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Is SARA growing teeth?

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Cases Considered:

Alberta Wilderness Association v Canada (Minister of the Environment), 2009 FC 710

One of the purposes of endangered species legislation is "to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity" (*Species at Risk Act*, S.C. 2002, c. 29 (*SARA*)). A crucial element of any recovery plan must be the identification of, and then subsequently the protection of, critical habitat for listed species. Without such designation and protection it is easy to predict that a listed species will continue on the downward slide to extinction. Habitat protection may not be a sufficient condition to reverse that slide, but it will likely be a necessary condition.

Yet the experience in the United States is that the relevant agencies (the US Fish and Wildlife Service and National Oceanic and Atmospheric Administration (NOAA)) are typically reluctant to designate critical habitat; and yet, absent such designation, the legal effect of listing under the Endangered Species Act is much reduced. The reluctance to designate may stem in part from legitimate concerns as to the adequacy of the information on which to base a designation, but in part also the reluctance stems from direct or indirect pressure from politicians, industry and landowners not to take that extra step. A case in point is the recent listing of polar bears as threatened in the United States. The listing decision (May 15, 2008) was not accompanied by a designation of critical habitat (*id*., at 28298 - to the huge relief of the oil and gas industry) despite the fact that, at least in some cases, denning sites (to which bears show a high degree of fidelity) are well known.

As the federal government moves to implement *SARA* one of things to look for in assessing the effectiveness of the legislation will be the extent to which critical habitat for endangered species will be identified\designated, and the willingness of the courts to step in and require identification when the minister fails to do so. In this case Justice Russell Zinn of the Federal Court Trial Division agreed to second-guess the federal government's refusal to identify critical habitat for the Greater Sage Grouse as part of the Recovery Strategy for that species (listed as endangered). The case suggests that the courts will not be unduly deferential but will instead *require* identification where there is an adequate (albeit not perfect) information basis on which to do so. The process of identifying critical habitat may be an iterative one. The holding is fully consistent with the precautionary approach that the legislation requires.

Section 37 of *SARA* requires the competent minister to prepare a recovery strategy for a listed endangered species, and, if recovery is considered to be "feasible", such a strategy "must include" *inter alia:*

> (*c*) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;

Section 42 of the Act prescribes time lines for the preparation of the Strategy.

As noted above, in this case, the minister failed to identify *any* critical habitat but did identify a list of studies to be undertaken to achieve that result. Given the mandatory language of s.37 and the evidence (both the record and affidavit evidence), Justice Zinn concluded that this decision was unreasonable and should be struck thereby requiring the minister to go back and consider the matter afresh. The standard of review was "reasonableness" but the decision (not to designate critical habitat) would be unreasonable if it fell "outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para. 45 and quoting *Dunsmuir v New Brunswick* [2008] SCC 9 at para. 47). The court acknowledged that it was not an academy of science (at para. 52) but that it was well equipped to assess the information (which was part of the record) and determine, in light of that assessment, whether the minister's decision that critical habitat could not be identified was based on an erroneous finding of fact or capricious or perverse (*Federal Court Act*, R.S.C. 1985, c. F-7, s.18.1) (at para. 53).

In this case, the Recovery Strategy identified four habitat requirements for the species: (1) breeding habitat (lek habitat), (2) nesting habitat, (3) brood-rearing habitat and (4) winter habitat. Each fell within the definition of critical habitat since each was essential to the survival of the species, and with respect to the first three Justice Zinn held that there was available information that should have allowed the minister to fulfil the "must identify" mandate of s.37; hence the minister's conclusion that critical habitat could not be identified was unreasonable. In the course of reaching that conclusion Justice Zinn emphasised that *SARA* did not require a single definitive judgement based upon impeccable science before a designation could be made. Rather (at para 69) "… the *SARA* stipulates that the respondent must make the determination of critical habitat based on the best available information, which is to say the best information that exists at any one point in time. That information may change over time, but the identification of critical habitat cannot be postponed for that reason alone."

The *Dunsmuir* reasonableness test establishes a high threshold before a reviewing court will step in. In many cases a decision on the (non)designation of critical habitat may be very difficult to overturn. And of course it would be if the minister had designated *some* critical habitat for each of the four categories of essential habitat. What made it easier here is that the minister had not designated *any* habitat notwithstanding the fact that the record showed that lek locations were well known and well described.