Federal Court  Cour fédérale

Date: 20140214

Docket: T-1777-12

Citation: 2014 FC 148

Ottawa, Ontario, February 14, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

WESTERN CANADA WILDERNESS COMMITTEE, DAVID SUZUKI FOUNDATION, GREENPEACE CANADA, SIERRA CLUB OF BRITISH COLUMBIA FOUNDATION, AND WILDSIGHT

Applicants

And

MINISTER OF FISHERIES AND OCEANS AND MINISTER OF THE ENVIRONMENT

Respondents

REASONS FOR ORDER AND ORDER

[1] Where a species is identified as being endangered, threatened or extirpated, the *Species at Risk Act,* S.C. 2002, c. 29 ("*SARA*" or "the Act") requires that a proposed recovery strategy for the species in question be published by the competent minister within a fixed period of time. The statute further requires the Minister to publish a final recovery strategy shortly thereafter.

[2] The Minister of Fisheries and Oceans did not comply with the statutory timelines for the preparation and publication of recovery strategies for the White Sturgeon, Nechako River population (the "Nechako White Sturgeon") and the Humpback Whale, North Pacific population (the "Pacific Humpback Whale"). Nor did the Minister of the Environment comply with the statutory timelines for the preparation and publication of recovery strategies for the Marbled Murrelet and the Woodland Caribou, Southern Mountain population (the Southern Mountain Caribou"). These are the four species at issue in these consolidated applications for judicial review (collectively "the four species").

[3] The Ministers' failure to act in a timely fashion in relation to the four species led the applicants to commence these applications for judicial review. The applicants seek declaratory relief regarding the Ministers' conduct and orders of *mandamus* to compel the Ministers to perform their statutory duties in relation to the four species.

[4] The commencement of this litigation prompted the publication of proposed recovery strategies for three of the four species shortly before the start of the hearing, as well as the publication of a final recovery strategy for one of these species. A proposed recovery strategy was published for the fourth species shortly after the hearing was concluded. In each case, however, the proposed recovery strategy was published *several years* after the expiry of the relevant statutory timeline.

[5] The Ministers admit that they have failed to comply with their statutory obligations under *SARA*. Where they disagree with the applicants is in relation to the legal consequences that should follow from this breach.

[6] For the reasons that follow, I have concluded that the applications for judicial review should be granted, and that in light of the egregious delays in each case, a declaration should issue in relation to the Ministers' conduct.

[7] Given that proposed recovery strategies have now been published for all four of the species at issue, the applications for *mandamus* will be dismissed insofar as they relate to proposed recovery strategies. In accordance with the agreement of the parties, I will retain jurisdiction over this matter so as to allow the parties to make further submissions as to whether orders of *mandamus* should issue in relation to the publication of final recovery strategies for the three species for which such strategies have not yet been published.

The Parties

[8] The applicants, the Western Canada Wilderness Committee, the David Suzuki Foundation, Greenpeace Canada, the Sierra Club of British Columbia Foundation and Wildsight are non-governmental organizations working to protect Canada's environment and preserve Canada's species at risk. They identify themselves as public interest litigants who have an interest in the protection and recovery of species at risk in Canada.

[9] No issue has been taken by the Ministers with respect to the applicants' standing to bring these applications.

[10] The respondent Minister of Fisheries and Oceans and Minister of the Environment are "competent ministers" under section 2 of *SARA* responsible for the four species in issue in these applications. The Minister of Fisheries and Oceans is the competent minister for the Nechako White Sturgeon and the Pacific Humpback Whale, whereas the Minister of the Environment is the competent minister for the Marbled Murrelet and the Southern Mountain Caribou.

The *Species at Risk Act*

[11] The relevant provisions of *SARA* came into force on June 5, 2003. Enactment of *SARA* had the effect of incorporating the objectives of the *Convention on Biological Diversity* (negotiated under the guidance of the United Nations and ratified by Canada in December 1992) into Canadian legislation.

[12] The purposes of *SARA* are identified in section 6 of the Act as being "...to prevent wildlife species from becoming extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened". The full text of the relevant provisions of *SARA* are attached as an appendix to these reasons.

[13] Section 2 of the Act defines "species at risk" as meaning "an extirpated, endangered or threatened species or a species of special concern". An "extirpated species" is one "that no

longer exists in the wild in Canada, but exists elsewhere in the wild". An "endangered species" is "a wildlife species that is facing imminent extirpation or extinction", whereas a "threatened species" is "a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction". Finally, "a species of special concern" is "a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats".

[14] *SARA* creates a process for the classification of species by level of risk. Section 14 of the Act establishes the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), which is an independent committee of experts. Pursuant to subsection 15(1) of the Act, COSEWIC is mandated to assess the status of each wildlife species that it considers to be at risk, identify existing and potential threats to the species, and classify the species as being extinct, extirpated, endangered, threatened or of special concern.

[15] If a species is classified as being "at risk", then the Minister of the Environment must make a recommendation to the Governor in Council to either list the species in Schedule 1 to the Act with the classification assigned by COSEWIC, not list the species or send the matter back to COSEWIC for reconsideration.

[16] Once a species is listed in Schedule 1 to the Act, section 37(1) provides that the competent minister must prepare a recovery strategy for the species in question and statutory timelines begin to run.

[17] Section 42(1) of the Act provides that in the case of an endangered species, the competent minister must include a proposed recovery strategy for the species in the public registry established under section 120 of the Act within one year of the species being listed in Schedule 1. A proposed recovery strategy must be posted in the public registry within two years after the species is listed in the case of threatened or extirpated species.

[18] Where species are listed in Schedule 1 on the day that the relevant provisions of the Act came into effect, section 42(2) of *SARA* requires that the competent minister must include a proposed recovery strategy in the public registry within three years of that date, in the case of endangered species, and within four years, in the case of threatened or extirpated species.

[19] Where a species is added to Schedule 1 by the Governor in Council as the result of an assessment under section 130 of the Act, section 132 of *SARA* requires that a recovery strategy for the species must be prepared within three years in the case of endangered species, and within four years in the case of threatened species.

[20] Regardless of the process followed in listing the species, once a proposed recovery strategy has been posted for a species at risk, section 43 of the Act provides a 60 day period for public comment. The competent minister then has a further 30 days in which to review the comments received, make the appropriate changes and finalize the recovery strategy by posting it in the public registry.

[21] Recovery strategies must address the threats to the survival of the species, including any loss of critical habitat. The Minister must then prepare an action plan based upon the recovery strategy. There is no statutory timeline for the preparation of an action plan.

[22] As noted above, the timelines for the production of proposed and final recovery strategies depend on the level of risk assessed, and which of several processes was followed in relation to the listing of the species in question. I do not understand there to be any material disagreement between the parties with respect to the applicable timelines identified in the following paragraphs.

Nechako White Sturgeon

[23] The Nechako White Sturgeon was listed as an endangered species on Schedule 1 of *SARA* on August 15, 2006, as a result of an assessment under section 130 of the Act. The respondents admit that in accordance with section 132 of the Act, the Minister of Fisheries and Oceans was required to post a proposed recovery strategy for the Nechako White Sturgeon in the public registry created under the Act within three years - that is by August 15, 2009. The Act further required that a final recovery strategy be posted in the public registry by no later than November 16, 2009.

