Federal Court Cour fédérale

Date: 20240607

Docket: T-1177-23

Citation: 2024 FC 870

Ottawa, Ontario, June 7, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

WESTERN CANADA WILDERNESS COMMITTEE

Applicant

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

[1] What started off as a judicial review application in the nature of a *mandamus*, because of the alleged failure of the Minister of Environment and Climate Change [the Minister] to make a recommendation to the Governor-in-Council once he has formed the opinion that a species faces imminent threats to its survival or recovery, has become a request for declaratory relief. It is on that basis that the case proceeded.

[2] The case involves the *Species at Risk Act*, SC 2002, c 29 [the *Act* or *SARA*], and the duty created by legislation on the Minister to make a recommendation to the Governor-in-Council for the issuance of an emergency order, once some conditions are met. In the case at bar, it is the Spotted Owl that is the species at risk, with only three individuals remaining in British Columbia left in the wilderness at the time an opinion concerning an imminent threat to its survival or recovery was formed. The Applicant in this case put significant pressure on the Minister, leading to the application for a writ of *mandamus* as the recommendation mandated by law was not forthcoming.

I. Preliminary Matter

[3] As the parties readily acknowledged at the start of the hearing of this matter, a writ of *mandamus* to compel the Minister to recommend that the Governor-in-Council make an emergency order providing for measures designed to protect the highly endangered Northern Spotted Owl (*Strix occidentalis caurina* subspecies), the "Spotted Owl", had become moot since the application for the judicial review (June 6, 2023). It is because the Minister had made the mandated recommendation on September 26, 2023.

[4] In effect, the Court authorized supplementary affidavits, pursuant to Rule 312 of the *Rules of the Federal Courts* (SOR/98-106), to complete the record in view of developments which had occurred after the notice of application had been issued.

[5] The more important affidavit for our immediate purpose was that of the Acting Director General of the Regional Operations Directorate at Environment and Climate Change Canada.

The Acting Director General testified about the requirements for a Memorandum to Cabinet, the instrument used to bring matters before the federal Cabinet for consideration. The Minister's recommendation for the Governor-in-Council to issue an emergency order goes to Cabinet. In so doing, she was building on the affidavit of her predecessor who supplied his own affidavit detailing the requirements under various central agencies' directives as of June 2023.

[6] The work on a Memorandum to Cabinet is said to have started in February 2023, a few weeks after the Minister formed the opinion about imminent threats to the Spotted Owl due to logging activities affecting its critical habitat. The work continued well after June 2023 and into the Summer of 2023. I will return to the various efforts made in order to bring a final product, a Memorandum to Cabinet, to fruition in September 2023 for presentation to Cabinet.

[7] Instead of accepting the Minister's recommendation for an emergency order, the affiant testified that "The Government of Canada has determined that an emergency order is not the preferred approach at this time and has endorsed a collaborative approach with BC and Indigenous Peoples" (affidavit of Marie-Josée Couture, October 5, 2023, para 25). No more information on the decision taken is available. The information constitutes Confidences of the King's Privy Council for Canada (s 39 of the *Canada Evidence Act*, RSC 1985, c C-5) and, at any rate, the Cabinet decision is not the matter before the Court. It is rather whether the Minister discharged his obligation to make a recommendation once he has arrived at an opinion on imminent threats to the survival or recovery of an endangered species.

II. Facts

[8] It is not a matter of dispute that the Spotted Owl is an endangered species. It has been on the list of endangered species in Schedule 1 of *SARA* ever since the Act came into force in 2003. An endangered species is defined as "a wildlife species that is facing imminent extirpation or extinction" (the *Act*, ss 2(1)). The Spotted Owl can be found exclusively in Southwestern British Columbia. Before European settlement and industrial logging, it is said that there were as many as 500 pairs of the species. There has been a very sharp decline of that population, with very few individuals remaining in the wilderness (there were three individuals until May 2023 when two captive bred Spotted Owls released in the wild in August 2022 were found dead). There is evidence that the species relies on large ranges of mature forest habitat for its survival. That will explain why logging may be a threat to the species' survival and recovery.

[9] The evidence offered by the government on the work involved in this case to bring the matter before Cabinet is eye opening. However, the Minister must operate under an obligation which is strict. There lies the tension: *SARA* creates some obligation when the Minister forms the opinion that there is an imminent threat, but the making of the recommendation is argued to take time.

[10] The power to make an emergency order is not in the hands of the Minister, but is rather for the Governor-in-Council to make:

Emergency order	**Décrets d'urgence**
80 (1) The Governor in Council may, on the recommendation of the	**80 (1)** Sur recommandation du ministre compétent, le gouverneur en conseil peut

competent minister, make an emergency order to provide for the protection of a listed wildlife species.	prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.

The competent minister in this case is the Minister of Environment and Climate Change, one of the Respondents.

