

New Developments in Protecting Species at Risk

A. Introduction

In a country well-known for its charismatic megaf flora and megafauna such as ancient red cedars and grizzly bears, it is telling that the most important developments in the protection of species at risk since the introduction of the federal *Species at Risk Act (SARA)* in 2002 is thanks to a small minnow and a ground bird.¹ The Nooksack Dace and Greater Sage Grouse made headlines last year when the federal court, in two separate actions, ordered the federal government to identify critical habitat for these endangered species that are listed in Schedule 1 of SARA. Both species are characterized by low numbers and have specific habitat requirements that are limited in geographic scope. The Nooksack Dace is a small minnow (less than 15 centimetres in length) residing in four streams in the Fraser Valley. Its global distribution extends to 20 other streams in northwest Washington State. The Greater Sage Grouse number 150,000 in North America, of which less than one percent is found in Canada. They depend on sagebrush habitat for food and shelter, and need open sparsely vegetated areas for breeding, called leks, that range in 1.4 to 16 hectares in size.

While it may be difficult for some to embrace the survival of a minnow, taken in its broader context *SARA* addresses one aspect of maintaining biodiversity throughout Canada. Healthy ecosystems require diversity to sustain their resilience. Species at risk are the bellwether for loss of habitat and ecosystem function. Given the increasing attention paid to biodiversity in this era of action on climate change, the purpose of this backgrounder is to discuss some of the new developments in protecting species at risk. Section B sets out federal and provincial jurisdiction for species at risk. Section C discusses five recent cases that address species at risk and their effect on government and other activities. Section D invites the reader to consider questions posed in anticipation of the ELC Associates teleconference on Monday April 26 2010.

B. Legislation and Jurisdiction

British Columbia does not have dedicated legislation for endangered species. Biodiversity in BC is protected primarily by the federal *SARA*, and to a lesser extent by a patchwork of provincial statutes, including the *Wildlife Act*,² and the *Forest and Range Practices Act (FRPA)*.³

1. The Federal Species At Risk Act

The *Species At Risk Act* seeks to prevent wildlife species from being extirpated or becoming extinct and to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.

The Act establishes a process whereby the conservation status of species is assessed by a scientific body of experts, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). After

¹ S.C. 2002, C.29. Returning to the B.C. tradition of charismatic megafauna, a third federal court application will be argued in June on similar grounds for the Orca whale.

² R.S.B.C. 1996, c. 488.

³ S.B.C. 2002, c. 69.

COSEWIC's assessment, the Governor in Council must decide whether to list that species. The Governor in Council must provide reasons if it opts not to list a COSEWIC-assessed species.⁴ Species added to the "list" are included in Schedule 1 of *SARA* in one of four categories: extirpated; endangered; threatened; or special concern.

Once a species is listed (except a special concern species), it enjoys automatic protection against physical harm or the destruction of its residences on federal lands.⁵ This protection is largely inapplicable in B.C. where more than 95 percent of the land base is recognized as provincial Crown or fee simple land.

Listing also triggers the preparation of a recovery strategy within one year of listing a species as endangered.⁶ If the Minister determines that the recovery of the listed species is technically and biologically feasible, the recovery strategy has many mandatory elements, including a description of the species and the threats to its survival, and identification of its critical habitat, "...to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction[.]"⁷ If critical habitat cannot be identified, the recovery strategy must include a schedule of studies necessary to identify critical habitat. The recovery strategy must be prepared in cooperation with "every aboriginal organization that the competent Minister considers will be directly affected by the recovery strategy[.]"⁸

Implementation of the recovery strategy is, on paper, driven by action plans. Recovery strategies must state when action plans in relation to the recovery strategy will be completed.⁹ In reality, because action plans, unlike recovery strategies, do not have to be prepared within a timeframe, to date they have been of little consequence. In fact, only one finalized action plan exists today – that for the Banff Springs Snail.¹⁰

A stronger avenue for protection of species at risk relates to the mandatory protection of critical habitat identified in a final recovery strategy within 180 days of the recovery strategy being posted on the public registry. Protection in this context means by an Act of Parliament or the general prohibition against the destruction of critical habitat.¹¹ This protection extends to habitat on federal land, to the habitat of aquatic species, and to the habitat of migratory birds protected by the *Migratory Birds Convention Act*.¹² For critical habitat not protected in these areas of federal jurisdiction, the Minister must make either an order protecting critical habitat, or a statement explaining how the critical habitat is already legally protected.¹³ Protection of a terrestrial species' critical habitat that occurs on provincial land requires an order of the Governor in Council on the recommendation of the Minister.¹⁴ The recommendation and order are not mandatory and it appears that neither has ever been

⁴ At s.27(1.2).

