Federal Court  Cour fédérale

Date: 20210510

Docket: T-716-20

Citation: 2021 FC 416

Ottawa, Ontario, May 10, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

LINDA SKIBSTED, RICK SKIBSTED, SPRUCE COULEE FARMS LTD., RICHARD CLARK, WENDY CLARK, HALF-DIAMOND HC LIMITED, SAMANTHA ANDERSEN AND H&A ANDERSEN FARMS LTD.

Applicants

and

CANADA (MINISTER OF ENVIRONMENT AND CLIMATE CHANGE) AND CANADA (ATTORNEY GENERAL)

Respondents

and

BADLANDS RECREATION DEVELOPMENT CORP.

Intervener

JUDGMENT AND REASONS

[1] This is an application for judicial review seeking an order of *mandamus* compelling the Minister [Minister] of Environment and Climate Change Canada [ECCC], pursuant to the *Species at Risk Act*, SC 2002, c 29 [SARA], to prepare and publicly register a recovery strategy and an action plan, and to designate critical habitat for the Bank Swallow, a threatened species.

Background

[2] The Bank Swallow (*Reparia riparia*) is a small, insectivorous and migratory songbird. It builds its nests in burrows made in vertical or near vertical banks of silty fine sands, such as those found on lake and ocean bluffs, and stream and river banks.

[3] In May 2013, the Committee on the Status of Endangered Wildlife in Canada [COSEWIC] assessed the Bank Swallow as a threatened species. Section 27(1.1) of the SARA states that the Governor in Council may, within 9 months after receiving a COSEWIC assessment and on the recommendation of the Minister, accept the assessment and add the species to the *List of Wildlife Species at Risk*, which is Schedule 1 of the SARA [List]. Four years after being assessed by COSEWIC as threatened, on November 2, 2017, the Bank Swallow was listed as a threatened species (*Order Amending Schedule 1 to the Species at Risk Act*, SOR/2017-229).

[4] The *Assessment and Status Report on the Bank Swallow Riparia riparia in Canada* prepared by COSEWIC states that the reason for designation of the Bank Swallow as threatened is that the widespread species has shown a severe long-term decline amounting to a loss of 98% of its Canadian population over the last 40 years. The report states that, as with many other aerial

insectivores, the decline continues, albeit at a slower rate since the 1980s. Breeding Bird Survey data for 2001-2011 indicate a potential loss of 31% of the population during that 10-year time period. Further, that the reason for this decline is not well understood, but is likely caused by the cumulative effects of several threats. These threats include loss of breeding and foraging habitat, destruction of nests during aggregate excavation, collision with vehicles, widespread pesticide use affecting prey abundance, and impacts of climate change, which may reduce survival or reproductive potential.

[5] Under the SARA, when a species, such as the Bank Swallow, is listed as threatened a number of statutory obligations and timelines are triggered. The Minister is required to develop a recovery strategy for the threatened species, and to post a proposed recovery strategy in the public registry within two years of the species being designated (SARA at s 37 and s 42(1)). The recovery strategy must contain, among other things, identification of the species' critical habitat. Once a proposed recovery strategy is posted, there is a 60-day period for public comments (s 43(1)). Thirty days after the 60-day comment period has ended, the Minister is required to consider any comments received, revise the proposed strategy as the Minister considers appropriate, and post a final recovery strategy in the public registry (s 43(2)).

[6] In this case, pursuant to the SARA, a proposed recovery strategy should have been posted in the public registry by November 2, 2019. However, to date, a recovery strategy has not been posted. The Respondents' evidence is that a draft of the recovery strategy has been developed, which is subject to ongoing consultations, and it is anticipated that the proposed recovery

strategy will be posted on the public registry in June 2021 and that the final version will be posted “on or about November 2021”.

[7] When a final recovery strategy is posted, the SARA requires that the Minister prepare an action plan (s 47). The action plan is based on the final recovery strategy and must describe the measures that are to be taken to implement the recovery strategy, including measures to protect the species’ critical habitat and identification of portions of the species critical habitat that have not been protected (SARA at s 49). There is no statutory timeline for developing an action plan. However, the Minister must include a proposed action plan in the public registry. Public comments can be filed within 60 days after the proposed action plan is posted. Within 30 days after the comment period has ended, the Minister is required to consider any comments received, revise the proposed action plan as the Minister considers appropriate, and post a final action plan in the public registry (s 50).

[8] Within 180 days after the recovery strategy or the action plan that identified the critical habitat of the threatened species is included in the public registry, all of the critical habitat is protected (s 57-58).

[9] The Applicants own, reside at or are the corporate representatives of properties bordering the Rosebud River, in Alberta. Those properties are also immediately adjacent to property owned by the Badlands Recreation Development Corp [Badlands], also bordering the Rosebud River. Badlands has proposed the development of a motor vehicle racetrack on its property. It is not disputed that there are colonies of Bank Swallows nesting along the banks of the Rosebud River,

including on and adjacent to the Badlands property. The Applicants claim that the proposed racetrack will be constructed on lands that are critical habitat for the Bank Swallow. By way of this application for judicial review, they seek an order of *mandamus* compelling the Minister, pursuant to his statutory obligations under the SARA, to prepare a recovery strategy and action plan for the Bank Swallow and to identify the species' critical habitat.

Procedural History

[10] The Applicants filed their Notice of Application on July 7, 2020, naming the Minister of Environment and Climate Change Canada and the Attorney General as the Respondent, and seeking the following relief:

1. A writ of mandamus compelling the Minister of Environment and Climate Change (the "Minister") to prepare a recovery strategy for a species known as the "Bank Swallow" or "riparia riparia" pursuant to section 37(1) of the Species at Risk Act ("SARA");

2. A writ of mandamus compelling the Minister to prepare an action plan or action plans based on the recovery strategy pursuant to section 47 of SARA;

3. A writ of mandamus compelling the Minister to recommend, identify and/or designate critical habitat for the Bank Swallow pursuant to sections 41(1)(c), 58(5) and (5.1) of SARA; and

4. A writ of mandamus compelling the Minister to recommend that the Governor in Council make an emergency Order providing for the protection of the Bank Swallow pursuant to section 80(1) of SARA, particularly in or around the lands subject to Water Act, RSA 2000, c W-3, Approval No. 00406489-00-00.

[11] Badlands brought a motion seeking leave to intervene with respect to the fourth ground of relief sought by the Applicants, an emergency order under s 80(1). By order dated December 21, 2020, Case Management Judge Ring granted Badlands' motion, but limited its participation as an intervener in the proceeding to the facts and issues relevant to that ground of relief. By Order

dated December 24, 2020, the Case Management Judge dealt with the timetable governing the completion of the remaining steps in the underlying application for judicial review. This included granting the Applicants leave to file a supplementary record, including any supplemental affidavits and supplemental written submissions in response to the Intervener's affidavits.

[12] On February 23, 2021, the Applicants filed a notice of motion seeking an interlocutory injunction against Badlands. The Applicants sought to prevent Badlands from proceeding with any construction or development pending the hearing of this application. The motion was heard by Justice Pentney on March 9, 2021 and his reasons dismissing the motion were issued on April 7, 2021.

[13] On March 24, 2021, the Respondents wrote to the Applicants indicating that the Minister has decided not to make a recommendation to the Governor in Council under s 80(1) of the SARA. Given this development, the Applicants brought a motion seeking leave to further amend their Notice of Application to remove the fourth ground of relief, seeking a writ of *mandamus* compelling an emergency order pursuant to s 80(1). By Order dated April 12, 2021, the Case Management Judge granted the request. The Applicants filed an Amended Amended Notice of Application on April 13, 2021 striking out the fourth ground of relief. The Applicants also advised the Case Management Judge that they would not be seeking costs against the Intervener, Badlands, in relation to its participation and, ultimately, Badlands advised that it would not be filing a motion record or appearing at the hearing of this judicial review.

Legislative Regime

[14] The most relevant provisions of *Species at Risk Act*, SC 2002, c 29 are attached as Annex A to these reasons.

Issues

[15] There are two preliminary issues and one substantive issue arising in this application.

[16] Preliminary issues:

i. Admissibility of the Expert Affidavit of Cliff Wallis [Wallis Affidavit #1] sworn on July 6, 2020; and

ii. Status of the Applicants' Supplementary Record.

