of petition. Given that reality, the appellant says the judge should have simply confirmed that such was the case and declined to strike the petition if there was any "chance that the [appellant] might succeed": *Union Road Properties* at para. 9, citing *Willow v. Chong*, 2013 BCSC 1083 at para. 18.

[38] First, it is apparent from the judge's reasons that he was alive to *E.B.* and the question posed in that case: see para. 28. Second, and more critically, asking whether a particular claim is the "type of claim" that may proceed by petition (*E.B.* at para. 42) is not the end of the inquiry under R. 9-5(1)(a). If the answer to that question is "no", the petition is likely to be struck on that basis. However, if a court determines that the claim is properly the subject matter of a petition proceeding, the applicant under R. 9-5(1)(a) may still ask to have the petition struck on grounds that it discloses no reasonable claim: *Harun-ar-Rashid v. British Columbia (Human Rights Tribunal)*, 2023 BCCA 276 at paras. 28–33.

[39] In my view, *E.B.* has not substantively altered the R. 9-5(1)(a) inquiry specific to petitions. Respectfully, to the extent the appellant suggests the contrary, it has misread *E.B.* and fails to appreciate the issues that were before the Court when it posed the question it did at para. 42 of its judgment.

[40] *E.B.* was a case in which the petitioner filed an "omnibus" petition that sought to advance "an amalgam of different claims that [had to] be resolved by different procedures": at paras. 4–5, 36, emphasis added. This included claims that involved "appeal[s]" of Provincial Court orders that had been issued in ongoing and related

child protection proceedings. An application to strike the petition was dismissed in the Supreme Court. This Court overturned that decision (in part), concluding that the matters raised in the petition had to be "divided into properly-constituted and confined proceedings": at para. 5. After doing so, the Court allowed the petition to move forward, but only in respect of claims that were properly the subject matter of a petition proceeding. The other claims were dismissed under R. 9-5(1)(a). During its analysis, the Court noted that:

> [42] … The question of whether a pleading discloses a reasonable cause of action is the correct test under Rule 9-5(1)(a) when a defendant applies to strike an ordinary civil claim made in a Notice of Civil Claim. The test must be modified, somewhat, when the application is to strike a petition rather than a Notice of Civil Claim. 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.]

[41] As I read this paragraph, the Court did not alter the long-standing principle that to survive a R. 9-5(1)(a) application, a petition must disclose or "set out" a reasonable claim or "foundation" for the relief sought. Rather, the Court focused its analysis on the "type of claim[s]" raised by the petitioner because of the omnibus nature of that petition and the fact that it sought to advance claims that were properly governed by other forms of process. *E.B.* does not stand for the general proposition that in petition proceedings, the only question to ask under R. 9-5(1)(a) is whether the claim is the "type of claim" properly advanced by way of a petition. Indeed, *Harun-ar-Rashid*, cited earlier, demonstrates that such is not the case. Like a notice of civil claim, a petition must disclose a reasonable claim or foundation, assuming the pleaded facts are true.

[42] I note further that in *Trenchard v. Westsea Construction Ltd.*, 2024 BCCA 273, this Court recently confirmed that the test to strike under R. 9-5(1)(a) is the same for notices of civil claim and petitions:

> [31] … there is no authority for the proposition that there are different tests applicable to applications to strike pleadings depending on the type of pleading. The "plain and obvious" test for striking pleadings as articulated

> in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 1990 CanLII 90, and reiterated in *[R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42], is well settled and has stood the test of time. It applies to notices of civil claim, petitions, and responses to those initiating documents. By its terms, the Rule applies to applications to strike or amend "the whole or any part of a pleading, petition or other document…". While the application of the test differs depending on the circumstances (including whether the pleading in question is found in an initiating document or a response) and on the particular subsection of the rule under consideration, that does not change the test itself.
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> [Emphasis added, internal reference added.]

[43] I agree with British Columbia that endorsing the test for striking a petition suggested by the appellant would allow plainly doomed petitions to proceed to a hearing on the merits and undermine the efficient administration of justice. In my view, that was not the intent of *E.B.*

[44] Accordingly, I would not accede to this ground of appeal.

b) Did the judge err in finding the declaration of no practical utility?