[24] At the time that the applicants commenced their application for *mandamus* with respect to the proposed recovery strategy for the Nechako White Sturgeon on September 25, 2012, the proposed recovery strategy had not yet been posted and was more than three years overdue.

[25] The respondents also admit that as a result of the commencement of this litigation, a decision was made by the Minister of Fisheries and Oceans to prioritize this case. This led to a proposed recovery strategy for the Nechako White Sturgeon being posted in the public registry in mid-December, 2013 - less than a month before the start of this hearing, and more than four years after the statutory time limit for the posting of such a document had passed.

Pacific Humpback Whale

[26] The Pacific Humpback Whale was listed as a threatened species in Schedule 1 of the *SARA* on January 12, 2005, as the result of an assessment under section 130 of the Act. The Minister of Fisheries and Oceans was therefore required to post a proposed recovery strategy for the Pacific Humpback Whale in the public registry by January 12, 2009, with a final recovery strategy due by April 14, 2009.

[27] At the time that the applicants commenced their application for *mandamus* with respect to the proposed recovery strategy for the Pacific Humpback Whale, the proposed recovery strategy had not yet been posted and was nearly four years late.

[28] As was the case with the Nechako White Sturgeon, the commencement of this litigation caused the Minister of Fisheries and Oceans to move on this case. A proposed recovery strategy for the Pacific Humpback Whale was posted in the public registry on July 17, 2013, and a final recovery strategy was released on October 21, 2013 - more than four years after it was due.

[29] Because a final recovery strategy has now been posted for the Pacific Humpback Whale, the applicants are no longer seeking an order of *mandamus* with respect to this species, although they maintain their claim for declaratory relief.

Marbled Murrelet

[30] The Marbled Murrelet is a small fish-eating sea bird that forages in British Columbia coastal waters and adjacent old-growth forests. The Marbled Murrelet was listed as a threatened species on June 5, 2003. As a consequence, a proposed recovery strategy was to have been posted by no later than June 5, 2007, with the final strategy due by September 6, 2007.

[31] At the time that the applicants commenced their application for *mandamus* with respect to the proposed recovery strategy for the Marbled Murrelet in September of 2012, no proposed recovery strategy had yet been posted in the public registry and it was more than five years late.

[32] The commencement of this litigation also prompted the Minister of the Environment to move this case forward, and a proposed recovery strategy for the Marbled Murrelet was posted in the public registry on January 7, 2014 - the day before the start of the hearing, and some six and half years after the statutory time limit for the posting of such a document had passed.

Southern Mountain Caribou

[33] The Southern Mountain Caribou was listed as a threatened species on June 5, 2003. A proposed recovery strategy should therefore have been posted by no later than June 5, 2007, with the final recovery strategy required to have been posted by September 6, 2007. No proposed

recovery strategy for the Southern Mountain Caribou had been posted at the time that this case was heard. However, counsel for respondents advised that the Minister of the Environment had committed to posting a proposed recovery strategy by January 17, 2014, and I was subsequently advised by that this in fact occurred on that date - some six and a half years after it was due.

The Applications for Judicial Review

[34] The applicants commenced their four applications for judicial review on September 25, 2012. They chose a terrestrial mammal and a migratory bird for whom the Minister of the Environment was responsible, together with an aquatic mammal and a fish under the jurisdiction of the Minister of Fisheries and Oceans as the subjects of their applications.

[35] The applicants characterize these four applications as being representative of the endemic systemic problems that have been encountered with both the Minister of Fisheries and Oceans and the Minister of the Environment in relation to the implementation of the recovery strategy provisions of *SARA*.

[36] By way of relief, the applicants seek a declaration declaring unlawful the Ministers' ongoing failure or refusal to include proposed recovery strategies for the four species in the public registry as he or she was required to do pursuant to the provisions of *SARA*.

[37] The applications also seek orders of *mandamus* compelling the competent minister to include proposed recovery strategies for each of the four species in the public registry within 30 days of the date of the Court's judgment and to include final recovery strategies for the four

species in the public registry within 90 days from the date on which the relevant proposed recovery strategy is included in the public registry.

[38] Finally, the applicants seek their costs, if successful, or an order that the applicants not be required to pay the Ministers' costs, in the event the applications are dismissed.

[39] By Order of Prothonotary Lafrenière, the four applications were consolidated and ordered to be heard together on the basis of a common evidentiary record.

The Minsters' Concessions

[40] The Ministers have made a number of admissions and concessions that have greatly assisted in limiting and focusing the issues in this case.

[41] In particular, the Ministers acknowledge that:

1. *SARA* does not confer any discretion on the Ministers to extend the time for the performance of their statutory duties with respect to the preparation and posting of proposed and final recovery strategies for species at risk;

2. The Ministers are legally required to comply with the statutory timelines and they have not done so in these cases;

3. The breaches of the statutory timelines at issue in these proceedings were not minor: there were "substantial delays" in the preparation of the proposed recovery strategies for each of the four species, and the posting of the documents was "seriously overdue"; and

4. While the Ministers have provided explanations for the delays in posting the proposed recovery strategies for each of the four species, these explanations do not change the

> fact that the Ministers have failed to comply with the provisions of *SARA*.

[42] Counsel for the respondents states that the explanations provided for the delays in posting draft recovery strategies for the four species are not being offered as a justification for the Ministers' failure to comply with the provisions of the Act. Rather the reasons for the delays are something that the Court should take into account in deciding whether or not *mandamus* should issue, and in determining the terms of any such order.

[43] The respondents have provided extensive affidavit evidence from four affiants: two senior managers within the Department of Fisheries and Oceans and two from Environment Canada.

[44] Before reviewing the explanations provided by the Ministers, however, it is first necessary to address the motions brought by the parties with respect to the affidavit evidence filed in this matter.

The Motions to Strike

[45] The applicants brought a motion to strike portions of the respondents' evidence prior to commencement of the hearing. The respondents then brought a cross-motion seeking to strike portions of the affidavit of the applicants' main affiant, which Prothonotary Lafrenière described in his August 8, 2013 Order as being essentially a "'tit-for-tat' reaction", rather than one motivated by a genuine concern about prejudice arising out of the affidavit in issue.

[46] Prothonotary Lafrenière agreed with the applicants that portions of the respondents' affidavits "contain some hearsay, speculation, arguments and conclusions rather than facts, and opinion evidence". However, he was not persuaded that leaving the impugned evidence in the record would give rise to any serious prejudice or impede the orderly disposition of these proceedings. Consequently, he dismissed both motions, without prejudice to the rights of the parties to renew their arguments at the hearing on the merits.

[47] At the hearing, the parties agreed that they were content to leave the impugned portions of their opponents' evidence in the record, and to have their objections taken into account by the Court in determining the weight to be ascribed to the competing evidence. The applicants also confirmed that they are no longer seeking leave to file further affidavits in this matter in response to some of the respondents' evidence.

