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	ERIN LIVINGSTONE	
VANCOUVER, BC		1

Court File Number: T-849-22

FEDERAL COURT

BETWEEN:

**WESTERN CANADA WILDERNESS COMMITTEE and
SIERRA CLUB OF BRITISH COLUMBIA FOUNDATION**

Applicants

AND:

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE

Respondent

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*, RSC
1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicants.
The relief claimed by the applicants appears on the following pages.

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 **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.

Date: April 25, 2022

**ERIN LIVINGSTONE
REGISTRY OFFICER
AGENT DU GREFFE**


~~ORIGINAL SIGNED BY
ERIN LIVINGSTONE
A SIGNÉ L'ORIGINAL~~

Issued by:



Address of local office:
P.O. Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: MINISTER OF ENVIRONMENT AND CLIMATE CHANGE

AND TO: ATTORNEY GENERAL OF CANADA

c/o DEPARTMENT OF JUSTICE CANADA
British Columbia Regional Office
Department of Justice Canada
900 - 840 Howe Street
Vancouver, British Columbia V6Z 2S9

APPLICATION

This is an application for judicial review in respect of a decision of the Minister of Environment and Climate Change (the “Minister”) on March 25, 2022 to issue the “Protection statement for the habitat to which the *Migratory Birds Convention Act, 1994* applies for migratory birds listed under the *Species at Risk Act*” (the “Protection Statement”). The Protection Statement purports to fulfill the Minister’s obligations to protect the critical habitat of Marbled Murrelet and other migratory birds pursuant to s. 58(5.2) of the *Species at Risk Act*, SC 2002, c 29 (“*SARA*”).

Subsection 58(5.2) of *SARA* imposes a duty on the Minister to recommend an order to protect migratory bird critical habitat on non-federal lands if no federal laws protect that habitat. In the Protection Statement, however, the Minister interprets s. 58(5.2) as only requiring him to consider whether the nests of at-risk migratory birds are protected by federal laws. The Protection Statement concludes that these nests are already protected by the *Migratory Birds Convention Act, 1994*, SC 1994, c 22 (the “*MBCA*”) and by another provision of *SARA*. The Minister has stated that the Protection Statement fulfills his obligations under s. 58(5.2); further, he has made it clear that he will not take additional steps under s. 58(5.2) to protect any migratory bird critical habitat on non-federal lands.

Through his decision to issue the Protection Statement, the Minister has unreasonably limited his obligations to ensure the protection of the critical habitat of threatened, endangered, and extirpated migratory birds under s. 58(5.2). This decision leaves the majority of the critical habitat of Marbled Murrelet and at least 24 other at-risk migratory birds unprotected on non-federal lands across the country.

THE APPLICANTS MAKE APPLICATION FOR THE FOLLOWING ORDERS:

1. An order in the nature of certiorari quashing or setting aside the Minister’s decision to issue the Protection Statement and remitting to the Minister the matter of whether to issue a recommendation or protection statement under s. 58(5.2) of *SARA* in accordance with this Court’s reasons.

2. In addition or in the alternative to the relief sought in paragraph 1, an order declaring unlawful the Minister's decision to issue the Protection Statement and his conclusion that the Protection Statement fulfils his obligations under s. 58(5.2) of *SARA*.
3. An order declaring unlawful the Minister's failure to recommend protection pursuant to s. 58(5.2)(a) of *SARA* of any Marbled Murrelet critical habitat on non-federal land.
4. An order for costs in favour of the Applicants throughout.
5. An order that the Applicants shall not be required to pay costs to the Minister, in the event this application is dismissed.
6. In the alternative to paragraphs 4 and 5, an order that each party bear their own costs.
7. Such further and other relief as to this Court may seem just.