[45] The appellant says the judge misunderstood its use of the term "indiscriminate destruction", causing him to not appreciate the practical utility of the proposed declaration. The judge's finding of no practical utility played a material role in his decision to strike under R. 9-5(1)(a): at paras. 81, 88–89.

[46] The appellant's challenge to the judge's conclusion on practical utility must be analyzed specific to the "critical" question that it says was raised by the petition, namely: whether the provincial government can "issue permits which allow the contravention of the federal [*Regulations*]". To be of any practical value, the proposed declaration had to be reasonably capable of resolving that issue.

[47] First, I see no indication the judge misunderstood the term "indiscriminate destruction". It is readily apparent that he tried to discern the meaning of the term. He looked to the material facts pleaded in the petition and the *Regulations* for informative guidance. He also turned to *The Concise Oxford Dictionary,* edited by A. Stevenson and M. Waite, 12th ed. (New York: Oxford University Press, 2011) at 724,

in search of a definition of “indiscriminate”. Ultimately, he found the term chosen by the appellant to be “vague” (at paras. 58–61, 66, 79), and “imprecise” (at para. 64).

[48] This outcome is not surprising. The petition did not define the meaning of “indiscriminate destruction”. In its factum, the appellant has attempted to explain the term, but in different ways. The factum states that “indiscriminate destruction” is the “destruction of the nests of the marbled murrelet in disregard of the prohibitions in s. 5 of the [*Regulations*]” (emphasis added). However, in another part of the factum, the term is defined as “logging in TFL 46 without regard (indiscriminately) to the destruction of marbled murrelet nests” (emphasis added). Further on: it is “the random or indiscriminate taking of old growth trees without regard for the nests of the marbled murrelet that is the issue” (emphasis added). Closer to the end of the factum, “indiscriminate” is defined as: logging “without regard to the destruction of the nests of the marbled murrelet and the prohibitions in s. 5 of the [*Regulations*] unless authorized by permit, irrespective of provincial authorization” (emphasis added). Some of these definitions focus on conduct that disregards the *Regulations*; others on conduct that disregards the nests; and yet another of the stated definitions combines both of these things.

[49] The judge found that the inability to discern the meaning of “indiscriminate destruction” rendered the proposed declaration unclear. I agree. Given the challenges the appellant itself appears to have in defining the term, the judge cannot be faulted for reaching this conclusion.

[50] Under R. 9-5(1)(a), this lack of clarity mattered. Confusing pleadings only serve to “impede litigation in contradiction to their mandate”: *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2012 BCCA 196 at para. 1. Moreover, although declaratory relief is unquestionably a flexible remedy and can be “highly useful” in ascertaining in advance the scope of rights or the interests of parties (*Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 at paras. 378–379, leave to appeal to SCC ref’d, 41241 (10 October 2024), citing Malcolm Rowe and Diane Shnier, “The Limits of the Declaratory Judgment” (2022) 67:3 McGill L.J. 295 at 299), an

overly broad and vaguely worded declaration with difficult-to-discern parameters will generally have no practical value, especially in the context of a proceeding that seeks no other form of relief and is not connected in any way to an ongoing legal or factual dispute between the parties.

[51] The appellant says the term “indiscriminate destruction” accurately reflects its position that British Columbia has no jurisdiction to authorize harvesting rights or practices that contravene the *Regulations*. Respectfully, this is not at all apparent from the face of the proposed declaration. In my view, the judge was correct to find that the vagueness of the term and its lack of clarity would only serve to “introduce ambiguity into the [*Regulations*] and confuse rather than guide those subject to the [*Regulations*]”: at para. 16.

[52] Second, and more critically, the Supreme Court of Canada reiterated in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, that declaratory relief may be appropriate where:

> [60] … (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 …
>
> [Internal references omitted.]

