

COURT FILE NO: T-11-19

FEDERAL COURT

BETWEEN:

THE MAA-NULTH FIRST NATIONS, being the
HUU-AY-AHT FIRST NATIONS,
KA:'YU:'K'T'H'/CHE:K'TLES7ET'H' FIRST NATIONS,
TOQUAHT NATION,
UCHUCKLESAHT TRIBE and
UCLUELET FIRST NATION

FEDERAL COURT COUR FÉDÉRALE	
FILED	JAN 03 2019
FRANK FEDORAK	
VANCOUVER, BC	/

APPLICANTS

AND:

THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and
THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

RESPONDENTS

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at 701 West Georgia Street, Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor, or where the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 3, 2019

Issued by: _____
ORIGINAL SIGNED BY
FRANK FEDORAK
~~A SIGNÉ L'ORIGINAL~~
(Registry Officer)

Address of local office:
Federal Court
Pacific Centre - P.O. Box 10065
701 West Georgia Street
Vancouver, B.C.V7Y 1B6

TO: Minister of Environment and Climate Change, and
Minister of Fisheries, Oceans and the Canadian Coast Guard
c/o The Department of Justice
Attorney General of Canada
900-840 Howe Street
Vancouver, BC V6Z 2S9

I HEREBY CERTIFY that the above document is a true copy of
the original ~~issued~~ issued / filed in the Court on the _____
day of JAN 3 2019 A.D. 20_____
Dated this _____ day of JAN 3 2019 20_____



FRANK FEDORAK
REGISTRY OFFICER
AGENT DU GREFFE

APPLICATION

This is an application for judicial review in respect of:

The decision of the Minister of Environment and Climate Change and the Minister of Fisheries, Oceans and the Canadian Coast Guard (the “**Ministers**”) or their delegate made December 5, 2018 pursuant to the *Species at Risk Act*, SC 2002, c 29 (“**SARA**”) section 45 (the “**Decision**”).

The applicants make application for:

1. An order quashing the Decision;
2. A declaration that the Ministers had a constitutional and/or statutory obligation to consult with the Applicants prior to making the Decision;
3. A declaration that the Ministers breached their obligation to consult;
4. Costs; and
5. Such further and other relief as this honourable court considers just.

THE GROUNDS for the Application are:

A. THE PARTIES

1. The Applicants Huu-ay-aht First Nations (“**Huu-ay-aht**”), Ka:’yu:’k’t’h’/Chek’tles7et’h’ First Nations (“**Ka:’yu:’k’t’h’/Chek’tles7et’h’**”), Toquaht Nation (“**Toquaht**”), Uchucklesaht Tribe (“**Uchucklesaht**”), and Ucluelet First Nation (“**Ucluelet**”) (collectively, the “**Maa-nulth**”) are each Indigenous Nations and aboriginal peoples as defined by section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK). Each of the Maa-nulth First Nations is a signatory to the *Maa-nulth First Nations Final Agreement* (the “**Final Agreement**”).

2. The Final Agreement, which was entered into by the Maa-nulth, the Government of Canada and the Government of British Columbia, came into effect on April 1, 2011. The Final Agreement was approved, given effect, declared valid and given the force of law in the *Maanulth*

First Nations Final Agreement Act, SC 2009, c 18 and the *Maa-nulth First Nations Final Agreement Act*, SBC 2007, c 43.

3. The rights conferred to the Maa-nulth under the Final Agreement are “treaty rights” within the meaning of and recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. The Final Agreement is also a “land claims agreement” as defined in section 2(1) of SARA.

4. The Respondent Ministers are the “competent ministers” under SARA for the Northern and Southern Resident Killer Whales.

B. MAA-NULTH FISHING RIGHTS

1. Fishing Rights under the Final Agreement

5. Under the Final Agreement, the Maa-nulth have the right to harvest fish and aquatic plants for food, social and ceremonial purposes in accordance with the terms of the Final Agreement, and to trade and barter among themselves, or with other aboriginal people of Canada, any fish or aquatic plants harvested under that right. Pursuant to the Final Agreement, this right to harvest fish and aquatic plants is exercisable within a geographical area defined by the Final Agreement and referred to therein as the “**Domestic Fishing Area**”.

6. The Domestic Fishing Area includes a north region, which encompasses Kyuquot Sound and adjacent ocean, and a south region, which encompasses Barkley Sound and adjacent ocean. The south region is most relevant to this application. It extends inland from Barkley Sound for approximately 10 to 25 km, and southwest from Barkley Sound into the Pacific Ocean for up to 125 km. The open-water portion of the south region includes most of Management Areas 121 and 123 as defined by the *Pacific Fisheries Management Area Regulations, 2007*, SOR/2007/77.

