



Court File No. T-1999-14

FEDERAL COURT

MUSQUEAM INDIAN BAND

Applicant

AND:

**THE ATTORNEY GENERAL OF CANADA, THE
VANCOUVER FRASER PORT AUTHORITY, doing
business as PORT METRO VANCOUVER, and FRASER
SURREY DOCKS LIMITED PARTNERSHIP**

Respondents

NOTICE OF APPLICATION

APPLICATION UNDER Sections 17, 18, 18.1, of the *Federal Courts Act*, and
Part 5 of the Federal Court Rules.

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed
by the applicant 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 applicant. The applicant requests 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 Court Rules and serve it on the applicant's solicitor, or where the applicant is

self-represented, on the applicant, 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: Sept. 24 - 2014

Issued by: _____
(Registry Officer)

ORIGINAL SIGNED BY
SANDRA MCPHERSON
A SIGNÉ L'ORIGINAL

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

TO: Her Majesty the Queen and the Attorney General of Canada
Department of Justice
900 - 840 Howe Street
Vancouver, BC V6Z 2S9
Tel: (604) 666-2760
Fax: (604) 666-1511

AND TO: The Vancouver Fraser Port Authority, doing business as
Port Metro Vancouver
100 The Pointe
999 Canada Place
Vancouver, BC V6C 3T4

AND TO: Fraser Surrey Docks Limited Partnership
c/o Fraser Surrey Docks Ltd.
Suite 2300, Bentall 5
550 Burrard Street, Box 30
Vancouver, BC V6C 2B5

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the 24th

day of Sept. A.D. 20 14

Dated this 24th day of Sept. 2014

Sandra McPherson

APPLICATION

This is an application by the Musqueam Indian Band ("Applicant") for judicial review of a decision of the Vancouver Fraser Port Authority, doing business as Port Metro Vancouver ("PMV"), to issue project permit # 2012-072 (the "Permit") to Fraser Surrey Docks Limited Partnership ("FSD") on August 21, 2014, authorizing FSD to construct and operate a Direct Transfer Coal Facility ("Project") on the banks of the Fraser River.

The decision to approve the Project was communicated to the Applicant by PMV on or about August 25, 2014.

The Applicant seeks relief in respect of the legal obligations of PMV to justify any infringement of Musqueam's Aboriginal right to fish for food, social and ceremonial purposes.

THE APPLICANT MAKES APPLICATION FOR:

- (a) a declaration that the Project *prima facie* infringes the Applicant's Aboriginal right to fish for food, social and ceremonial purposes;
- (b) a declaration that PMV owes the Applicant a legal and constitutional duty to justify the infringement of the Applicant's Aboriginal right to fish for food, social and ceremonial purposes;
- (c) a declaration that PMV has failed to comply with its legal and constitutional duties to justify the infringement of the Applicant's Aboriginal right to fish for food, social and ceremonial purposes;
- (d) an order setting aside the Permit;
- (e) costs; and
- (f) such further and other relief as this Honourable Court may deem appropriate.

THE GROUNDS FOR THE APPLICATION ARE:

Factual Background

The Applicant

1. The Applicant is an Indian Band within the meaning of the *Indian Act*, RSC 1985, c. I-5, as amended. Members of the Applicant are an Aboriginal people within the meaning of section 35(1) of the *Constitution Act, 1982*.
2. The traditional territory used and occupied by the Applicant are the lands and waters now known as the lower mainland of British Columbia and encompassing the Greater Vancouver region, as shown on Musqueam's Statement of Intent, and includes the Georgia basin and the Fraser River estuary ("Territory"). Attached as Schedule "A" is a map of Musqueam's territory submitted to the British Columbia Treaty Commission ("BCTC") with the location of the Project marked.
3. As coastal peoples, the Musqueam have depended on the Fraser River and fishing since time immemorial. Musqueam has a proven Aboriginal right within the meaning of section 35(1) of the *Constitution Act, 1982* to fish in the Fraser River for food, social and ceremonial purposes ("Fishing Right"), as recognized by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].
4. Musqueam people have historic, cultural and spiritual ties to the fisheries within their Territory, and particularly to the salmon. Fishing remains a central and integral part of Musqueam life and tradition to this day, and the Applicant is committed to preserving its fisheries for both current and future generations of its members.
5. Following European settlement in the Lower Mainland, the Musqueam saw their rights to the land and its resources infringed by non-Aboriginal fishers and government regulation. In the face of these changes the Applicant continues to

exercise its inherent and unextinguished right to maintain Musqueam culture and ways of life, particularly in relation to fishing.