⁵ At s.34(1).

⁶ At s.42(1).

⁷ At s.41(1)(c).

⁸ At s.39(1)(d).

⁹ At ss.41(1)(g) and 47.

¹⁰ Based on information retrieved 14 April 2010, online: SARA Registry http://www.sararegistry.gc.ca/sar/recovery/actionPlansTimelines_e.cfm.

¹¹ At s.57.

¹² At s.58(1).

¹³ At s.58(5).

¹⁴ At s.61.

made.¹⁵ The other way for *SARA* to protect critical habitat under provincial jurisdiction is through an emergency order, a power that also has not been used to date.¹⁶

Schedule 1 currently lists approximately 9 terrestrial mammals in BC as endangered or threatened, along with dozens of plants, molluscs, fish, amphibians, reptiles and birds.¹⁷ The Pacific Ocean is home to at least 8 endangered or threatened marine mammals, all of which are whales.¹⁸ Of the 76 final recovery strategies posted for Canadian species, 50 of those implicate B.C. species with 24 B.C.-specific final recovery strategies.¹⁹ None are for terrestrial mammals, amphibians or reptiles. Most are for birds and aquatic species, plus a few mollusks, arthropods, mosses, lichens and plants.

The *SARA* contains specific requirements for recovery planning to be carried out in cooperation with affected First Nations. British Columbia does not have similar legislative requirements, but has signed on to the federal/provincial *Accord for the Protection of Species at Risk*.²⁰ This *Accord*, while non-binding, indicates a commitment on the part of the Province to participate in action for species recovery.

2. Provincial Legislation

The *Forest and Range Practices Act* (FRPA) allows the provincial Deputy Minister of Environment to designate species as identified wildlife, which are called either species at risk or regionally important wildlife. Currently there are 85 species and plant communities included in the category of species at risk and none in the category of regionally important wildlife. The Ministry manages identified wildlife through the establishment of wildlife habitat areas and the implementation of general wildlife measures within wildlife habitat areas. However, other forestry regulations mandate that conservation measures cannot unduly reduce the timber supply.²¹

The *Wildlife Act* is predominantly concerned with the regulation of hunting in B.C. It allows the Minister, with permission of Cabinet, to designate wildlife management areas (WMAs) and endangered or threatened species. However, designation is optional and to date the Minister has designed only one threatened and three endangered species.²² Moreover, once a species is

¹⁵ David Suzuki Foundation et al., “Canada’s Species at Risk Act: Implementation at a Snail’s Pace” (April 2009), at 4, online: <http://www.ecojustice.ca/publications/reports/canadas-species-at-risk-act-implementation-at-a-snails-pace/attachment>; Keith Ferguson, Staff Counsel Ecojustice. Personal communication, February 2010.

¹⁶ At s.80.

¹⁷ The mammals include a badger, a shrew, a mole, a marmot, an ermine, a bat, a bison, and two populations of woodland caribou.

¹⁸ Based on information retrieved 14 April, 2010, online: SARA Registry http://www.sararegistry.gc.ca/sar/index/default_e.cfm.

¹⁹ Calculated from the SARA Registry April 20 2010, online: http://www.sararegistry.gc.ca/sar/index/default_e.cfm.

²⁰ *Accord for the Protection of Species at Risk*, 1996, online: Species at Risk Public Registry http://www.registrelep.gc.ca/ap-proach/strategy/default_e.cfm.

²¹ *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004. As well, a 2004 government policy limits measures for forest-dependant species to an impact on timber supply of no greater than one percent. The policy explicitly acknowledges its failure to address species’ key needs such as “habitat supply, habitat connectivity, and population viability and other issues such as access management.” Ministry of Water, Land and Air Protection, “Identified Wildlife Management Strategy: Procedures for Managing Identified Wildlife” (2004) at 3, online: <http://www.env.gov.bc.ca/wld/documents/identified/IWMS%20Procedures.pdf>.