[53] However, even assuming these criteria are met, the practical utility of a sought-after declaration is also an important consideration. Generally, the courts will not issue a declaration that is “merely advisory” in nature: *Shot Both Sides v. Canada*, 2024 SCC 12 at para. 68, citing Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters, 2016) at 46; Rafal Zakrzewski, *Remedies Reclassified* (New York: Oxford University Press, 2005) at 159; and David Wright, *Remedies,* 2nd ed. (Sydney, N.S.W.: Federation Press, 2014) at 284. In *Solosky v. The* Queen, [1980] 1 S.C.R. 821, 1979 CanLII 9, declaratory relief was described as a remedy availing to “… persons sharing a legal relationship, in respect of which a ‘real issue’ concerning the relative interests of each has been raised and falls to be determined”: at 830.

[54] This is not one of those cases. The appellant is not in a legal relationship with the named respondents. It does not allege a breach of contract or some form of tortious conduct by these respondents arising from an owed duty of care. It does not seek a declaration in the context of an application for judicial review or assert a vested or future right that has been wrongfully denied or otherwise impacted by the respondents' conduct. The appellant does not claim a statutory entitlement to a remedy for unlawful conduct or allege some sort of constitutional infringement that affects its interests. Instead, I agree with the judge that what the appellant seeks through the proposed declaration is to have the Supreme Court interpret and opine on the meaning and scope of s. 5 of the *Regulations* for an as-of-yet undefined future use. That future use might include lobbying government or laying the groundwork for a court-based or administrative proceeding involving the respondents, Teal Cedar, or all three. At this point, it is unclear.

[55] In this context, the judge was correct to find that the petition, as framed, does not provide an appropriate basis for declaratory relief. It does not establish a practical (as opposed to theoretical) need for legal clarification or guidance from the courts. In the absence of a "live dispute" or controversy between the named parties, a declaration serves no real purpose: *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 at paras. 85–86. The appellant's proposed declaration is not necessary to resolve existing uncertainty in the law, to promote judicial economy by preventing future disputes between the parties, to solve underlying issues that require resolution to determine and remediate past wrongs, or to allow the parties to carry on within an existing legal relationship: *Prince Albert Right to Life Association v. Prince Albert (City)*, 2020 SKCA 96 at paras. 14, 54. See also the discussion in *Trang v. Alberta (Edmonton Remand Centre)*, 2007 ABCA 263 at paras. 13–16, leave to appeal to SCC ref'd, 32310 (21 February 2008); *Pereira v. British Columbia (Workers' Compensation Board)*, 2023 BCCA 195 at paras. 13-18.

[56] According to the appellant's written submissions in the Supreme Court, the proposed declaration would have practical utility by defining the "relationship

between the [*Regulations*], as a federal law, and the provincial licences" that have been granted to Teal Cedar, thereby clarifying whether the provincial government has authority to issue permits that allow for a contravention of the *Regulations*.

[57] In its material, British Columbia has accepted that any harvesting rights granted for TFL 46 must respect the *Regulations*. In its factum, British Columbia states "[t]here is no controversy" about "whether the provincial authorization prevails over the [*Regulations*]". It agrees with the appellant that "provincial timber harvesting rights are not an exemption from the [*Regulations*] nor an authorization to destroy bird nests that are protected by the [*Regulations*]". From British Columbia's perspective, "there is absolutely no doubt that companies like Teal Cedar must comply with provincial and federal environmental legislation, including the [*Regulations*], when exercising [their] timber harvesting rights".

[58] Given these acknowledgments, I fail to understand the purpose to be served by the proposed declaration, as explained by the appellant. British Columbia has definitively answered what the appellant says is the "critical issue" raised by the petition. As a result, there is no live (or even hypothetical) controversy between the parties. Contrary to the appellant's apparent perspective, British Columbia does not view itself as having authority to grant harvesting rights that defy the *Regulations*.

[59] In my view, the judge correctly found that the proposed declaration has no practical utility. Accordingly, I would not accede to this ground of appeal.

c) Did the judge misconstrue the intent of the petition?

[60] The appellant says the judge misinterpreted the petition as seeking a declaration that the harvesting operations in TFL 46 constitute a regulatory offence, and that this misinterpretation materially affected the decision to strike under R. 9-5(1)(a).