6. In contemporary times the traditional fishery has been practiced in the various reaches of the lower Fraser River and has been carried out mainly by means of gillnet fishing.
7. The Applicant relies upon its fishery to meet its food, social and ceremonial requirements now and for future generations. For the Applicant, a successful fishery relies upon, *inter alia*, access to the fishing grounds, abundance of fish and healthy fish stocks.
8. In the *Sparrow* case, the Supreme Court held the Fishing Right exists because of the integrality of salmon and salmon fishing to Musqueam life and culture since long before European contact and continuing to the present. The Court further held that, despite nearly a century of governmental regulations and restrictions on the Fishing Right, it had not been extinguished.
9. In *Sparrow*, both the British Columbia Court of Appeal and the Supreme Court of Canada accepted expert evidence regarding the extent of Musqueam's traditional territory, "which includes the Fraser River estuary" and extends "to the south shore of the main channel of the Fraser River, including the waters of the three channels by which that river reaches the ocean."

Port Metro Vancouver

10. PMV is established by Letters Patent pursuant to the *Canada Marine Act*, SC 1998, c. 10.
11. PMV exercises powers in relation to Project Permit Applications pursuant to, *inter alia*, the Port Authorities Operations Regulations, SOR/2000-55, issued under the *Canada Marine Act*.

12. Under this legislation PMV has decision-making ability and control over the approval and issuing of Project Permit Applications, including the terms and conditions upon which the projects may proceed.

Proposed Project

13. FSD is a limited partnership registered in British Columbia on December 27, 2000 and the proponent of the Project. Fraser Surrey Docks Limited is the general partner of FSD.
14. The construction works and operations of the Project are described by FSD in the Project Permit Application. According to the Permit Application the Project would export up to four million metric tonnes of thermal coal per year.
15. The coal will be shipped by train to a facility where it will be transferred from trains to barges. The loaded barges will then be towed by tug boats down the Fraser River and then north to Texada Island where the coal will be stored until transferred to deep-sea vessels and exported.
16. The Permit approves a significant increase in vessel and barge traffic on the Fraser River.

Impact on Rights

17. The increase in barge and vessel traffic on the Fraser River will adversely affect the Applicant's members' ability to practice their preferred means of exercising their Fishing Right.
18. The increase in the volume and frequency of traffic and the large size of the barges will impact the ability of the Applicant's members to safely gillnet fish in certain areas of the River. Limited fishing openings and variable tidal conditions create a fishing environment where a multitude of fishing vessels must compete for a limited fish resource. With an increase in barge traffic, there will be more instances where Musqueam fishers engaged in fishing for food, social and

ceremonial purposes will have to move fishing locations or tow drift nets out of the path of barges in order to avoid a collision.

19. The increase in the volume and frequency of traffic and the large size of the barges will disrupt an already crowded fishery and adversely impact the Applicants' members' ability to harvest fish. The congestion of fishing vessels coupled with the presence of large barges transporting coal will interfere with Musqueam fishing and will inevitably result in Musqueam fishers having to stop fishing in order to move their nets to avoid collision with these large vessels or barges. Given the limited openings and fishing times, this will result in lost fishing opportunities and the inability to harvest fish for food, social and ceremonial purposes.
20. The effect of increased barge and vessel traffic on fish and fish behaviour has not been sufficiently considered by PMV, including how the potential for fish injury and mortality from direct contact with tugs, barges, hulls and propellers, as well as habitat disturbance, juvenile fish stranding from vessel wakes, and changes in fish behaviour would affect the quantity and health of fish available for harvest by Musqueam for food, social and ceremonial purposes.
21. The risk of a variety of environmental and biological consequences of the Project, including fish exposure to coal spillage and contamination, represents a potential for serious adverse effects on the Applicant's Fishing Right.