[11] In the case at bar, the *Act* makes it mandatory for the Minister to make the recommendation for an emergency order where the species at risk faces imminent threats to its survival or recovery. In either case, once the opinion is formed, that triggers an obligation to recommend an emergency order that the Governor-in-Council may or may not issue. Before making the recommendation, the *Act* mandates that the Minister consult the other federal competent ministers. These obligations, created through remarkably strict language, are found in subsections 80(2) and 80(3):

Obligation to make recommendation	**Recommandation obligatoire**
(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.	**(2)** Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.
Consultation	**Consultation**
(3) Before making a recommendation, the competent minister must consult every other competent minister.	**(3)** Avant de faire la recommandation, il consulte tout autre ministre compétent.

The *Interpretation Act*, RSC 1985, c I-2, provides that the use of the word "shall" is to be construed as imperative (s 11). Parliament was evidently not satisfied with "shall" as it chose to use the word "must". The French version ("est tenu de") is equally prescriptive. There does not appear to be discretion built in.

[12] In effect, Parliament creates a strong obligation to make a recommendation to the Governor-in-Council once the Minister "is of the opinion that the species faces imminent threats to its survival or recovery". The issue before the Court is whether taking more than eight months to present the recommendation satisfies the obligation created by ss 80(2) on the facts of this case.

[13] The facts giving rise to the obligation of ss 80(2) are relatively complex. Fortunately, they can be summarized in view of the limited issue put before the Court, that is the allegation that the Minister took too long (unreasonable delay) to fulfil his statutory duty to recommend an emergency order. The Court is not seized of the decision not to issue the emergency order recommended by the Minister. Moreover, the Court is not asked to determine whether an opinion ought to have been reached by the Minister on the facts before him. That opinion was made on January 17, 2023. On that date, the Minister endorsed the recommendation made to him by his department.

[14] The first federal recovery strategy for the Spotted Owl, mandated by s 37 of the *Act*, was published in 2006. The evidence before the Court is that there were 22 Spotted Owls in the wild at that time. It was identified that the critical habitat of the Spotted Owl (habitat for the survival

or recovery) constitutes a threat to its survival, together with a larger owl species which competes for prey and habitat, noise disturbance and climate change. The loss of mature old growth forest habitat from logging was identified as the primary reason for the decline. As can be seen, the decline continued in the years that followed.

[15] British Columbia has favoured a program to breed Spotted Owls in captivity, to be released into the wild. The program, established in 2007, has a goal of restoring the Spotted Owl population to 250 mature individuals in 50 years. The Respondents inform the Court that, since 1997, British Columbia has put in place the Spotted Owl Management Plan, the purpose of which includes protecting the habitat for the Spotted Owl. The evidence is clear that the habitat is a serious concern for the survival and recovery of this particular endangered species.

[16] The Respondents insisted that there has been cooperation between the federal government and the province of British Columbia in their effort to protect the Spotted Owls. It remains that, obviously, the efforts have been less than stellar at producing the hoped for results.

[17] On January 26, 2023, barely days after the Minister had formed his opinion pursuant to ss 80(2) of the *Act*, an Amended Recovery Strategy for the Spotted Owl was published by the Minister of Environment and Climate Change. Two features of the proposed strategy are worth mentioning for our purposes. The goal of restoring a population of 250 mature individuals is estimated to take more than fifty years; logging and wood harvesting, together with roads, railroads, and utility and service lines continue to be concerns as primary threats. Clearly, the habitat is a critical concern.

[18] As already mentioned, this case identifies the basic tension between the statutory obligation of the Minister to make a recommendation and the process in order to bring the matter before Cabinet for a decision to issue the emergency order recommended by the Minister. What has actually happened between January 17, 2023 and September 26, 2023 must be reviewed.

[19] The Applicant requested that the Minister make a recommendation in accordance with ss 80(2) in October 2020. The request came because of the threat posed by logging activities in two watersheds: the Spuzzum and Utzlius watersheds. British Columbia issued orders deferring logging in the two watersheds. There was no recommendation under ss 80(2) of the *Act*.

[20] A new request came in October 2022: the threat of logging activities, because of the expiry of the logging deferral, was a basis for the request. The Applicant also claimed concerns over "all pending and approved cutblocks (logging sites) overlapping suitable Spotted Owl habitat" (Respondents' memorandum of fact and law, para 28). That would cover an area of 415,258 hectares.

[21] The Minister formed his opinion on January 17, 2023, by agreeing to the following three conclusions presented in a Memorandum to the Minister entitled "Decision on whether Spotted Owl is facing Imminent Threats to its Survival or Recovery":

The Spotted Owl is facing imminent threats to its survival should the deferral on logging activities in the Spuzzum and Anderson/Utzlius Creek expire in February 2023

✓ **I concur** ___ **I do not concur**

The Spotted Owl is facing imminent threat to its recovery due to logging and associated activities in its draft critical habitat

✓ **I concur** ___ **I do not concur**

The Spotted Owl is **not** facing imminent threat to its recovery due to acoustic disturbance from construction adjacent to the captive breeding facility at this time

✓ **I concur** ___ **I do not concur**

No one disputes that the decision contemplated by ss 80(2) was formed on that date.