THE GROUNDS FOR THE APPLICATION ARE:

The Parties

1. The applicants Western Canada Wilderness Committee and Sierra Club of British Columbia Foundation (the "Applicants") are public interest litigants. The Applicants are environmental non-governmental organizations working to protect Canada's environment and to preserve species-at-risk.
2. The Applicants have genuine interests in the protection and recovery of species-at-risk in Canada, including in the Minister's compliance with the duties Parliament has imposed upon him under *SARA*. Along with other environmental non-governmental organizations, the Applicants have in the past successfully challenged in this Court the Minister's failure to publish recovery strategies for species at risk listed under *SARA*. Since 2020, the Applicants have been working to secure protection of critical habitat for Marbled Murrelet, a threatened migratory bird, on non-federal lands by sending petitions and letters to the federal government and to the government of British Columbia.

3. The Respondent Minister is the competent minister with respect to threatened, endangered, and extirpated migratory birds, pursuant to the definition of “competent minister” in s. 2 of *SARA*.

The Minister is required to protect the critical habitat of migratory birds on non-federal lands under SARA

4. *SARA* requires the Minister to list, identify, and protect threatened, endangered, and extirpated species, including species of migratory birds protected by the *MBCA*. Because of the federal government’s clear constitutional jurisdiction over the conservation of migratory birds, *SARA* imposes additional duties on the Minister to ensure the protection of migratory birds and their habitat on non-federal lands through federal law.
5. Section 6 of *SARA* provides that the purposes of the legislation include:
 - i. to prevent wildlife species from being extirpated or becoming extinct; and
 - ii. to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.
6. The preamble of *SARA* recognizes that “the habitat of species at risk is key to their conservation”. *SARA* requires the Minister to prepare a recovery strategy for threatened, endangered, and extirpated migratory birds that identifies their critical habitat to the extent possible, based on the best available information (ss. 37, 41). Once migratory bird critical habitat has been identified, the Minister and Governor in Council have various duties to protect that habitat under section 58.
7. For migratory birds, habitat is “the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced” (s. 2). Critical habitat is “the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species” (s. 2).
8. Subsection 58(5.2) requires that the Minister protect the critical habitat of

migratory birds on non-federal lands that is “habitat to which the [*MBCA*] applies” by either: (a) recommending that the Governor in Council issue an order to legally protect this critical habitat where the Minister is of the opinion that this habitat is not already protected by federal law, or (b) publishing a statement describing how this critical habitat is already legally protected by federal legislation. The Minister must make this recommendation or statement within 180 days of the critical habitat being identified in a recovery strategy or action plan.

9. The purpose of s. 58 of *SARA* is to ensure that critical habitat for species over which the federal government has primary jurisdiction — including species on federal lands, aquatic species, and migratory birds — is protected within 180 days from when habitat is identified in a recovery strategy or action plan (ss. 57 and 58).
10. *SARA* differentiates between protecting the critical habitat of a migratory bird and protecting a nest. Sections 33 and 34 of *SARA* prohibit damage or destruction of a nest of any endangered, threatened, and extirpated migratory bird species. Section 58 ensures broader protection of critical habitat beyond nests.

The MBCA applies to migratory bird habitat beyond nests

11. The *MBCA* applies to and protects the habitat of migratory birds, and goes beyond protecting individual birds and their nests.
12. Section 5.1 of the *MBCA* applies to areas or waters “frequented by migratory birds” and protects these areas and waters from pollution harmful to migratory birds. Prior to 2005, s. 35(1) of the *Migratory Birds Regulations*, CRC, c 1035, similarly protected areas and waters frequented by migratory birds.
13. The protection of habitat is essential to upholding the purpose of the *MBCA*, which is to “implement the [Convention for the Protection of Migratory Birds in Canada and the United States] by protecting and conserving migratory birds – as populations and individual birds – and their nests” (s. 4).
14. Protecting and conserving populations of migratory birds requires the protection of their broader habitat, and not merely their nests.

15. The federal government has clear jurisdiction over the protection and conservation of migratory bird populations under s. 132 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, because the Convention for the Protection of Migratory Birds in Canada and the United States (the “Convention”) is an Empire treaty.