[17] The substantive issue can be framed as follows:

Have the Applicants have met the test for *mandamus* compelling the Minister:

a) to prepare a recovery strategy, pursuant to s 37 of the SARA;

b) to prepare an action plan based on the recovery strategy, pursuant to s 47 of the SARA; and

c) to recommend, identify and/or designate critical habitat for the Bank Swallow pursuant to sections 41(1)(c), 58(5) and (5.1) of SARA.

Preliminary Issues

i. Admissibility of the Wallis Affidavit #1

[18] In its written submissions, the Respondents point out that the Wallis Affidavit #1, sworn and filed on July 6, 2020, was not accompanied by a Form 52.2 – Certificate Concerning Code of Conduct for Expert Witnesses [Certificate], as required by Rule 52.2(1)(c) of the *Rules of the Federal Courts* SOR 98-106 [Rules] and that the Applicants have never cured this defect.

[19] Further, that by Order dated January 6, 2021, the Case Management Judge declined to exercise her discretion to decide the Applicants' motion seeking leave to append the required Certificate to Wallis Affidavit #1 or to make an early ruling as the admissibility of the affidavit. The Respondents submit that the Applicants have flouted the Court's decision by including a signed copy of the Certificate with Wallis Affidavit #1 found in their Application Record.

[20] The Respondents submit that an expert's failure to meet the objective requirements of the Code of Conduct means the Court could exclude some or all of the expert's affidavit. Wallis Affidavit #1 does not meet the threshold requirements for admissibility because the expert has not complied with the Rules by appending a certificate. Further, the lack of compliance gives rise to concerns about the objectivity and independence of the expert. Here, the cross-examination of Mr. Wallis reflects the lack of objective compliance with the Code and raises material questions as to his impartiality.

[21] When appearing before me, the Applicants submitted that the cross-examination and re-direct testimony of Mr. Wallis established that he understood and complied with the duties of an expert witness. Therefore, failure to append the Certificate could be cured and did not warrant the exclusion of his report.

Analysis

[22] By way of background, in her January 6, 2021 Order, the Case Management Judge noted that the Applicants had brought a motion in writing seeking an order appending the Certificate, required by Rule 52.2(1)(c), to Wallis Affidavit #1. The Prothonotary noted that it was common ground that the affidavit did not comply with Rule 52.2(1)(c) because a Form 52.2 Certificate was not appended. The Order also notes that when Mr. Wallis was cross-examined by the Respondents he acknowledged that he had not read the Code and was not aware that in the Federal Court a certificate is required to be appended to affidavits of expert witnesses. The Order also notes that during re-direct, Applicants' counsel asked Mr. Wallis a series of questions regarding his compliance with the Code.

[23] The Respondents opposed the motion and also contended that it was an opportunity for the Court to review the expert witness affidavit and determine its admissibility. The Respondents asked the Court to exclude the entire affidavit. The Case Management Judge held that the Respondents' informal request "is in essence a disguised attempt to seek an interlocutory order striking out the Wallis Affidavit without necessity of bringing a formal motion requesting such relief". She declined to entertain the Respondents' request.

[24] With respect to the relief that was actually sought in the motion before her, the Case Management Judge referred to the Federal Court of Appeal's decision in *Saint Honore Cake Shop Limited v Cheung's Bakery Products Ltd.,* 2015 FCA 12 [*Saint Honore*], and concluded that "the absence of a certificate constitutes a defect in the expert's affidavit that, depending on all of the circumstances, may be curable or may render the affidavit inadmissible".

[25] Ultimately, the Case Management Judge declined to exercise her discretion to entertain the Applicants' motion, on a preliminary basis, because "it is not in the interests of justice to parse out the various alleged defects in the Wallis Affidavit and have them determined in a piecemeal fashion at different stages of the proceeding by different members of the Court". Therefore, she held that the Applicants' request for leave to append the required certificate to the Wallis Affidavit #1 after it was sworn would be determined at the hearing of the application for judicial review, at the same time as any motion by the Respondents to strike out Wallis Affidavit #1.

[26] She dismissed the motion, without prejudice to the ability of the Applicants to seek an order appending the Certificate at the hearing of the application for judicial review.

[27] As the Respondents note, the Applicants have appended the Certificate to the Wallis Affidavit #1 found in their Application Record.

[28] I note that the Respondents have not filed a motion seeking to strike Wallis Affidavit #1 nor made substantive submissions as to its admissibility other than to footnoted references in their written submissions to identified pages of the transcript of the Wallis cross-examination.

[29] Rule 52.2(1)(c) states that:

> 52.2 (1) An affidavit or statement of an expert witness shall:
>
> …
>
> (c) be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it;
>
> (2) Failure to comply – If an expert fails to comply with the Code of Conduct for Expert Witnesses, the Court may exclude some or all of the expert's affidavit or statement.

[30] Form 52.2 Certificate Concerning Code of Conduct for Expert Witnesses certifies that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule to the Rules and agrees to be bound by it.

[31] In *Saint Honore*, the Federal Court of Appeal held:

> [24] With respect, in my opinion, the judge erred when he found the Chen affidavit to be inadmissible in the circumstances. His finding confuses the particular content requirements of an expert affidavit pursuant to Rule 52.2(1)(c) with the general objective of Rule 52.2(2) regarding compliance with the Code of Conduct for Expert Witnesses. Lack of compliance with the former should not be conflated with a failure to comply with the Code of Conduct for Expert Witnesses. Indeed, whilst Rule 52.2(2) permits the exclusion of some or all of an expert's affidavit for failing to comply with the Code of Conduct, the same cannot necessarily be said for failing to comply with particular content requirements of an expert affidavit set forth by Rule 52.2(1).

[32] In this case, the Respondents point to the October 15, 2020 transcript of the cross-examination of Mr. Wallis. There, Mr. Wallis confirmed that he had not read the Code of Conduct nor was he aware of the Certificate and that, as an expert witness, he was required to sign and attach it to his affidavit. However, he also stated that he was aware he had a duty to provide an independent opinion and he understood that, as an expert giving evidence in this Court, his overriding duty is to assist the Court impartially on matters relevant to his expertise, and that this duty overrode any duty owed to the party retaining him. Further, he understood that for the purposes of giving evidence as an expert, he must be independent and objective. On re-direct, counsel for the Applicants took Mr. Wallis through the Code of Conduct and Mr. Wallis confirmed his understanding of its requirements and his compliance in that regard.

[33] The Schedule – Code of Conduct of Expert Witnesses (Rule 52.2), under the heading General Duty to the Court states:

> 1. An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.
>
> 2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for any party.

[34] In my view, it is clear from Mr. Wallis's cross-examination and re-direct testimony that he understood his general duty owed to the Court. The Respondents make the general assertion that not complying with the Certificate requirement gives rise to concerns about the expert's objectivity and independence. As a general assertion, this is true. However, given Mr. Wallis' cross-examination and re-direct testimony, I do not agree with the Respondents' further assertion

that the cross-examination reflects the lack of objective compliance with the Code – beyond his acknowledgement that he did not provide the required Certificate. Moreover, the Respondents do not expand on their submission that the absence of the Certificate raises "material questions as to his impartiality". They do not identify these material questions and they have not responded to the Case Management Judge's Order by bringing a preliminary motion challenging the impartiality of Mr. Wallis's expert report on this basis and seeking to have it struck out.

[35] When appearing before me the Respondents took the position that the Applicants were required to bring a motion to address the appending of the Certificate but that they had failed to do so. However, the Applicants did file such a motion. The Case Management Judge declined to entertain the motion, instead holding that the issue would be heard at the hearing of the application. She dismissed the Applicants' motion without prejudice to their ability to seek an order appending the Certificate at the hearing of the application for judicial review. Accordingly, in my view, there is no merit to the Respondents' position that the Applicants were required to bring a new motion. It was open to the Applicants to raise their request at the hearing before me.

[36] The Applicants should not have appended the Certificate to Wallis Affidavit #1 until obtaining leave of the Court to do so, or they should have signalled that the Certificate had been appended subject to leave being granted at the hearing. However, because I am satisfied that Mr. Wallis understood his duty to the Court, I am granting leave to the Applicants to cure the defect by appending the Certificate.

ii. Status of Applicants' Supplemental Record

[37] As indicated above, the Applicants have submitted a Supplementary Record. This was done pursuant to the December 24, 2020 Order of the Case Management Judge which addressed, among other things, the timetable for additional steps to be taken after Badlands was granted intervener status. Paragraph 4(b) of the Order grants the Applicants and Respondents leave to serve supplemental affidavit evidence in reply to the Intervener's affidavits. Paragraph 4(d) granted leave to the Applicants to file a supplemental record "that includes any supplemental affidavits and supplemental written submissions in reply to the Intervener's affidavits".

