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“Species at Risk” Legislation In Ontario and Canada

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Introduction

Species at risk in Canada are managed both through provincial legislation, where it exists, and federally, under the *Species at Risk Act*.

In Ontario, the province has had an *Endangered Species Act* for several decades. Prior to 2007, the *Endangered Species Act* consisted of only six sections. Simply, it made it an offence to “kill, injure, interfere with or attempt to destroy or interfere with or take any species of fauna or flora; or destroy or interfere with or attempt to destroy or interfere with the habitat of any species of fauna of flora, declared in the regulations to be threatened with extinction.”² In 2007, after much consultation and some fanfare, a new *Endangered Species Act* was proclaimed.

Federally, the *Species at Risk Act* was enacted in 2002, after a long and difficult process. It looks to be the federal government’s next target for substantive amendments to environmental legislation; though beyond media reports, it is unknown what those amendments might look like, and they are not expected to materialize in the next federal budget bill.³

In day to day life for practitioners, the most likely place we are likely to intersect with species at risk legislation is if we are seeking permits for our clients, to authorize prohibited activities. Most typically, this would occur in the context of development applications, whether it is a residential subdivision, a business park, or an industrial development.

Provincially, there has been only one significant case which has tested the limits of a section 17(2)(d) permit under the ESA.⁴ The upshot of that litigation is that the Minister has wide discretion to form his or her own opinions. These need not follow the opinions of independent experts required to provide opinions on jeopardy to affected species. In addition, the precautionary principle plays no real role in circumscribing that discretion.

Federally, most of the litigation has centered on the federal government’s failure to follow legal requirements in the context of recovery strategies. The Federal Court has made strong pronouncements about legal errors in these contexts, admonishing the federal government and its departments for failing to uphold the federal statutory

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² *Endangered Species Act* R.S.O 1990.

³ “Environment Minister eyes overhaul of law protecting at-risk wildlife”, *The Globe and Mail* (15 September 2012) online: <<http://www.theglobeandmail.com/news/politics/environment-minister-eyes-overhaul-of-law-protecting-at-risk-wildlife/article4547799/>>.

⁴ *Sierra Club Canada v. Ontario (Ministry of Natural Resources)* 2011 ONSC 4086.

requirements, including failing to apply the precautionary principle properly. [See *Environmental Defence Canada v. Canada (Ministry of Fisheries and Oceans) (Environmental Defence Canada)* and *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)(Georgia Strait Alliance)*].⁵ These cases and the relevant sections will be discussed more fully below.

Purpose of the Acts

The *Endangered Species Act (ESA)* sets out in s.1 that the purposes of the act are to

- identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge.
- protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.
- promote stewardship activities to assist in the protection and recovery of species that are at risk.⁶

The preamble notes the UN Convention on Biological Diversity (**Convention**) as “taking note” of the precautionary principle.⁷ The Precautionary Principle requires that “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.”⁸ Canada is a signatory to the Convention.

The Federal *Species at Risk Act (SARA)* states in section 6: “the purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.”⁹

The preamble of SARA also references the Convention. The Preamble specifically notes that Canada has ratified the Convention, “providing legal protection for species at risk” and indicates that protection of wildlife in Canada is shared amongst governments in Canada, who must work co-operatively to protect and recover species at risk.¹⁰

⁵ *Environmental Defence Canada v. Canada (Ministry of Fisheries and Oceans)* 2009 FC 878, *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)* 2012 FCA 40.

⁶ *Endangered Species Act* S.O. 2007, s.1.

⁷ *Ibid*, s.11(3).

⁸ *Supra* 6.

⁹ *Species At Risk Act* S.C. 2002, s.6.

¹⁰ *Ibid*.

Listing Species

Provincial Process

Under the ESA, species are evaluated and listed by regulation as endangered, extirpated, threatened, or of special concern.

COSSARO (the Committee on the Status of Species at Risk in Ontario) is established under the ESA, and functions to maintain criteria for assessing and classifying species; maintain and prioritize a list of species that should be assessed and classified including species that should be reviewed and reclassified; assess, review and classify species in accordance with the list; submit reports in accordance with the ESA and provide advice to the Minister, as requested by the Minister.