[22] The question then becomes, why did it take from January 17, 2023 to September 26, 2023 to make the recommendation for the Governor-in-Council to issue an emergency order? The Respondents contend that the Minister had to supply a more fulsome record to Cabinet, in the form of a Memorandum to Cabinet, than simply his recommendation, in order to provide other information relevant for the determination of whether an emergency order was warranted on the part of the Governor-in-Council. In this case, argue the Respondents, that required engagement with British Columbia, consulting with potentially affected First Nations (and Indigenous groups) and conducting socio-economic analyses. The Minister informed his counterpart in the Government of British Columbia on February 14, 2023, four weeks after his decision was made.

[23] *SARA* allows for an emergency order to prohibit activities on provincial land. The *Act* provides what an emergency order may contain. In the case of the Spotted Owl, it is paragraph 80(4)(c) which finds application:

Contents	**Contenu du décret**
(4) The emergency order may	**(4)** Le décret peut :
…	[…]
(c) with respect to any other species,	**c)** dans le cas de toute autre espèce se trouvant :
(i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada,	**(i)** sur le territoire domanial, dans la zone économique exclusive ou sur le plateau continental du Canada :
(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and	**(A)** désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,
(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and	**(B)** imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,
(ii) on land other than land referred to in subparagraph (i),	**(ii)** ailleurs que sur le territoire visé au sous-alinéa (i) :
(A) identify habitat that is necessary for the survival or recovery of the species in the area to	**(A)** désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

which the emergency order relates, and	
(B) include provisions prohibiting activities that may adversely affect the species and that habitat.	**(B)** comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat.

As is readily evident, it is subparagraph 80(4)(c)(ii) which applies to British Columbia. If on federal land, the *Act* allows the emergency order to require the doing of things, together with prohibiting certain activities. An emergency order concerning land other than federal land, in the exclusive economic zone or on the continental shelf, could only prohibit activities that may affect the species' habitat. Since the emergency order would affect land other than federal land, the February 14 letter prompted a response.

[24] There followed an exchange of letters between ministers where it became apparent that British Columbia disagreed with the Minister. The February 14 letter made it clear that the potential destruction of the habitat in the Spuzzum and Utzlius Creek watersheds, which supported the remaining Spotted Owls, constituted an important element in the formation of the opinion, with the expiry of deferrals expected later that month. There continued to be an exchange of pointed letters throughout the Spring of 2023.

[25] First, the deferral in the Spuzzum Creek and Utzlius Creek watersheds was extended until February 28, 2025. The survival of the Spotted Owl was accordingly not in imminent threat. Second, the Minister advised his BC counterpart that he was still of the opinion that the recovery of the endangered species continued to face an imminent threat. The Minister advised that he still

intended to recommend an emergency order. That was on April 21, 2023, three months after the initial decision on the opinion had been made.

[26] Within days (April 27, 2023), an official response came from British Columbia. There is no need to detail the exchange of letters between the ministers. Suffice it to say that British Columbia disagreed with the conclusion that there continued to be an imminent threat to recovery, and that measures in place, including its captive breeding program and its Spotted Owl Management Plan, serve well the purpose of protecting the endangered species. British Columbia also noted its concern that the Trans Mountain Expansion Project lacked oversight, which impacts its efforts to help with the recovery of Spotted Owls.

[27] More letters followed, with the BC Minister seeking from the Minister to reconsider his conclusion that logging and land clearing activities threatened the recovery of the Spotted Owl (May 12, 2023). In his response of May 19, the Minister confirmed his opinion that the recovery was imminently threatened. As for the Trans Mountain Expansion Project, the activities undertaken did not exceed noise thresholds, claimed the Minister.

[28] There was also a need to consult with Indigenous groups affected by the proposed order in view of the imminent threat to the recovery of the Spotted Owl. It looks like the consultation process was launched more than one month after the opinion had been formed (February 21, 2023). Only two groups responded and they supported the Minister’s opinion.

[29] Finally, the Respondents contend that there is a need for a socio-economic analysis to assess scope and impact of the measures ordered. Although the said analysis seems to have begun in February 2023, it was not yet completed in June 2023.

III. The parties' arguments

[30] The Respondents did not challenge the standing of the Applicant to launch these proceedings. The Applicant describes itself as an environmental charitable organization in British Columbia with a long history of working to protect the Spotted Owl. That has included petitioning the Minister for an emergency order to prevent further logging of habitat.

[31] In view of the fact that the judicial review seeking the issuance of a writ of *mandamus* has become moot, the issue to be decided is limited to some declaratory relief. In its original memorandum of fact and law, the Applicant limited its request in the following fashion:

> 75. In addition or in the alternative, the Applicant seeks a declaration from this Court that the Minister's unreasonable delay in making this recommendation is unlawful under s. 80(2). The Applicant particularly seeks this relief if the Court decides not to issue an order for *mandamus* but finds that the Minister has unreasonably delayed making the mandatory recommendation under s. 80(2) of *SARA*. In its Notice of Application, the Applicant also sought a broader declaration regarding the allowable delay for any recommendation under s. 80, but the Applicant now only seeks a declaration that the Minister's delay in making the Spotted Owl emergency order recommendation was unreasonable and unlawful.