[38] On January 20, 2021, the Intervener filed an affidavit of Heather Ferguson, biologist, affirmed on January 19, 2021, and the affidavit of Rick Grol, affirmed on January 20, 2021. Ms. Ferguson and Mr. Grol were cross-examined on their affidavits on February 12, 2021.

[39] On January 29, 2021, the Applicants filed a responding affidavit of Cliff Wallis sworn on January 29, 2021 [Wallis Affidavit #2]. Mr. Wallis was cross-examined on this affidavit on February 10, 2021.

[40] The Applicants' Supplemental Record was filed on February 26, 2021. Their Supplemental Memorandum of Fact and Law confirms that the supplemental written submissions are provided pursuant to paragraph 4(d) of the December 24, 2020 Order of the Case Management Judge. Included with the Supplemental Record is Wallis Affidavit #2, the

transcript of the cross-examination of Natalie Savoie, answers to undertakings given at that cross-examination, and the cross-examination transcripts of Heather Ferguson and Rick Grol.

[41] As indicated above, given the subsequent developments, Badlands is no longer involved in the proceedings. However, the affidavits filed by the Intervener and the Applicants' Supplemental Record remain in the record.

[42] Given that relief by way of a writ of *mandamus* compelling the Minister to recommend that the Governor in Council make an emergency Order pursuant to section 80(1) of SARA was no longer being pursued and the Intervener is no longer involved, the Case Management Judge directed the parties to advise the Court what evidence and materials were no longer relevant to the application.

[43] By letter to the Court dated April 16, 2021, the Applicants took the position that only four paragraphs of their Supplementary Memorandum of Fact and Law should not be considered (paragraphs 68-72) as well as the cross-examination transcript of Rick Grol (additionally, they advised that portions of their original Memorandum of Fact and Law were no longer relevant).

[44] In a letter dated April 16, 2021, the Respondents provided the background to this situation and their position. Given that the Applicants were denied leave to rely on additional affidavit evidence, that the Intervener is no longer participating in the *mandamus* application, and the ground of relief in paragraph 4 of the Applicants' Notice of Application is no longer being pursued, the Respondents submit that the Applicants' Supplementary Record should be

excluded in its entirety from the proceeding (the Respondents also identify additional paragraphs of the Applicants' original Memorandum of Fact and Law that they submit are no longer relevant).

[45] At the hearing of this matter, counsel for the Applicants advised that the Applicants would not be relying on their Supplemental Record other than referring to three cases cited in paragraphs 55-62 of their Supplemental Memorandum of Fact and Law. They also pointed out that their Supplemental Application Record includes the transcript of the cross-examination of Ms. Natalie Savoie, a biologist with ECCC. The Applicants advised that the Respondents had sought and been granted leave to file the Savoie Affidavit by the Case Management Judge, and that that affidavit was not filed in response to the Intervener's affidavits.

[46] I agree that the Applicants' Supplementary Record should be excluded in whole from consideration in this application as it is no longer relevant, except the transcript of the cross examination of Natalie Savoie. The Applicants may also refer to the three referenced cases.

[47] The affidavits filed by the Intervener are also no longer relevant.

Have the Applicants have met the test for *mandamus*?

The test

[48] The parties agree that the test for *mandamus* is as set out in *Apotex Inc v Canada (Attorney General),* [1994] 1 FC 742 (FCA) [*Apotex*]:

1. There must be a public legal duty to act;

2. The duty must be owed to the applicant;

3. There is a clear right to performance of that duty, in particular:

a) the applicant has satisfied all conditions precedent giving rise to the duty;

b) there was

i. a prior demand for performance of the duty;

ii. a reasonable time to comply with the demand unless refused outright; and

iii. a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;

4. Where the duty sought to be enforced is discretionary, the following rules apply:

a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as “unfair”, “oppressive” or demonstrate “flagrant impropriety” or “bad faith”;

b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty…;

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. The Court in the exercise of its discretion finds no equitable bar to the relief sought; and

8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

[49] The Respondents challenge only two aspects of the test. First, they deny that a duty is owed to the Applicants, as they do not meet the applicable principles governing standing. Second, they submit that the Applicants do not have a clear right to the performance of the Minister's duty as the Applicants have failed to make prior demand and because the delay in posting the recovery strategy is justified and reasonable in this circumstance. When appearing before me, the Respondents confirmed that they do not dispute that the remaining factors of the *mandamus* test are met in this case with respect to the recovery strategy. The Respondents' position is premised on their view that the Minister is not under a duty to prepare and produce an action plan or to designate critical habitat until the recovery strategy has been posted.

i. Public legal duty to act

Applicants' submissions

[50] The Applicants submit that the Minister has a public legal duty to produce a recovery strategy, an action plan and to designate and protect critical habitat. They submit that the Minister was required, within 9 months after the COSEWIC assessment of the Bank Swallow as a threatened species, to amend the List accordingly (SARA at s 27(3)) but the Minister missed this deadline by nearly four years. When the order was issued on November 2, 2017, it triggered the statutory requirement for the Minister to include in the public registry a recovery strategy and an action plan by November 1, 2019. This has not been done and the Minister has failed to comply with these statutory deadlines.

[51] The Applicants note that a recovery strategy must include identification of the species' critical habitat (SARA at s 41(1)(c)). Further, that an action plan must include both an identification of the species' critical habitat and examples of activities that are likely to result in its destruction and identification of any portion of the species' critical habitat that have not been protected (SARA at s 49(1)(a) and (c)). The Applicants submit that a critical part of the SARA scheme is that the Minister must protect the critical habitat 180 days after publishing an action plan or recovery strategy (SARA at s 58(5)). Further, that the Minister has no discretion in identifying a critical habitat and, once a critical habitat is designated through a recovery strategy and action plan, the critical habitat is automatically protected. Applying principles of statutory interpretation to s 58(5.1), the Applicants conclude that the Minister is required to protect the critical habitat through either a s 11 agreement or by issuing an order under s 58 of the SARA.

Respondents' submissions

[52] The Respondents agree that the Minister must prepare a recovery strategy for the Bank Swallow because it has a threatened listing under SARA and that a proposed recovery strategy was required to be included in the public registry by November 2, 2019, two years after the listing. However, the Respondents submit that failure to meet the deadline does not prevent the Minister from developing the recovery strategy, that ECCC has been diligently engaged in developing an effective recovery strategy and that the delay is reasonable and does not warrant judicial intervention by way of *mandamus*.

[53] The Respondents also submit that the Applicants cannot compel an action plan or identification of critical habitat until a final recovery strategy is posted in the public registry. The

Respondents submit that the Applicants' request is premature as the requirement for the performance of the duty has yet to arise. That is because, based on the statutory scheme, the Minister is not under a public legal duty to develop an action plan and/or protect critical habitat until the final recovery strategy has been posted. Further, it is premature for the Court to interpret the Minister's requirements under s 58 since the provision is only triggered once a recovery strategy is posted.

Analysis

[54] In order to compel the Minister to act, the Applicants are required to demonstrate that the Minister is under a public legal duty to act.

[55] Section 37 of SARA states 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. In the case of a threatened species, s 42(1) of SARA states that the competent minister must include a proposed recovery strategy in the public registry within two years after the species was listed as such. The parties do not dispute that the Minister has an obligation to post a recovery strategy and that the statutory deadline for posting that recovery strategy, November 2, 2019, has passed.

[56] I agree with the Applicants that the Minister has a public legal duty to issue a recovery strategy and has failed to do so within the two-year period prescribed by statute.

[57] However, I also agree with the Respondents that any further *mandamus* relief is premature because the Minister's duty to issue an action plan or protect critical habitat is only triggered after the final recovery plan is posted.

[58] Section 41(1) of SARA states that the competent minister must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and in doing so must include the information listed in that provision. This includes the identification of the threats to the survival of the species and threats to its habitat (s 41(1)(b)), and the identification of the species' critical habitat, to the extent possible, based on the best information possible. Where the available information is inadequate, a schedule of studies to identify critical habitat (s 41(1)(c), (c.1)), as well as a statement of when one or more action plans "in relation to the recovery strategy" will be completed (s 41(1)(g)) must be included in the recovery strategy.

[59] Section 47 of the SARA states that the competent minister in respect of a recovery strategy must prepare one or more action plans "based on the recovery strategy". Section 49(1) sets out what must be included in an action plan, this includes a statement of the measures that are to be taken to implement the recovery strategy (s 49(1)(d)).