[48] In light of the recent developments in this case, as well as the various concessions and admissions made by counsel for the Ministers, it has not been necessary to review the parties' evidence in any detail in these reasons. While I agree with the applicants that there are frailties in some of the respondents' evidence, I have nevertheless taken all of the evidence into account in arriving at my decision.

The Ministers' Explanations

[49] Although the facts giving rise to the delays in posting proposed recovery strategies differ somewhat from species to species, the respondents highlight four central challenges they say that they faced in preparing proposed recovery strategies for the four species.

[50] First, the enactment of *SARA* required the Ministers to develop new policies, standards, administrative structures and consultation processes. They also had to acquire the scientific expertise that was required to implement the legislation. All of this took time.

[51] Secondly, several of the respondents' affiants attribute at least some of the delays in producing recovery strategies to "organizational capacity issues", including staff turnover. Delays were also attributed to the need to manage competing legal duties, including the need to consult with stakeholders including provincial governments, First Nations, landowners and industry representatives.

[52] It should, however, be noted that although a lack of resources was a recurring theme in the respondents' evidence, counsel for the respondents advised the Court that he had been specifically instructed not to raise a lack of resources as a justification for the delay in posting proposed recovery strategies for the four species.

[53] Thirdly, the Ministers say that they faced scientific challenges, particularly in relation to the identification of critical habitat for the species in question.

[54] "Critical habitat" is defined in section 2 of *SARA* as "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". The identification of the species' critical habitat is necessary to the survival and recovery of a species: indeed, the

preamble to *SARA* describes the preservation of the habitat of species at risk as being "key to their conservation".

[55] Finally, the Ministers describe the challenges that they say they faced in responding to change, in particular, the evolving understanding of the law resulting from various decisions of this Court. For example, the Department of Fisheries and Oceans undertook "an extensive policy analysis" in order to develop new operational guidelines for identifying critical habitat in the wake of this Court's decisions in *Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans)*, 2009 FC 878, 349 F.T.R. 225 ("*Nooksack Dace*") and *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans),* 2010 FC 1233, [2012] 3 F.C.R. 136 rev'd in part on other grounds 2012 FCA 40, 427 N.R. 110 ("*Orca*").

The Consequences of the Ministers' Failure to Act

[56] The applicants point out that the failure to post recovery strategies for the four species in a timely manner has had adverse consequences for the species as it deprives them of an identified critical habitat. This in turn prevents the implementations of recovery measures, and denies the species the legal protection of their critical habitat and the prohibition of its destruction.

[57] The applicants are particularly concerned that the critical habitat of the four species is at risk from industrial development affecting the coast of British Columbia. As an example, the applicants cite Enbridge's proposed Northern Gateway pipeline development project which, they say, will have a negative impact on all four of the species at issue in these applications. I do not

understand the respondents to take issue with this proposition, although they do deny that recovery strategies have been intentionally delayed in order to facilitate industrial development.

[58] The Ministers submit that the work done in the preparation of proposed recovery strategies for the four species was used by their Departments in formulating submissions to the Enbridge Northern Gateway Project Joint Review Panel. The submissions related to the potential impact of the project on the four species and potential mitigation measures to lessen those impacts.

[59] I accept that the work done by the Ministers in relation to proposed recovery strategies for the four species may well have been of assistance in formulating submissions to the Enbridge Northern Gateway Project Joint Review Panel with respect to the potential impact of the project on the four species.

[60] That said, the absence of posted recovery strategies deprives the Ministers of considerable leverage in dealing with the impact of industrial development on species at risk. Moreover, the making of submissions to a regulatory panel of this nature cannot be equated to the level of protection that would be provided to the four species, had recovery strategies been posted for them in a timely fashion. As the applicants point out, the respondents' statutory duties to prevent the destruction of "critical habitat" are not generally triggered until such habitat has been identified in a recovery strategy or action plan for the species.

The Issues

[61] The parties have characterized the issues raised by these applications in different ways. I agree with the respondents that the cases ultimately raise two fundamental questions. The first is whether there has been a breach of the Ministers' statutory duty to post proposed recovery strategies for the four species within the statutory timelines. As noted earlier, the respondents concede that there has indeed been such a statutory breach.

[62] This leads us to the second question, which is what consequences should flow from that breach? I will deal with the issues identified by the applicants, including the relevance of a standard of review analysis to this case and the legal nature of the statutory timelines in issue, in that context.

Should Declaratory Relief be Granted?

[63] The Ministers submit that declaratory relief should not be granted in this case. According to the Ministers, the fact that they have conceded that they were legally required to meet the statutory timelines for the posting of proposed recovery strategies and that they failed to do so means that declarations would serve no practical utility.

[64] In support of this contention, the respondents rely on the decision of the Supreme Court of Canada in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 14, where the Court stated that "Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation". See also *Solosky v Her Majesty the Queen*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745.

[65] While this is unquestionably true as a general proposition, the Court has a broad discretionary power in relation to the granting of declaratory relief, and there are cases where the granting of such relief may nevertheless be appropriate: see, for example, *K'Omoks First Nation v. Canada (Attorney General)*, 2012 FC 1160, 419 F.T.R. 144, at para. 44. This is just such a case.

[66] Declaratory relief may address the legality of government action, both prospectively and retrospectively: *Reece v. Edmonton (City)*, 2011 ABCA 238, 335 DLR (4th) 600, at para. 163, per Chief Justice Fraser, dissenting, but not on this point. Moreover, public officials are not above the law. If an official acts contrary to a statute, the Courts are entitled to so declare: see *Singh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 757, 372 F.T.R. 40, at para. 40, citing *Canada v. Kelso*, [1981] 1 S.C.R. 199 at 210.

[67] A review of the record in these matters gives rise to a number of concerns. The development of a proposed recovery strategy for a species at risk is undoubtedly a complex process involving the need to reconcile competing statutory requirements and Departmental priorities, and to consult with multiple stakeholders, other levels of government and First Nations. The process also presents the Ministers with various administrative challenges, and involves an evolving base of scientific knowledge. One has to assume, however, that Parliament knew what it was doing when it established the timelines for the preparation of proposed recovery strategies in sections 42 and 132 of *SARA*.

[68] It is apparent that the posting of proposed recovery strategies were delayed in these cases, in part, as a result of a desire to achieve consensus amongst the stakeholders. This is particularly so for the aquatic species under the jurisdiction of the Minister of Fisheries and Oceans.

[69] While the achievement of a consensus may be desirable, it is not a legislative requirement for a recovery strategy. Indeed, section 39 of *SARA* only contemplates that there be cooperation with others "to the extent possible". Subject to the Ministers' constitutional obligations to consult with First Nations, I agree with the applicants that consensus should not be pursued at the expense of compliance with the Ministers' statutory obligations.

[70] Furthermore, as one of the Ministers' own affiants has observed, a recovery strategy should be science-based, not consensus-based: see the cross-examination of Robert McLean, the Executive Director of Environment Canada's Canadian Wildlife Service, at pages 3007 and 3022 of the applicants' record. See also *Nooksack Dace*, at para. 41.

[71] Insofar as the scientific basis for the proposed recovery strategies is concerned, I agree with the applicants that "the perfect should not become the enemy of the good" in these cases. Section 38 of *SARA* (which incorporates the "precautionary principle" into the Act) is very clear: the preparation of a recovery strategy for a species at risk "should not be postponed for a lack of full scientific certainty".