²² *Designation and Exemption Regulation*, B.C. Reg. 168/90, s. 13. The sea otter is threatened; the Vancouver Island marmot, burrowing owl, and American white pelican are endangered.

designated, the *Wildlife Act* does not prescribe a timeframe within which protective measures, such as a recovery plan, must be in place. Wildlife management areas provide minimal protection because, unlike protected areas, industrial activities such as forestry, mining, or waterpower projects are permitted within WMAs.²³ Based on reporting from the Ministry of Environment WMA website, it appears that the Ministry has designated only one WMA since 2001.²⁴

In 2008, the provincial government amended the *Wildlife Act* through the *Environmental (Species and Public Protection) Act* to increase maximum fines to \$250,000 (minimum \$2,500) for first-time poaching offences and \$500,000 (minimum \$5,000) for subsequent offences.²⁵ The amendments also increased the number of wildlife protection officers to monitor hunting and fishing activities, and created authority to regulate the possession of alien and exotic species. The *Controlled Alien Species Regulation*, enacted in 2009, prohibits the possession of designated species other than by zoos, research institutions or permit holders, and also regulates breeding and release.²⁶

In summary, given the vast amount of land in B.C. that is regulated by the provincial government and the inadequacy of provincial laws in addressing species at risk, there is insufficient protection for species at risk and biodiversity in B.C. Conservation organizations are turning to *SARA* and the mandatory requirement for designating critical habitat as an opportunity for leveraging government attention for habitat requirements for species at risk.

C. Recent Case Law

1. Bird, Minnow, and Whale: the *SARA* Trilogy

In 2009 the Federal Court decided two important cases, and will hear another in June, interpreting the provisions of *SARA* that address the steps that the federal government must take to identify and protect critical habitat.

²³ Furthermore, the designation of a WMA does not affect the pre-existing rights of land users within that area. *Wildlife Act* at s.4(3).

²⁴ Ministry of Environment website, “Wildlife Management Areas, Alphabetically Listed” http://env.gov.bc.ca/bcparks/explore/wma/alpha_listing.html#u.

²⁵ S.B.C. 2008, c. 33.

²⁶ B.C. Reg. 94/2009.

Alberta Wilderness Association v. Canada (Environment) (Sage Grouse)²⁷

In *Sage Grouse*, the Federal Court allowed the judicial review application of a coalition of environmental groups challenging the decision of the Minister of Environment to refuse to identify critical habitat in the Greater Sage Grouse Recovery Strategy, posted January 14 2008. The recovery strategy identified requirements for four types of habitat: breeding, nesting, brood-rearing and winter. The Minister concluded that, based on the available scientific evidence, no critical habitat could be identified with respect to any of these requirements. The facts, however, showed that critical habitat was identifiable for three of the four habitat types.

The Court agreed with the applicants that the Minister must identify as much critical habitat as possible in a recovery strategy, even if all critical habitat cannot be identified at the time the Ministry is developing the recovery strategy. In particular, the Court noted that the Ministry of Environment appeared to be seeking precision rather than using best available information in identifying critical habitat. While that information may change over time, the identification of critical habitat cannot be postponed for that reason alone. The court refused to find an error of law, however, it did conclude that the Minister's decision not to identify any critical habitat, despite such habitat being known, was unreasonable.

The Court ordered the Minister to remedy the critical habitat provision in the recovery strategy, and invited the applicants to make submissions on that point. The applicants argued for a redetermination of critical habitat on the basis of the judgment and additional scientific information provided since the initial judgment. However, the court agreed with the respondent Minister that the recovery strategy need only be updated to correct the deficiencies originally found by the Court, i.e., to identify as critical habitat all known active breeding sites in Alberta and Saskatchewan, and known source habitat within the Manyberries area.

Environmental Defence Canada v. Canada (Fisheries and Oceans) (Dace)²⁸

While *Sage Grouse* can be characterized as grounded in the facts, the decision in *Dace* involves a thorough examination of the definition of critical habitat and the mandatory nature of its identification in recovery strategies. The applicants in *Dace* argued that the Minister of Fisheries and Oceans had failed to meet the requirements of *SARA* regarding the final recovery strategy for the Nooksack Dace. The Recovery Team that prepared the recovery strategy identified the geospatial location of critical habitat, but the Minister ultimately decided to remove that information from the final recovery strategy and provided it in a separate document. Only a qualitative description of what critical habitat would consist of (the attributes of critical habitat) remained in the final recovery strategy. The rationale provided by the Minister was that the severed critical habitat document could then be scientifically peer-reviewed and used in an action planning process that would include socio-economic analysis as well as consultation with affected parties. The applicants argued this approach was contrary to *SARA*, and the Court agreed. As in *Sage Grouse*, the requirement to identify critical habitat in section 41(1)(c) of *SARA* was found to be mandatory and provides no ministerial discretion in identifying critical habitat.