7. The south region of the Domestic Fishing Area also includes La Pérouse Bank and Swiftsure Bank, which are preferred fishing areas for the Maa-nulth. La Pérouse, or the “Big Bank” as it is often called, is especially important to the Maa-nulth, despite its long distance and problematic weather, because of its relative abundance and variety of fish species.

8. Each of the Maa-nulth First Nations is and always has been a fishing people. Harvesting,

processing, consuming and trading all species of fish and aquatic plants has, since time immemorial and, in any event, since a time before contact, been a practice that is integral to the distinctive culture of each of the Maa-nulth First Nations and a defining feature of that culture, and continues to be. Reliance on all species of fish, as a natural food, is also important for the Maa-nulth and their members to contribute to a healthy life.

9. Without restricting the importance of any species of fish, chinook salmon have a heightened significance for the Maa-nulth, as it is a species of salmon that is generally more reliable and available to Maa-nulth fishers within the Domestic Fishing Area compared to other species of salmon such as passing Fraser River sockeye.

2. The Joint Fisheries Committee

10. The Final Agreement (sections 10.4.1 to 10.4.6) establishes a Joint Fisheries Committee, which engages in co-operative planning and management of the exercise of Maa-nulth fishing rights; activities related to stock assessment, enhancement, stewardship and habitat; activities related to fisheries monitoring and enforcement; activities related to environmental protection and ocean management; and other fisheries-related matters.

11. The Final Agreement (section 6.3.2) specifically confers upon the Maa-nulth, as a constitutionally-protected treaty right, the “opportunity to participate in fisheries related management activities in the Domestic Fishing Area through the Joint Fisheries Committee” in accordance with certain other provisions of the Agreement.

12. Pursuant to section 10.4.8 of the Final Agreement, the Maa-nulth Fisheries Committee is mandated to discuss and make recommendations to Canada in respect of a wide range of matters regarding marine harvesting and resource management, including the management, conservation and protection of fish and fish habitat, marine animals (including whales) and their habitat, and aquatic plants within the Domestic Fishing Area.

13. Canada, British Columbia and each Maa-nulth First Nation appoint one member to the Joint Fisheries Committee.

14. The Joint Fisheries Committee is a “wildlife management board” as defined in section 2(1) of SARA.

C. SARA DESIGNATION OF NORTHERN AND SOUTHERN RESIDENT KILLER WHALES

15. The purpose of SARA is to provide legal protection for species at risk throughout Canada. It is meant to ensure the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity, as well as the management of species of special concern to prevent them from becoming endangered or threatened.

16. The process by which SARA protects species generally begins with an assessment of a particular species by the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”), which may classify a species as extinct, extirpated, endangered, threatened, of special concern, or not currently at risk (s. 15). Following an assessment by COSEWIC, the Governor-in-Council may, on the recommendation of the Minister of the Environment, amend Schedule 1 of SARA (List of Wildlife Species at Risk) with respect to that species (s. 27).

17. The effect of having been listed as threatened or endangered in Schedule 1 of SARA includes:

- (a) prohibitions on harming that species or its dwellings (ss. 32 and 33 of SARA);
- (b) a requirement that the competent minister prepare a recovery strategy for that species, which must include, among other things, an identification of the species’ critical habitat and threats to the survival of the species (s. 41 of SARA);
- (c) a requirement that the competent minister prepare an action plan based on the recovery strategy, including a statement of measures that are to be taken to address the threats to the species and that are proposed to be taken to protect the species’ critical habitat (s. 49 of SARA); and
- (d) a requirement that the competent minister, within 180 days after a recovery strategy or action plan that identified critical habitat is included in the public registry, make an order that ensures that critical habitat is protected (ss. 57 and 58 of SARA).

18. In or about 2001, COSEWIC designated the Northern Resident Killer Whale (“NRKW”) as threatened and the Southern Resident Killer Whale (“SRKW”) as endangered. In or about

2003, the two populations were listed as threatened and endangered, respectively, in Schedule 1 of SARA.

19. The “Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada” (the “**Recovery Strategy**”) was finalized and published in the Species at Risk Public Registry in 2008 with minor amendments made in 2011.

20. The Recovery Strategy identified NRKW critical habitat as the waters of Johnstone Strait and southeastern Queen Charlotte Strait, and SRKW critical habitat as the transboundary waters in southern BC including the southern Strait of Georgia, Haro Strait and Juan de Fuca Strait. Neither the NRKW nor the SRKW critical habitat areas extended into the Domestic Fishing Area.

