January 3, 2011

SARA has a spine as well as teeth

By Nigel Bankes

Cases Considered:

David Suzuki Foundation v Minister of Fisheries and Oceans and the Minister of the Environment, 2010 FC 1233

Eighteen months ago I blogged on Justice Zinn's decision in *Alberta Wilderness Association v Canada (Minister of the Environment)*, 2009 FC 710. The decision dealt with the government's failure to designate critical habitat for the greater sage grouse under the federal *Species at Risk Act* S.C. 2002, c. 29 (*SARA*) as part of the development of a recovery plan. I thought that Justice Zinn's decision confirmed that the Courts were prepared to give *SARA* a fairly robust interpretation and hence I suggested that the legislation was starting to "grow teeth".

Since then, the Federal Court, in a couple of decisions out of British Columbia, has continued to insist that the Government of Canada in all its guises must take *SARA* seriously, and, in particular must take seriously its duty to designate critical habitat for endangered species as part of developing a recovery strategy. The first of these decisions was Justice Campbell's decision in *Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, 2009 FC 878 (the nooksack dace decision). In that case Justice Campbell sided with the applicant in concluding that the Minister had a duty to designate as critical habitat not just the geographical or geophysical components of habitat but also the biological and ecosystem process components of habitat.

The second and more recent is decision is the subject of this comment: *David Suzuki Foundation v Minister of Fisheries and Oceans and the Minister of the Environment*, 2010 FC 1233. This case deals with the recovery plans for the northern and southern populations of resident killer whales. One of the key issues in this case was the Minister's duty under s.58(5) of the Act to effectively protect the critical habitat of an endangered species (that is not already contained with a national park or similar protected area) by either making an order affording legal protection (direct protection – a protection order) to the critical habitat if it is not already legally protected, or, alternatively, filing a statement "setting out how the critical habitat … [is] legally protected" (indirect protection – a protection statement).

In purporting to fulfill its obligations in this case the Department of Fisheries and Oceans (DFO) pursued, at different times, two different strategies. Initially it sought to rely on a "protection statement". In doing so DFO relied not only on certain provisions of the *Fisheries Act*, RSC 1985, c. F-14 and other legislation but also (see para. 76) on (a) code of conduct and outreach initiatives; (b) whale-watching guidelines; (c) statement of practice regarding the mitigation of seismic sound in the marine environment; (d) sensitive benthic areas policy; (e) wild salmon policy; (f) integrated fisheries management plans; (g) military sonar protocols, and (h) provincial

protected area legislation. Somewhat later, DFO also published a protection order in the Canada Gazette listing certain areas of critical habitat.

In his judgement Justice Russell emphasised that DFO was only allowed to rely on a protection statement rather than a protection order if existing and alternative "sources of protection are of the same kind, degree and scope as the protection afforded" (at para. 272) by a protection order which legally prohibits and in mandatory terms the destruction of critical habitat. Later Justice Russell put the point this way (at para. 297): "Within the SARA scheme, a protection statement acts as a substitute for a protection order. Hence, the provisions cited in a protection statement act in place of the prohibition in subsection
58(1) …. Importantly, in my view, the provisions cited in a protection statement are intended to provide the same protection for critical habitat as that provided by a protection order."

This approach allowed Justice Russell to examine each of the measures listed in the protection statement and all were found wanting on various grounds, including (1) the measures *did not create binding legal obligations* (e.g the various policy instruments which "may affect behaviour" but "do not compel behaviour" (at para. 301), (2) the measures created the *potential* for protection but not the present reality of protection (e.g. suggestions (at paras. 308 – 310) that habitat might be protected as marine protected areas under the *Oceans Act*, SC 1996, c.3 or through conditions included in fisheries licences under the various regulations of the *Fisheries Act*), (3) the measures were based on *provincial law*, (e.g. (at para. 336) the Robson Bight marine protected area), or (4) because the existing prohibitions afforded *too much discretion* to the Minister or other officials. This last point was particularly significant and led Justice Russell to the conclusion that DFO could not rely on the so-called HADD provision of s.35 of the *Fisheries Act*. This is the provision that prohibits persons from engaging in "any harmful alteration, disruption or destruction of fish habitat". This is undoubtedly a powerful provision but it does not apply where the Minister authorizes such activities or where such activities are authorized by other regulations and thus (at para. 324) "[t]he approval of destruction of fish habitat … is at the complete discretion of the Minister." And furthermore the Minister (at para. 332) "had not and … could not undertake to exercise her powers … in a way that would preserve the mandatory prohibitions under SARA."