The Minister has never fulfilled his obligations under s. 58(5.2) of SARA to ensure protection of critical habitat for migratory birds

16. There are at least 25 migratory bird species that are listed as threatened or endangered under *SARA* with critical habitat identified in a recovery strategy. The majority of these migratory bird species have critical habitat identified on non-federal lands that extends beyond nests.

17. Subsection 58(5.2) of *SARA* has been in force since June 1, 2004.

18. On January 14, 2021, the Applicants sent a petition to the Commissioner of the Environment and Sustainable Development under s. 22 of the *Auditor General Act*, RSC 1985, c A-17, seeking information on actions taken under ss. 58(5.1) and (5.2) of *SARA*.

19. On July 29, 2021, the Applicants received a response from the Minister to the petition to the Commission of the Environment and Sustainable Development. The Minister confirmed that neither he nor his predecessors had ever made a recommendation or issued a statement under s. 58(5.2)(a) or (b) of *SARA* since that section came into force.

20. The Protection Statement issued on March 25, 2022 is the only time the Minister has issued a statement pursuant to s. 58(5.2) of *SARA*.

In deciding to issue the Protection Statement, the Minister adopted an unreasonably narrow interpretation of his duties under s. 58(5.2)

21. This judicial review application concerns the Minister’s decision to issue the Protection Statement as the purported fulfillment of his duties under s. 58(5.2) of *SARA*. The Minister has not fulfilled those duties because he has failed to consider or ensure the protection of critical habitat on non-federal lands beyond

individual bird nests.

22. The Protection Statement purports to describe how critical habitat that is “habitat to which [the *MBCA*] applies” is already protected by federal laws on non-federal lands. Through the Protection Statement, the Minister interprets the phrase “habitat to which [the *MBCA*] applies” as referring only to nests. As migratory bird nests are already protected by s. 33 of *SARA*, s. 6 of the *Migratory Birds Regulations*, CRC, c 1035, and s. 3(2) of the *Migratory Bird Sanctuary Regulations*, CRC, c 1036, the Minister takes the position that he does not need to make any recommendations under s. 58(5.2)(a) to protect critical habitat of any at-risk migratory bird species.
23. In a letter to the Applicants dated March 30, 2022, the Minister’s delegate confirmed that the Protection Statement is intended to apply to “the portion of critical habitat to which the *MBCA* applies for migratory birds under both the *MBCA* and *SARA*, fulfilling [the Minister’s] obligations under Subsection 58(5.2) of *SARA*.”
24. The Minister’s decision to issue the Protection Statement instead of making a recommendation to protect critical habitat of migratory birds is unlawful because it is based on an unjustified and narrow interpretation of s. 58(5.2) that limits “habitat to which [the *MBCA*] applies” to only nests. This interpretation does not comply with relevant legal and factual constraints.

In deciding to issue the Protection Statement, the Minister has failed to fulfill his obligations to protect the critical habitat of migratory birds

25. The Protection Statement applies to at least 25 threatened or endangered migratory birds. This includes the Marbled Murrelet, a seabird that nests in old-growth coastal forests in British Columbia.
26. Marbled Murrelet is listed as a threatened species under Schedule 1 of *SARA*, and is defined and protected as a migratory bird under Article 1 of the Convention.
27. The final recovery strategy for Marbled Murrelet was published in 2014. The recovery strategy partially identified Marbled Murrelet critical habitat by

identifying the threshold amount of suitable nesting habitat required in each of six conservation regions in coastal British Columbia. The recovery strategy determined that having a sufficient area of intact nesting habitat in each of these conservation regions was necessary for the survival and recovery of Marbled Murrelet in Canada.

