

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

JUL 20 2016

S-16667.0

No.
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SIERRA CLUB OF BRITISH COLUMBIA FOUNDATION and JOSETTE WIER

PETITIONERS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
(MINISTRY OF FORESTS, LANDS, AND NATURAL RESOURCE OPERATIONS)

RESPONDENT

PETITION

ON NOTICE TO:

Ministry of Forests, Lands and Natural Resource Operations, and
Attorney General of British Columbia
PO Box 9289 Stn Prov Govt
Victoria, BC V8W9J7

British Columbia Hydro and Power Authority
333 Dunsmuir St.
Vancouver, BC V6B 5R3

This proceeding is brought for the relief set out in Part 1 below, by

the person(s) named as petitioner(s) in the style of proceedings above

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

- (i) 2 copies of the filed response to petition, and
- (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is: Gratl & Company 601-510 West Hastings St. Vancouver, BC V6B 1L8
(3)	The name and office address of the petitioner's lawyer is: Jason Gratl Gratl & Company 601-510 West Hastings St. Vancouver, BC V6B 1L8

CLAIM OF THE PETITIONERS

Part 1: ORDERS SOUGHT

The Petitioners seek the following orders:

1. A declaration that it was *ultra vires* for the Ministry of Forests, Lands and Natural Resource Operations to purport to grant the British Columbia Hydro and Power Authority an exemption from sections 29, 33, and 37 of the *Wildlife Act*, R.S.B.C. 1996, c. 488 on or about May 19, 2016 without issuing a permit as required under s. 2 of the *Permit Regulation*, B.C. Reg. 253/2000.
2. A declaration that the purported exemption granted to the British Columbia Hydro and Power Authority by the Ministry of Forests, Lands and Natural Resource Operations on or about May 19, 2016 is null and void, and of no force and effect.
3. A declaration that the purported exemption granted to the British Columbia Hydro and Power Authority by the Ministry of Forests, Lands and Natural Resource Operations on or about May 19, 2016 was an abuse of process and was issued in contravention of the rule of law.
4. A declaration that the purported exemption granted to the British Columbia Hydro and Power Authority by the Ministry of Forests, Lands and Natural Resource Operations on or about May 19, 2016 does not give rise to a defence of officially induced error.
5. An order that the petitioner is protected from adverse costs liability in the event that this petition is dismissed.
6. Costs in this petition, including special costs.
7. Such other and further relief as this Honourable Court deems appropriate and just.

Part 2: FACTUAL BASIS

Parties

1. The Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") is responsible for the administration of the *Wildlife Act*, R.S.B.C. 1996, c. 488 (the "Act"). The Act, among other things, prohibits the capture, possession, and transportation of wildlife. A regional manager under the Act may issue permits authorizing a person to capture, possess, and transport wildlife.

2. **Josette Wier is a resident of Smithers, British Columbia, and has a long and abiding history of political and social activism in respect of amphibians and amphibian habitat within the Province of British Columbia. Ms. Wier was a public interest litigant in *Wier v. Environmental Appeal Board*, 2003 BCSC 1441 (CanLII) and *Wier v. Canada (Minister of Health)*, 2011 FC 1322 (CanLII), both of which concern amphibians and amphibian habitat.**
3. **The Sierra Club of British Columbia Foundation (“Sierra Club BC”) is a federally registered charity whose mission is to protect, conserve, and educate the public about, British Columbia’s wilderness, species and ecosystems. It has a demonstrated interest in the protection and conservation of wildlife and wildlife habitat in British Columbia, including amphibians and their habitat.**

Relevant Facts

4. **The British Columbia Hydro and Power Authority (“BC Hydro”) is engaged in the construction of a large hydroelectric dam known as the Site C Project (the “Project”) on the Peace River in northeastern British Columbia.**
5. **The Project involves construction of three dikes across the South Bank Side Channel of the Peace River, which will likely result in the dewatering of the upstream section of the channel. Dewatering of this section of the channel is anticipated to destroy amphibian habitat and, absent other action, will be lethal to tadpoles in that habitat.**
6. **In September of 2015, BC Hydro applied to the Ministry for an amphibian salvage permit that would allow BC Hydro to move tadpoles and frogs that live in the channel to another area. The permit was not expected to be issued until mid to late June 2016.**
7. **On or about May 13, 2016, BC Hydro sought permission from the Ministry to undertake amphibian salvage prior to the issuance of the amphibian salvage permit in order to avoid possible delays in BC Hydro’s construction schedule.**
8. **On or about May 19, 2016, Mr. Christopher Addison (Director of Resource Management, Northeast) purported to issue an “authorization” to BC Hydro to exempt BC Hydro from prosecution for offences under sections 29, 33, and 37 of the Act for the capture, possession, and transport of amphibians in the channel. Capture, possession of and transport of wildlife are offences punishable by imprisonment and fines. The exemption from prosecution was purported to be valid until June 20 and would have been superseded by a permit, or extended or revoked at the discretion of the Regional Manager under the Act.**