[60] In essence, the recovery strategy is the foundation for the action plan. Until critical habitat is identified, measures cannot be taken to protect it. As stated in *Environmental Defence Canada v. Canada (Fisheries and Oceans)*, 2009 FC 878:

> [6] The recovery strategy provisions of *SARA* are one component of a comprehensive protection strategy. Following meeting the recovery strategy requirements in s. 41, the action plan element takes effect as set out in sections 47 to 55. There is no

> dispute that the scheme of these two elements is to first provide a baseline of information about the biology and ecology of a species and a broad strategy to address conservation threat. In contrast, action plans are intended to describe more detailed "action" measures to achieve a species' survival and recovery, including evaluation of the socio-economic costs and benefits of such measures.

[61] In *Western Canada Wilderness Committee v Minister of Fisheries and Oceans*, 2014 FC 148 [*WCWC*], the applicants sought declarations that the Minister had unlawfully failed to post proposed recovery strategies within the statutory timelines prescribed in the SARA and orders of *mandamus* compelling the Minister to post proposed and final recovery strategies within specified time periods for the four species that were the subjects of that application. When the application was heard, the Minister had posted proposed recovery strategies for three of the four species, and a final recovery strategy for one of the species. The Court held that it was premature to order *mandamus* for a duty not yet owed:

> [123] I agree with the Ministers that the applicants' request for *mandamus* in relation to the posting of final recovery strategies for the three species in question is indeed premature. The timelines contained in section 43 of *SARA* are only triggered once a proposed recovery strategy has been included in the public registry. Those timelines have not yet expired, with the result that there is currently no public legal duty on the part of the Ministers to act in relation to the posting of final recovery strategies for the Southern Mountain Caribou, the Marbled Murrelet, and the Nechako White Sturgeon.
>
> [124] An order of mandamus will not be granted to compel a public official to act in a specified manner if he or she is not under an obligation to act as of the date of the hearing: *Apotex*, above at para. 51. See also *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41 at para. 157.

[62] In *WCWC*, the Court declined to issue an order of *mandamus* compelling the Minister to post final recovery strategies when the 90-day statutory comment and revision period had not yet passed. However, the Court retained jurisdiction over the matter so that the applicants did not have to file a new application if the time period passed without the Minister complying with his statutory duties (WCWC at para 125).

[63] In this case, the Minister is not yet under a public legal duty to issue an action plan pursuant to s 47, as the action plan is based on the recovery strategy, which remains outstanding.

[64] As to designation of critical habitat, s 57 states that the purpose of s 58 is to ensure that, within 180 days after the recovery strategy or action plan that identified the critical habitat referred to in s 58(1) is included in the public registry, all of the critical habitat is protected by one of the two mechanisms set out. Either the provisions in or measures under SARA or other Act of Parliament (including agreements under s 11), or the application of s 58(1).

[65] It is clear from s 57 that s 58 is subject to the requirement that the recovery strategy or action plan must first be posted. The Minister's public duty with respect to s 58(1) is not triggered until 180 days after the recovery strategy or action plan are posted and, therefore, any order for *mandamus* is premature.

[66] In that regard, I note that the Federal Court of Appeal in *Canada v David Suzuki Foundation*, 2012 FCA 40 [*Suzuki*], stated at para 30 that pursuant to s 58(5) of SARA the inclusion of the recovery strategy in the public registry required the Minister to ensure that the

critical habitat identified in that strategy be protected within 180 days through either a protection order made pursuant to s 58(1) and (4) or through a statement by the Minister setting out the critical habitat or portions of it. Section 58(5) explicitly states that the Minister must take one of those actions within 180 days after the recovery strategy or action plans that identified the critical habitat is posted to the public registry.

[67] I acknowledge the Applicants' statutory interpretation submissions regarding s 58(5.1). However, even if I were to accept the Applicants' view, the recommendation of the competent minister referred to in s 58(5.1) is explicitly subject to the statutory timeline set out in s 58(5.2)(a). The competent minister must make the recommendation within 180 days after the recovery strategy or action plan that identifies the critical habitat that includes habitat to which the *Migratory Birds Convention Act, 1994* applies is included in the public registry, and after the required consultation. Therefore the Minister's public duty is not yet triggered and the *mandamus* application is premature.

[68] In view of the above, of the three grounds for *mandamus* listed in the Applicants' Notice of Application (the Applicants having abandoned the fourth ground), only the first ground, the preparation of a recovery strategy pursuant to s 37(1) of SARA, remains at issue. The other two being premature. The reasons that follow will therefore address only that ground. I also note that the only public legal duty that the Minister owes at this point is to post a proposed recovery strategy in the public registry. Based on the statutory scheme, the Minister is not obligated to post a final recovery strategy until the 90-day comment and revision period has passed (SARA s 42 – 43; *WCWC* at para 123).

ii. The duty must be owed to the Applicants

Applicants' position

[69] The Applicants submit that, when determining whether a duty is owed to an applicant in an application seeking *mandamus*, the principles of standing apply and that either direct or public interest standing meets the *Apotex* threshold (citing *Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175 at para 145 [*Bancroft*]). The Applicants submit that they meet either test.

[70] Regarding direct standing, the Applicants submit that private interest standing is extended to parties who have "a personal basis where [their] legal rights have been or are likely to be affected" (citing *Alberta (Attorney General) v Malin*, 2016 ABCA 396 at paras 18-19). They submit that they have direct standing because they are adjacent landowners to the Badlands property which hosts Bank Swallow colonies, as do other properties near theirs, and they would likely be subject to any draft critical habitat designation. Similarly, the Applicants submit that they have a special interest in the operation of SARA, beyond the general interest common to persons interested in the protection of a threatened species, because they each have a personal interest in protecting the Bank Swallow and when and how protection is afforded to the Bank Swallow will have a direct impact on their lands (citing *Finlay v Canada (Minister of Finance*), [1986] 2 SCR 607 at paras 17-22 [*Finlay*]).

[71] The Applicants submit that they also meet the criteria for public interest standing as set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*DESW*]. The matter is justiciable because there is a legislative

requirement that binds the Minister, and the Minister's failure to comply with legislative requirements, and therefore his duty to preserve or protect the environment, raises a serious issue. They have a genuine interest because their lands are likely going to be affected by the critical habitat designation and because one of the Applicants is an avid bird watcher. Further, that this is a reasonable and effective means of bringing the matter forward because the Bank Swallow is incapable of bringing the action or enforcing the SARA.

Respondents' position

[72] The Respondents submit that the Applicants lack direct standing because their rights are not directly affected by the Minister's actions. To obtain the remedy of *mandamus*, an applicant must be "directly affected" within the meaning of s 18.1(1) of the *Federal Courts Act,* RSC 1985 c F-7 [*Federal Courts Act*]. That relief must affect legal rights, impose legal obligations, or prejudicially affect an applicant in some way. Nor have the Applicants demonstrated that they meet requirements for a private, or direct, interest standing as they have not shown that they are exceptionally prejudiced or have a special interest in the subject matter of the action or are more particularly affected than others, as prescribed by *Finlay*. The Respondents assert that the Applicants' evidence falls short of demonstrating a special interest or that they have a genuine interest in the relief sought. The Respondents submit that an interest in protecting the Rosebud River and being a bird watcher cannot result in direct standing. Further, that there is no evidence of detriment or impact to the Applicants' legal or property interests arising from future conduct or actions taken under the SARA. Proximity to the proposed racetrack does not meet the test for direct standing, and the Applicants are merely interested observers. Finally, opposition to the project in other forums does not ground standing.

[73] The Respondents also submit that the Applicants lack public interest standing to seek *mandamus*. The Respondents acknowledge the *DESW* test but submit that the Applicants must tender direct evidence of demonstrated real and continuing interest and, must demonstrate that the matter will affect them personally and directly (citing *Canadian Council of Churches v Canada (Minister of Employment and Immigration),* [1992] 1 SCR 236 at p 254). The Respondents submit that the Applicants have failed to tender evidence of a direct and personal interest and that they do not have a genuine interest because they are nearby landowners or avid birdwatchers. Finally, the Respondents submit that private interests or opinions of property owners is not synonymous with the public interest.

Analysis

[74] I agree with the parties that the principles regarding standing apply to this branch of the *Apotex* test. Thus, the analysis of whether a duty is owed to the Applicants is a consideration of whether the Applicants are "directly affected" by the matter or whether they have met the *DESW* criteria for public interest standing.