Interactions Between Applicant and PMV

22. On June 13, 2012, FSD submitted a Project Permit Application to PMV for the construction and operation of the Project.
23. On October 22, 2012 PMV sent a referral package regarding the Project to the Applicant, followed by a supplemental package of additional information on November 1, 2012.

24. Another referral package containing updated information was sent to the Applicant by PMV on May 16, 2013, with a request for comment by June 17, 2013.
25. On June 17, 2013, the Applicant wrote to PMV and stated its lack of support for the Project as proposed, and expressed a desire to engage in more detailed discussions on the Project.
26. On July 23, 2013, the Applicant met with PMV and FSD personnel and discussed the Project. The Applicant described its specific concerns regarding the additional vessel and barge traffic and the potential environmental impacts of coal spillage and contamination. The Applicant expressed concerns about continued access to the River and advised PMV that additional vessel traffic necessitated a justification analysis of the infringement of the Applicant's Fishing Right.
27. On September 11, 2013, the Applicant wrote to PMV and advised that Musqueam has an established Aboriginal right to fish. The Applicant expressly explained that the proposed Project has the potential for significant impact upon the recognized Fishing Right, and that any infringement of that right must be justified.
28. In the letter of September 11, 2013, the Applicant presented 16 comments and questions on materials made available to the Applicant in relation to the Project, which included the Applicant's concerns regarding barge movements and potential impacts on fish and fish behaviour from increased barge and vessel traffic. The Applicant specifically requested that a biological study be conducted to properly address potential impact on protected and non-protected species along the proposed route. The letter also requested PMV to advise a convenient time for a meeting to discuss this matter and the consultation process in more detail.

29. By letter dated October 17, 2013, PMV responded to the Applicant's comments of September 11, 2013. PMV stated that additional details regarding marine life impact would be made available through an environmental impact assessment ("EIA") submitted by FSD to PMV. PMV noted this EIA would be sent to Musqueam for comment later in the fall of 2013.
30. The Applicant was notified of the public release of the EIA for comment on November 18, 2013. The EIA documentation does not address the issues and concerns set out in Musqueam's comments of September 11, 2013.
31. Once PMV completed its internal Planning Review and Environmental Assessment Procedure, it prepared a Project Review Report of the Project on August 15, 2014. Section 5.1 of the Report addresses First Nations Consultation. This section states that anticipated increases in vessel traffic will not result in "significant adverse impacts to Aboriginal and Treaty Rights." The section summarizes various First Nations' concerns, but does not list the Applicant's concerns regarding potential impact to fish and fish behaviour. The Report states there are no outstanding issues in regards to First Nations' consultation comments. The section concludes by noting that the PMV Manager of Aboriginal Affairs has reviewed the record and is of the view that the duty to consult has been fulfilled. No mention is made of duty to justify any infringement of the Applicant's Fishing Right.
32. On August 21, PMV issued the Permit to FSD approving the Project.
33. The issuance of the Permit and the approval of the Project were communicated by PMV to the Applicant by letter dated August 21, 2014, and received by the Applicant on or about August 25, 2014. The letter directed the Applicant to the PMV website for related decision documents, including the Project Review Report dated August 15, 2014.
34. On August 28, 2014 the Applicant wrote PMV expressing shock at the Project approval, and indicated that PMV had yet to justify the infringement to the Fishing

- Right constituted by the Project or to have meaningful consultations with the Applicant. The Applicant stated that it did not consider the project updates sent by PMV from time to time as constituting appropriate or meaningful consultation.
35. The Applicant further requested that PMV provide a written statement of how PMV justifies the issuance of the Permit and the impact this will have on Musqueam's ability to fish in accordance with the *Sparrow* decision. In addition, the Applicant requested that PMV exercise its right under General Condition #7 of the Permit to include a new Condition that no action may be taken under the Permit until PMV has justified the proposed infringement, had meaningful consultations with the Applicant, and inserted other revised conditions into the Permit which ensure the Applicant's Aboriginal rights are protected.
36. The Applicant wrote PMV again on September 17, 2014 requesting a response to the letter of August 28. The Applicant also expressly stated that its concerns regarding potential impact on fish and fish behaviour were not addressed within the EIA or by a biological assessment as requested. The Applicant again expressed hope that the matter could be resolved by placing new conditions in the approved Permit.
37. PMV responded to the Applicant's letter of August 28, 2014 on September 18, 2014. PMV indicated its view that the consultation conducted in relation to the Project was adequate and meaningful. PMV determined that the Project is not expected to adversely impact Aboriginal rights, and therefore justification for infringement is not required. In arriving at this conclusion, PMV stated that the Supreme Court of Canada decision in *Sparrow* is only relevant in situations where the Crown seeks to directly regulate the Fishing Right.