A species is to be classified as

- extinct if it no longer lives anywhere in the world.¹¹
- extirpated species if it lives somewhere in the world, lived at one time in the wild in Ontario, but no longer lives in the wild in Ontario.¹²
- endangered if it lives in the wild in Ontario but is facing imminent extinction or extirpation.¹³
- threatened if it lives in the wild in Ontario, is not endangered, but is likely to become endangered if steps are not taken to address factors threatening to lead to its extinction or extirpation.¹⁴
- being of special concern if it lives in the wild in Ontario, is not endangered or threatened, but may become threatened or endangered because of a combination of biological characteristics and identified threats.¹⁵

These classifications are to be based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge.¹⁶

Once a recommendation is made by COSSARO, the Ministry of Natural Resources “shall make and file a regulation” that lists those species, as COSSARO has designated them.¹⁷

¹¹ Supra 6, s.5(1)1.

¹² Ibid, s.6(1)2.

¹³ Supra 6, s. 5(1)3.

¹⁴ Ibid, s.5(1) 4.

¹⁵ Supra 6, s.5(1)5.

¹⁶ Supra 6, s. 4(3).

¹⁷ Supra 6, s.7.

Federal Process

Federally, COSEWIC (Committee on the Status of Endangered Wildlife in Canada) is to assess the status of each wildlife species considered by COSEWIC to be at risk. As part of the assessment, it is to identify existing and potential threats to the species;¹⁸ and (i) classify the species as extinct, extirpated, endangered, threatened or of special concern;¹⁹ (ii) indicate that COSEWIC does not have sufficient information to classify the species;²⁰ or (iii) indicate that the species is not currently at risk.²¹

COSEWIC must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.²² COSEWIC must assess the status of a wildlife species within one year after it receives a status report on the species, and it must provide reasons for its assessment.²³

Cabinet, within 9 months after receiving an assessment of the status of a species by COSEWIC *may* review that assessment and may

- a) accept the assessment,²⁴
- b) decide not to add the species²⁵ ;or
- c) refer the matter back to COSEWIC.²⁶

Where Cabinet has not within 9 months after receiving an assessment of the status of the species by COSEWIC made a decision to do one of the above, the Minister “shall, by order, amend the List in accordance with COSEWIC’s assessment.”²⁷

Fundamentally, however, this process is political, in contrast to Ontario’s where the listing is based solely on the COSSARO’s classification.

Any person who considers that there is an imminent threat to the survival of a wildlife species may apply to COSEWIC for an assessment of the threat for the purpose of having the species listed on an emergency basis under subsection 29(1) as an endangered species.²⁸ If the minister is of the opinion that there is an imminent threat to the survival of a wildlife species, the Minister must on an emergency basis after consultation with every other competent minister, make a recommendation to the Cabinet that the List be

¹⁸ Supra 9, s.15(1)(a).

¹⁹ Ibid, s.15(1)(a)(i).

²⁰ Supra 9, s.15(1)(a)(ii).

²¹ Ibid, s.15(1)(a)(iii).

²² Supra 9, s.15(2).

²³ Ibid, s.23(1).

²⁴ Supra 9, s.23(1.1) (a).

²⁵ Ibid, s.23 (1.1) (b).

²⁶ Supra 9, s.23(1.1) (c).

²⁷ Ibid, s.27(3).

²⁸ Ibid, s.28(1).

amended to list the species as an endangered species.²⁹ The Minister may arrive at that opinion on the basis of his or her own information or on the basis of COSEWIC's assessment.³⁰

Prohibitions

Ontario

Section 9(1) of the ESA provides that no person shall

- a) kill harm harass capture or take a living member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;³¹
- b) possess, transport, collect, buy, sell, lease, trade or offer to buy, sell, lease or trade
 - i) a living or dead member of a species that is listed on the Species at Risk in Ontario List as an extirpated endangered or threatened species,³²
 - ii) any part of a living or dead member of a species referred to in subclause (i)³³
 - iii) anything derived from a living or dead member of a species referred to in subclause (i)³⁴ or
- c) sell, lease, trade or offer to sell, lease or trade anything that the person represents to be a thing described in subclause (b)(i) ii) or (iii).³⁵

Clause 9(1)(b) does not apply to a member of a species that originated outside Ontario if it was lawfully killed, captured or taken in the jurisdiction from which it originated.³⁶

Under section 10, ESA provides that no person shall damage or destroy the habitat of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species³⁷ or a species that is listed on the Species at Risk in Ontario List as an extirpated species, if the species is prescribed by the regulations for the purpose of this clause.³⁸

Federal

Under SARA, the Minister of the Environment has various obligations, along with "competent ministers." "Competent ministers" are defined as the Ministers responsible for Parks Canada Agency, with respect to individuals in or on federal lands administered

²⁹ Supra 9, s.29(1).

