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Is the Federal Government Intent on Hurrying Along the 'Sixth Extinction'?

By: Martin Olszynski

Legislation Commented On: *Species At Risk Act,* SC 2002 c 29

Sitting on a shelf in my office – unread since roughly this time last year – is Elizabeth Kolbert's book *The Sixth Extinction: An Unnatural History*. Ms Kolbert's book recently won the Pulitzer Prize for non-fiction, having been described by its judges as "an exploration of nature that forces readers to consider the threat posed by human behaviour to a world of astonishing diversity." Also sitting on my computer's desktop – unfinished since this past December – has been a blog post about the federal government's failure to list species under the *Species At Risk Act* (*SARA*) since 2011, notwithstanding the fact the scientific body responsible for recommending listing, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), has made 67 such recommendations since that time (all of which was reported in the Globe and Mail here; after this story broke three bat species were listed, but to my knowledge the government hasn't changed its basic position, as further discussed below). My plan was to read Ms. Kolbert's book and use it to frame a post describing yet another example of the federal government's total disregard for the rule of law when it comes to species at risk (see *e.g.* here). But I am already late to the party and, having just blogged about environmental-law-as-process and its implications for the environment, it seems to me that such a post makes for a reasonable *Exhibit A*. The fact that I have a huge pile of marking sitting in front of me right now is also not irrelevant.

To understand the problem it is necessary to first understand the dynamics – and the history – of *SARA*'s listing process. Pursuant to section 27 of *SARA*, COSEWIC makes a recommendation to Cabinet. Cabinet, upon recommendation of the Minister of the Environment, then has *nine months* to either accept the recommendation and list the species, decline the recommendation (in which case it must provide reasons for its decision), or it can return the matter to COSEWIC for further clarification.

As noted by Professor Stewart Elgie, this approach was actually the result of a last minute political compromise that ensured *SARA*'s passage:

> One of the most contentious issues in *SARA*'s development was the process for listing endangered species. Almost all environmental groups and scientists, and even some industries, advocated a scientific approach, in which COSEWIC …would make final decisions about which species to list under the Act… Environment Minister David Anderson and the Prime Minister's Office (PMO) were strongly opposed… Their view was that listing species had social and

> economic consequences, and so decisions should be made by elected, accountable politicians. […]
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> This listing controversy carried over into the parliamentary Committee hearings held after *SARA*'s second reading. The Committee decided to adopt a compromise approach… It left cabinet with discretion over species listing, but limited that discretion in two ways: (i) cabinet had to *decide within six months* of a COSEWIC recommendation, and (ii) it had to provide reasons in the Canada Gazette if it did not accept a COSEWIC recommendation. The hope was that these requirements would result in more species getting listed, or at the very least more timely and transparent decisions.
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> …The PMO finally agreed to…the Committee's changes to the listing process (and several other changes), with one small revision: cabinet would have *nine months, rather than six,* to act on COSEWIC's recommendations to allow sufficient time for normal pre-regulatory analysis and consultation.
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> See Stewart Elgie, "Statutory Structure and Species Survival: How constraints on Cabinet discretion affect Endangered Species Listing Outcomes" (2008) 19 J Env Law & Prac 1 at 4-5 [italics mine].

In his article, Professor Elgie sought to test the belief that such a "constrained discretion" scheme would lead to higher listing rates than a purely discretionary approach (as is found in most provinces). The results showed "a substantial difference in listing rates between jurisdictions with full discretion (35%) and those with constrained discretion (78%)" (*ibid*, at 14), supporting the general thesis that constraining discretion leads to more listing.

Or at least it did, until the federal government seized upon section 25 of the Act:

> **25.** (1) When COSEWIC completes an assessment of the status of a wildlife species, it must provide the Minister…with a copy of the assessment and the reasons for it...
>
> (3) On receiving a copy of an assessment of the status of a wildlife species from COSEWIC under subsection (1), the Minister must, within 90 days, include in the public registry a report on how the Minister intends to respond to the assessment and, to the extent possible, provide time lines for action.

Thus, while section 27 states that Cabinet has only nine months following the receipt of a COSEWIC assessment to make a decision, section 25 states that the assessment first goes to the Minister, who then has only 90 days to report on how he or she intends to respond (a process which includes consultation) but who is given an unspecified amount of time to bring the actual assessment to Cabinet (and triggering the nine month period).