21. As well, the Recovery Strategy identified chinook and chum salmon as preferred prey for the NRKW and SRKW, noted that chinook is the principal prey but has declined in abundance, and identified several recovery strategies that involve protection of these prey populations and their habitat.

22. The Decision amended the Recovery Strategy to, among other things, identify a new critical habitat area that applies to both the NRKW and the SRKW. This new critical habitat area encompasses almost the entire open-water portion of the southern Domestic Fishing Area, including La Pérouse Bank and Swiftsure Bank.

23. The Decision is a strategic, higher-level plan that may impact Maa-nulth’s ability to exercise their fishing rights under the Final Agreement. It forms the basis for future orders or management measures that may restrict the exercise of those rights within the southern Domestic Fishing Area.

24. In addition, the Decision requires the Ministers to make a critical habitat order pursuant to sections 58(4) and (5) of SARA, which will include most of the southern Domestic Fishing Area. Once the order is made, a prohibition on the destruction of that critical habitat will be in effect, pursuant to section 58(1) of SARA. Relevant to that prohibition is section 7.3 of the Recovery Strategy, which identifies activities likely to result in the destruction of critical habitat and states:

“It is anticipated that protection of the four Resident Killer Whale critical habitat areas identified in this recovery strategy will be accomplished through a SARA Critical Habitat Order made under subsections 58(4) and (5), which will invoke the prohibition in subsection 58(1) against the destruction of any part of the identified critical habitat. The term “recovery strategy” is defined in subsection 2(1) of SARA as meaning “a recovery strategy included in the public registry under subsection 43(2), and includes any amendment to it included in the public registry under section 45”. Thus, reading the definition of “critical habitat” in conjunction with the definition of “recovery strategy,” the Critical Habitat Order will apply not only to the critical habitat identified in the recovery strategy, but also to any modification to the critical habitat subsequently made in an amended recovery strategy, without the need to amend the Critical Habitat Order.

The following examples of activities likely to result in the destruction of critical habitat are based on known human activities that are likely to occur in and around critical habitat and would result in the destruction of critical habitat if unmitigated. Some activities may impact critical habitat regardless of whether or not the whales are present within the area, while others would require the presence of the whales, dependent on the activity and the feature, function, or attribute affected by that activity. The list of activities is neither exhaustive nor exclusive and has been guided by the threats described in section 4 of this recovery strategy.

...

Reduced prey availability

Availability of Chinook and Chum Salmon is key to the presence of Resident Killer Whales in critical habitat areas (Ford and Ellis 2005; DFO 2017b). Maintaining an adequate food supply for Resident Killer Whales depends on many factors, including the body size and condition of prey, as well as sufficient stock diversity of key prey species to maintain prey availability over time. Activities that result in insufficient abundance, quality, or availability of Chinook Salmon, Chum Salmon, or other Resident Killer Whale prey species could therefore lead to destruction of critical habitat. These include fishing for Chinook Salmon, Chum Salmon, and other important prey species, as well as activities that impact the survival and prey supply of these species such that they are not of sufficient abundance, quality, or availability for Resident Killer Whales.”

D. CONSULTATION OBLIGATIONS

25. Prior to the Decision, the Ministers were obligated:

- (a) to meaningfully consult with Maa-nulth about potential impacts of the Decision on Maa-nulth's treaty rights pursuant to section 35(1) of the *Constitution Act, 1982*;
- (b) to prepare the amended Recovery Strategy in co-operation with the Joint Fisheries Committee and Maa-nulth more generally pursuant to sections 45(3) and 39(1)(c) and (d) of SARA;
- (c) to prepare the amended Recovery Strategy in accordance with the provisions of the Final Agreement pursuant to sections 45(3) and 39(2) of SARA; and
- (d) to prepare the amended Recovery Strategy in consultation with Maa-nulth pursuant to sections 45(3) and 39(3) of SARA.

26. The Ministers failed or refused to do any of these, or alternatively, failed or refused to do any of these adequately and in accordance with the required legal standard.

E. CHRONOLOGY OF COMMUNICATIONS WITH MAA-NULTH

27. By letter dated June 12, 2018, Canada advised Larry Johnson and Ron Frank, the current and former chair of the Joint Fisheries Committee, that Canada intended to amend the Recovery Strategy to include additional areas of critical habitat for the Killer Whale off the southwest coast of Vancouver Island and a portion of the Dixon Entrance north of Haida Gwaii. Maa-nulth was invited to provide comments on this proposal.