Accordingly, the only declaration sought concerns the Minister's delay in making his recommendation in this case after having formed the opinion that the Spotted Owl faces imminent threats to its recovery.

[32] With the clear focus on declaratory relief, and the Respondents' contention that there exists tension between acting quickly and ensuring that the decision maker, the Governor-in-Council, has sufficient information to make a decision, the Court sought from counsel for the parties additional written submissions. The Court put it in the following terms in its Direction:

> Submissions are expected on the construction to be put on the three provisions [sections 80, 81 and 82 of *SARA*] to justify the position taken by the parties. Furthermore, the Parties are invited to provide their views on factors to be taken into account in reaching the conclusion that the obligation to make a recommendation, as per ss. 80(2), has been fulfilled. Counsel for the Wilderness Committee argued that the timeline for fulfilling the ss. 80(2) obligation is a function of the imminence of the threat and its severity. The Respondent suggested that flexibility ought to be read into the scheme. But then, how much flexibility is permitted under the scheme? Are imminence and severity the only factors and what do they imply? Are there others that could be supported by an appropriate interpretation of the provisions? Does the fact that an opinion is with respect to the recovery of the species, as opposed to its survival, change the perspective on the timeline to make the recommendation to Cabinet?

The supplementary submissions were received on November 16, 2023.

A. *The Applicant*

[33] The Applicant argues that the test is whether the delay by the Minister in making his recommendation has the effect of denying the decision maker, the Governor-in-Council, the opportunity to address the threats before they materialize and thus jeopardize the species' recovery. I note that the Respondents concede that "there is no difference between threats to survival and recovery" (Respondents' Supplementary Submissions, para 33). That was the position taken by the Applicant (Applicant's Supplemental Written Submissions, para 24-25).

[34] In essence, the Applicant pleads that the recommendation must be timely. But timely, in the context of s 80 of the *Act*, implies urgency. Not only is the order that can be issued by the Governor-in-Council an “emergency” order, but the threat to recovery must be imminent. Given the urgency, the Governor-in-Council must be given the opportunity to act.

[35] It follows, claims the Applicant, that the only factors that should be considered in the timing of the recommendation are the imminency and the severity of the threats. The Applicant suggests that the imminency implies the consideration of the specificity of the threat and the timing of the intervention to prevent the harm from occurring. As for the severity of the threats, the Applicant argues that it is constituted by the risk afflicting a species and, thus, the impact to its recovery if the risk were to materialize. In the case at bar, there were three individuals left in the wild when the opinion was formed and only one appears to have been left by May 2023; an area of 2,542 hectares of habitat was particularly critical. The Applicant further argues that the Minister would have to make his recommendation without delay where imminent threats would have already started to jeopardize the recovery of the species.

[36] It is recognized that Cabinet can establish policies and procedures in order to bring matters to it, but not at the expense of statutory obligations. Hence, “a competent minister’s efforts to consider and advise Cabinet on additional factors cannot undermine the minister’s statutory obligation to recommend an emergency order that is responsive to the imminent threats identified” (Applicant’s Supplemental Written Submissions, para 18).

[37] The Respondents' argument according to which federal-provincial considerations, consultations with Indigenous groups and socio-economic considerations may justify delay in bringing the recommendation to Cabinet is rejected by the Applicant. The recommendation is triggered by the determination of imminent threats to the recovery of the species. Indeed provincial involvement is not required by s 80, as it is for ss 39(1) of the *Act*, for the recovery strategy of endangered species; as stated by Leblanc J, as he was then, "(i)n other words, in an emergency situation, it [subparagraph 80(4)(c)(ii)] seeks to fill the deficits of the provincial and territorial schemes already in place" (*Le Groupe Maison Candiac Inc v Canada (Attorney General)*, 2018 FC 643, [2019] 1 FCR 40, at para 181).

[38] The Applicant concedes that the Minister must consider Indigenous rights in reaching his decision on the imminent threats to an endangered species, but that should not delay making the recommendation once he has formed the opinion. In other words, the consideration of Indigenous rights would have to be *ex ante* as much as possible. Similarly, socio-economic considerations are not irrelevant to issuing an emergency order. However, secondary analysis and consultation to support the decision to make the emergency order and, presumably, to determine the scope of the order can only be justified if the delay does not jeopardize the recovery of the species.

[39] In the case at bar, the imminence and severity of the threat called for the recommendation to be made to Cabinet in early 2023. The Minister had to act concerning the specifically identified threat of imminent logging on some 2,500 critical hectares. The *Act* provides for the repeal of the order. If the Minister is of the opinion that the species would no longer face

imminent threats to its survival or recovery, he must make a recommendation to the Governor-in-Council for the order to be repealed. That is a safety valve against emergency orders remaining in place for longer than needed. Such is the regime in place.