³⁰ Ibid, s.29(2).

³¹ Supra 6, s.9(1)(a).

³² Ibid, s.9(1)(b)(i).

³³ Supra 6, s.9(1)(b)(ii).

³⁴ Ibid, s.9(1)(b)(iii).

³⁵ Supra 6, s.9(1)(c).

³⁶ Ibid, s.9(2).

³⁷ Supra 6, s.10(1)(a).

³⁸ Ibid, s. 10(1)(b).

by that Agency; the Minister of Fisheries and Oceans with respect to aquatic species, other than those protected by Parks Canada; and the Minister of the Environment with respect to all other individuals.”³⁹

Under SARA, prohibitions are very similar to those in the ESA.

Section 32(1) states no person shall kill harm harass capture or take an individual of a wildlife species that is listed as an extirpated species an endangered species or a threatened species.⁴⁰ Further, no person shall possess, collect, buy sell or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species or any part or derivative of such an individual.⁴¹

Section 58 protects habitat stating, “subject to this section, no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species - or of any listed extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada - if (a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada⁴²; (b) the listed species is an aquatic species⁴³; or (c) the listed species is a species of migratory birds protected by the Migratory Birds Convention Act, 1994⁴⁴.

Critical Habitat under SARA

Defining critical habitat and properly incorporating it into Recovery Strategies, discussed more fully below, has been a contentious issue and litigated in the Federal Court by public interest litigants Environmental Defence Canada and Georgia Strait Alliance.⁴⁵ Courts have determined that critical habitat is not only a geophysical location but also must include other factors like acoustic degradation, chemical and biological contamination and prey availability.⁴⁶

Section 33 also states that no person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.⁴⁷

Jurisdictional issues

Under SARA, the section 32 and 33 prohibitions are limited to federal lands. Section 34 states, “With respect to individuals of a listed wildlife species that is not an aquatic

³⁹ Supra 9, s. 2(1).

⁴⁰ Supra 9, 32(1).

⁴¹ Ibid, s. 32(2).

⁴² Supra 9, s.58(1)(a).

⁴³ Ibid, s.58(1)(b).

⁴⁴ Supra 9, s.58(1)(c).

⁴⁵ Supra 4.

⁴⁶ *Georgia Strait Alliance* Supra 4, para 32.

⁴⁷ Ibid, s. 33.

species or a species of birds that are migratory birds protected by the Migratory Birds Convention Act, 1994, sections 32 and 33 do not apply in lands in a province that are not federal lands unless an order is made under subsection (2) to provide that they apply.⁴⁸ [emphasis added]

While Ontario has fairly comprehensive legislation now, many other provinces do not. Section 34(3) of SARA does, however, place an onus on the Minister to make an order that sections 32 and 33, or either of them, will apply to lands in a province that are not federal lands if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residence of its individuals.⁴⁹ While better than no or little possibility for protection, it is up to the federal Minister to decide what “effective protection” is, and, at best protects, a “residence”, not habitat or critical habitat, as that is defined in SARA.

Recovery Strategies

Both in Ontario and federally, in addition to prohibitions on harming species or their habitats, recovery strategies must be established for species at risk. Under the ESA, recovery strategies must be prepared for threatened and endangered species.

Section 11 of the ESA mandates the creation of a recovery strategy,⁵⁰ which shall include

1. identification of the habitat needs of the species;
2. A description of the threats to the survival and recovery of the species;
3. recommendations to the minister and other persons on
 - a. objectives for the protection and recovery of the species,
 - b. approaches to achieve the objectives recommended under subparagraph I, and
 - c. the area that should be considered in developing a regulation under clause 55(1)(a) that prescribes an area as the habitat of the species.⁵¹

Within 9 months after a recovery strategy is prepared under this section, the Minister shall publish a statement that summarizes the actions that the Government of Ontario intends to take in response to the recovery strategy and the Government’s priorities with respect to taking those actions.⁵²

The Minister has the right to determine the relative priority to be given to the implementation of actions referred to in those statements,⁵³ and no later than 5 years after a statement is published the Minister shall ensure that a review is conducted of progress towards the protection and recovery of the species.⁵⁴

⁴⁸ Supra 9, s.34(1).