28. As of 2016, there was less suitable nesting habitat in the East Vancouver Island Conservation Region than was required by the 2014 recovery strategy for the survival and recovery of Marbled Murrelet. As of 2016, all remaining suitable nesting habitat in that Conservation Region was critical habitat. The amount of critical habitat in the Conservation Region has continued to decline between 2016 and 2020 primarily because of industrial logging.
29. The majority of remaining suitable nesting habitat within the East Vancouver Island Conservation Region (of which known nest sites represent a miniscule fraction) is on non-federal lands and is unprotected by federal laws.
30. As of 2016, the Minister had a duty to make a recommendation under s. 58(5.2) of *SARA* for any portions of suitable nesting habitat in the East Vancouver Island Conservation Region on non-federal lands. If the Minister formed the opinion that parts of the suitable nesting habitat were already protected by federal law, then he was required to issue a protection statement setting out how that habitat was protected.
31. As of 2020, the West and North Vancouver Island Conservation Region only had approximately 8,577 hectares of suitable nesting habitat above the critical habitat threshold set by the recovery strategy. Based on the rate of logging on Vancouver Island, there will likely be less suitable nesting habitat in the Conservation Region than required for the survival and recovery of the species in the next five to eight years.
32. As timber licensee forest stewardship plans are set for up to five years, and can be extended for another five years under provincial legislation, the Minister has a current obligation to recommend protection of remaining suitable nesting habitat in the West and North Vancouver Island Conservation Region to ensure that

critical habitat is not destroyed.

33. On September 2, 2021, the Applicants sent a letter to the Minister seeking an updated recovery strategy for Marbled Murrelet and a recommendation to protect critical habitat for Marbled Murrelet under s. 58(5.2) on non-federal lands, particularly in the East Vancouver Island Conservation Region.
34. On March 30, 2022, in the same letter referenced above in paragraph 23, the Minister's delegate stated that the Protection Statement fulfilled the Minister's obligations under s. 58(5.2) of *SARA* for Marbled Murrelet.
35. Identifying occupied nests for Marbled Murrelet is very difficult because they are well-hidden and located high up in the mossy branches of old-growth trees. Therefore, limiting protection to identified nests does not support the purposes and scheme of *SARA* or the *MBCA* to ensure the survival and recovery of migratory bird populations.
36. Without protection of critical nesting habitat in old growth forests in coastal British Columbia, Marbled Murrelet populations have continued to decline — primarily as a result of continued logging in their nesting habitat.

The Minister's decision to issue the Protection Statement is unlawful because it is based on an error of law

37. In issuing the Protection Statement and concluding that he has no further obligations to protect critical habitat under s. 58(5.2) of *SARA*, the Minister has unlawfully failed to fulfill his obligations under s. 58(5.2).
38. A reasonable interpretation of s. 58(5.2) requires the Minister ensure protection of critical habitat of migratory birds beyond nests. The Minister's decision is based on an unjustified and unreasonably narrow interpretation of the words "habitat to which the [*MBCA*] applies" that limits s. 58(5.2) only to the protection of nests. This is an error of law reviewable on a standard of reasonableness.
39. The Minister's narrow interpretation of the words "habitat to which the [*MBCA*] applies" in the Protection Statement is unreasonable; it is not justified based on internally coherent reasoning and it fails to comply with relevant factual and legal

constraints, particularly the text and purposes of the governing statutory schemes. Relevant factual and legal constraints on the Minister's interpretation include:

- i. Parliament's intent in including s. 58(5.2) in the scheme of *SARA* to protect the critical habitat of migratory birds outside of federal lands and uphold the purposes of *SARA*. Section 33 of *SARA* already protects the nests of at-risk migratory birds on non-federal lands. The Minister's interpretation renders s. 58(5.2) redundant.
- ii. The plain wording of provisions of the *MBCA* that apply to habitat beyond nests. Section 5.1 of the *MBCA*, and its earlier equivalent in the *Migratory Birds Regulations*, applies to areas and waters "frequented by migratory birds" and protects those areas and waters from pollution.
- iii. The purposes of the *MBCA* and the Convention, which are to protect and conserve migratory bird populations, as well as individual birds and nests. Protecting migratory bird populations and individuals requires the protection of their habitat.
- iv. The courts' broad interpretation of the Convention and the federal government's jurisdiction to protect migratory bird populations and their habitat from new threats, such as industrial logging. And,
- v. The need for habitat protection to address area-level threats to migratory bird populations, particularly when it is difficult or impossible to identify their nests prior to development or industrial activity.