B. *The Respondents*

[40] The Respondents put very significant emphasis on the need to put before the Governor-in-Council an "informed recommendation". They seek to justify the timing of the recommendation through factors other than the nature of the threats. They argue that, on a standard of reasonableness, the Minister acted reasonably in gathering more information on the impacts an emergency order may have. As I read the Respondents' further submissions, it is the recommendation itself that is said to be better informed, as opposed to the merits of the decision to issue the emergency order, which is the responsibility of the Governor-in-Council.

[41] The Respondents invite the Court to consider that the Minister's interpretation of his duty under ss 80(2) of the *Act* is justified given the relevant factual and legal constraints.

[42] Subsection 80(1) gives a broad authority to make emergency orders in order to protect endangered species. Considerations of a political, economic and social nature are appropriate. 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" (Respondents' Additional Written Submissions, para 10).

[43] The Respondents acknowledge that subsections 80(1) and 80(2) contemplate distinct decisions: the Minister recommends, based on the sole relevant consideration of whether the species faces imminent threats to its recovery, and the Governor-in-Council decides if an emergency order is warranted, taking into account a range of factors. Since ss 80(2) does not impose statutory timelines, that gives the Minister a "measure of interpretative flexibility" (para 15) which allows for steps taken for the purpose of informing the recommendation. I note that the Respondents fail to explain what is "informing the recommendation" since it is already acknowledged that the sole relevant consideration is the existence of imminent threats.

[44] 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.

[45] Instead, the Respondents state that, if their construction does not prevail, the burden to gather the needed information to make an emergency order would be shifted to the Governor-in-Council, who may well direct the Minister to do the work.

[46] As for the timeliness of the opinion and the recommendation to the Governor-in-Council, the Respondents submit that factors the Minister should reckon with are the nature and timing of

the imminent threats to the species, the scope of the potential emergency order and the nature and scope of the information required by the Governor-in-Council.

[47] The nature and timing of imminent threats are self-evident. The imminent threats will vary in severity. As to “timing”, however, the Respondents suggest that it is the “timeframe within which the identified threats are expected to materialize or to continue to occur” (para 27) which needs to be factored in. That is, it seems to me, what makes the threat imminent. In the case at bar, the Minister evidently found the threat to survival and recovery to be imminent. The real issue is rather when should the recommendation for an emergency order be put before Cabinet for the Governor-in-Council to determine whether the order should be made.

[48] The Respondents appear to put some burden on the Minister to assist in the configuration of the emergency order that may be made by the Governor-in-Council. One of the factors to take into account is the scope of the potential emergency order. They say that the area to which the order applies and the measures (in this case the prohibition of activities) to be taken must be considered; they contend that the Minister continues, after he has already formed his opinion, to assess the nature and scope of the threats until the recommendation is made. It is difficult to understand how the timing of the recommendation reaching Cabinet can be affected by the nature and the scope of the threats changing. The situation, by its very nature, is urgent. The trigger that is ss 80(2) is the imminence of a threat to the survival or recovery of an endangered species. For the threat to require a recommendation pursuant to ss 80(2), it must be imminent. It the threat is not imminent anymore, a recommendation must be made to repeal an emergency order that would have been made (s 82) in view of the urgency to act. Here, the Respondents

refer to the fact that logging in a particular area was the identified threat; the Respondents suggest that logging areas change. That, they contend, requires the Minister to operate on the basis of updated information. There is no indication how the need for such information, assuming that it is a consideration for the Minister after he has formed his opinion on the imminence of the threat to survival or recovery, could justify a delay of more than eight months.

[49] The last factor proposed by the Respondents is the nature and scope of the information required by Cabinet. The need for information will vary from case to case. In this case, the impact on Indigenous groups' rights and interests required an assessment which necessitated consultation. That is accepted. The Respondents also claim that a socio-economic analysis was necessary. Although consultations with the province of British Columbia are not expressly required in accordance with ss 80(2), it is reasonable for the Minister to consult in view of the interjurisdictional cooperation at the heart of the scheme (see the Preamble to the *Act*).

[50] In the end, say the Respondents, the nature and timing of the threat facing a species cannot be the only factors; the Minister's ability to gather information required by the Governor-in-Council cannot be constrained to those two factors.

IV. Analysis

[51] In my view, the Applicant is entitled to the declaration that the Minister's delay in making his recommendation for an emergency order was not in this case in accordance with the obligation created by ss 80(2) of the *Act*. I stress again that is not before the Court the decision made by the Governor-in-Council to decline to follow the Minister's recommendation. Only the

time taken to make the recommendation after the opinion had been formed is before the Court. The text of the provision, the context in which it finds itself and the general purpose of the *Act* require that such result be attained.

[52] The Respondents argue that it takes time to bring a matter before Cabinet. There are requirements to gather information that will present a fulsome picture for the decision maker, the Governor-in-Council. However, that argument must itself be tempered by the text, context and purpose of the *Act*. 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.