[72] The precautionary principle was discussed by the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R.

241. Citing the Bergen Ministerial Declaration on Sustainable Development (1990), the Court noted that "[e]nvironmental measures must anticipate, prevent and attack the causes of environmental degradation". As a result, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation": at para. 31

[73] Indeed, as Justice Russell observed in his decision in the *Orca* case, "[e]ndangered species do not have time to wait for [the competent minister] to 'get it right'": at para. 66.

[74] It is also important to remember that proposed recovery strategies are, by their very nature, open to change based upon additional input received by the competent minister through the consultation process. Moreover, the content of final recovery strategies and action plans are not cast in stone. *SARA* specifically contemplates that amendments can be made to each document at any time (see subsection 45(1) in the case of recovery strategies and subsection 52(1) in the case of action plans).

[75] It is also apparent from a review of the record that conscious decisions were made from time to time within the Ministers' Departments to delay or defer the preparation of proposed recovery strategies for the four species.

[76] By way of example, in the case of the Marbled Murrelet, multiple proposed recovery strategies were prepared for the bird between 2003 and 2007. A proposed recovery strategy was sent to the headquarters of Environment Canada's Canadian Wildlife Service for approval and

posting in February of 2008 (eight months after the expiry of the relevant statutory timeline for the posting of the document).

[77] According to the respondents' evidence, the proposed recovery strategy was then "queued for review and approval". However, it was not reviewed by headquarters personnel for over a year. When the document was finally reviewed by the Executive Committee of the Canadian Wildlife Service in the Spring of 2009, certain rewrites to the document were required, although I note that there is some disagreement between the respondents' affiants as to the extent of the additional work that was necessary in order to finalize the document at the regional level.

[78] According to the affidavit of Dr. Barry Douglas Smith, the Regional Director of Environment Canada's Canadian Wildlife Service's Pacific and Yukon Region, the re-writes were completed with the intent to post the proposed recovery strategy for the Marbled Murrelet in the public registry by the summer of 2009: Smith affidavit at para. 80. However, the release of this Court's decision in *Alberta Wilderness Assn. v. Canada (Minister of Environment)*, 2009 FC 710, 349 F.T.R. 63 ("*Sage Grouse*") in the summer of 2009 caused publication to be postponed so as to allow for at least a partial identification of the species' critical habitat.

[79] What happened next? The short answer is: not much. Dr. Smith deposes that due to staff shortages and "the need to make progress against the large number of overdue recovery strategies for other species", work to identify the critical habitat for the Marbled Murrelet was not completed in 2009-2010 and the decision was made to defer the work to the next financial year: Smith affidavit at para. 84.

[80] However the work was not completed in the 2010-2011 financial year either. Dr. Smith explains in his affidavit that "due to significant capacity constraints" he "deemed it an acceptable risk to prioritize work on species at risk with smaller populations and more immediate threats": Smith affidavit at para. 85.

[81] Staffing issues also appear to have prevented any substantive work being carried out on the proposed recovery strategy for the Marbled Murrelet in the 2011-2012 fiscal year. Indeed, it was not until it was identified as a priority matter in November of 2012 that substantive work on a proposed recovery strategy for the Marbled Murrelet recommenced - after this litigation had been started, and more than five years after *SARA* required that a proposed recovery strategy be posted for the bird: Smith affidavit at paras. 86-88.

[82] As was noted earlier, a proposed recovery strategy for the Marbled Murrelet was posted in the public registry on January 7, 2014 - the day before the commencement of this hearing, and some six and half years after the statutory time limit for the posting of such a strategy had passed.

[83] While the cause of much of the delay described by Dr. Smith in his affidavit ultimately boils down to a question of resources, it bears repeating that the Ministers expressly do not rely on a lack of resources as a justification for the delay in relation to the species at issue in these applications.

[84] The commencement of this litigation has caused the responsible Ministers to put these files “on the top of the pile”, with the result that proposed recovery strategies have now been posted for the four species. However, the flurry of recent activity on these files does not address any deterioration in conditions for the four species at issue that may have occurred in the intervening years when the Ministers were in breach of their statutory duties.

[85] It is, moreover, apparent that the delays encountered in these four cases are just the tip of the iceberg. There is clearly an enormous systemic problem within the relevant Ministries, given the respondents’ acknowledgment that there remain some 167 species at risk for which recovery strategies have not yet been developed. In this regard it is noteworthy that the Ministers acknowledge that they have not complied with the statutory timelines for the preparation and posting of proposed recovery strategies for any of the other 167 species.

[86] Indeed, it is reasonable to assume that the acceleration of progress on these four cases in response to the commencement of this litigation could well have caused further delays in the preparation of recovery strategies for other species

[87] However, responding on an *ad hoc* basis to external pressures such as pending litigation fails to take into account the fact that Parliament has itself assigned priorities in dealing with these matters, by fixing different timelines for the preparation of proposed recovery strategies for listed species that are based upon the extent to which the species are at risk.

[88] The respondents agree that the applicants should not be expected to commence 167 additional applications for judicial review in order to compel the responsible Ministers to comply with their statutory duties. Nor would this be an answer to the underlying systemic problems that exist in the species at risk protection process, as clearly one cannot prioritize every case without rendering prioritization meaningless.

[89] I agree with the respondents that bad faith has not been demonstrated in these cases. However, the respondents also acknowledge that bad faith is not required for declaratory relief to be granted.

[90] The Supreme Court of Canada has observed that adherence to the rule of law is a major feature of the Canadian democracy: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at para. 31. Moreover, as Chief Justice Fraser observed in her dissenting opinion in *Reece*, the rule of law allows citizens to come to the Courts to enforce the law as against the executive branch of government.

[91] Chief Justice Fraser went on to observe that "… [C]ourts have the right to review actions by the executive branch to determine whether they are in compliance with the law and, where warranted, to declare government action unlawful. This right in the hands of the people is not a threat to democratic governance but its very assertion": at para. 159.

[92] It is simply not acceptable for the responsible Ministers to continue to miss the mandatory deadlines that have been established by Parliament. In the circumstances of these

cases, it is therefore both necessary and appropriate to grant the applicants the declaratory relief that they are seeking, both as an expression of judicial disapproval of the current situation and to encourage future compliance with the statute by the competent ministers.

[93] Indeed, the issues that were originally raised by these applications are “genuine, not moot or hypothetical” insofar as there remain numerous species at risk for which the posting of proposed recovery strategies is long overdue: *Danada Enterprises Ltd. v. Canada (Attorney General)*, 2012 FC 403, 407 F.T.R. 268 at para. 67. I am, moreover, satisfied that a declaration will serve a useful purpose and will have a “practical effect” in resolving the problems identified by these cases: see *Solosky*, above, at 832-833.

[94] Accordingly, a declaration will issue declaring the Ministers’ failure to include proposed recovery strategies for the four species in the public registry within the statutory time periods set out in sections 42 and 132 of *SARA* to be unlawful. Given that the statutory timeline for posting final recovery strategies for three of the four species has not yet passed, and there appears to have been substantial compliance with the statutory timelines for the posting of a final recovery strategy for the Pacific Humpback Whale, I decline to grant any declaratory relief in this regard.