In a strongly worded decision, the court noted at the beginning of the judgment that:²⁹

²⁷ 2009 FC 710, 45 C.E.L.R. (3d) 48. No parties appealed *Sage Grouse*.

²⁸ 2009 FC 878, 45 C.E.L.R. (3d) 161. No parties appealed *Dace*.

²⁹ At para. 2.

...[T]he story that gave rise to the present litigation and the conduct of the litigation itself is important to be told. This is so because a review of the Minister's decision-making under *SARA* applied to the Nooksack Dace provides ample proof that the bringing of the present Application was absolutely necessary. This is a story about the creation and application of policy by the Minister in clear contravention of the law, and a reluctance to be held accountable for failure to follow the law. Therefore, this is a case about the rule of law described by Justices Bastarache and LeBel at paragraph 28 of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190:

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

The decision yields at least three important principles for the application of the *SARA*. First, the Minister cannot disregard, ignore, or remove reliable information about a species' critical habitat. Second, socio-economic concerns cannot be considered in developing a recovery strategy, only in developing an action plan. This is because recovery strategies are to provide baseline biological and ecological information about a species, and present a broad strategy to address threats to conservation. In contrast, action plans are intended to describe discrete measures to be taken to achieve a species' survival and recovery, including evaluation of the socio-economic costs and benefits of such measures. Finally, critical habitat means both a defined geographic area capable of being located on a map and the physical and biological attributes of that area that allow a species to use it to carry out its life processes.

***David Suzuki Foundation et al. v. Minister of Fisheries and Oceans et al. (Orca)*³⁰**

The third case involves two consolidated motions. The first challenges the Minister's determination that the critical habitat of Northern and Southern Resident Killer Whales is legally protected per section 58(5)(b) of *SARA* by existing policies, voluntary guidelines, discretionary provisions, prospective laws, and provincial laws (the protection statement). The Minister responded to this challenge by issuing a protection order in an attempt to render the application moot. The second motion challenges the Minister's protection order that legally protects only geospatial areas and/or geophysical elements of the whales' critical habitat and not other components of critical habitat, such as prey availability, environmental quality and acoustic environment.³¹

The Minister's mootness motion was dismissed and the applicants' motion to consolidate was granted. The question before the court is therefore: does section 58 of *SARA* require that all components of critical habitat be legally protected by the competent ministers? The applicants were able to rely in their factum on the decision in *Dace* that critical habitat includes not only geospatial locations but

³⁰ Docket: T-1552-08 and T-541-09. The hearing will take place in June 2010.

³¹ Fisheries and Oceans Canada has created confusion by using the terms geospatial/geophysical, and areas/attributes interchangeably, which makes it unclear whether they are referring to locations represented by coordinates on a map (geospatial areas) or features such as narrow channels to funnel prey and beaches suitable for rubbing behaviour (geophysical attributes).

also geophysical features or components of habitat. The principal anthropogenic threats facing orcas, as identified in versions of the recovery strategy, are reduction in the availability of salmon prey, environmental contamination and physical and acoustic disturbance.

Implications of the *SARA* Trilogy

The most immediate effect of these cases is their impact on the recovery planning processes that are currently underway for dozens of species. From a legal perspective, several points are important to note. First, the government's own scientific evidence of critical habitat provides sufficient proof of the needs of species at risk.

Second, the federal government's refusal to designate critical habitat when mandated to do so under *SARA*, and with adequate factual basis to do so, is unreasonable. This finding of unreasonableness using the administrative law standard for judicial review from *Dunsmuir v. New Brunswick* gives some additional indication of how courts will evaluate government decisions that are not based on an error of law.³²

Third, the cases provide a new endorsement of the precautionary principle and caution industry and local governments dealing with land development. Both the *Dace* and *Sage Grouse* judgments refer to the precautionary principle—that “where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”³³ While Zinn J. in *Sage Grouse* referred to it only briefly, Campbell J. in *Dace* more fully discussed the codification of the principle in section 38 of *SARA* and its relation to Canada's commitments under the *Convention on Biological Diversity*, which is also referenced in the preamble to *SARA*. Campbell J. found the applicants' argument “correct in law” that “not only must *SARA* be construed to conform to the values and principles of the *Convention*, but the Court must avoid any interpretation that could put Canada in breach of its *Convention* obligations.”