[61] The petition asserts that the "old growth logging in TFL 46 is not exempted from the prohibitions set out in section 5 (1) of the *Regulations*". The appellant says this statement does not allege unlawful conduct by Teal Cedar. A declaration that

the *Regulations* prohibit the "indiscriminate destruction" of Marbled Murrelet nests would "[leave] open entirely the question of whether the logging is being done under federal permit and [is] therefore lawful". As such, the appellant says the judge was wrong to find that the petition is (directly or indirectly) aimed at the lawfulness of Teal Cedar's operations.

[62] Canada says it is obvious that the purpose of the petition is to "call into doubt whether Teal Cedar has a lawful right to log" under the provincially granted harvesting rights. British Columbia shares that view. Together, the respondents submit that if this is the appellant's objective, it is an objective more appropriately pursued by way of an action directly against Teal Cedar, judicial review of any permits, licenses, or other form of government authority that is enabling old-growth logging in TFL 46, or a prosecution. Declarations are generally not granted where there are alternative ways to address the issue: *Canada (Attorney General) v. Iris Technologies Inc*., 2022 FCA 101 at para. 18, aff'd *Iris Technologies Inc. v. Canada*, 2024 SCC 24 at para. 58.

[63] In my view, given the vagueness of the proposed declaration and some of the language of the petition, it was open to the judge to find that the petition, in its practical effect, sought to challenge the lawfulness of Teal Cedar's logging activity in TFL 46, with specific reference to the prohibitions established under the *Regulations*: at para. 132. He did not err in allowing this factor to inform his determination under R. 9-5(1)(a).

[64] 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 [*Regulations*]. Permission to destroy nests in contravention of the federal [*Regulations*] cannot be granted through provincial permits" (emphasis added). In the appellant's response to the application to strike, it described the "live controversy" between the parties this way: "old-growth trees which are the sole nesting habitat for the marbled murrelet, a species protected under the [*Regulations*] are falling every day. This is a live issue". The focus is clearly on the nature of the

logging in TFL 46 and its implications vis-à-vis the *Regulations*, not the relationship between federal and provincial law.

[65] If the appellant's true objective is to challenge the harvesting rights granted for TFL 46 on the basis that those rights have enabled conduct that is contrary to the *Regulations*, or that Teal Cedar is acting in contravention of the provincial scheme or the prohibitions established under the *Regulations*, it should have challenged the provincial scheme, the harvesting rights themselves, or Teal Cedar's conduct directly. This would have required a pleading that squarely raised those issues, and importantly, pleaded the necessary material facts. The appellant has not done so.

[66] In my view, the appellant's third ground of appeal does not establish a principled basis on which to interfere with the order to strike.

Application to amend the petition

[67] The appellant did not seek leave to amend its petition in the Supreme Court. The judge nonetheless addressed the issue, declining to exercise his discretion in favour of an amendment. That decision attracts a deferential standard of review on appeal: *Gadsby v. British Columbia (Attorney General)*, 2021 BCCA 161 at para. 34 (Chambers), citing *Kindylides v. Does*, 2020 BCCA 330 at paras. 22–23.

[68] In its factum, the appellant does not identify or assert any error in the judge's exercise of discretion. Instead, its submissions focus predominantly on the finding that the proposed declaration lacked practical utility. I have rejected this submission. Moreover, although it asks that leave to amend be granted as an alternative remedy to allowing the appeal, the appellant has not provided proposed amendments for this Court's consideration.

[69] Given the position taken below and the absence of proposed amendments, I would not grant leave to amend. It is the appellant's obligation to demonstrate how the deficiencies identified by the judge and affirmed in this Court can be rectified. See the related discussions in: *E.B. v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47 at paras. 69–73; *Jones v. Bank of Nova*

Scotia, 2018 BCCA 381 at para. 36; *Finkel v. Coast Capital Savings Credit Union,* 2017 BCCA 361 at para. 17. The appellant has made no effort to do so and I am not persuaded denying leave would result in an injustice.

Disposition

[70] The appellant has not established reversible error in the judge's order to strike under R. 9-5(1)(a). Accordingly, I would dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Justice Mayer"