[53] The modern approach to the interpretation of statutes crystalized in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, a case turning on an issue of statutory interpretation. The Supreme Court settled on the approach encapsulated in the words of Elmer Driedger in his second edition of his famous *Construction of Statutes* (Butterworths, Toronto, 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [footnote omitted]

These words have been cited by Canadian Courts numerous times ever since.

[54] The Preamble to the *Act*, which is part of the Act and is "intended to assist in explaining its purport and object" (*Interpretation Act*, s 13), gives guidance as to the purpose of the *Act*. I reproduce the first five paragraphs of the Preamble to *SARA*:

Preamble	**Préambule**
Recognizing that	Attendu :
Canada’s natural heritage is an integral part of our national identity and history,	que le patrimoine naturel du Canada fait partie intégrante de notre identité nationale et de notre histoire;
wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons,	que les espèces sauvages, sous toutes leurs formes, ont leur valeur intrinsèque et sont appréciées des Canadiens pour des raisons esthétiques, culturelles, spirituelles, récréatives, éducatives, historiques, économiques, médicales, écologiques et scientifiques;
Canadian wildlife species and ecosystems are also part of the world’s heritage and the Government of Canada has ratified the United Nations Convention on the Conservation of Biological Diversity,	que les espèces sauvages et les écosystèmes du Canada font aussi partie du patrimoine mondial et que le gouvernement du Canada a ratifié la Convention des Nations Unies sur la diversité biologique;
providing legal protection for species at risk will complement existing legislation and will, in part, meet Canada’s commitments under that Convention,	que l’attribution d’une protection juridique aux espèces en péril complétera les textes législatifs existants et permettra au Canada de respecter une partie des engagements qu’il a pris aux termes de cette convention;
the Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the	que le gouvernement du Canada s’est engagé à conserver la diversité biologique et à respecter le principe voulant que, s’il existe une menace d’atteinte grave ou irréversible à une espèce sauvage, le manque de certitude scientifique ne soit

species should not be postponed for a lack of full scientific certainty,	pas prétexte à retarder la prise de mesures efficientes pour prévenir sa disparition ou sa décroissance;

Clearly the purpose of the *Act* and the intention of Parliament are the protection of endangered species. The Spotted Owl has been on the list of wildlife species at Risk as an Endangered Species since the coming into force of the *Act* in 2003. Indeed there were 22 individuals left in the wild in 2007. Only three were left at the time of the Minister's opinion as to imminent threats to its recovery in January 2013. It is difficult to see how the protection of the species does not call for measures to be taken urgently.

[55] The purpose of the *Act* is confirmed at s 6:

Purposes	**Objet**
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.	**6** La présente loi vise à prévenir la disparition — de la planète ou du Canada seulement — des espèces sauvages, à permettre le rétablissement de celles qui, par suite de l'activité humaine, sont devenues des espèces disparues du pays, en voie de disparition ou menacées et à favoriser la gestion des espèces préoccupantes pour éviter qu'elles ne deviennent des espèces en voie de disparition ou menacées.

Parliament has spoken: the purpose of the *Act* is to prevent species from becoming extinct and to provide for the recovery of endangered species as a result of human activities.

[56] The context in which sections 80 to 82 (Emergency Orders) are found is also relevant to the interpretation of those sections and other components of the *Act*. Elaborate schemes are found in the *Act* to protect individuals of a species at risk, including through prohibitions (sections 32 to 36), providing for the recovery of endangered species (sections 37 to 58) and addressing directly the protection of critical habitat (sections 56 to 64). The prohibition can only be recommended by the Minister to the Governor-in-Council following consultations with the appropriate provincial minister (para 34(4)(a) and para 61(3)(a)). There is no such requirement in the chapter concerned with emergency orders. There are therefore regular regimes to protect wildlife species, and then there are provisions which target urgent situations where there are imminent threats to survival or recovery of endangered species found in Schedule 1 to the *Act*. Evidently, Parliament was concerned that regular measures may not be sufficient: the scheme of the *Act* includes action to be taken, in the form of emergency orders, where the other measures are proving to be less effectual than expected.

[57] Guidance on the interpretation of sections 80 to 82 is relatively limited. That may very well be because these provisions have been used sparingly. Nevertheless, the saga surrounding another endangered species, the Western Chorus Frog (Pseudacris triseriata), resulted in jurisprudence that is relevant to the construction to give these sections. There was first a judicial review application (*Centre Québécois du droit de l'environnement v Canada (Environment)*, 2015 FC 773) challenging the refusal of the Minister to recommend that an emergency order be made by the Governor-in-Council. In the result, our Court returned the matter to the Minister to consider again whether a recommendation should be made in view of its conclusion that ss 80(2) should not be given a restrictive interpretation such that the Minister was not limited to cases

where a species was exposed to an imminent threat on a national basis. The new determination produced an emergency order.

[58] The order was challenged on the basis that subparagraph 80(4)(c)(ii) of the *Act*, the same paragraph as the one applicable in the case at bar, was unconstitutional. The Attorney General was relying on the criminal law head of power (*Le Groupe Maison Candiac Inc v Canada (Attorney General)*, *supra*, para 37; 2020 FCA 88, [2020] 3 FCR 645) in arguing for the constitutionality of the provision. Both the Federal Court and the Federal Court of Appeal ruled that the subparagraph is constitutional.