Since about 2007, the government has been of the view that there is no limit on the amount of time that the Minister can take to form his or her response and bring COSEWIC's assessment to Cabinet, an interpretation so strained that it caught the attention of the House of Commons Standing Joint Committee on the Scrutiny of Regulations:

> 9. The wording of the Act, *taken solely on its face without reference to the broader intent of the scheme reflected in it*, does support the interpretation advanced by the Department. At the same time, given the intent of section 27 of the Act as stated by the Minister of the day, *it is difficult to conclude that Parliament intended that the goal of a timely decision on an assessment could be defeated simply by delaying submission of the assessment to [Cabinet]*. Indeed, under the interpretation advanced by the Department, it would have to be concluded that [Cabinet] need never be provided with an assessment, no matter what recommendation it might contain. The Committee has therefore concluded that the failure to provide for the delivery to, and receipt of, an assessment by [Cabinet] reflects an unintended gap in the scheme established by the Act" [italics mine].

While it is certainly open to the Committee to entertain an interpretation of section 25 that disregards Parliamentary intent and the scheme of the Act, courts are pretty much bound by the rules of statutory interpretation, the most important one being that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E.A. Driedger, *Construction of Statutes* (2nd ed. 1983) at 87).

As it turns out, this "purposive approach" was invoked to resolve a similar conundrum under the *Canadian Environmental Protection Act, 1999*, SC 1999 c 33 a few years back. In *Great Lakes United v. Canada (Minister of the Environment)*, 2009 FC 408 (CanLII), the applicants – once again, environmental groups – alleged that the Minister of Environment was in breach of his duties in relation to the National Pollution Reporting Inventory (NPRI). More specifically, they alleged that the Minister had unlawfully failed to require mining companies to report releases or transfers of pollutants from their tailings impoundment areas. The relevant sections were 46 and 48:

> **46.** (1) The Minister may, for the purpose of conducting research, creating an inventory of data, [etc…] publish…a notice requiring any person described in the notice to provide the Minister with any information that may be in the possession of that person…
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> **48.** The Minister shall establish a national inventory of releases of pollutants using the information collected under section 46 and any other information to which the Minister has access...

The government argued that "the use of the word 'may' in section 46 makes it clear that the section is wholly permissive, and the Minister's choice of the scope of information required under any notice sent out under section 46 is entirely the function of a policy decision" (at para 194). Justice Russell disagreed:

> [198] If this interpretation were accepted, however, it would mean that, if the Minister chooses not to collect information under section 46 about any "releases of pollutants", either from a particular sector or otherwise, then any national inventory established under section 48 need not accurately or fully reveal to Canadians the environmental and health hazards they face.

> [199] This interpretation is very difficult to reconcile with the obligations imposed upon the Government of Canada under other sections of the *CEPA* and, in particular, section 2 which, among other things, obliges the Government of Canada to protect the environment and to provide information to the people of Canada on the state of the Canadian environment.
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> [200] Simply put, I cannot see how the national inventory that must be established under section 48 can, when the full context of the *CEPA* is examined, be entirely governed by whatever information the Minister may, or may not, choose to collect under section 46.
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> [201] The discretion allowed under section 46 must, in my view, be exercised in a way that meets the obligations of the Government of Canada, as those obligations are defined in the *CEPA*, and that allows the various tools necessary to fulfill the general scheme and objects of the *CEPA* to be assembled and used in a meaningful way. A national inventory of releases of pollutants can hardly play the role ascribed to it by the *CEPA* if the Minister decides, under section 46, not to collect information so that the people of Canada are not provided with a full and accurate picture of the releases of those pollutants that pose environmental and health risks.

In my view, the same reasoning applies to *SARA* and the Minister's duties pursuant to section 25. *SARA* is, by its very nature, 'emergency room' legislation. As recently noted by the Federal Court in *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 (CanLII), in the context of litigation challenging the government's failure to prepare *SARA* recovery strategies on time:

> [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.
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> [102] The timelines contained in the Act reflect the clearly articulated will of Parliament…recognizing that there is indeed urgency in these matters.

While it is true that section 25 contains no clear timelines, it is equally clear that the Minister cannot drag his or her feet in tabling a COSEWIC assessment before Cabinet. "There is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption." (*Roncarelli v. Duplessis*, [1959] SCR 121 at 140). There are presently 117 species awaiting a Ministerial response. Don't dither, Minister. To borrow the words of Ms. Kolbert, you are "deciding…which evolutionary pathways will remain open and which will forever be closed" (at 268).