> The whole point of SARA is to provide protection for the critical habitat of species at risk in such a way that those protections cannot be set aside or modified through the exercise of ministerial discretion at some time in the future. The protection for critical habitat that a protection order brings into being is not protection that can be modified or compromised by ministerial discretion. The Minister cannot relinquish or curtail her discretionary powers under the *Fisheries Act*. Hence, reliance upon the *Fisheries Act* means that the critical habitat of the Resident Killer Whales is protected subject to the Minister deciding otherwise. This was not the intent of Parliament when it brought SARA into being. The Parliamentary record is clear. [at para. 332]

There was a second issue in this case and that was whether the protection order was too narrow insofar as it failed to legally protect all the elements of the whales' critical habitat. And on this point Justice Russell largely followed Justice Campbell's earlier judgment in *Environmental Defence Canada* on the scope of the duty to designate and protect the full range of critical habitat. Here, the argument was that neither the protection statement nor the protection order took account of the need to deal with the significant threats to some components of habitat, including reduction in prey availability, toxic contamination and physical and acoustic

disturbance. Justice Russell accepted that DFO's approach had been too narrow and indeed, by the time of the trial, DFO itself largely seemed to accept that Justice Campbell's approach was correct:

> [163] It is my view that the Applicants' statement of the law and their conclusions regarding the Protection Order and its application to all components of critical habitat are correct …. the Ministers did act unlawfully in limiting the Protection Order made under subsection 58(4) of SARA. The Respondents now appear not to take issue with the Applicants' position regarding the scope of "critical habitat," and they say that they recognize the implications of Justice Campbell's decision in *Environmental Defence* for this issue. [But] …. It still seems to me that the Protection Order was and is incorrect and unlawful because, in limiting its application to geophysical areas, the Respondents failed to respond to a duty assigned to them by statute ….
>
> [164] The Applicants' interpretation of the Ministers' duty under SARA to protect all components of critical habitat for the Resident Killer Whales is fully supported by the plain language of section 58 read in the full context of SARA, the bilingual version of the section and the decision of the Court in *Environmental Defence*.

The Court also had occasion to comment on s.11 agreements in this case. Section 58(5)(a) of *SARA* contemplates that the Minister does not need to make a protection order with respect to lands that are covered by a s.11 agreement. Section 11 provides as follows:

> 11 (1) A competent minister may, after consultation with every other competent minister, and with the Canadian Endangered Species Conservation Council or any of its members if he or she considers it appropriate to do so, enter into a conservation agreement with any government in Canada, organization or person to benefit a species at risk or enhance its survival in the wild.
>
> (2) The agreement must provide for the taking of conservation measures and any other measures consistent with the purposes of this Act, and may include measures with respect to
>
> (*a*) monitoring the status of the species;
>
> (*b*) developing and implementing education and public awareness programs;
>
> (*c*) developing and implementing recovery strategies, action plans and management plans;
>
> (*d*) protecting the species' habitat, including its critical habitat; or
>
> (*e*) undertaking research projects in support of recovery efforts for the species.

But the Court was clear in emphasising that a s.11 agreement must also deliver equivalent legal protection to that offered by a protection order before a Minister could rely on such an agreement to avoid having to make or extend the scope of a protection order:

> In my view, it cannot be just any section 11 agreement that allows the minister to opt out of the mandatory obligation imposed by subsection 58(5) to provide legal protection for critical habitat. The section 11 agreement referred to in subsection 58(5)(*a*) would have to be one that legally protects critical habitat in such a way that the mandatory prohibitions triggered by a protection order are not required. This can occur only if the protection to critical habitat provided by a section 11 agreement is the same as, or equivalent to, a mandatory prohibition under section 58. I do not think subsection 58(5)(*a*) can be read as giving the minister the flexibility to dispense with the prohibition against the destruction of critical habitat because that minister may decide, in her or his discretion, that "in all circumstances" such a prohibition would not be appropriate. This would be to import political and other expediencies into the SARA scheme when Parliament has clearly decided to relieve individual ministers of the problems associated with expediency by requiring a mandatory prohibition. (at para. 285 emphasis in original)

While this statement is *obiter* (here was no s.11 agreement) the reasoning is typical of the very purpose approach to statutory interpretation found in both this case and the two earlier *SARA* critical habitat decisions.

In conclusion, these three decisions, Greater Sage Grouse, Nooksack Dace and Resident Killer Whale set the stage for effective implementation of *SARA* in a way that should help to achieve one of the objectives of the statute, namely the recovery of endangered and threatened species. The Federal Court has also indicated that it understands the urgency associated with applications to enforce the legislation and that it has very little patience with arguments from Justice lawyers that seek to maintain the discretionary powers of Ministers in the face of what the Court regards as the clear parliamentary intention of requiring ministers to take legally effective measures to protect critical habitat.

There is a caveat of course to this rosy view of *SARA* implementation and that is that *SARA* only has a spine and teeth when it comes to federal lands and federal species; *SARA's* anatomy is rather more flexible when it comes to provincial lands and species.