[75] Section 18(1) of the *Federal Courts Act* grants the Federal Court jurisdiction to issue the relief set out, which includes the writ of *mandamus*. Those remedies may only be obtained in an application for judicial review made under s 18.1. Section 18.1(1) sets out who may bring an application for judicial review:

> 18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[76] In *League for Human Rights of B'nai Brith Canada v. Odynsky*, 2010 FCA 307, the Federal Court of Appeal held that to be "directly affected" by a decision in the context of s 18.1(1), the decision must have affected the legal rights, imposed legal obligations on, or prejudicially affected the party bringing the application for judicial review in some way (*Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (FCA); *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116). This test has been consistently applied in subsequent jurisprudence when standing under this provision is at issue (see also, for example, *Forest Ethics Assn v National Energy Board*, 2014 FCA 245 at para 29; *Oceanex Inc. v. Canada (Transport)*, 2018 FC 250 at para 258).

[77] The Applicants submit that they have a special interest in the operation of SARA because their properties may be affected by the critical habitat designation and because they have a personal interest in protecting the Bank Swallow, which nests near or on their properties as well as on the Badlands property.

[78] The Applicants' evidence on this point is limited. Of the named Applicants, only Rick Skibsted filed a supporting affidavit. In his affidavit, he describes himself as an avid bird watcher and having studied the nesting habits of birds in the Rosebud River Valley for decades. He states that each of the Applicants owns property, resides at property or is the corporate representative for the property owner, which is immediately adjacent to the proposed Badlands project site along the Rosebud River Valley. Further, that the Badlands racetrack site is directly adjacent to three nesting sites for the Bank Swallow, two on the Badlands property and a third colony on lands owned by the Knibbs (who are not applicants in this matter). He attaches as exhibits

various maps and photos that identify the location of the properties of the Applicants, and others, and the location of Bank Swallow colonies. On re-direct examination based on his affidavit, Mr. Skibsted was asked why he thought the Valley should be protected and responded because of the endangered species, the peregrines, the prairies, the swallows and the wildlife.

[79] The Wallis expert report submitted by the Applicants states that in 2020 there were five active Bank Swallow colonies on the banks of the Badlands property and the properties on the opposite side of the river. These range from small colonies of 10 pairs, to colonies with hundreds of nesting pairs. The report states that the Bank Swallows are known to feed over the wetlands in the valley that are proximate to the racetrack and that he has observed feeding over wetlands in the valley. In June and July 2020 hundreds of birds were flying from the colonies over grasslands, low scrublands and wetlands on the Badlands property.

[80] I am not persuaded that this evidence demonstrates that the Applicants will be directly affected by the Minister's failure to produce a recovery strategy within the prescribed timeframe.

[81] In that regard, it is of note that the evidence filed by the Respondents establishes that the recovery strategy is incomplete, primarily because critical habitat has not yet been determined. Therefore, what will ultimately comprise the Bank Swallow critical habitat is currently unknown. For example, the Respondents filed the affidavit of Mr. Marc-André Cyr, wildlife biologist, with Canadian Wildlife Services [CWS] of ECCC in the Migratory Birds Conservation Unit, affirmed on September 11, 2020 [Cyr Affidavit]. Since May 2017, Mr. Cyr has been the CWS lead coordinating the development of the recovery strategy for the Bank Swallow. Among other

things, in his affidavit he references the SARA definition of critical habitat, being the "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". As to the foraging habitat of the Bank Swallow, Mr. Cyr states that Bank Swallows are central-place foragers, meaning that the species forages in a radial pattern from the nest. The distance travelled for catching prey is influenced by environmental factors (i.e. weather and insect abundance) and the time of breeding. As to the identification of draft critical habitat locations as presented in the draft recovery strategy (which was not produced) Mr. Cyr states:

> 48 … the area containing critical habitat for the Bank Swallow were identified based on sequential application of the following methods:
>
> > a) Selection of natural water bodies (such as lakes, ponds, wetlands and coastal waters) and watercourses (such as rivers and creeks) shorelines that intersected records of confirmed nesting within a radial distance corresponding to the record's spatial uncertainty and a 100 m search distances (i.e. within a maximum of 800 m distance from the record);
> >
> > b) Extraction of the selected shorelines within the radial distance of 5 km from a nesting record's uncertainty in the area. It should be noted that this factor has not been finalized as of yet and thus the radial distance buffer may change in the future when the proposed recovery strategy is posted in the Species at Risk Public Registry and when the recovery strategy is finalized by CWS; and
> >
> > c) Application of the 500 m radial distance around extracted shorelines to capture the foraging habitat associated with potential nesting locations.
>
> 49. To date, this approach has identified about 400 critical habitat locations. The application of the modelling procedure results in about 19,000 km of shorelines. As of the swearing of this affidavit, this work has not yet been completed and this these locations and the results of the modelling processes are subject to change. A further affidavit can be provided once work on the critical habitat mapping will have been completed.

[82] As to the Bank Swallow colonies on the Rosebud River, Mr. Cyr testified that he had not visited the Rosebud River Valley or other sites in Alberta where the Bank Swallow nests but that he had seen aerial photographs of the area. He also confirmed that the species needs foraging habitat near the nesting habitat to feed nestlings during the breeding season. In response to an undertaking, Mr. Cyr produced aerial and other photographs that he had reviewed identifying Bank Swallow colonies along the Rosebud River. These appear to include 7 colonies directly adjacent to the Badlands property as well as 13 other nearby colonies along the river. He also produced a map of potential nesting and foraging habitat near Bank Swallow colonies on the Rosebud River.

[83] Thus, the fact that the Bank Swallow has colonies in the area identified by the Applicants is not in dispute. However, there is no certainty that some or all of the Badlands property, or the Applicants' properties, will be designated as critical habitat.

[84] When appearing before me the Applicants submitted that it was their hope that the recovery strategy would identify critical habitat and therefore impose restrictions on the use of their properties and that such restrictions would serve to protect the Bank Swallow. However, the failure to implement the recovery strategy in accordance with the SARA timelines does not establish that the individual Applicants are or will be prejudicially affected by such inaction. The same may not be true for the Bank Swallow.

[85] It may be that the recovery strategy will identify portions of the Applicants' properties as critical habitat, thereby affecting their legal rights or imposing legal obligations in that regard.

However, the recovery strategy is still in draft form and the evidence as to Bank Swallow nesting and foraging areas does not establish that their properties will be so designated. In any event, the Applicants appear to view any such obligation as a positive, rather than prejudicial, development. The onus was on the Applicants to adduce sufficient evidence to establish a direct affect. Evidence which merely shows an applicant's interest in a matter will not be sufficient to ground a claim for standing (*Unifor v Vancouver Fraser Port Authority*, 2017 FC 110 at para 29).

[86] Similarly, I cannot conclude that an interest in bird watching or a general interest in the fate of the Bank Swallow meets the direct affect threshold of having the Applicants' legal rights affected, imposing legal obligations or prejudicially affecting the Applicants. Nor does this demonstrate a special, private or sufficient interest, beyond that affecting the public generally. Or, that the Applicants are more affected than other Canadians or have a special interest in the operation of s 37 of the SARA which is beyond the general interest that is common to all Canadians concerned with wildlife conservation (*Finlay* at para 19). Accordingly, in my view, the Applicants do not meet the principles of direct standing so as to establish that a duty is owed to them under the *Apotex* test.

[87] As to public interest standing, the factors to be considered when exercising the discretion to grant public interest standing were set out by the Supreme Court of Canada in *DESW*:

> 37 In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public

> interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[88] The Supreme Court held that these factors should be seen as interrelated considerations to be assessed and weighed cumulatively, not individually, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes (*DESW* at paras 20, 36). In determining whether to grant standing in public law cases courts should exercise their discretion and balance the underlying rationale of restricting standing with the important role of the Court in assessing the legality of government action. "At the root of the law of standing is the need to strike a balance 'between ensuring access to the Courts and preserving judicial recourses' *Canadian Council of Churches*, at p 252" (*DESW* at para 23). Public interest standing is available to challenge not just unconstitutional laws, but other administrative action as well (*Finlay* at paras 31 – 32).

[89] Here there is no doubt that the Applicants raise a serious justiciable issue: the Minister's failure to prepare and post to the public registry a proposed recovery strategy as required within the time prescribed by ss 37 and 42(1) of SARA.