[95] Before leaving this issue, I would note that the parties spent some time in their submissions discussing whether the timelines established by *SARA* for the posting of proposed recovery strategies were “mandatory” or “directory”. While asserting that this is “an irrelevant distraction” in this case, the applicants nevertheless submit that the timelines are “mandatory”, as

SARA provides that relevant competent minister "*must*" post proposed and final recovery strategies within certain specified timeframes.

[96] In contrast, the respondents contend that the *SARA* timelines are not mandatory in the "administrative law sense", but are rather "directory". In support of this contention, the respondents point out that the duty being discharged is a public one, and the Act does not provide for a penalty for failure to comply with the timelines in issue. Moreover, the balance of inconvenience suggests that the timelines should be interpreted as directory rather than mandatory because interpreting them as mandatory would be contrary to achieving the goals of *SARA*.

[97] In particular, the respondents say that interpreting the timelines as mandatory would mean that the Ministers would lose the power to post recovery strategies for the species at risk once the deadlines set out in the Act had passed

[98] It is apparent from the jurisprudence cited by the parties that the significance of the distinction between "mandatory" or "directory" timelines is that, as the respondents suggest, a public authority exercising a statutory power loses jurisdiction once the timeline has passed: see *Reference re Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721, [1985] S.C.J. No. 36, at para. 35.

[99] In this case, the parties all agree that the Ministers do *not* lose jurisdiction after the expiry of the time periods set out in sections 42 and 132 of *SARA*, and can continue to develop and post proposed recovery strategies after expiry of the time periods specified in the legislation.

[100] Given the parties' agreement on this point, I do not need to decide whether the timelines contained in sections 42 and 132 of *SARA* are mandatory or directory. However, the fact that the timelines may be directory rather than "mandatory" (in the legal sense) does not mean that they are optional, or that the responsible Ministers do not have to comply with them. Indeed, counsel for the Ministers acknowledged that the Ministers are indeed required to comply with the statute in this regard.

[101] To state the obvious, the *Species at Risk Act* was enacted because some wildlife species in Canada *are at risk*. As the applicants note, many are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake.

[102] The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk.

The Applicants' Request for *Mandamus*

[103] The next issue for consideration is the applicants' request for *mandamus*.

[104] The applicants' Notices of Application seek orders of *mandamus* compelling the relevant competent minister to include a proposed recovery strategy for each of the four species in the public registry within 30 days of the Court's judgment in this matter.

[105] Orders of *mandamus* are also sought to compel the relevant competent minister to include final recovery strategies for the four species in the public registry within 90 days of the Court's judgment.

[106] As noted earlier, both a proposed and a final recovery strategy have already been posted for the Pacific Humpback Whale, with the result that the applicants no longer seek an order of *mandamus* in this regard.

[107] Insofar as the other three species are concerned, the Ministers' memorandum of fact and law states that they do not dispute that most of the elements of the test for *mandamus* established by Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, [1993] F.C.J. No. 1098, have either been met in this case, or are not applicable.

[108] However, the Ministers took the position in their memorandum that the right to the performance of their statutory duty had not been established insofar as the requests for *mandamus* with respect to the posting of proposed recovery strategies for the three remaining species are concerned. This is because they say that the delay in these cases is not unreasonable in light of the explanations that have been provided.

[109] The applicants submit that the Federal Court of Appeal has already determined in its decision in *Orca* that the standard of review applicable to the Ministers' interpretation of the provisions of *SARA* is that of correctness: see *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40, [2012] F.C.J. No. 157, at paras. 6 and 98-105.

[110] In light of this, the applicants say that the Ministers should not be allowed to do an 'end run' around the Federal Court of Appeal's decision in *Orca* by applying a reasonableness analysis in assessing the Ministers' conduct when deciding whether *mandamus* should issue.

[111] I have some difficulty with the applicants' submissions on this point, given that there is no disagreement between the parties as to the proper interpretation of the relevant provisions of *SARA*.

[112] What is at issue in these proceedings is not the judicial review of a Ministerial decision or action, but rather an attempt to compel the performance of a statutory duty in light of prolonged inaction. As such the question is whether the requirements of *mandamus* have been met. One of these involves the determination of whether the Ministers have provided a reasonable explanation for the delay.

[113] However, as will be explained below, I do not have to finally determine whether a standard of review analysis should enter in the equation in applications for *mandamus* in light of the recent developments in these cases.

[114] The Ministers' position has evolved as a result of these developments. At the hearing of this matter, the Ministers submitted that the request for *mandamus* in relation to the inclusion of proposed recovery strategies in the public registry for each of the four species is now moot, given that proposed recovery strategies have now been posted for all four of the species.

[115] While not explicitly abandoning this aspect of their application for *mandamus*, I do not understand the applicants to still be seriously pressing their request for relief with respect to the proposed recovery strategies. Even if I am mistaken in this understanding, I agree with the Ministers that this aspect of the applicants' request for *mandamus* is indeed now moot.

[116] The next issue, then, is the applicants' request for orders of *mandamus* compelling the relevant competent minister to include a final recovery strategy in the public registry within 90 days of the Court's judgment for each of the three species for which such strategies remain outstanding.

[117] The Ministers resist this relief being granted, submitting that the applicants' request for *mandamus* is premature. In support of this contention they point out that the 60 day time period set out in subsection 43(1) allowing for public comments on the proposed recovery strategies and the additional 30 day period set out in subsection 43(2) of *SARA* for the finalization of such strategies have not yet elapsed. As a result, the Ministers say that there is not yet a public legal duty to act.

[118] Given that the Minister of the Environment was prepared to make a commitment to post a proposed recovery strategy for the Southern Mountain Caribou by a specified date, the Court asked counsel for the respondents whether the Ministers were prepared to offer a similar commitment with respect to the posting of final recovery strategies for the Southern Mountain Caribou, the Marbled Murrelet, and the Nechako White Sturgeon within the 90 day period contemplated by section 43 of *SARA*.

[119] Counsel advised that the Ministers could offer no such commitment as they do not yet know the nature of the comments that will be offered during the 60 day period, nor can they currently anticipate the nature and extent of the modifications that may need to be made to the proposed recovery strategies before the documents can be finalized.

[120] Counsel was then asked if this meant that the applicants would have to commence fresh applications for *mandamus* in the event that the Ministers did not post final recovery strategies for one or more of the three species at issue within the time period set out in section 43 of *SARA*.

[121] Counsel for the Ministers agreed that the applicants should not be obliged to start over, suggesting that the better course would be for the Court to retain jurisdiction over these matters so as to allow the applicants to bring this aspect of their claim for relief back before this Court in the event that they become concerned that final recovery strategies for any of the three species in issue have not been finalized in a timely manner.

[122] The applicants would prefer that the Court make orders of *mandamus* to compel the performance of the Ministers' statutory duty to provide final recovery strategies within 90 days of the publication of the proposed recovery strategies in the public registry. However, they agree that in the event that the Court is not prepared to make such an order, it should indeed retain jurisdiction in order to deal with future developments in these matters in the event that it becomes necessary to do so.