[59] In conducting its pith and substance analysis as well as determining the classification of the head of power under which the provision under attack was to be found, the Court of Appeal conducted a careful review of the *Species at Risk Act*.

[60] The Court of Appeal was in complete agreement with the trial judge who found that the purpose and legal and practical effects are such that the provision was "to give the Governor-in-Council emergency intervention authority when a species at risk is about to suffer harm that will compromise its survival or recovery" (Federal Court Judgment, para 104). The Court of Appeal equally agreed at paragraph 34 of its Judgment that the Governor-in-Council did not have to conduct consultations as needed to make prohibitions under sections 34 and 61 of the *Act* where a province is involved, thus agreeing with the trial judge. The Court of Appeal stated this at paragraph 35 of its decision:

> [35] In my view, this characterization of subparagraph 80(4)(c)(ii) is unassailable and perfectly consistent with the purpose and

> effects of this provision. The purpose of the Act is not at all to directly encroach on provincial jurisdiction or impose uniform national standards, as the appellant argued at trial and reiterated before us. On the contrary, I am of the view that subparagraph 80(4)(c)(ii) is really intended to permit an emergency response when a listed wildlife species is about to suffer harm that will jeopardize its survival or recovery.

[61] The urgent nature of the scheme under consideration does not suffer any discussion:

> [40] In my view, it is clear that this provision has a limited scope and is intended to address an emergency situation. It is clearly intended to prevent irreparable harm that would jeopardize the survival or recovery of a listed wildlife species. This is why such an order can be made by the Governor in Council without having to conduct consultations and comply with the formalities normally required under sections 34 and 61 of the Act, as noted by the Federal Court (the Decision, at paragraph 105). It is undoubtedly for the same reason that subparagraph 80(4)(c)(ii) does not authorize the Governor in Council to impose measures to protect the species and its designated habitat, as it can on federal lands. Under this provision, the Governor in Council may only enact provisions prohibiting activities likely to harm the species and this habitat. In my opinion, these are two indications of the narrow purpose pursued by Parliament and its desire to go no further than necessary to ensure the immediate survival of a species. This purpose is perfectly consistent with the preamble of the Act and section 6 to which I referred above (at paragraph [36] of these reasons).
>
> [41] The urgency to act to protect biodiversity, which underlies the Act as a whole and more particularly the orders authorized under section 80, not only reflects Canada's desire to comply with the international obligations that it has undertaken in ratifying the Convention, it also forms part of the backdrop of many scientific findings, each more alarming than the next. …

[62] For the Court of Appeal, the obligation made by s 82 for the Minister to recommend that an emergency order be repealed when the imminent threat no longer exists "clearly demonstrate once again that the objective is to deal with a precarious situation which requires an immediate

response, and not to encroach on provincial powers and to seize powers for itself on a permanent basis" (para 44).

[63] Thus, the context in which the Minister must act pursuant to ss 80(2) is one where it is urgent that something be done. Other provisions from the *Act* allow for more time to be taken, including because of consultations that may need to be undertaken. Sections 80 to 82 require that the matter be dealt with expeditiously once an opinion has been reached that the species faces imminent threats to its survival or recovery. Not only is ss 80(2) remarkably prescriptive with its use of "must", which expresses that something be done, but the urgency of the situation is conveyed by the fact that the danger is about to happen. The threat to the survival or the recovery is imminent. Once the opinion has been formed, the *Act* commands that the recommendation be made with a view to having an emergency order made by the Governor-in-Council. The existence of s 82, the recommendation to repeal once the imminent threat is no longer, makes it equally mandatory for the Minister to act. That constitutes in my view another signal that the initial recommendation must be done very quickly, subject to the emergency order to be repealed once the opinion that threats are not present has been reached. In other words, the scheme requires that the actions taken be precisely on time.

[64] In *Athabasca Chipewyan First Nation v Canada (Environment)*, 2011 FC 962, [2013] 2 FCR 201, Chief Justice Crampton opined on the scheme, considering the plain meaning of the language of the statute, its preamble and the history of the *Act*. He said at paragraph 39:

> [39] …
>
> i. The mandatory duty contemplated in subsection 80(2) is only triggered when the Minister reaches the "opinion" referred to in that provision.

ii. The language in subsection 80(1) is sufficiently broad to permit the Governor in Council to make an emergency order on recommendation of the competent minister in situations other than those contemplated by subsection 80(2), however, the competent minister would not have any statutory duty to make a recommendation in such other situations.

iii. In reaching an opinion under subsection 80(2), the Minister is not confined to considering the best available scientific information – for example, the Minister may also consider legal advice with respect to the meaning of the language in subsection 80(2).

