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Canadian Species at Risk, Where the Government Ignores Emergencies and Law

By: Drew Yewchuk

Decision Commented On: *Western Canada Wilderness Committee v Canada (Environment and Climate Change)*, [2024 FC 870 \(CanLII\)](#)

Western Canada Wilderness Committee v Canada (Environment and Climate Change), [2024 FC 870 \(CanLII\)](#) is a Federal Court decision about the obligations of the federal Minister of Environment and Climate Change (the Minister) to recommend emergency protections for species facing imminent threats to their survival or recovery under the *Species at Risk Act*, [SC 2002, c 29 \(SARA\)](#). Justice Yvan Roy concluded that the Minister had unlawfully delayed recommending that the Governor in Council issue an emergency order under *SARA* for the spotted owl, and rejected the Minister's interpretation that recommending an emergency order could be delayed while the Minister gathered extensive information. The decision also addresses a long-term problem with the implementation of *SARA*: internal executive branch processes have not complied with the text, purpose, or past judicial interpretations of *SARA*.

Readers may be experiencing some *déjà vu*, because there was another decision with the name *Western Canada Wilderness Committee v Canada (Environment and Climate Change)* in February 2024 rejecting a Ministerial interpretation of *SARA*. This post is about a second decision (2024 FC 870 (CanLII)) relating to emergency orders and the spotted owl, and not [2024 FC 167 \(CanLII\)](#) relating to migratory bird habitat protection and the marbled murrelet, which I discussed [here](#). Despite the identical names and similar subjects, 2024 FC 870 (CanLII) relates to an entirely different piece of *SARA* litigation.

As a quick summary for non-lawyers interested in the implications of the decision: the Court found that the Minister had taken an unreasonably long time to recommend the federal Cabinet make an emergency order after accepting the spotted owl faces an imminent threat to its survival or recovery. The decision should promote faster federal government decision making for populations of threatened wildlife facing imminent threats to their survival or recovery.

The Spotted Owl's Slide to Extinction

The spotted owl's habitat is in the Pacific northwest, on both sides of the Canada-U.S. border, in old-growth forests desired by the logging industry. The spotted owl has the sad distinction of being a long-term species at risk on both sides of the border and an example of failure of North American species at risk law. The protections for spotted owl under the American [Endangered Species Act of 1973](#) set off [a lengthy legal and political fight through the 1980s and 1990s over logging and endangered species in the United States](#). The spotted owl populations on the U.S. side have

dropped by 75% over the last two decades and continue to fall, such that the United States Fish and Wildlife Service have proposed to [shoot large numbers of competing owl species](#) to try to open space for the spotted owls. Alberta uses a comparable strategy of culling wolves to support falling caribou populations (discussed by [Shaun Fluker here](#)).

[Canada's spotted owl population](#) is found entirely in B.C., and the spotted owl was one of the species listed as 'endangered' under *SARA* when it came into force in 2003. By 2007, there were an estimated twenty-two wild spotted owls in Canada, and [only three \(one wild-born and two captive-born\)](#) by 2023 (at para 54). Logging of spotted owl habitat is the primary cause of the species' decline (at para 14). Canada's spotted owl now survives primarily in a [captive breeding centre](#) operated by the British Columbia provincial government. The government of British Columbia prioritized logging and drove the spotted owl to extirpation and the federal government chose not to interfere.

The Process for *SARA* Emergency Orders

Western Canada Wilderness Committee v Canada (Environment and Climate Change), 2024 FC 870 (CanLII) [focuses on the interpretation of](#) section 80 of *SARA*. The key subsections are:

Emergency order

80 (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.

Obligation to make recommendation

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

Consultation

(3) Before making a recommendation, the competent minister must consult every other competent minister.