[90] The seriousness of the issue is demonstrated in *WCWC* where, over seven years ago, this Court made the following comment in granting declaratory relief under SARA:

> [92] It is simply not acceptable for the responsible Ministers to continue to miss the mandatory deadlines that have been established by Parliament. In the circumstances of these cases, it is therefore both necessary and appropriate to grant the applicants the declaratory relief that they are seeking, both as an expression of

> judicial disapproval of the current situation and to encourage future compliance with the statute by the competent ministers.
>
> [93] Indeed, the issues that were originally raised by these applications are "genuine, not moot or hypothetical" insofar as there remain numerous species at risk for which the posting of proposed recovery strategies is long overdue: *Danada Enterprises Ltd. v. Canada (Attorney General)*, 2012 FC 403, 407 F.T.R. 268 at para. 67. I am, moreover, satisfied that a declaration will serve a useful purpose and will have a "practical effect" in resolving the problems identified by these cases: see *Solosky*, above, at 832-833.

[91] This Court in *WCWC* declared that the Minister of Fisheries and Oceans and the Minister of the Environment, the competent minsters in that case, had acted unlawfully in failing to post proposed recovery strategies within the statutory timelines prescribed by SARA for four species. Clearly, the Applicants in this case have raised a serious and justiciable issue.

[92] However, I am not persuaded that the Applicants have demonstrated a genuine interest in the application. The Applicants state that because their land could be affected by the critical habitat designation and because they are interested in the Bank Swallow, they have a genuine interest.

[93] The Respondents assert that the Applicants' concern with the Bank Swallow is simply a ruse, and is intended only to support their ongoing opposition to the racetrack development. In my view, the Applicants may well be opposed to that development but this does not mean that their concern for the threatened Bank Swallow is not genuine. The two are not mutually exclusive. Nor is the relief that they seek in this application directed at Badlands. *Mandamus* relief is aimed at compelling the Minster to perform his public duties under the SARA

(*Chetwynd Environmental Society v. Dawson Creek Forest District (District Manager)*, 1995 CanLII 3352).

[94] The Respondents also assert that the Applicants are only concerned about a small portion of the Bank Swallow population. It is true that the Applicants bring their *mandamus* application in the context of the Rosebud Valley River Bank Swallow colonies. However, this is where the Applicants live. Mr. Skibsted's cross-examination testimony was that he farmed there for over 40 years until his retirement. Further, the Respondents' evidence is that the remaining Bank Swallow population has an extensive breeding range across Canada and therefore requires the identification of critical habitat across Canada. It is improbable that an individual, or even a non-governmental organization, could demonstrate genuine interest in every Bank Swallow colony across the country. This should not bar them from seeking to enforce the Minister's obligation to post a recovery strategy for the species. And while I appreciate that most such challenges concerning wildlife protection are mounted by organizations (e.g. *Environmental Defence Canada v Minister of Fisheries and Oceans*, 2009 FC 878; *WCWC*; *Alberta Wilderness Association v Minister of Environment* 2009 FC 710; *Canada v David Suzuki Foundation*, 2012 FCA 40), this may, in part, be reflective of the cost of bringing applications. It does not mean, however, that only public interest groups or non-profit organizations will be granted public interest standing.

[95] The question is whether the Applicants have a real stake in the proceedings or are engaged with the issues that they raise (*DESW* at para 43 referencing *Finlay* and *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342). Given the limited evidence put forward by the

Applicants, I am not satisfied that the Applicants, simply as landowners who have Bank Swallow colonies on or near their properties and who have raised concerns about the impact of the proposed development on those colonies – as well as concerns about other impacts – have established that their engagement is sufficient to demonstrate a genuine interest. Unlike cases where individuals (together with organizations) have been granted public interest standing, here the Applicants have not demonstrated an ongoing dedication to the preservation of the species or wildlife causes more broadly.

[96] That said, this application is a reasonable and effective means to bring the issue before the Court. In *DESW*, the Supreme Court held that this approach reflects the flexible, discretionary and purposeful approach to public interest standing (*DESW* at para 44). This factor is closely linked to the principle of legality, as courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government (*DESW* at para 49). And, when taking a purposeful approach, one of the factors to be considered is whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged action (or inaction in this case). Further, that: "The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities" (*DESW* at para 51).

[97] And, in *Bancroft*, the Nova Scotia Supreme Court held:

> [152] As to the third factor, no one suggests the species themselves are capable of bringing an application, and the ESA

> does not provide for penalties or other consequences against the Minister where deadlines have been breached. There are no alternative routes to compel the Minister to meet his duties under the ESA. The species need people like Mr. Bancroft and organizations like the other Applicants and the Intervenor to take such action and speak for them. It would be absurd if no person or interested entity could bring such reviews under the ESA to hold government to account. How else would the Mainland Moose, Ram's- head Lady Slipper, Canada Warbler, Black Ash, Wood Turtle or Eastern Wood Pewee find protection when and if a government failed to reasonably execute its duties and responsibilities?

[98] In this case, it is equally obvious that the Bank Swallow cannot bring an application to enforce the SARA. As a threatened species, they have a direct interest, but they cannot speak for themselves. Other than the Applicants, no party asserts standing to seek *mandamus*. And, like *Bancroft* regarding the provincial species protection legislation, there are no penalty provisions in the SARA that apply when there is a failure to meet statutory deadlines and obligations. Therefore, bringing an application and seeking public interest standing is the only way for members of the public to seek compliance with the SARA. Moreover, requiring the Minister to comply with the mandatory provisions of SARA transcends the interests of the Applicants; preserving a threatened species serves the current and future interests of all Canadians and, of course, the threatened species itself. Additionally, the relief sought by the Applicants is limited to *mandamus*, they seek to compel the Minister to perform his public duty. Granting standing is therefore desirable, as it seeks to compel the Minister to act lawfully.

[99] Having considered the factors cumulatively, in my view, because the Applicants have not demonstrated a genuine interest, they have met the requirements for public interest standing and,

therefore, they have not established that a duty was owed to them by the Minister. Thus, this aspect of the *Apotex* test has not been met.

iii. There is a clear right to performance of that duty

Applicants' position

[100] The Applicants submit that there is a low threshold for what constitutes a demand (*Bancroft* at para 155). Further, that the demand does not have to be express when there has been a long delay (*Bhatnager v Canada (Minister of Employment & Immigration)*, [1985] 2 FC 315 at para 4 [*Bhatnager*]). In this case, there was a significant delay of nearly four years in adding the Bank Swallow to the threatened species List, and although the recovery strategy was required by November 2, 2019, it still has not been posted. The Applicants also submit that the Notice of Application can constitute an express demand, as is the case in debtor/creditor law. They also point to *Orr v Alook*, 2012 FC 590 [*Orr*] as an example where the Court considered an application, filed the year prior, as an express demand meeting the *Apotex* criteria. The Applicants submit that, in this case, the Notice of Application is a form of demand. And, while the Respondents claim that ECCC is actively working on a recovery strategy, saying that work is in progress is likely insufficient when there is a clear legal duty to act (*Bancroft* at para 161).

Respondents' position

[101] The Respondents submit *mandamus* is only appropriate when there is evidence of a refusal to a proper demand. The Applicants have not issued a proper demand nor has the Minister refused to comply with SARA. The Respondents submit that the commencing

document cannot be the demand. Even if the law supports a low threshold for what constitutes a demand, a demand is still required. The Respondents also reject the Applicants' assertion that debtor/creditor law is applicable. This is because the enforcement of a debt owed under a contract is not analogous to the extraordinary discretionary remedy of *mandamus*.

[102] The Respondents submit that the delay in issuing a recovery strategy in this case is reasonable and the posting of the proposed recovery plan is imminent. The Minister's failure to meet the deadline does not prevent him from continuing to develop a recovery strategy. The Respondents submit that the reasonableness of the delay is contextual and is not determined solely by length. Three conditions are necessary to establish delay: the delay has been longer than the necessary delay normally required by the nature of the process; the applicant and his or her counsel are not responsible for the delay; and the authority has not provided satisfactory justification for the delay (*Coderre c Canada (Commissaire a l'Information),* 2015 FC 776 at para 26 [*Coderre*]). The Respondents submit that developing a recovery strategy is a complex process involving, among other things, the need to reconcile competing statutory requirements and departmental priorities, and to consult with multiple stakeholders and other levels of government (citing *WCWC*). In this case, ECCC has diligently engaged in developing a recovery strategy.

Analysis

[103] In *Apotex*, the Court held that one element of proving that there is a clear right to the performance of a duty is that "there was (i) a prior demand for performance of the duty; (ii) a

reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay".