Grounds for Judicial Review

38. The Applicant has an existing and proven Aboriginal right to fish for food, social and ceremonial purposes in its Territory. The Applicant exercises this Fishing

Right in the various reaches of the Fraser River subject to the coal barge traffic of the Project.

39. At all material times, PMV had or ought to have had knowledge of the Applicant's Fishing Right. Further, at all material times, PMV had knowledge that approval of the Project could have an adverse impact on the Fishing Right.
40. Particulars of PMV's knowledge include, but are not limited to, the following facts:
 - (a) The lands, water, and resources in the Territory were used and occupied by the Ancestors of the Applicant prior to assertion of Crown sovereignty over British Columbia in 1846;
 - (b) In 1976 the Musqueam adopted and signed the Musqueam Declaration, openly and publicly affirming that Musqueam holds Aboriginal title to its land, and Aboriginal rights to exercise use of its land, the sea and fresh waters;
 - (c) In 1990 the Supreme Court of Canada recognized the Applicant's Fishing Right;
 - (d) In 1991 the Applicant's Comprehensive Claim in relation to its Aboriginal title was accepted for negotiation by Canada;
 - (e) In 1993 the Applicant submitted a Statement of Intent to the BCTC to negotiate a treaty with respect to the Territory, including the Fraser River estuary. The Applicant was accepted into the BCTC Process by Canada and British Columbia; and
 - (f) Since PMV's announcement to consider the Project application, the Applicant has met with PMV from time to time and advised them of:
 - (i) its established Fishing Right and the exercise of that right;
 - (ii) the importance of the Fishing Right;

- (iii) the need for continued access to the Fishing Right;
- (iv) its concerns about the potential impacts of the Project on the Fishing Right; and
- (v) the need for additional study of environmental impacts on fish and fish behaviour.

41. The Permit amounts to a *prima facie* infringement of the Applicant's Fishing Right. In particular, the Permit approves a significant increase in barge and vessel traffic on the Fraser River, which in turn will adversely affect the Applicant's members' ability to practice their preferred means of exercising their Fishing Right in the Territory at their preferred locations. The Project approved by the Permit would interfere with the Fishing Right in a more than insignificant or trivial way.
42. PMV cannot justify the infringement because: a) the Permit was not issued in pursuit of a compelling or substantial legislative objective; b) PMV failed to discharge its duty to consult and accommodate the Applicants; c) if the Permit was issued in pursuit of a compelling and substantial legislative objective, then the Permit and its particular terms were not necessary to achieve that objective; d) the Permit infringes the Fishing Right more than necessary to achieve the objective; e) PMV did not give priority to the Fishing Right in deciding to issue the Permit; and f) the benefits that are expected to flow from the Project are outweighed by the adverse effects on the Fishing Right.
43. Such further and additional grounds as counsel may identify and this Honourable Court may consider.

This Application will be supported by the following material:

- (a) Affidavit of Chief Wayne Sparrow to be sworn and filed.
- (b) Affidavit of Leona Sparrow to be sworn and filed.

- (c) Affidavit of Geoff Wickstrom to be sworn and filed.
- (d) Such further and additional affidavits as counsel may advise.
- (e) Such further and additional materials as counsel may advise.

Date: September 24, 2014



Maria Morellato, QC
Mandell Pinder LLP
Barristers and Solicitors
422 - 1080 Mainland Street
Vancouver, BC V6B 2T4
Tel: 604.681.4146 Fax: 604.681.0959
Counsel for the Applicant

Musqueam SOI Boundary and the location of Fraser Surrey Docks

Legend

- Musqueam Indian Reserves
- Musqueam SOI Boundary
- PMV - Fraser Surrey Docks Expansion