⁴⁹ Ibid, s.34(3).

⁵⁰ Supra 6, s.11(1).

⁵¹ Ibid, s.11(2).

⁵² Supra 6, s.11(8).

⁵³ Ibid, s.11(10).

⁵⁴ Supra 6, s.11(11).

The Minister shall also ensure that a management plan is prepared for each species that is listed on the Species at Risk in Ontario List as a special concern species.⁵⁵ Within nine months after a management plan is prepared under this section, the Minister shall publish a statement that summarizes the actions that the Government of Ontario intends to take in response to the management plan and the Government's priorities with respect to taking those actions.⁵⁶

Under subsection 11(3) of the ESA, the precautionary principle is specifically required to be considered when preparing a recovery strategy.⁵⁷

SARA's recovery provisions state that if a wildlife species is listed as an extirpated species, an endangered species or a threatened species, the competent minister must prepare a strategy for its recovery.⁵⁸ In preparing a recovery strategy, action plan or management plan, the competent minister must consider the commitment of the Government of Canada to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.⁵⁹ Thus precautionary principle is also specifically addressed as applying to recovery strategies under SARA.

Under section 40, when preparing a recovery strategy, the competent minister must determine whether the recovery of the listed wildlife species is technically and biologically feasible. The determination must be based on the best available information, including information provided by COSEWIC.⁶⁰

Under section 41, if the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include

- (a) a description of the species and its needs that is consistent with information provided by COSEWIC;
- (b) an identification of the threats to the survival of the species and threats to its habitat that is consistent with information provided by COSEWIC and a description of the broad strategy to be taken to address those threats;
- (c) an identification of the species' 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;

⁵⁵ Ibid, s.12(1).

⁵⁶ Supra 6, s.12(5).

⁵⁷ Ibid, s.11(3).

⁵⁸ Supra 9, s.37(1).

⁵⁹ Ibid, s.38.

⁶⁰ Supra 9, s.40.

(d) a schedule of studies to identify critical habitat, where available information is inadequate;

(e) a statement of the population and distribution objectives that will assist the recovery and survival of the species, and a general description of the research and management activities needed to meet those objectives;

(f) any other matters that are prescribed by the regulations;

(g) a statement about whether additional information is required about the species; and

(h) a statement of when one or more action plans in relation to the recovery strategy will be completed. ⁶¹

If the competent minister determines that the recovery of the listed wildlife species is not feasible, the recovery strategy must include a description of the species and its needs, an identification of the species' critical habitat to the extent possible, and the reasons why its recovery is not feasible. ⁶²

Finally, subject to 41(2), the competent minister must include a proposed recovery strategy in the public registry within one year after the wildlife species is listed, in the case of a wildlife species listed as an endangered species, and within two years after the species is listed, in the case of a wildlife species listed as a threatened species or an extirpated species. ⁶³

According to Environment Canada, under the Species At Risk Public Registry there are two recovery strategies under the 60 day comment period, one under a 30 day comment review period, 131 that are final and 28 that have had their finalization delayed. ⁶⁴

In Ontario, the Ministry of Natural Resources has posted 30 Final Recovery Strategies ⁶⁵ and 9 draft strategies. ⁶⁶

Provincial Permits

Under the ESA the Minister may issue a permit to a person that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an

⁶¹ Ibid, s.41(1).

⁶² Supra 9, 41(2).

⁶³ Ibid, s. 42(1).

⁶⁴ Species At Risk Public Registry, "Recovery Strategies," online: Environment Canada, <http://www.sararegistry.gc.ca/sar/recovery/timelines_e.cfm#4>.

⁶⁵ Species At Risk, "Final Recovery Strategies," online: Ministry of Natural Resources, <<http://www.mnr.gov.on.ca/en/Business/Species/2ColumnSubPage/287123.html>>.