[104] It is correct that case law regarding what constitutes a "demand" suggests a fairly low threshold. As indicated in *Bancroft*, letters requesting action have previously been found to satisfied the demand requirement (*Bancroft* at para 155). Here, however, the Applicants concede that they did not make any express demand prior to filing the Notice of Application. Therefore, the question is whether their Notice of Application can meet the requirement for a demand. And, if so, whether the delay in this case is so unreasonable that it serves to constitute an implied refusal.

[105] In my view, the Notice of Application is just that, notice of the commencement of the application. It is difficult to see how this can be characterized as a *prior* demand that the Minister perform his duties and which would afford the Minister with an opportunity to comply with the demand.

[106] I acknowledge the Applicants' view that it is a different circumstance when the time period for performing a public duty is set out in the statute and that a demand should not be necessary in that circumstance. Further, that in this matter the Respondents' evidence establishes that even if a demand had been made it would not have been complied with as the recovery strategy remains outstanding even nine months after the commencement of this application. However, I am not persuaded that this overcomes the responsibility of a party seeking *mandamus* to make a prior demand.

[107] I also agree with the Respondents that seeking the prerogative writ of *mandamus* is a different circumstance than making a demand in the context from debtor/creditor law. In support of their submission that an initiating court document can constitute a demand, the Applicants rely on *Canada Trustco Mortgage Company v 1122 93 Holdings Ltd*., 1984 ABCA 102 at para 7 [*Canada Trustco*]. However, in *Canada Trustco*, the issue was whether a demand was necessary to make the debt due. The Alberta Court of Appeal relied on case law holding that a debt due on demand is due at the date of execution of the instrument and without formal demand having been made, formal demand was not a condition precedent to an action on the debt. The Alberta Court of Appeal held that no demand was necessary to make the debt due and, even if it was, "the issuance of a statement of claim is the most emphatic means of making the required demand" (para 7). It is also of note that in *Canada Trustco* there had been prior demands for payment before the issuance of the statement of claim (para 3). In my view, *Canada Trustco* is not applicable to this circumstance.

[108] Nor do I agree with the Applicants' submission that *Orr* stands for the proposition that the Notice of Application can constitute a demand in this case. In *Orr*, the First Nation's council had received complaints and therefore initiated a public hearing into whether the chief was in a conflict of interest. At the second public hearing, the council announced that it would wait two weeks before making its decision. The applicant filed a notice of application during that two-week period but discontinued the application. The applicant filed a new application when the two-week period had passed and no decision was made. Regarding prior demand, the Court held:

> [30] As for the third requirement, counsel for the Respondents submit that it is only in his Memorandum of Fact and Law dated September 28, 2011 that Mr. Orr says, for the first time, that his affidavit filed in the now discontinued application T-959-11 is his

> further information, as requested by Council at its June 2, 2011 meeting. Furthermore, counsel argues that even if the Applicant's Memorandum of Fact and Law may be considered Mr. Orr's prior demand of Council to perform its duty, such demand had not been made when he commenced the within application on August 22, 2011. As a result, it cannot be said that there is an unreasonable delay on the part of the Council.
>
> [31] I find this argument without merit. According to the affidavit of Mr. Pitcairn, the Council announced at the end of the meeting held on June 2, 2011 that it would wait two more weeks before making its decision, and that in those two weeks, it would accept any other evidence in support of the allegations of conflict of interest. There was therefore no need for a further request that Council exercise its duty to come to a decision with respect to the allegation made against Chief Alook. The Applicant and all other members of PTFN were entitled to a decision, and therefore the only issue is whether a reasonable time was allowed to comply with the demand.

[109] Therefore, in *Orr*, the original notice of application served as a prior demand made to the council before the issuance of the second notice of application. This Court found that no further demand was necessary for the purposes of satisfying this ground of the *mandamus* test in those circumstances. That is a different factual situation than the matter now before me where there is no evidence of any form of prior demand being made to the Minister.

[110] In these circumstances, the filing of the Notice of Application is not a prior demand and, therefore, this factor of the *mandamus* test has not been satisfied.

[111] Moreover, even if there had been a demand, there is still the question of whether there has been a refusal. A refusal can be either express or implied. An implied refusal can be, for example, by way of an unreasonable delay (*Apotex*). In this matter, there is no evidence of an express refusal, and the question is whether the delay is unreasonable.

[112] This Court has previously found that unreasonable delay may warrant an order of *mandamus*. In *Bhatnager*, an immigration matter, this Court held:

> 4 The decision to be taken by a visa officer pursuant to section 6 of the Regulations with respect to issuing an immigrant visa to a sponsored member of the family class is an administrative one and the Court cannot direct what that decision should be. But mandamus can issue to require that some decision be made. **Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. I believe that to be the case here.** The respondents have in the evidence submitted on their behalf suggested a number of general problems which they experience in processing these applications, particularly in New Delhi but they have not provided any precise explanation for the long delays in this case.

(see also *Thomas v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164 at para 25-27; *Coderre* at para 42 citing *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, at para. 23.)

[113] Thus, the two relevant inquiries are whether the delay is longer than what is normally required and whether the Minister has provided a satisfactory explanation for the delay.

[114] In my view, when there are statutorily prescribed deadlines requiring that action be taken within the time prescribed, what is "normally required by the nature of the process" is determined by the statute. As held in *WCWC*:

> [101] To state the obvious, the *Species at Risk Act* was enacted because some wildlife species in Canada *are at risk*. As the applicants note, many are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake.

> [102] The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk.

[115] In this case, Parliament determined that the competent minister is required, pursuant to s 37 and s 42(1) of SARA, to post the proposed recovery strategy within two years after a wildlife species is listed as threatened. Thus, Parliament was of the view that two years was a sufficient period of time to accomplish this protective step. As stated in *WCWC*:

> [67] A review of the record in these matters gives rise to a number of concerns. The development of a proposed recovery strategy for a species at risk is undoubtedly a complex process involving the need to reconcile competing statutory requirements and Departmental priorities, and to consult with multiple stakeholders, other levels of government and First Nations. The process also presents the Ministers with various administrative challenges, and involves an evolving base of scientific knowledge. One has to assume, however, that Parliament knew what it was doing when it established the timelines for the preparation of proposed recovery strategies in sections 42 and 132 of *SARA*.
>
> ……
>
> [102] The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk.

[116] Here, the two year period expired on November 2, 2019. Thus, the delay is longer than what is normally required.

[117] As to an explanation for the delay, the Respondents do not point to any evidence explaining why it took nearly four years to place the Bank Swallow on the threatened species List. When appearing before me, counsel for the Respondents submitted that the Respondents did not understand this to be relevant to the application.

[118] There is no question that placing the Bank Swallow on the List on November 2, 2017 – as opposed to the issuance in 2013 of the COSEWIC assessment of the Bank Swallow as a threatened species – that triggered the running of the two-year period for posting the proposed recovery strategy. The SARA defines a threatened species as a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction. The stated purpose of SARA is to prevent wildlife species from being extirpated (meaning a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild) or becoming extinct, and to provide for recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity. Delaying placing the Bank Swallow on the List for nearly 4 years had the effect of delaying the triggering of the two-year period for posting the recovery strategy. Given COSEWIC's finding that the Bank Swallow population has decreased by 98% from 1970 to 2011 and that data from the most recent 10 year period (2002-2011) showed an annual decline rate that amounts to a loss of 31% of the population over the last 10 years, I agree with the Applicants that this four year delay provides context when assessing the reasonableness of the two-year delay in posting the proposed recovery strategy.

[119] The Respondents submit that the delay in posting a recovery strategy is justified given that the process for developing a recovery strategy is complex, involving consultation with

multiple stakeholders, including provinces and First Nations. The Respondents note that developing a recovery strategy for the Bank Swallow is uniquely challenging given their wide distribution and the scientific challenges involved in determining its critical habitat. For example, the Cyr Affidavit states that there is uncertainty in setting a population objective for the Bank Swallow given the assumed inflated breeding population size resulting from the incidental availability of human-made nesting habitat. Further, assessing the critical habitat against long-term population objectives presents further challenges. However, in March 2020 Mr. Cyr developed a method to predict the size of a Bank Swallow breeding population based on an estimated amount of nesting habitat identified within critical habitat. Mr. Cyr states that it is his opinion that data collected from October 2017 to January 2020, with additional information provided by Alberta Environment and Parks in July 2020, constitutes the best available data to inform CWS draft recovery strategy.