28. By letter dated July 11, 2018, the Maa-nulth (*per* Charlie Cootes, President of the Maa-nulth Treaty Society), wrote to Canada expressing concerns regarding the inclusion of La Pérouse Bank in the critical habitat area and requesting that Canada provide all the information that supported that decision, allow the Maa-nulth a reasonable amount of time to assess that information and then meet with the Maa-nulth to discuss the matter.

29. Canada responded by letter dated August 17, 2018 stating that the SRKW was in "imminent threat of extinction" and, because of this, it could not delay its process but offered to meet with the Maa-nulth during the 60 day public comment period (September 4, 2018 to

November 3, 2018) provided for under section 43 of SARA. Canada did not provide the information requested in the Maa-nulth's July 11, 2018 letter.

30. By Order in Council PC 2018-1352 dated November 1, 2018, the Governor in Council declined to make an Emergency Order for the protection of the Killer Whale Northeast Pacific Southern Resident Population. The Applicants say that this Order in Council calls into question the *bona fides* of Canada's August 17, 2018 representation that the SRKW was in "imminent threat of extinction" and, in any event, removed the apparent urgent need for Canada to proceed under SARA without providing the requested information to Maa-nulth or otherwise consulting meaningfully with Maa-nulth.

31. On or about November 9, 2018 Canada met with the Maa-nulth. At that meeting Canada committed to providing certain information to the Maa-nulth as soon as possible, and the Maa-nulth were to provide comments within a week-and-a-half of receiving that information.

32. Canada failed or refused to provide Maa-nulth with adequate information in respect of the proposed Recovery Strategy. To the extent that it did provide information, it did not do so in a timely way, and thus Maa-nulth was unable to meaningfully participate in a consultative process, particularly within the constrained timeframe set by Canada.

33. The amended Recovery Strategy was finalized and published in the Species at Risk Public Registry on December 5, 2018.

F. LACK OF CONSULTATION

34. Under section 35(1) of the *Constitution Act, 1982*, the Crown has a duty to consult when it has knowledge of an Aboriginal right and contemplates conduct that might adversely affect that right. Among other things, that duty imposes on the Crown a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

35. Canada failed to meet this duty:

- (a) it failed to provide the information requested by the Maa-nulth in the letter dated July 11, 2018 and at the meeting on November 9, 2018;
- (b) it would not extend the period for consultation beyond the 60-day public comment period provided for under section 43 of SARA;
- (c) there is nothing in the amended Recovery Strategy to indicate that the Maa-nulth's concerns were seriously considered;
- (d) there is nothing to show that those concerns were incorporated into the amended Recovery Strategy in any way; and
- (e) it failed to explain why those concerns were not considered or incorporated into the amended Recovery Strategy.

36. Canada also failed to meet its statutory obligations under SARA by:

- (a) failing to prepare the amended Recovery Strategy in co-operation with the Joint Fisheries Committee and Maa-nulth pursuant to sections 45(3) and 39(1)(c) and (d) of SARA;
- (b) failing to prepare the amended Recovery Strategy in accordance with the provisions of the Final Agreement pursuant to sections 45(3) and 39(2) of SARA; and
- (c) failing to prepare the amended Recovery Strategy in consultation with the Maa-nulth pursuant to sections 45(3) and 39(3) of SARA.

37. Further and in the alternative, Canada was obligated to accommodate the Maa-nulth prior to approving the amended Recovery Strategy and failed to do so, including by:

- (a) failing to give priority to the Maa-nulth's treaty rights under section 35(1) of the *Constitution Act, 1982*; and
- (b) failing to minimally impair those treaty rights.

38. Further and in the alternative, Canada unnecessarily and unlawfully rushed the Decision for ulterior purposes, contrary to the honour of the Crown, including to support the application of Trans Mountain Corporation, a Crown corporation wholly owned by Canada, to the National Energy Board (“NEB”) for a Certificate of Public Convenience and Necessity for its Trans Mountain Expansion Project. That application is presently before the NEB on a court-ordered reconsideration process with imminent deadlines for the filing of evidence.

This application will be supported by the following material:


- Affidavit of Larry Johnson and/or Charlie Coots (to be sworn)
- Such other affidavits or evidence as may be filed pursuant to the *Federal Courts Rules*.

The applicants request the Ministers to send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the Ministers to the applicants and to the Registry:

All materials before the Ministers in making the Decision.

Date: January 3, 2019

Issued by:



(Signature of solicitor or applicant)

F. Matthew Kirchner
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