Subsections 80(1) and (2) contain both compulsory (must) and discretionary (may) provisions. Where the competent minister has evidence that leads them to believe a species faces imminent threats to its survival or recovery, the competent minister *must* recommend the Governor in Council make an emergency order. But Parliament left the final decision on whether to issue an emergency order to the Governor in Council because of the potentially large socio-economic consequences of any such decision. After receiving the competent minister's recommendation, the Governor in Council has discretion about whether to make an emergency order, take a different action to protect the species, or to do nothing and leave the species to probable extinction or extirpation. If the Governor in Council does choose to make an emergency order, they have broad discretion to prohibit activities adversely affecting the species or its habitat, with the precise scope of the discretion depending on whether the species is in a category more fully under federal jurisdiction (aquatic species, migratory birds, or species found on federal lands) (at paras 10-12, *SARA*, s 80(4)).

Case Summary

On January 17, 2023, the Minister officially formed the opinion the spotted owl faces imminent threats to its survival and recovery (at para 21). Staff at Environment and Climate Change Canada started work on the recommendation to the Governor in Council in February 2023 (at para 6).

The application for judicial review was originally filed in June 2023 seeking a *mandamus* order to compel the Minister to recommend the Governor in Council issue an emergency order for the protection of the spotted owl. But after the minister made such a recommendation in September 2023, the proposed *mandamus* order became moot, and the application proceeded as an application for declaratory relief (at paras 1 and 31).

Justice Roy found that the question before the Court was “whether taking more than eight months to present the recommendation satisfies the obligation created by ss 80(2) on the facts of this case” (at para 12).

Western Canada Wilderness Committee argued the only considerations were “the imminency and the severity of the threats” to the species (at para 35), and “that Cabinet can establish policies and procedures in order to bring matters to it, but not at the expense of statutory obligations” (at para 36). The applicant conceded that the Minister must consider Indigenous rights in determining whether there is an imminent threat to the species but argued that should not delay making the recommendation for an emergency order once the Minister determines there is an imminent threat. In this case, both Indigenous groups that responded to the Minister were supportive of the proposed order (at paras 28 and 38).

The Minister argued that *SARA* allows a Minister to gather further types of information before making a recommendation to the Governor in Council, but Justice Roy noted that the Minister failed “to explain what is ‘informing the recommendation’ since it is already acknowledged that the sole relevant consideration is the existence of imminent threats” (at para 43). Justice Roy was critical of the Minister’s position, noting holes in the Minister’s interpretive argument in a tone that emphasized the Minister’s position was untenable, for example:

Without authority in support of the proposition, the Respondents declare that Parliament “was keenly aware of the time that the Cabinet process would require before an emergency order could be issued” (at para 42)

...

If I understand the position now advanced by the Respondents, they seek to create two stages: the opinion stage and the recommendation stage, with the recommendation stage requiring different information from the opinion stage. Here again, the Respondents do not indicate how the text, context and purpose of ss 80(2) support the existence of two stages. Rather the Respondents argue that such interpretation is consistent with the objectives of the scheme “because making an informed recommendation promotes species protection more effectively than a bare recommendation” (para 23). The Respondents do not say why that would be. (at para 44)

Justice Roy agreed with Western Canada Wilderness Committee’s argument, finding “it difficult to fathom how a period of more than eight months could be reasonable once the opinion has been formed that there exist imminent threats to the species’ survival or recovery” (at para 65) and that the Minister’s interpretation was inconsistent with the scheme of *SARA* and appeared to ignore “the legal constraint represented by the jurisprudence of the federal courts” (at para 68). The Court declared: “The Minister of Environment and Climate Change’s delay in making his recommendation for an emergency order was not in this case in accordance with the obligation created by subsection 80(2) of the *Species at Risk Act*.”

Commentary

First, what was the real cause of the long delay? Considering that the Governor in Council ultimately declined to issue an emergency order, why did the Minister not quickly make the recommendation leaving it to the Governor in Council to decline to issue the emergency order? That approach would have fulfilled the legal requirements of *SARA* and had the same outcome.