Finally, these cases may begin to have an impact on requirements for future identification of critical habitat, and on potential development around or within critical habitat. For example, local governments may feel compelled to identify and protect critical habitat through development permit processes. As one national law firm has warned its clients:³⁴

Companies making investment decisions in Canada have to carefully consider the potential delay risk associated with unfulfilled obligations under the *SARA*, and potentially under all federal legislation that affect land and resource use in Canada. As a result of [the *Sage Grouse* and *Dace* decisions], the first to consider critical habitat, the issuance of recovery strategies may be delayed to allow for the identification of some critical habitat. In addition, the extent of *critical habitat identified may be conservatively broad to avoid further litigation, and will not take costs or socio-economic impacts into account*. Accordingly, proponents with projects that have the potential to be affected by the presence of *SARA* species should be prepared to make application under section 73 of the *SARA* for permits to allow projects to proceed within critical habitat. [*emphasis added*]

³² [2008] 1 S.C.R. 190.

³³ 114957 *Canada Ltée (Spraytech, Société d'Arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para. 31.

³⁴ Osler, Hoskin & Harcourt LLP, “Federal Court Weighs in on *SARA* Critical Habitat” 14 September 2009, online: Osler Update <http://www.osler.com/resources.aspx?id=18432>.

2. Other Cases

Two other recent cases have implications for species at risk.

R. v. J.D. Irving Ltd. (Irving)³⁵

In *Irving*, the New Brunswick Provincial Court dismissed a constitutional challenge of provisions of the *Migratory Birds Convention Act* (“MBCA”) and *Migratory Birds Regulations*, C.R.C., c. 1035 that prohibit the destruction of migratory bird habitats. The accused, a forestry company, was charged with damaging or destroying approximately eight Great Blue Heron nests located on its lands. The accused argued that the offence provisions in the Regulations were unconstitutional because they infringed upon the province’s jurisdiction over property and civil rights (in the form of hunting) under section 92(13) of the *Constitution Act, 1867*. It also made a section 7 *Charter* argument that the Regulations were vague and overbroad.

In dismissing the jurisdictional challenge, the Court rejected J.D. Irving’s narrow characterization of the MBCA as hunting legislation falling solely within provincial jurisdiction. It construed the purpose of the MBCA as protecting and conserving migratory bird habitats from harm caused by a broader range of activities. Consequently, federal authority to enact the MBCA lay in its legislative power over matters concerning “peace, order and good government.” Moreover, the protection of migratory birds requires a single and unified approach that cannot be undertaken in piecemeal fashion via provincial legislation. Finally, the Constitution allows the federal government to enact legislation in order to fulfill Canada’s international obligations under a treaty, in this case the Migratory Birds Convention of 1916.

With respect to the *Charter* argument, the Court held that the Regulations were not void for vagueness because the terms “nest,” “destroy” and “disturb” were understood by the average citizen. Nor were the Regulations overbroad, because the means chosen to address the harm were proportionate to the state objective, and because the prohibition of harm did not remove the “due diligence” defence available with respect to regulatory offences.

The accused subsequently pleaded guilty and was sentenced to pay \$60,000, with \$50,000 to Bird Studies Canada’s Atlantic Canada office and \$10,000 to the Environmental Damages Fund.

West Moberly First Nations v. British Columbia (Chief Inspector of Mines) (West Moberly)³⁶

The *West Moberly* case illustrates the important influence of aboriginal law on environmental law, particularly with respect to species at risk. The petitioners, West Moberly First Nations, sought to quash three decisions of the Crown permitting mining exploration by First Coal Corporation in land subject to their Treaty No. 8 guaranteed traditional right to hunt.

³⁵ (2008) 37 C.E.L.R. (3d) 200 (N.B. Prov. Ct.).