⁶⁶ Species At Risk, "Draft Recovery Strategies," online: Ministry of Natural Resources, <<http://www.mnr.gov.on.ca/en/Business/Species/2ColumnSubPage/264191.html>>.

extirpated, endangered or threatened species, authorizes the person to engage in an activity specified in the permit that would otherwise be prohibited by sections 9 or 10.⁶⁷

The Minister may issue four different types of permits under section 17(2). These can be issued when,

- (a) the Minister is of the opinion that the activity authorized by the permit is necessary for the protection of human health or safety;
- (b) the Minister is of the opinion that the main purpose of the activity authorized by the permit is to assist, and that the activity will assist, in the protection or recovery of the species specified in the permit;
- (c) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,
 - (i) the Minister is of the opinion that an overall benefit to the species will be achieved within a reasonable time through requirements imposed by conditions of the permit,
 - (ii) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted, and
 - (iii) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit; or
- (d) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,
 - (i) the Minister is of the opinion that the activity will result in a significant social or economic benefit to Ontario,
 - (ii) the Minister has consulted with a person who is considered by the Minister to be an expert on the possible effects of the activity on the species and to be independent of the person who would be authorized by the permit to engage in the activity,
 - (iii) the person consulted under subclause (ii) has submitted a written report to the Minister on the possible effects of the activity on the species, including the person's opinion on whether the

⁶⁷ Supra 6, s.17(1).

activity will jeopardize the survival or recovery of the species in Ontario,

- (iv) the Minister is of the opinion that the activity will not jeopardize the survival or recovery of the species in Ontario,
- (v) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted,
- (vi) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit, and
- (vii) the Lieutenant Governor in Council has approved the issuance of the permit.⁶⁸

Before issuing a permit under section 17, the Minister is required to consider any statement that has been published under subsection 11(8) with respect to a recovery strategy for the species specified in the permit.⁶⁹

In environmental legislation in Ontario, the ESA is unique in requiring the opinions of experts independent of the proponent, as it does for section 17(2)(d) permits. In this case, an opinion is required on the question of whether an activity will jeopardize the survival or recovery of a species in Ontario. Those opinions, however, do not affect or constrain the discretion of the Minister in any way.⁷⁰

Federal Permits

Under SARA, section 73 (1) states that the competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.⁷¹ The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

- (a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons;
- (b) the activity benefits the species or is required to enhance its chance of survival in the wild; or

⁶⁸ Ibid, s.17(2).

⁶⁹ Supra 6, s.17(3).

⁷⁰ Supra 3.

⁷¹ Supra 9, s.73(1).

(c) affecting the species is incidental to the carrying out of the activity.⁷²

Further, the agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

- (a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- (b) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
- (c) the activity will not jeopardize the survival or recovery of the species.⁷³

Unlike under the ESA, the Minister has no obligation to seek an opinion from an expert independent of the proponent when forming an opinion on jeopardy to the survival or recovery of the species affected by the proposal.

- (a) respecting time limits for issuing or renewing permits, or for refusing to do so;
- (b) specifying the circumstances under which any of those time limits does not apply; and
- (c) authorizing the competent minister to extend any of those time limits or to decide that a time limit does not apply, when the competent minister considers that it is appropriate to do so.⁷⁴

Federal Case Law

The Federal Court considered the application of the precautionary principle in *Environmental Defence Canada*. That case was argued in the context of recovery strategies, which codifies the requirement for applying the precautionary principle in section 38 of SARA, and the identification of “critical habitat” under s.41 of SARA.

“Critical habitat” is defined as “habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species.”⁷⁵

Section 4(1)(c) states, “If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include an identification of the species’ critical habitat, to the extent possible, based on

⁷² Ibid, s.73(2).

⁷³ Supra 9, 73(3).

⁷⁴ Ibid, s.73(11).

⁷⁵ Supra 9, s.2.

the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction.”⁷⁶ Further (c.1) requires a schedule of studies to identify critical habitat, where available information is inadequate.⁷⁷

In the *Environmental Defence* case, the Recovery Team, comprised of leading experts regarding the Nooksack Dace, could and did identify its critical habitat and wished to include that identification of critical habitat in the Nooksack Dace Recovery Strategy. However, at the direction of the Minister and/or his delegate, the Recovery Team removed the identification of critical habitat from the Recovery Strategy and inserted it into a separate document which was not posted to the Public Registry.⁷⁸ Since the main protective measures of SARA do not kick in until critical habitat is defined, there was no protection assured for the Nooksack Dace.