9. In an email sent by Mr. Addison to Mr. Jeff Richert (Natural Resource Management Advisor of the Nun wa dee Stewardship Society) dated May 27, 2016, Mr. Addison indicated his awareness that there is no provision under the Act to grant exemptions from prosecution for offences committed under the Act and that the permitting process is the only lawful process under the Act. Mr. Addison also indicated that he knew and intended that such a purported "authorization" had legal effect because it would allow a proponent to raise the defence of officially induced error if confronted with a charge under the Act. Mr. Addison indicated that he had issued such "authorizations" in the past.
10. The defence of officially induced error is an exception to the principle that ignorance of the law is no excuse. If a person charged with an offence was reasonably misled by the false but reasonable legal advice of a public official, the person charged can rely on a mistake of law. Mr. Addison intentionally provided what he knew to be a false legal interpretation of the Act (ie. that he was issuing an "authorization") that was intended to induce and facilitate the commission of offences under the Act.

Part 3: LEGAL BASIS

1. This petition is brought pursuant to s. 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, and Rule 2-1(2)(b) and Part 16 generally of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

Legal Error

2. The Ministry acted *ultra vires* the Act, in a manner that violates the rule of law, and in bad faith when he purported to grant BC Hydro an exemption from prosecution for offences under the Act. The without issuing a permit.
3. Sections 29, 33, and 37 of the Act make it an offence to capture, possess, or transport wildlife except as authorized by the Act, its regulations, or a permit. Section 19 of the Act sets out a constrained power to grant permits:

19 (1) A regional manager or a person authorized by a regional manager may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person

(a) to do anything that the person may do only by authority of a permit or that the person is prohibited from doing by this Act or the regulations, or

(b) to omit to do anything that the person is required to do by this Act or the regulations,

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite anything contained in this Act or the regulations, that person has that authority during the term of the permit.

4. Section 2 of the *Permit Regulation*, B.C. Reg. 253/2000 under the Act provides that a regional manager may issue a permit authorizing a person to capture, possess, or transport wildlife. The Act does not allow for exemptions in the manner issued by the Ministry. Exemptions from prosecution for offences as granted by Mr. Addison are contrary to the express wording of s.19, which requires permits to issue a permit "to the extent authorized by and in accordance with regulations".
5. The rule of law requires that the exercise of all public power must find its source in law. The Ministry did not have legal authority to grant BC Hydro an exemption from prosecution for the offences under the Act outside the permitting process.
6. The delegate knew that he did not have the legal authority to grant an exemption to ss. 29, 33, and 37 of the Act. It was an abuse of process and deliberate perversion of the rule of law for the delegate to attempt to contrive a false defence of officially induced error for a project proponent and to deliberately thwart and circumvent the legislated process for issuing a permit. The purported exemption was issued in bad faith and was *ultra vires* the delegate.
7. Should BC Hydro have already completed the salvage operation, this Court should exercise its discretion to hear and determine the issues. Purported exemptions of this type are evasive of review because they are short-term and clandestine. The delegate has stated that this was not the first "exemption" he has purported to grant, and, absent adjudication of these issues, it cannot be expected to be the last.

Public Interest Costs Immunity and Costs

8. The Petitioners seek costs immunity. An award of costs against a public interest litigant in an environmental matter engaging the rule of law would be contrary to the public interest. Special costs should attend a successful public interest litigant in this context.

Enactments and Other Grounds Replied Upon


1. *Wildlife Act*, R.S.B.C. 1996, c. 488.
2. *Permit Regulation*, B.C. Reg. 253/2000
3. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.
4. *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
5. Such other enactments and grounds as counsel may identify.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Shauna Stewart, affirmed July 20, 2016.
2. Such further material that the Court may allow.

The petitioners estimate that the hearing of the petition will take 0.5 day.

Date: July 20, 2016



Jason Grat
Counsel for the Petitioners

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this petition
 with the following variations and additional terms:

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Date:

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_____ **Signature of Judge Master**