[123] I agree with the Ministers that the applicants' request for *mandamus* in relation to the posting of final recovery strategies for the three species in question is indeed premature. The timelines contained in section 43 of *SARA* are only triggered once a proposed recovery strategy has been included in the public registry. Those timelines have not yet expired, with the result that there is currently no public legal duty on the part of the Ministers to act in relation to the posting of final recovery strategies for the Southern Mountain Caribou, the Marbled Murrelet, and the Nechako White Sturgeon.

[124] An order of *mandamus* will not be granted to compel a public official to act in a specified manner if he or she is not under an obligation to act as of the date of the hearing: *Apotex*, above at para. 51. See also *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41 at para. 157, 114 D.L.R. (4th) 193, at para. 157.

[125] I concur with the parties that it is appropriate for the Court to retain jurisdiction in this matter. This would obviate the need for the applicants to start over with fresh applications for *mandamus* to compel the performance of the Ministers' statutory duties in the event that final

recovery strategies are not posted in the public registry in a timely manner. This would obviously be a more efficient use of the resources of all concerned.

[126] I note that a similar approach has been taken by this Court in immigration matters: see *Zaib v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 687, [2008] F.C.J. No. 880 and *Rousseau v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 602, 252 F.T.R. 309. This Court also suspended the granting of relief in another *SARA* case so as to allow the responsible Minister to comply with his statutory duties: see *Athabasca Chipewyan First Nation v. Canada (Minister of the Environment)*, 2011 FC 962, [2011] 4 C.N.L.R. 17 at para. 73.

[127] The parties have agreed to the terms of the order that they seek. In accordance with this agreement, I will adjourn the applicants' application insofar as it seeks *mandamus* to compel the posting of final recovery strategies for the Southern Mountain Caribou, the Marbled Murrelet, and the Nechako White Sturgeon.

[128] If necessary, a case management conference will be scheduled with the parties to be held in late April or early May, following the expiry of the last of the 60 and 30 day periods referred to in section 43 of *SARA* for the posting of final recovery strategies for these species.

[129] The parties are directed to consult with one another with respect to the progress of these matters in advance of the case management conference, in order to determine whether the conference is necessary, and to attempt to resolve any outstanding issues without the need for further judicial intervention.

[130] In the event that it is necessary to proceed, the respondents will advise the Court at the case management conference as to whether the relevant final recovery strategies have been posted in the public registry for the three species still at issue. The applicants will advise the Court whether they intend to pursue their applications for *mandamus* in relation to the release of final recovery strategies for some or all of these species.

[131] In the event that the applicants do intend to pursue their requests for orders of *mandamus*, the Court will establish a schedule for the filing of further evidence, cross-examinations (if any) on that further evidence, the exchange of written submissions (including reply submissions from the applicants, if necessary), and any further appearances of the parties that may be required.

Costs

[132] These applications have been brought by the applicants, acting in the public interest, to compel the Ministers to perform their statutory duties under *SARA*, something that they admittedly have not done.

[133] The commencement of this litigation has had the salutary effect of prompting the Ministers to prepare and post proposed recovery strategies for the four species at issue in these applications. The fact that I have not acceded to the applicants' request for *mandamus* in relation to the posting of proposed recovery strategies is no reflection on the merits of their claim, but is rather a function of the Ministers' last-minute performance of their statutory duties in this regard.

[134] The applicants have, moreover, succeeded in persuading me that the granting of declaratory relief is appropriate in this case.

[135] In these circumstances I am satisfied that the applicants should have their costs of these applications to date. In accordance with the agreement of the parties, these costs are fixed in the amount of $22,500, inclusive of disbursements.

ORDER

THIS COURT ORDERS AND ADJUDGES THAT:

1. These applications are granted, in part;

2. This Court declares that the Minister of Fisheries and Oceans has acted unlawfully in failing to post proposed recovery strategies for the Pacific Humpback Whale and the Nechako White Sturgeon within the statutory timelines prescribed in the *Species at Risk Act*;

3. This Court further declares that the Minister of the Environment has acted unlawfully in failing to post proposed recovery strategies for the Marbled Murrelet and the Southern Mountain Caribou within the statutory timelines prescribed in the *Species at Risk Act*;

4. The applications are dismissed insofar as they relate to requests for orders of *mandamus* to compel the posting of proposed recovery strategies for the four species;

5. The applications are adjourned *sine die* as they relate to the applicants' requests for orders of *mandamus* to compel the posting of final recovery strategies for the Nechako White Sturgeon, the Marbled Murrelet and the Southern Mountain Caribou, and this Court will retain jurisdiction over these aspects of the applications;

6. If necessary, a case management conference will be scheduled with the parties to be held in late April or early May. The parties shall confer in advance of this case conference and shall come to the conference prepared to address the necessity of further hearings in these matters and a schedule for the next steps in the litigation;

7. The applicants shall have their costs to date of these applications fixed in the amount of $22,500, inclusive of disbursements; and

8. A copy of the reasons should be placed on Court files T-1778-12, T-1779-12 and T-1780-12.

"Anne L. Mactavish"
Judge

Appendix

Species at Risk Act, SC 2002, c. 29

2. (1) The definitions in this subsection apply in this Act.	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
…	[. . .]
"competent minister" means	« ministre compétent »
…	[. . .]
(b) the Minister of Fisheries and Oceans with respect to aquatic species …; and	*b)* en ce qui concerne les espèces aquatiques [. . .], le ministre des Pêches et des Océans;
(c) the Minister of the Environment with respect to all other individuals.	*c*) en ce qui concerne tout autre individu, le ministre de l'Environnement.
6. The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.	**6.** La présente loi vise à prévenir la disparition — de la planète ou du Canada seulement — des espèces sauvages, à permettre le rétablissement de celles qui, par suite de l'activité humaine, sont devenues des espèces disparues du pays, en voie de disparition ou menacées et à favoriser la gestion des espèces préoccupantes pour éviter qu'elles ne deviennent des espèces en voie de disparition ou menacées.
14. The Committee on the Status of Endangered Wildlife in Canada is hereby established.	**14.** Est constitué le Comité sur la situation des espèces en péril au Canada.
15. (1) The functions of COSEWIC are to	**15.** (1) Le COSEPAC a pour mission :
(a) assess the status of each wildlife species considered by COSEWIC to be at risk and, as part of the assessment, identify existing and potential threats to the species and	*a)* d'évaluer la situation de toute espèce sauvage qu'il estime en péril ainsi que, dans le cadre de l'évaluation, de signaler les menaces réelles ou potentielles à son égard et d'établir, selon le cas :

(i) classify the species as extinct, extirpated, endangered, threatened or of special concern,

(i) que l'espèce est disparue, disparue du pays, en voie de disparition, menacée ou préoccupante,

(ii) indicate that COSEWIC does not have sufficient information to classify the species, or

(ii) qu'il ne dispose pas de l'information voulue pour la classifier,

(iii) indicate that the species is not currently at risk;

(iii) que l'espèce n'est pas actuellement en péril;