The Applicants in *Environmental Defence* successfully argued that the Minister knowingly failed to follow the mandatory requirements of s. 41(1)(c) and (c.1) of SARA with respect to the Final Recovery Strategy for Nooksack Dace, an endangered species, as he did not include a definition for critical habitat in the edited Strategy; yet the Minister identified loss of habitat as one of the main threats to the Nooksack Daces’s survival, and recommended habitat protection to ensure the species survival and recovery.⁷⁹

Here the court found that the direction to remove the location constituent of critical habitat from the Recovery Strategy was contrary to law, as the identification of critical habitat, location and attributes are inextricably linked.⁸⁰ The result of these actions is that the Minister failed to meet the mandatory requirements of s. 41(1)(c) in the Final Recovery Strategy. It was held that this conduct was fundamentally inconsistent with the precautionary principle as codified in SARA.⁸¹ It was clear that they had taken the term out not for the protection of the species but to protect the Minister for socioeconomic reasons. Thus, it was determined that the Applicants had rightly defined critical habitat as including its location and to remove the location of habitat from the Recover Strategy was a breach of SARA and the precautionary principle.

The court went so far as to adopt the Applicants’ argument that the Convention was a part of the “entire context” to be considered in interpreting SARA, and that the courts should avoid any interpretation that would put Canada in breach of its Convention obligations.⁸² The Minister in that case did not disagree with this argument, and the court concluded this was correct in law.

⁷⁶ Ibid, s.4(1)(c).

⁷⁷ Ibid, s.4(1)(c.1).

⁷⁸ *Environmental Defence Canada Supra* 4, para 4.

⁷⁹ Ibid, para 46.

⁸⁰ Supra 72, para 46.

⁸¹ Ibid, para 40.

⁸² Supra 72, para 32.

In *Georgia Strait Alliance*, the Federal Court of Appeal considered the Ministry's obligations under s.58 of SARA to provide legal protection for the critical habitat of two populations of killer whales; the southern Resident Killer Whale, which is an endangered species, and northern Resident Killer Whale, which is a threatened species. Again here the issue was the identification and protection of the species' critical habitat in a recovery plan.

The Recovery Team was instructed to identify the critical habitat of the Resident Killer Whales as well as examples of activities likely to destroy critical habitat. On March 14, 2008, DFO posted the Recovery Strategy to the public registry. The Applicants challenged the lawfulness of the Protection Statement alleging that DFO erred in law and jurisdiction in issuing a Protection Statement that relies on non-binding policy, prospective legislation and ministerial discretion – none of which legally protect critical habitat within the meaning of section 58 of SARA.⁸³ Further, the Strategy limited the application of the Protection Order to the geophysical area of the habitat, to the exclusion of the most significant threats to critical habitat: reduction in prey availability, toxic contamination, and physical and acoustic disturbance.⁸⁴

The court upheld its previous finding that, “that delegates to the Minister a broad discretion to do a wide range of things in order to manage a national resource on behalf of all of the people of Canada. SARA is a statute that compels the competent Minister – and the Parliamentary debates are clear on this crucial point – to act in specific ways to protect the critical habitat of species at risk. The protection of critical habitat and what constitutes critical habitat are not left to ministerial discretion in SARA. If the Ministers were allowed to illegally apply SARA free of the scrutiny of this Court, and in breach of what Parliament has said must occur, then Parliamentary sovereignty would be replaced by ministerial sovereignty.”⁸⁵

Provincial Case Law

In *Sierra Club Canada v. Ontario (Ministry of Natural Resources)*, Sierra Club sought to challenge the issuance of a section 17(2)(d) permit.⁸⁶ In that case, the Minister had approved a permit to allow for the construction of an approximately 10 km long highway, connecting to a new proposed international crossing in Windsor.⁸⁷ The highway would affect 8 species at risk. Of those Sierra Club was primarily concerned with two snake species, Eastern Foxsnake (Carolinian Population) and Butler's Gartersnake, and one plant, Colicroot.⁸⁸

The Eastern Foxsnake (Carolinian population) was listed as endangered by the time the original permit was granted. Butler's Gartersnake was listed as threatened when the

⁸³ *Georgia Strait Alliance* Supra 4, para 34.