Costs

40. The Applicants are public interest litigants with a genuine interest in conserving species at risk, including at-risk migratory birds such as Marbled Murrelet. The Applicants have no personal, proprietary or pecuniary interest in the outcome of the proceeding. The Minister's obligations to protect the critical habitat of at-risk migratory birds is an issue of broad public importance and has not previously been considered by this Court. It would be just and appropriate to make an order pursuant to Rule 400 that costs be awarded to the Applicants if this application is

allowed, in whole or in part, and that no costs be awarded against the Applicants if the application is dismissed.

Additional Grounds of Review

41. The Applicants rely on the *Federal Courts Act*, RSC 1985, c F-7, in particular ss. 18 and 18.1, the *Federal Courts Rules*, SOR/98-106, *SARA*, the *MBCA*, and such additional grounds as counsel may identify.

This application will be supported by the following material:

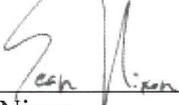
1. The affidavit of Liat Podolsky, on behalf of the Applicants, to be served;
2. The affidavit of Lindsay Dodwell, on behalf of the Applicants, to be served;
3. An affidavit on behalf of Sierra Club of British Columbia Foundation, to be served;
4. An affidavit on behalf of Western Canada Wilderness Committee, to be served;
5. An affidavit providing further information about the migratory bird species affected by the Minister's decision to issue the Protection Statement;
6. Material requested pursuant to Rule 317 and produced to the Applicants and to the Court pursuant to Rule 318 of the *Federal Courts Rules*; and
7. Such other and additional materials as counsel may advise and the Court may allow.

Rule 317 Request

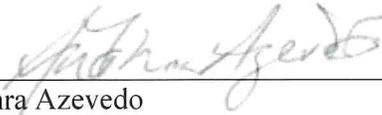
The Applicants request that the Minister send a certified copy to the Applicants and to the Registry of the following material pursuant to Rules 317 and 318 of the *Federal Courts Rules* that is not in the possession of the Applicants but is in the possession of the Minister (in this Rule 317 Request, any reference to the Minister includes the Deputy Minister or any other delegate to the Minister):

1. All documents in the possession of the Minister, related to the Minister's decision to issue the Protection Statement on March 25, 2022 (for clarity, the Minister's decision to issue the Protection Statement includes his decision not to issue any recommendation under s. 58(5.2) of *SARA*), including but not limited to:
 - i. Any memoranda to the Minister, including any attachments, in relation to his decision to issue the Protection Statement on March 25, 2022.
 - ii. All correspondence, emails, meeting minutes, agendas, presentations, and monographs relating to the Minister's decision to issue the Protection Statement.
2. All documents in the possession of the Minister, including any attachments, in relation to the Applicants' letter seeking protection of Marbled Murrelet critical habitat dated September 2, 2021 and in relation to the Minister's response sent on March 30, 2022.
3. All documents in the possession of the Minister, including any attachments, in relation to the Applicants' petition to the Commissioner of the Environment and Sustainable Development regarding the protection of migratory birds under s. 58(5.2) of *SARA* sent on January 14, 2021 and in relation to the Minister's response sent on July 29, 2021.
4. The material before the Minister when he made his decision to issue the Protection Statement on March 25, 2022.

April 25, 2022



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HEREBY CERTIFY that the above document is a true copy of the original issued out of/ filed in the Court on the _____ day of _____ APR 25 2022 A.D. 20 _____

**ERIN LIVINGSTONE
 REGISTRY OFFICER
 AGENT DU GREFFE**

Dated this _____ day of _____ APR 25 2022 20 _____