The reason is that the federal government has a practice of not using the emergency order power as drafted, and instead using the possibility of an emergency order as leverage in negotiations to push provincial governments to take their own species protection measures. This is what the federal government referred to when it “insisted that there has been cooperation between the federal government and the province of British Columbia in their effort to protect the Spotted Owls” (*sic*) (at para 16). During the long delay, the Minister was negotiating with British Columbia (at para 24-27) as British Columbia preferred to rely on the captive breeding program rather than habitat protection (at paras 15, 26) because captive breeding does not involve stopping logging activities. But captive breeding without habitat protection is ineffective. Wildlife needs wild habitat, not government facilities. The British Columbia government is not “a partner in spotted owl recovery” – it is an obstacle to spotted owl survival, negotiating to replace habitat protection with [an expensive but ineffective captive breeding program](#) that will transform the spotted owl from wildlife to a species that survives only in captivity. Instead of issuing the emergency order, the real-world outcome was that the federal government negotiated a [complex agreement with British Columbia](#) that falls short of protecting the habitat necessary for spotted owl survival and recovery as contemplated by *SARA*.

The use of emergency order provisions as a federal threaten-and-negotiate strategy is not what *SARA* intended. The interjurisdictional cooperation scheme of *SARA* (at para 49 and the preamble of *SARA*) was meant to take place early in species protection, when recovery strategies were being prepared, not at the last minute when the situation has become an emergency. As part of the 1996 [National Accord for Species at Risk](#), the provinces were supposed to establish provincial species at risk laws that would provide protections complementary to those found in *SARA*, but British Columbia did not (neither did Alberta, Saskatchewan, or the Yukon). There has been a tremendous distortion from the scheme of *SARA* established by the legislature and the administrative processes and procedures the executive branch has developed in relation to *SARA*. That is the background to Justice Roy’s comment:

The machinery of government cannot undermine the clear statutory obligations made to the Minister. Process must serve the legal obligation; it is not for the legal obligation to adjust to some process. The tail cannot be wagging the dog. (at para 52)

In *SARA* implementation, we see the tail wag the dog. Executive branch process has evolved to ignore the text of *SARA* and the intent of the legislature. That is a failure for species at risk policy and Canadian rule of law. Ministerial actions under *SARA* have not been a power grab by the federal government, but an abdication of the statutory duties placed on federal Ministers by *SARA*. The federal government has had the jurisdiction to shut down logging to protect spotted owl for almost two decades and has chosen to negotiate ineffective agreements instead.

Second, Justice Roy’s harsh tone in describing the Minister’s arguments is notable. While there are reasons that courts should remain studiously respectful and civil with individual litigants [even when those individuals badly misunderstand law](#), those reasons do not apply to a government minister acting in their official role in the executive branch of government. It is an affront to the rule of law for the executive branch to adopt interpretations of law so inconsistent with statute and past judicial decisions that they cannot be plausibly defended in court. Harsh expressions of judicial disapproval are justified to discourage this practice (see Justice Mactavish’s comments in *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at paras 85-92).

Finally, despite the decision being a total victory for the Western Canada Wilderness Committee, I have doubts about whether it will have much impact, given the federal executive branch’s pattern of ignoring of Federal Court decisions on *SARA*. Since the Minister already ignores past judicial decisions interpreting *SARA* (as Justice Roy noted at para 68), how hard will it be for the Minister to ignore one more? To give an idea how little the Minister complies with *SARA*, consider examples of other *SARA* non-compliance relating just to the spotted owl. The Minister posted [a new proposed recovery strategy for the spotted owl](#) on January 26, 2023. That recovery strategy has not been finalized even though *SARA* sets a strict 90-day timeline for recovery strategy finalization (see *SARA* at s 43). Given the first recovery strategy for the spotted owl was posted to the registry in in 2006, there ought to be three five-year reports on the implementation of that recovery strategy (see *SARA* at s 46), but there are none. The [2006 Recovery strategy](#) anticipated 6 action plans by the end of 2007 (see page 53), but no action plans or summaries of work completed on the action plans (as required by *SARA* s 50) have ever been posted to the registry. Keep in mind the spotted owl is a charismatic high-profile species that was listed as endangered when *SARA* came into force – lower profile species like the [Enos Lake stickleback](#) received even less protection from *SARA* as they [went extinct](#).

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