(b) determine when wildlife species are to be assessed, with priority given to those more likely to become extinct;

b) de déterminer le moment auquel doit être effectuée l'évaluation des espèces sauvages, la priorité étant donnée à celles dont la probabilité d'extinction est la plus grande;

(c) conduct a new assessment of the status of species at risk and, if appropriate, reclassify or declassify them;

c) d'évaluer de nouveau la situation des espèces en péril et, au besoin, de les reclassifier ou de les déclassifier;

(c.1) indicate in the assessment whether the wildlife species migrates across Canada's boundary or has a range extending across Canada's boundary;

c.1) de mentionner dans l'évaluation le fait que l'espèce sauvage traverse la frontière du Canada au moment de sa migration ou que son aire de répartition chevauche cette frontière, le cas échéant;

(d) develop and periodically review criteria for assessing the status of wildlife species and for classifying them and recommend the criteria to the Minister and the Canadian Endangered Species Conservation Council; and

d) d'établir des critères, qu'il révise périodiquement, en vue d'évaluer la situation des espèces sauvages et d'effectuer leur classification, ainsi que de recommander ces critères au ministre et au Conseil canadien pour la conservation des espèces en péril;

(e) provide advice to the Minister and the Canadian Endangered Species Conservation Council and perform any other functions that the Minister, after consultation with that Council, may assign.

e) de fournir des conseils au ministre et au Conseil canadien pour la conservation des espèces en péril et d'exercer les autres fonctions que le ministre, après consultation du conseil, peut lui confier.

(2) COSEWIC must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.

(3) COSEWIC must take into account any applicable provisions of treaty and land claims agreements when carrying out its functions.

27. (1) The Governor in Council may, on the recommendation of the Minister, by order amend the List in accordance with subsections (1.1) and (1.2) by adding a wildlife species, by reclassifying a listed wildlife species or by removing a listed wildlife species, and the Minister may, by order, amend the List in a similar fashion in accordance with subsection (3).

(1.1) Subject to subsection (3), the Governor in Council, within nine months after receiving an assessment of the status of a species by COSEWIC, may review that assessment and may, on the recommendation of the Minister,

(a) accept the assessment and add the species to the List;

(b) decide not to add the species to the List; or

(c) refer the matter back to COSEWIC for further information or consideration.

(1.2) Where the Governor in Council takes a course of action under paragraph (1.1)(b) or (c), the Minister shall, after the approval of the Governor in Council,

(2) Il exécute sa mission en se fondant sur la meilleure information accessible sur la situation biologique de l'espèce en question notamment les données scientifiques ainsi que les connaissances des collectivités et les connaissances traditionnelles des peuples autochtones.

(3) Pour l'exécution de sa mission, il prend en compte les dispositions applicables des traités et des accords sur des revendications territoriales.

27. (1) Sur recommandation du ministre, le gouverneur en conseil peut, par décret, modifier la liste conformément aux paragraphes (1.1) et (1.2) soit par l'inscription d'une espèce sauvage, soit par la reclassification ou la radiation d'une espèce sauvage inscrite et le ministre peut, par arrêté, modifier la liste conformément au paragraphe (3) de la même façon.

(1.1) Sous réserve du paragraphe (3), dans les neuf mois suivant la réception de l'évaluation de la situation d'une espèce faite par le COSEPAC, le gouverneur en conseil peut examiner l'évaluation et, sur recommandation du ministre :

a) confirmer l'évaluation et inscrire l'espèce sur la liste;

b) décider de ne pas inscrire l'espèce sur la liste;

c) renvoyer la question au COSEPAC pour renseignements supplémentaires ou pour réexamen.

(1.2) Si le gouverneur en conseil prend des mesures en application des alinéas (1.1)b) ou c), le ministre est tenu, avec l'agrément du gouverneur en conseil, de

include a statement in the public registry setting out the reasons.

mettre dans le registre une déclaration énonçant les motifs de la prise des mesures.

(2) Before making a recommendation in respect of a wildlife species or a species at risk, the Minister must

(2) Avant de faire une recommandation à l'égard d'une espèce sauvage ou d'une espèce en péril, le ministre :

(a) take into account the assessment of COSEWIC in respect of the species;

a) prend en compte l'évaluation de la situation de l'espèce faite par le COSEPAC;

(b) consult the competent minister or ministers; and

b) consulte tout ministre compétent;

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, consult the wildlife management board.

c) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, consulte le conseil.

(3) Where the Governor in Council has not taken a course of action under subsection (1.1) within nine months after receiving an assessment of the status of a species by COSEWIC, the Minister shall, by order, amend the List in accordance with COSEWIC's assessment.

(3) Si, dans les neuf mois après avoir reçu l'évaluation de la situation de l'espèce faite par le COSEPAC, le gouverneur en conseil n'a pas pris de mesures aux termes du paragraphe (1.1), le ministre modifie, par arrêté, la liste en conformité avec cette évaluation.

37. (1) If a wildlife species is listed as an extirpated species, an endangered species or a threatened species, the competent minister must prepare a strategy for its recovery.

37. (1) Si une espèce sauvage est inscrite comme espèce disparue du pays, en voie de disparition ou menacée, le ministre compétent est tenu d'élaborer un programme de rétablissement à son égard.

(2) If there is more than one competent minister with respect to the wildlife species, they must prepare the strategy together and every reference to competent minister in sections 38 to 46 is to be read as a reference to the competent ministers.

(2) Si plusieurs ministres compétents sont responsables de l'espèce sauvage, le programme de rétablissement est élaboré conjointement par eux. Le cas échéant, la mention du ministre compétent aux articles 38 à 46 vaut mention des ministres compétents.

38. In preparing a recovery strategy, action plan or management plan, the competent minister must consider the commitment of the Government of Canada to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.

38. Pour l'élaboration d'un programme de rétablissement, d'un plan d'action ou d'un plan de gestion, le ministre compétent tient compte de l'engagement qu'a pris le gouvernement du Canada de conserver la diversité biologique et de respecter le principe selon lequel, s'il existe une menace d'atteinte grave ou irréversible à l'espèce sauvage inscrite, le manque de certitude scientifique ne doit pas être prétexte à retarder la prise de mesures efficientes pour prévenir sa disparition ou sa décroissance.

39. (1) To the extent possible, the recovery strategy must be prepared in cooperation with

39. (1) Dans la mesure du possible, le ministre compétent élabore le programme de rétablissement en collaboration avec :

(a) the appropriate provincial and territorial minister for each province and territory in which the listed wildlife species is found;

a) le ministre provincial ou territorial compétent dans la province ou le territoire où se trouve l'espèce sauvage inscrite;

(b) every minister of the Government of Canada who has authority over federal land or other areas on which the species is found;

b) tout ministre fédéral dont relèvent le territoire domanial ou les autres aires où se trouve l'espèce;

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board;

c) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le conseil;

(d) every aboriginal organization that the competent minister considers will be directly affected by the recovery strategy; and

d) toute organisation autochtone qu'il croit directement touchée par le programme de rétablissement;

(e) any other person or organization that the competent minister considers appropriate.

e) toute autre personne ou organisation qu'il estime compétente.

(2) If the listed wildlife species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the recovery strategy must be prepared, to the extent that it will apply to that area, in accordance with the provisions of the agreement.

