

Federal Court of Appeal confirms that a SARA protection statement must offer the critical habitat of a listed species real legal and non-discretionary protection

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Case commented on: [Minister of Fisheries and Oceans v. David Suzuki Foundation \(the Killer Whale case\) 2012 FCA 40](#)

A unanimous Federal Court of Appeal in a decision authored by Justice Mainville has largely affirmed Justice Russell's decision at trial in a case dealing with the legal protection of the critical habitat of two populations of killer whale listed as threatened or endangered under the terms of the *Species at Risk Act* (SARA), SC 2002, c 29. ABlawg's post on the trial decision is available [here](#): "SARA has a spine as well as teeth."

The important conclusions in the Court of Appeal's decision are these:

1. The standard of review for the Minister's legal interpretation of SARA is correctness and not reasonableness. The line of cases which suggests that a statutory decision maker interpreting its home statute will generally be entitled to a deferential standard of (reasonableness) applies to adjudicative tribunals. The line of cases does not apply to a Minister who is simply the responsible minister for the statute in question, at least absent some clear parliamentary direction to that effect. The correctness standard is appropriate for Ministers fulfilling functions under statutes for which they are responsible for high constitutional reasons (at para 98):

What the Minister is basically arguing is that the interpretation of the SARA and of the *Fisheries Act* favoured by his Department and by the government's central agencies, such as the Department of Justice, should prevail. The Minister thus seeks to establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable. This harks back to the time before the *Bill of Rights* of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives. It would take a very explicit grant of authority from Parliament in order for this Court to reach such a far-reaching conclusion (emphasis supplied).

2. The Court can render a decision on an issue that has become moot where there is an adversarial context, where judicial economy favours granting judgement, and so long as the Court is sensitive to the role of the judicial branch of government (at para 59). The standard of review on whether a question is moot is correctness (at para 57). The standard of review on a decision to render judgement on a matter that is moot is reasonableness (at para 60). Here it was reasonable for the trial judge to proceed to judgment on the issues dealing with a protection

statement notwithstanding that the Minister subsequently issued a protection order. The federal Court of Appeal concluded that (at paras 62 - 64):

[62] Judicial economy will be well served if this Court addresses the issues raised. They have been fully canvassed in these proceedings and they will likely arise in the future in the context of other protection statements under the SARA. It is thus appropriate to settle these issues now rather than to await another case which will require additional efforts and expenditures to pursue.

[63] The issues raised are of public importance, and their resolution is in the public interest. This case is the first to be heard by this Court concerning the scope of a protection statement under the SARA. Many other protection statements are being prepared and may have been issued for other endangered or threatened species. Consequently, both the Minister and the respondents seek guidance as to the interpretation and application of section 58 of the SARA.

[64] Finally, this Court is neither departing from its traditional role as an adjudicator nor intruding upon the legislative or executive sphere by deciding to hear this appeal. The issues raised are all questions of statutory interpretation. Moreover, the Minister – acting as a member of the Executive branch of government – seeks the opinion of this Court on these issues.

3. The trial court correctly concluded that the Minister can only rely on a protection statement rather than a protection order if the legislation referred to and relied on in the protection statement offers equivalent legal protection to that offered by section 58 of *SARA*. Discretionary statutory protection will not suffice (at paras 17 and 125). The Court did conclude that in some situations the Minister might be able to rely on section 36 of the *Fisheries Act*, RSC 1985, c. F-14 (dealing with the deposit of deleterious substances in waters frequented by fish) along with any applicable regulations (at paras 132 – 142), but only if there were relevant evidence which was lacking in this case (at para 141 – although the Court did vary the judgment at trial on this point):

[141] However, in this case, there is no evidence in the record before this Court showing whether the pollution controls set out in these regulations protect from destruction the critical habitat of the concerned killer whale populations. Therefore, there was no basis in these proceedings upon which the Federal Court judge could have determined whether the Minister's reliance on section 36 of the *Fisheries Act* could have been justified in light of the provisions of section 58 of the SARA.

[142] Consequently, to the extent that the Federal Court judge's declaration impedes the Minister from relying, in appropriate cases, on

section 36 of the *Fisheries Act* and its regulations for the purposes of a protection statement made under paragraph 58(1) (b) of the SARA, it cannot stand. However, in light of the evidentiary record before us and the nature of these proceedings, we need not decide if the Minister's reliance on this provision met the requirements of section 58 of the SARA in this case.

4. The Federal Court of Appeal expressly endorsed Canada's concession that Federal Court Trial Division decision in *Environmental Defence Canada v Canada (Fisheries and Oceans)*, 2009 FC 878 correctly stated that critical habitat is not just a geophysical area but also a set of attributes (at paras 43 and 150). The implications of this endorsement are far reaching since the endorsement entails a set of logical propositions along the following lines: **(1)** assume that the recovery strategy identifies a series of components of critical habitat which reflect the different seasonal needs of the species during its life cycle, **(2)** if (1) then the designation of critical habitat must identify all of these elements (to the extent possible based on the best available information, (s.41(1)), and **(3)**, if (1) & (2), then a subsequent protection statement or protection order must offer non-discretionary legal protection to all of those elements and attributes of critical habitat.
5. The Minister cannot "contract out" of the obligation to protect critical habitat simply by entering into a section 11 agreement. The Minister can only rely on a section 11 agreement to meet the obligation of section 58 if (at para 119) the "agreement legally protects that habitat from destruction through non-discretionary means."
6. The duty to protect habitat (the function of s.58 of SARA) is different from the duty to manage habitat (the Minister's function under the *Fisheries Act*) (at paras 114 and 143 - 151). The Minister cannot rely on discretionary management functions to meet the standard of protection demanded by section 58.

This decision deals with a marine aquatic species but the reasoning is equally applicable to listed (endangered or threatened) freshwater aquatic species - and therein lies the real importance of this decision in a landlocked province like Alberta. In the case of "federal" species the federal government cannot hide behind the safety net provisions of SARA but must itself take the necessary steps to protect the attributes of the critical habitat of listed species - even if in doing so it limits or restricts the exercise of provincial water rights.

I presented a CLE paper on the interaction between SARA and provincial water rights at the law school in May 2011, <http://www.law.ucalgary.ca/system/files/Species+Protection+trifold+brochure+without+copies.pdf> copy available on request, ndbankes@ucalgary.ca.