³⁶ 2010 BCSC 359. Some of the analysis of this case is adapted from Caroline Findlay & Janice Walton’s analysis, “Coal, Caribou and Consultation – Court Directs Accommodation in Treaty 8 Region” 26 March 2010, online: Blakes http://www.blakes.com/english/view_bulletin.asp?ID=3869.

West Moberly brought evidence that the Burnt Pine caribou herd that inhabits the area of First Coal's operations has been reduced through incremental development in the area to a population of eleven. The Burnt Pine herd form part of the Southern Mountain population of Woodland Caribou, a species listed as "threatened" under *SARA*.

The BC Supreme Court found that the West Moberly have a treaty-protected right to hunt caribou in the area, and that the Crown failed to reasonably accommodate that right. The Court ordered a stay of provincial exploration permits for 90 days and ordered the Crown, in consultation with West Moberly, to put in place a reasonable, active plan for the protection and augmentation of a local caribou herd. Williamson J. concluded that "a balancing of treaty rights of Native peoples within the rights of the public generally, including the development of resources for the benefit of the community as a whole, is not achieved if caribou herds in the affected territories are extirpated."³⁷

The Court did not analyze the requirements of species protection laws, inquire as to why a recovery strategy for the Southern Mountain population of woodland caribou has not been completed under *SARA*, or determine the relevance, if any, of the statutory recovery planning process to the question of whether the Crown had properly accommodated West Moberly's hunting rights. Because of this, it is difficult to predict how significant the decision may be to future recovery planning.

West Moberly claimed that neither the federal nor provincial governments had lived up to their legal obligations under the *SARA* and the *Accord* with respect to recovery planning for the Burnt Pine Herd. One troubling aspect of this argument is that recovery planning under the *SARA* occurs at a population level. As such, even if the recovery strategy for the Southern Mountain population of the woodland caribou had been completed, it would not necessarily plan for or result in augmentation of this specific herd. Despite the lack of completion of formal recovery strategies under *SARA*, some plans for caribou recovery have been completed and are being implemented. One example is BC's *Mountain Caribou Recovery Implementation Plan*, which specifically impacts part of the Southern Mountain population.³⁸ It does not, however, include the Burnt Pine herd.

D. Discussion

This paper is a modest attempt to identify some of the recent developments associated with legal protection of species at risk, with an emphasis on case law dealing with the interpretation of ministerial duties under the *SARA*. This area of law and its interaction with Aboriginal law raises interesting questions that are making the application of *SARA* to broader considerations of biodiversity more tangible. We invite Associates to consider the following list of questions at our next teleconference on Monday, April 26 from 4pm to 6pm:

Questions arising from the *SARA* Trilogy

1. The *SARA* provisions that *could* protect critical habitat on provincial land are so discretionary that a skeptic would say that *SARA* will never protect most terrestrial species in Canada. Do *Dace* and *Sage Grouse* have a significant impact on this? Once the federal government identifies

³⁷ At para. 53.

³⁸ See BC Ministry of Environment, Mountain Caribou Recovery, online: http://www.env.gov.bc.ca/sarco/mc/files/Oct16_2007_Implementation_Plan_Map.pdf.

the area that an endangered species needs in order to survive, will they nonetheless refuse to protect it or ensure the province takes steps towards effective protection?³⁹

2. Many organizations are calling for endangered species legislation in B.C. Are efforts best directed at provincial endangered species legislation, or for faithful performance of duties under *SARA* and the non-binding federal-provincial *Accord for the Protection of Species at Risk*?
3. Osler advises its business clients that they may have to consider making applications under section 73 of the *SARA*.⁴⁰ Sections 73 and 74 allow the Minister to authorize or permit any activity that could affect critical habitat, as long as it is for one of three purposes: scientific research related to conservation; activities that will benefit the species; and activities where affecting the species is incidental to the carrying out of the activity. A *SARA* permit must also meet three pre-conditions: that reasonable alternatives are considered, that all feasible mitigative measures are taken, and that no activity may be authorized that could jeopardize the survival or recovery of the species. Are these conditions strict enough to disqualify activities that will further jeopardize species, or will sections 73 and 74 amount to an ineffective micro *Canadian Environmental Assessment Act* process?
4. What role should analysis of socio-economic impacts play in identifying critical habitat? The Court in *Dace* held that the language in *SARA* is unequivocal that measures to prevent loss of species must not be postponed for lack of full scientific certainty, and that socio-economic analysis does not form part of the assessment of what should be in a recovery strategy. Janice Walton of Blakes argues that:

[i]f socio-economics are irrelevant at the recovery planning stages, then what is the purpose of the consultation that is required with affected parties, including landowners, prior to the recovery strategy being posted to the *SARA* registry? Further, this seems at odds with *SARA*'s requirement that "cost effective" measures not be postponed because of scientific uncertainty. How is the planning team able to determine the cost effectiveness of proposed measures if no economic analysis is to be undertaken?⁴¹

5. The Nooksack Dace Critical Habitat Protection Statement describes human activities that threaten critical habitat and the federal legislation that "would be used to provide protection against such destruction." For every threat identified, from excessive water extraction drying out the gravelly habitat, to storm water washing it away, the federal government relies on section 35 of the *Fisheries Act*. Section 35 has, to date, failed to prevent the Nooksack dace and other species from becoming endangered. Does the critical habitat designation add any real protection?

³⁹ *SARA* at s.61(4)(b).

⁴⁰ Osler, Hoskin & Harcourt LLP, "Federal Court Weighs in on SARA Critical Habitat" 14 September 2009, online: Osler Update <http://www.osler.com/resources.aspx?id=18432>.

⁴¹ Janice Walton, "Consideration of Socio-Economic Impact Irrelevant to Species at Risk Identification of Critical Habitat" 15 September 2009, online: Blakes <http://www.blakes.com/english/view.asp?ID=3387>.

Questions arising from *West Moberly*

6. Some view the Court's remedy of an order to plan recovery and augmentation of the Burnt Pine Herd as problematic as it does not require co-ordination with the national development of a *SARA* recovery strategy for the Southern Mountain population of the woodland caribou, or the current plan being implemented by British Columbia for a portion of this particular population.⁴² The Court has imposed recovery planning requirements for one herd that may be incompatible with the recovery planning required under the *SARA* for the species as a whole. Given even a limited understanding of population dynamics, attempting to protect endangered species through recovery planning at the herd level rather than the population level may pose additional problems. Yet, at least where aboriginal hunting rights related to a specific herd are involved, relying on population-level recovery planning may (as it did in *West Moberly*) fall short of reasonable accommodation. Is there a better approach?
7. When asked by West Moberly to address the issue of cumulative impacts of Crown-approved development on the caribou herds in the permit process, the Crown answered that the issue is “beyond the scope of the review of this project to fully assess.” The Court commented that such a statement by a Crown decision-maker—that it does not have the authority to assess the “taking up” of a treaty right—fails to uphold the Crown's honour.⁴³ Does this mean cumulative impact assessment is arguably now part of the Crown's duty to consult and accommodate?

⁴² See, for example, Caroline Findlay & Janice Walton's analysis, “Coal, Caribou and Consultation – Court Directs Accommodation in Treaty 8 Region” 26 March 2010, online: Blakes http://www.blakes.com/english/view_bulletin.asp?ID=3869.

⁴³ At para. 55.

For More Information:

Legislation

Forest and Range Practices Act, S.B.C. 2002, c. 69

http://www.bclaws.ca/Recon/document/freeside/--%20f%20--/forest%20and%20range%20practices%20act%20sbc%202002%20c.%2069/00_02069_01.xml

Migratory Birds Convention Act, S.C. 1994, c. 22

<http://laws.justice.gc.ca/en/M-7.01/FullText.html>

Species At Risk Act, S.C. 2002, c. 29

<http://laws.justice.gc.ca/en/S-15.3/FullText.html>

Wildlife Act, R.S.B.C. 1996, c. 488

http://www.bclaws.ca/Recon/document/freeside/--%20w%20--/wildlife%20act%20rsbc%201996%20c.%20488/00_96488_01.xml

Books, Articles and Reports

“Canada’s Species at Risk Act: Implementation at a Snail’s Pace” (April 2009)

<http://www.ecojustice.ca/publications/reports/canadas-species-at-risk-act-implementation-at-a-snails-pace/attachment>

“Rich Wildlife, Poor Protection” (2007)

<http://www.ecojustice.ca/publications/reports/rich-wildlife-poor-protection>

2008 March Status Report of the Commissioner of the Environment and Sustainable Development: Chapter 5—Ecosystems—Protection of Species at Risk

http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200803_05_e_30131.html

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