⁸⁴ *Ibid*, para 32.

⁸⁵ *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)* 2010 FC 1233, para 175, Supra 4, para 46.

⁸⁶ Supra 3, para 1.

⁸⁷ *Ibid*, para 5.

⁸⁸ Supra 3, para 61.

permit was first issued, but then elevated to endangered after the permit was issued, necessitating a second permitting process. Colicroot was and remains listed as threatened.⁸⁹

The primary concern for Sierra Club related to these species was that the mitigation methods were either known not to work, or were expected to fail, and that “adaptive management” was not a sufficient response to deal with this problem.⁹⁰ Sierra Club argued that the Minister’s decision to authorize the permit failed, as a matter of law, to properly apply the precautionary principle and therefore ought to be quashed.⁹¹

Sierra Club argued at the hearing that while the ESA, like SARA, specifically requires that the precautionary principle apply in the context of recovery strategies, Sierra Club argued that it ought to apply more broadly, as the court held in *Environmental Defence Canada*.⁹² During the hearing, the Divisional Court advised it did not consider the federal court’s jurisprudence on this point to be relevant, as it was a different statute, and did not refer to this case law in its written reasons.⁹³

Ultimately, the Divisional Court concluded that the Minister’s discretion was not constrained by the precautionary principle, and indicated it was a consideration only.⁹⁴

Proposed Provincial Budget Amendments to the ESA

Earlier this year, Schedule 19 of the provincial budget bill, Bill 55, sought to amend the ESA. As the Liberals are in a minority government, one of the conditions of passing the budget bill was that these provisions be removed, and so they were. There is no indication at this point that the Liberal government intends to reintroduce these amendments at a later date.

The changes may come back, however, and are worth a brief mention.

Amendments created exemptions from prohibitions. This is distinct from a process which requires a permit.

For example, persons engaged in maintaining, repairing or replacing infrastructure would be exempted if the maintenance, repair or replacement does not change the location of the infrastructure, extend the infrastructure or alter the way in which it is used or operated.⁹⁵

Infrastructure includes communications systems; electric power systems, oil or gas pipelines, alternative energy or renewable energy systems; a transportation corridor or

⁸⁹ *Sierra Club Canada v. Ontario (Ministry of Natural Resources)* 2010 ONSC 5130, para 4.

⁹⁰ *Supra* 3, para 59.

⁹¹ *Ibid* 3, para 25.

⁹² *Supra* 3, para 49.

⁹³ *Ibid*, para 6.

⁹⁴ *Supra* 3, para 110.

⁹⁵ Action Alert, Schedule 19 Endangered Species Act, online: Ontario Nature <http://www.ontarionature.org/protect/campaigns/PDFs/Budget_Schedule_19.pdf>.

facility; a waste management system; or water works, wastewater works, and related infrastructure.⁹⁶

Persons engaged in ‘non-commercial’ activity on private lands that are within 50 m of the person’s primary residence, or any other area prescribed by the regulations, would also be exempted. Most species at risk are found on private lands in Ontario, meaning this may have very serious consequences for species at risk in Ontario.⁹⁷

Other exemptions relate to persons assisting in the recovery or protection of a species, or for avoiding a threat to human health or safety, in certain circumstances. Exemptions currently exist for human health and safety, and the current Act otherwise requires a permit for activities which will assist in the protection or recovery of species.

More significantly, the proposed amendments extended or removed timelines for completing recovery strategies. For species listed prior to the new ESA coming into force, no deadlines for completing recovery strategies would exist within the legislation, but are to be prescribed by regulation. For species listed after the ESA came into force, deadlines for recovery strategies were to be extended by a year.⁹⁸

Another proposed amendment sought to extend significantly the timelines for the Minister providing an action plan in response to a management plan, from 9 months to 18 months.⁹⁹

Section 17(2), which was litigated in the *Sierra Club* case, is to be repealed in its entirety and redrafted, though largely the requirements as they exist for section 17(2)(d) permits under the current legislation remain unchanged.¹⁰⁰

Section 18, “Minister’s Instruments”, is also to be repealed and revised in its entirety. The current section treats other instruments issued under other provincial or federal acts like section 17 permits, if it meets certain conditions. The new proposed new language treats other instruments as equivalent, without reference to the safeguards of the ESA requirements. This is a sweeping proposed change that could apply to any type of activity, industrial, commercial or otherwise.¹⁰¹

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⁹⁶ Ibid.