(2) Si l'espèce sauvage inscrite se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le programme de rétablissement est élaboré, dans la mesure où il s'applique à cette aire, en conformité avec les dispositions de cet accord.

(3) To the extent possible, the recovery strategy must be prepared in consultation with any landowners and other persons whom the competent minister considers to be directly affected by the strategy, including the government of any other country in which the species is found.

(3) Le programme de rétablissement est élaboré, dans la mesure du possible, en consultation avec les propriétaires fonciers et les autres personnes que le ministre compétent croit directement touchés par le programme, notamment le gouvernement de tout autre pays où se trouve l'espèce.

42. (1) Subject to subsection (2), the competent minister must include a proposed recovery strategy in the public registry within one year after the wildlife species is listed, in the case of a wildlife species listed as an endangered species, and within two years after the species is listed, in the case of a wildlife species listed as a threatened species or an extirpated species.

42. (1) Sous réserve du paragraphe (2), le ministre compétent met le projet de programme de rétablissement dans le registre dans l'année suivant l'inscription de l'espèce sauvage comme espèce en voie de disparition ou dans les deux ans suivant l'inscription de telle espèce comme espèce menacée ou disparue du pays.

(2) With respect to wildlife species that are set out in Schedule 1 on the day section 27 comes into force, the competent minister must include a proposed recovery strategy in the public registry within three years after that day, in the case of a wildlife species listed as an endangered species, and within four years after that day, in the case of a wildlife species listed as a threatened species or an extirpated species.

(2) En ce qui concerne les espèces sauvages inscrites à l'annexe 1 à l'entrée en vigueur de l'article 27, le ministre compétent met le projet de programme de rétablissement dans le registre dans les trois ans suivant cette date dans le cas de l'espèce sauvage inscrite comme espèce en voie de disparition ou dans les quatre ans suivant cette date dans le cas de l'espèce sauvage inscrite comme espèce menacée ou disparue du pays.

43. (1) Within 60 days after the proposed recovery strategy is included in the public registry, any person may file written comments with the competent minister.

(2) Within 30 days after the expiry of the period referred to in subsection (1), the competent minister must consider any comments received, make any changes to the proposed recovery strategy that he or she considers appropriate and finalize the recovery strategy by including a copy of it in the public registry.

43. (1) Dans les soixante jours suivant la mise du projet dans le registre, toute personne peut déposer par écrit auprès du ministre compétent des observations relativement au projet.

(2) Dans les trente jours suivant la fin du délai prévu au paragraphe (1), le ministre compétent étudie les observations qui lui ont été présentées, apporte au projet les modifications qu'il estime indiquées et met le texte définitif du programme de rétablissement dans le registre.

45. (1) The competent minister may at any time amend the recovery strategy. A copy of the amendment must be included in the public registry.

45. (1) Le ministre compétent peut modifier le programme de rétablissement. Une copie de la modification est mise dans le registre.

52. (1) The competent minister may at any time amend an action plan. A copy of the amendment must be included in the public registry

52. (1) Le ministre compétent peut modifier le plan d'action. Une copie de la modification est mise dans le registre.

130. (1) COSEWIC must assess the status of each wildlife species set out in Schedule 2 or 3, and, as part of the assessment, identify existing and potential threats to the species and

(a) classify the species as extinct, extirpated, endangered, threatened or of special concern;

(b) indicate that COSEWIC does not have sufficient information to classify the species; or

(c) indicate that the species is not currently at risk.

130. (1) Le COSEPAC évalue la situation de chaque espèce sauvage visée aux annexes 2 ou 3 ainsi que, dans le cadre de l'évaluation, signale les menaces réelles ou potentielles à son égard et établit, selon le cas :

a) que l'espèce est disparue, disparue du pays, en voie de disparition, menacée ou préoccupante;

b) qu'il ne dispose pas de l'information voulue pour la classifier;

c) que l'espèce n'est pas actuellement en péril.

(2) In the case of a species set out in Schedule 2, the assessment must be completed within 30 days after section 14 comes into force.

(2) Dans le cas d'une espèce visée à l'annexe 2, l'évaluation doit être terminée dans les trente jours suivant l'entrée vigueur de l'article 14.

(3) If an assessment of a wildlife species set out in Schedule 2 is not completed within the required time or, if there has been an extension, within the extended time, COSEWIC is deemed to have classified the species as indicated in Schedule 2.

(3) Si l'évaluation d'une espèce visée à l'annexe 2 n'est pas terminée dans le délai imparti ou prorogé, le COSEPAC est réputé avoir classifié cette espèce selon ce qui est indiqué à cette annexe.

(4) In the case of a species set out in Schedule 3, the assessment must be completed within one year after the competent minister requests the assessment. If there is more than one competent minister with respect to the species, they must make the request jointly.

(4) Dans le cas d'une espèce visée à l'annexe 3, l'évaluation doit être terminée dans l'année suivant la date à laquelle le ministre compétent en fait la demande. Si plusieurs ministres compétents sont responsables de l'espèce, la demande est présentée conjointement par eux.

(5) The Governor in Council may, on the recommendation of the Minister after consultation with the competent minister or ministers, by order, extend the time provided for the assessment of any species set out in Schedule 2 or 3. The Minister must include a statement in the public registry setting out the reasons for the extension.

(5) Sur recommandation faite par le ministre après consultation de tout ministre compétent, le gouverneur en conseil peut, par décret, proroger le délai prévu pour l'évaluation d'une espèce visée aux annexes 2 ou 3. Le ministre met dans le registre une déclaration énonçant les motifs de la prorogation.

(6) Subsections 15(2) and (3) and 21(1) and section 25 apply with respect to assessments under subsection (1).

(6) Les paragraphes 15(2) et (3) et 21(1) et l'article 25 s'appliquent à l'évaluation faite au titre du paragraphe (1).

(7) In making its assessment of a wildlife species, COSEWIC may take into account and rely on any report on the species that was prepared in the two-year period before this Act receives royal assent.

(7) Le COSEPAC peut, pour l'évaluation d'une espèce sauvage, prendre en compte et se fonder sur tout rapport portant sur l'espèce qui a été élaboré dans les deux ans précédant la sanction de la présente loi.

132. If a wildlife species is added to the List by the Governor in Council as the result of an assessment under section 130, the recovery strategy for the species must be prepared within three years after the listing in the case of an endangered species, and within four years in the case of a threatened species.

132. Si l'inscription d'une espèce sauvage par le gouverneur en conseil découle d'une évaluation faite par le COSEPAC en application de l'article 130, le programme de rétablissement est élaboré dans les trois ans suivant l'inscription en ce qui concerne une espèce en voie de disparition et dans les quatre ans en ce qui concerne une espèce menacée.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1777-12
STYLE OF CAUSE:	WESTERN CANADA WILDERNESS COMMITTEE, DAVID SUZUKI FOUNDATION, GREENPEACE CANADA, SIERRA CLUB OF BRITISH COLUMBIA FOUNDATION, AND WILDSIGHT v MINISTER OF FISHERIES AND OCEANS AND MINISTER OF THE ENVIRONMENT
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APPEARANCES:

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