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Unlawful Delay in the Preparation of Recovery Strategies under SARA and New Questions about Northern Gateway

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Case commented on: *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148

The federal government is failing to adhere to legislated timeframes for implementing recovery strategies under the *Species at Risk Act*, SC 2002, c 29 (SARA). In *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148, the Federal Court has declared this to be unlawful conduct by the Minister of Fisheries and Oceans and the Minister of the Environment in relation to 4 species at risk: the pacific northwest humpback whale; marbled murrelet; woodland caribou (southern population); and Nechako river white sturgeon. Readers may recall that I referred to these proceedings in my recent post concerning the Northern Gateway pipeline recommendation. The failure by the Ministers to adhere to SARA timelines was never in dispute here, the argument of the parties and the decision by the Honourable Madam Justice Mactavish instead focuses on the legal consequences this failure.

The obligation to prepare and finalize recovery strategies for species listed as endangered or threatened under SARA and the timeframe in which this occurs is set out in sections 37 to 44 of SARA. Simply put, section 37(1) states that the relevant Minister must prepare a recovery strategy. The recovery strategy is an essential step towards engaging the legal protections given by SARA to listed species at risk, including the identification of critical habitat. Depending on certain circumstances, the Minister has up to 4 years to publish a proposed recovery strategy (SARA, section 42). Once a proposed recovery strategy is published, SARA provides for a 60 day comment period and stipulates that a final recovery strategy be published 30 days thereafter (SARA, section 43). Justice Mactavish notes these timelines expired between 2007 and 2009 for the 4 species in question here (at paras 23-33).

The record before the Court demonstrated that recovery planning work had been done for these species, but that recovery strategies were not formally proposed for a variety of reasons, including a desire by the Ministers to consult with stakeholders, organizational capacity shortcomings, and challenges in properly identifying critical habitat (at paras 49-55). The evidence before the Court indicated that express decisions were made by federal officials to delay proposed recovery strategies even after SARA timelines had passed (at para 75). This decision also continues the recent trend of the Federal Court to observe the precautionary

principle stated in section 38 of SARA that the preparation of a recovery strategy should not be postponed for a lack of full scientific certainty (at paras 71-73).

Justice Mactavish acknowledges an appreciation for the complexities of recovery planning under SARA, but she rules that none of the explanations offered by the Ministers provide lawful justification for the failure to meet SARA timelines. What I think is more noteworthy than the ruling itself are the statements made along the way. I've already noted the reference to the precautionary principle. Justice Mactavish also observes that the failure to post a recovery strategy significantly limits the application of SARA protection for species at risk, particularly against harm to critical habitat from industrial activity (at paras 56-60). Northern Gateway is very much in the picture here and many would add this proposed new project to the list of reasons why recovery planning for these 4 species was delayed. Justice Mactavish reminds us that the rule of law ensures that government officials comply with their SARA obligations. My colleagues Professor Bankes and Professor Olszynski have previously commented on similar statements by the Federal Court in SARA cases (see here and here). While Justice Mactavish does not reach back to the 17th century Bill of Rights as Mainville JA does in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40 (at paras 71-100), Justice Mactavish does find support (at paras 66, 90-92) in the remarkable dissenting opinion of Alberta Court of Appeal Chief Justice Fraser in *Reece v Edmonton (City)*, 2011 ABCA 238. As an aside, it is nice to see Fraser CJA's dissent receive some attention in the SARA jurisprudence.

One of the arguments by the Ministers here was that declaratory relief is not available to the applicants because there is no longer a dispute. In the time which elapsed between the application for judicial review in September 2012 and the hearing of argument before the Court federal officials had in fact published the proposed recovery strategies in question. Justice Mactavish rejects this argument, citing the discretionary power of the Court to issue declaratory relief where appropriate, and finds the rule of law demands such relief is warranted here (at paras 65-66). In addition to the findings throughout her judgment that I've already noted, Justice Mactavish observes that federal officials have failed to comply with SARA recovery strategy timelines for another 167 listed species at risk (at para 85).The words chosen by Justice Mactavish to conclude her ruling suggest that the objective of SARA also had considerable influence here:

> 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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> 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 (at paras 100-101)
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> (Emphasis in original)

Accordingly, Justice Mactavish declares that the Ministers acted unlawfully in failing to post proposed recovery strategies for the pacific northwest humpback whale, marbled murrelet, woodland caribou (southern population), and Nechako river white sturgeon, within the timelines prescribed by SARA. The Court retained jurisdiction to hear submissions, if necessary, on compliance with final recovery strategy timelines for 3 of these 4 species (the final recovery strategy for the humpback whale has been published).

As I noted above, the Northern Gateway pipeline is lurking about in these proceedings. One very large question that remains is whether this declaration will have any legal effect on the Northern Gateway regulatory process. Recall that these 4 species and their habitat will be affected by the pipeline and its associated activities. The joint review panel concluded there would be no significant adverse effects on these species at risk, but did so in the absence of recovery strategies, a critical component of protecting species at risk under SARA. The absence of these recovery strategies in the regulatory process is the result of conduct that has now been declared contrary to law. Had the federal government complied with the law, these recovery strategies would have been placed before the Northern Gateway panel. Does the law require the panel to consider the content of these recovery strategies in its report? Can the Governor in Council lawfully make a decision on whether the Northern Gateway pipeline can go ahead when the recommendation before it is based on an incomplete record and fails to take into account these recovery strategies?