⁹⁷ Supra 83.

⁹⁸ Ibid.

⁹⁹ Supra 83.

¹⁰⁰ Ibid.

¹⁰¹ Supra 83.

Species at Risk

State of the Law in Ontario and
Federally



Overview

- Ontario: Endangered Species Act, 2007
- Federal: Species at Risk Act

- Other provinces – some have legislation specifically for SAR, others add it to general welfare wildlife protection legislation



Report

- EcoJustice just released a report (Oct 3, 2012) grading the provinces
 - Highest: Ontario, C +
 - Lowest: Yukon, BC, Alberta, all F
- www.ecojustice.ca

How does it matter to you

- development applications
- Permits to do what is otherwise prohibited
- Can be an elaborate process, but likely to get the permit a client needs if SAR is “in the way”

Endangered Species Act, 2007

- Purposes
 - Identify
 - Automatic listing based on expert advice
 - Political decision federally
 - Protect SAR and habitats to promote recovery
 - Promote stewardship activities
 - Most SAR in Ontario is on private lands
- UN Convention on Biological Diversity
 - Precautionary principle

Species at Risk Act

- Purposes:
 - Prevent species from being extirpated or becoming extinct
 - Recovery of extirpated, endangered, threatened
 - Manage species of special concern to avoid any of the above fates
- UN Convention – Canada is a signatory

Thou shalt not

- Kill, harm, harass, capture or take a listed species (extirpated, endangered, threatened)
- Possess, transport, collect, buy... living or dead SAR
- Damage or destroy habitat (prov) or residence (s. 33, SARA) and critical habitat (s. 58, SARA)

Critical Habitat

- Required to define for purposes of recovery strategies
 - Not only a geophysical location, but also includes other factors like acoustic degradation, chemical and biological contamination and prey availability

SARA

- S. 32 and s.33 prohibitions limited to federal lands, unless the SAR is aquatic or migratory birds
- Plan B
 - If the provinces are failing, can order that SARA applies to the province
 - discretionary

Recovery Strategies

- Obligations to create them and implement
- Federally, many are years behind
 - EcoJustice on behalf of David Suzuki Foundation, Greenpeace, Sierra Club, Wilderness Committee and Wildsight suing over the delay (Sept 26, 2012 news release)
 - Delay in recovery strategy = delay in identifying critical habitat = easier for Enbridge Northern Gateway pipeline

Permits

- ESA – section 17 – four types
 1. Protect human health or safety
 2. Scientific research (assist in protection or recovery)
 3. Not to assist in recovery, but has overall benefit

Permits

- 4. Not to assist, but
 - Significant socio economic benefit;
 - Minister consulted with independent expert;
 - Independent expert opinion on jeopardy to recovery or survival;
 - Minister of the opinion won't jeopardize
 - Reasonable alternatives;
 - Mitigation;
 - Cabinet must also approve

SARA

- Section 73(1)
 - Science
 - Of benefit to SAR; or
 - Incidental effect; and
 - Reasonable alternatives
 - Mitigation measures
 - Will not jeopardize survival or recovery
 - No independent expert opinion required

Federal Case Law

- Critical Habitat
 - Nooksack Dace (endangered species)
 - While identified “critical habitat” took it out of the Recovery strategy and made it policy
 - Determined contrary to law, contrary to precautionary principle
 - Decision “Convention part of the ‘entire context’, and court should avoid interpretation that puts Canada in breach of the convention

Provincial Case Law

- Challenge to s. 17(2)(d) permit
 - Highway construction leading to a proposed new international bridge
 - 8 species affected
 - Two snakes (Eastern Foxsnake (Carolinian population) and Butler's Gartersnake)
 - One plant (colicroot)

Provincial Case Law

- Divisional Court uninterested in the Federal Court case law
 - Precautionary principle a consideration only
 - Minister's opinion unfettered by precautionary principle
 - Minister's opinion unfettered by the independent expert advice

Questions?

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