iv. Keeping in mind the "emergency" nature of the power contemplated in section 80, it may nevertheless be legitimate for the Minister to take a <u>short period of time</u>, following a request such as was made by the Applicants to: (a) <u>obtain information necessary to make an informed opinion under subsection 80(2)</u>; or (b) <u>obtain receipt of scientific or other information that is in the process of being prepared</u>.

v. The fact that an Order may be made (under subsection 80(4)(c)) for only part of the range of a listed species, and the fact that the term "wildlife species" is defined in subsection 2(1) to include a "subspecies, variety or geographically or genetically distinct population," do not imply that an Order must always be made whenever the listed species faces threats to its survival or recovery in only a part of its habitat. The Minister's decision will properly depend on the nature of the scientific information, legal advice and other information that he receives and that is relevant to the determination to be made under subsection 80(2), including with respect to the biologically appropriate timescale within which to assess a particular threat.

vi. Conversely, I agree with the Applicants' submission that there is nothing in the plain language of subsection 80(2) which limits the mandatory duty imposed on the Minister to situations in which a species faces imminent threats to its survival or recovery on a national basis.

> vii. The less likely the threats are, the less weight that they may merit in the Minister's assessment of the imminency of the threats.
>
> (my emphasis)

I share the view of the Chief Justice that time is necessarily of the essence. The short period of time he establishes at iv. concerns the time needed to make the opinion referred to under subsection 80(2).

[65] I find 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. Either the threats are imminent or not. Either the threats concern the survival or recovery of the species or they do not. Once the opinion that the threats are about to happen, the *Act* says that the recommendation must be made. There is emergency. The opinion triggers the action that must be taken. In the case at bar, the opinion reached on January 17, 2023 concerned three Spotted Owls left in the wild. There were 22 barely fifteen years earlier. The situation was deemed to be sufficiently perilous that the formal opinion was formed. Without suggesting that the recommendation had to follow forthwith, a period of more than eight months to submit the recommendation mandated by ss 80(2) cannot be in line with the scheme of the *Act*.

[66] The Respondents argued that the time taken by the Minister was appropriate as he is entitled to interpret the statute. That is not denied. But the interpretation must be reasonable, with a reviewing court following the principle of judicial restraint (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], at para 13) as well as adopting "an appropriate posture of respect" (para 14). The reviewing court is not to determine

its preferred interpretation for the view taken by an administrative decision maker to be measured against the preferred interpretation, thereby turning the reasonableness standard into correctness.

[67] The hallmarks of reasonableness are said to be, according to the *Vavilov* Court, justification, transparency and intelligibility, “and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (para 99). “When a decision is untenable in light of the relevant factual and legal constraints that bear on it”, a decision is unreasonable (para 100). There are binding authorities, including by the Federal Court of Appeal, that are on point.

[68] Here, we do not know how the Minister concluded that more than eight months could satisfy the legal obligation he operates under pursuant to ss 80(2). One legal constraint is obviously the interpretation given to the scheme by decisions of this Court (*Athabasca Chipewyan* (2011), *Centre Québécois du droit de l’environnement* (2015), *Le Groupe Maison Candiac Inc* (2018)) and the Court of Appeal (*Le Groupe Maison Candiac Inc* (2020)). They all find that ss 80(2) requires urgent action once the opinion is reached and a restrictive interpretation of ss 80(2) is not appropriate. The protection of endangered species that face imminent threats to their survival and recovery is that significant. The Minister had to account for the legal constraint represented by the jurisprudence of the federal courts. There is no indication on this record that he did.

[69] In view of the specific declaration sought by the Applicant, it is not necessary to seek to prescribe what period of time is to be reasonable between the opinion made and the submission of a recommendation. I would nevertheless be tempted to agree with the Applicant that the delay until the recommendation is made should be a function of the nature of the threat and its severity. In this case, with three individual Spotted Owls left in the wild when the imminent threat was identified, and consultations with the province not being a pre-requisite (although they certainly are not discouraged if they do not generate undue delays), a long delay cannot be justified. The nature of the threat, logging jeopardizing the habitat of the endangered species and the small number of individuals left in the wild called for a process to submit the recommendation called for by ss 80(2) that had to be expedited, including by doing some work upstream whether that be conducting consultations with Indigenous groups affected or undertaking early socio-economic analysis.

V. Conclusion

[70] The availability of a declaration as a remedy was not made the subject of a challenge in this case. In my view, the conditions precedent were met (see *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165, at para 81; more generally, *The Limits of the Declaratory Judgment* by Malcolm Rowe and Diane Shnier, (2022) 67 McGill LR 295).

[71] As a result, the declaration sought by the Applicant is granted.

[72] The Applicant is awarded its costs, together with disbursements and taxes, in accordance with Rule 407.

[73] The Court wishes to thank counsel for the parties for the quality of their submissions, both in writing and orally.

JUDGMENT IN T-1177-23

THIS COURT'S JUDGMENT is:

1. The Applicant, the Western Canada Wilderness Committee, is entitled to the following declaration:

   > 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*.

2. The Applicant is awarded its costs calculated pursuant to Rule 407, as well as its disbursements and taxes.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1177-23
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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