[120] The Savoie Affidavit describes steps taken towards the development of the recovery strategy since 2016, including various data requests, the establishment of the multi-jurisdictional Swallows Recovery Working Group and, teleconference calls of that group. She references Mr. Cyr's work and identifies the same challenges in developing the Bank Swallow recovery strategy, stating that defining critical habitat has been the key limiting factor in developing the recovery strategy. Between 2018 and 2020, various iterations of critical habitat approaches were tested and questions remain to be answered through discussion with experts and within CWS. She states that consultation on the draft recovery strategy is expected to start in the first quarter of 2021 and that it could be posted for the 60-day public comment period at the beginning of the second quarter of 2021. In a second affidavit, affirmed on January 20, 2021 [Savoie Affidavit

#2], Ms. Savoie provides an "update" to ECCC's progress. She states that the proposed recovery strategy is expected to be posted to the SARA public registry in early June 2021 and, assuming a 60-day consultation period, that it is anticipated that the final version of the recovery strategy will be posted on or about November 2021.

[121] The Respondents emphasise that because the Bank Swallow's range is across Canada that a great deal of data gathering and consultation with other jurisdictions and interested parties is required. This point was addressed in *WCWC* where this Court considered whether scientific certainty or consensus could justify the delay and concluded, in that case, that they did not:

> [68] It is apparent that the posting of proposed recovery strategies were delayed in these cases, in part, as a result of a desire to achieve consensus amongst the stakeholders. This is particularly so for the aquatic species under the jurisdiction of the Minister of Fisheries and Oceans.
>
> [69] While the achievement of a consensus may be desirable, it is not a legislative requirement for a recovery strategy. Indeed, section 39 of SARA only contemplates that there be cooperation with others "to the extent possible". Subject to the Ministers' constitutional obligations to consult with First Nations, I agree with the applicants that consensus should not be pursued at the expense of compliance with the Ministers' statutory obligations.
>
> …
>
> [71] Insofar as the scientific basis for the proposed recovery strategies is concerned, I agree with the applicants that "the perfect should not become the enemy of the good" in these cases. Section 38 of SARA (which incorporates the "precautionary principle" into the Act) is very clear: the preparation of a recovery strategy for a species at risk "should not be postponed for a lack of full scientific certainty".

[122] Thus, the fact that ECCC may be facing some challenges when addressing these considerations – which would not appear to be a unique circumstance – is not sufficient to justify

the failure to meet statutory deadlines, especially when the recovery strategy can be amended (*WCWC* at para 53, 74).

[123] As stated by the Supreme Court of Canada in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44:

> 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[124] The delay in this matter is not as egregious as was the six-year delay in *WCWC*. However, in my view, because Parliament set a statutory two-year timeframe to post proposed recovery strategies for threatened species, a two-year delay in doing so is still unreasonable. This is particularly so because the ECCC was aware of the threatened species designation in 2013 and because the purpose of the SARA is to prevent the extirpation or extinction of threatened species and to provide for the recovery of endangered or threatened species.

[125] As to the remaining *Apotex* factors, it is not disputed that the Minister's duty is not discretionary and, therefore, that this factor is not applicable. The Applicants submit, and I agree, that there is no other remedy available for ensuring that the proposed recovery strategy for the Bank Swallow is developed and posted to the public registry and that there are no equitable bars to relief. The Respondents do not dispute these factors.

[126] With respect to the question of whether the order sought will be of some practical value or effect, neither party addresses this factor. I note that the Applicants' focus is on the Bank Swallow population in the Rosebud River Valley. Ultimately, the proposed recovery strategy may, or may not, designate critical habitat in that area. However, an order of *mandamus* would still be of some practical value or effect as it would compel the Minister to develop and post the recovery strategy – which is concerned with the Bank Swallow population and critical habitat in whole. And, in my view, the balance of convenience favours the Applicants.

Conclusion

[127] An order for *mandamus* can compel the performance of a clear, affirmative legal duty by a public authority, but only when all of the *Apotex* criteria are met (*Ahousaht First Nation v Minister of Fisheries and Oceans*, 2019 FC 1116 at para 73; see also *Humber Environmental Action Group v Canada*, 2002 FCT 421 at para 31).

[128] I have found above that the Applicants are not directly affected by the Minister's failure to post a proposed recovery strategy within the statutorily prescribed timeframe, nor have they established a genuine interest in the matter. Accordingly, because they have not met the applicable principles of standing, they have not established that a duty was owed to them by the Minister. They also did not make a prior demand. Thus, they have not satisfied these two required factors of the *Apotex* test and their application seeking *mandamus* cannot succeed.

[129] I would note, however, that even if they had met the test, the Respondents' evidence is that work on the proposed recovery strategy is ongoing and is anticipated to be posted in June

2021. Therefore, I would have limited the *mandamus* order such that the Minister would be compelled to post the proposed recovery strategy to the public registry prior to June 30, 2021. Presumably, the Minister will now ensure that the proposed recovery strategy for the Bank Swallow is posted to the public registry on or before June 30, 2021 and that the remaining steps of the statutory process to protect that threatened species are effected without further delay.

Costs

[130] While the Applicants have not been successful in obtaining the requested relief, given that the Minister has unreasonably delayed in posting the proposed recovery strategy, I am exercising my discretion pursuant to Rule 400 of the *Federal Courts Rules* and decline to award costs to either party.

JUDGMENT IN T-716-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed; and

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

ANNEX A

Species At Risk Act

Definitions

2 (1) The definitions in this subsection apply in this Act.

action plan means an action plan included in the public registry under subsection 50(3) and includes any amendment to it included in the public registry under section 52. (*plan d'action*)

…

critical habitat means the 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. (*habitat essentiel*)

…

recovery strategy means a recovery strategy included in the public registry under subsection 43(2), and includes any amendment to it included in the public registry under section 45. (*programme de rétablissement*)

…

species at risk means an extirpated, endangered or threatened species or a species of special concern. (*espèce en péril*)

….

threatened species means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction. (*espèce menacée*)

….

Purposes

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.

Power to amend List

27 (1) The Governor in Council may, on the recommendation of the Minister, by order amend the List in accordance with subsections (1.1) and (1.2) by adding a wildlife species, by reclassifying a listed wildlife species or by removing a listed wildlife species, and the Minister may, by order, amend the List in a similar fashion in accordance with subsection (3).

Decision in respect of assessment

(1.1) Subject to subsection (3), the Governor in Council, within nine months after receiving an assessment of the status of a species by COSEWIC, may review that assessment and may, on the recommendation of the Minister,

(a) accept the assessment and add the species to the List;

(b) decide not to add the species to the List; or

(c) refer the matter back to COSEWIC for further information or consideration.

Statement of reasons

(1.2) Where the Governor in Council takes a course of action under paragraph (1.1)(b) or (c), the Minister shall, after the approval of the Governor in Council, include a statement in the public registry setting out the reasons.

Pre-conditions for recommendation

(2) Before making a recommendation in respect of a wildlife species or a species at risk, the Minister must

(a) take into account the assessment of COSEWIC in respect of the species;

(b) consult the competent minister or ministers; and

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, consult the wildlife management board.

Amendment of List by Minister

(3) Where the Governor in Council has not taken a course of action under subsection (1.1) within nine months after receiving an assessment of the status of a species by COSEWIC, the Minister shall, by order, amend the List in accordance with COSEWIC’s assessment.

Recovery Strategy

Preparation — endangered or threatened species

37 (1) 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.

Contents if recovery feasible

41 (1) 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;

(c.1) a schedule of studies to identify critical habitat, where available information is inadequate;

(d) 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;

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

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

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

Proposed recovery strategy

42 (1) Subject to subsection (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.

First listed wildlife species

(2) With respect to wildlife species that are set out in Schedule 1 on the day section 27 comes into force, the competent minister must include a proposed recovery strategy in the public registry within three years after that day, in the case of a wildlife species listed as an endangered species, and within four years after that day, in the case of a wildlife species listed as a threatened species or an extirpated species.

Comments

43 (1) Within 60 days after the proposed recovery strategy is included in the public registry, any person may file written comments with the competent minister.

Finalization of recovery strategy

(2) Within 30 days after the expiry of the period referred to in subsection (1), the competent minister must consider any comments received, make any changes to the proposed recovery strategy that he or she considers appropriate and finalize the recovery strategy by including a copy of it in the public registry.

Existing plans

44 (1) If the competent minister is of the opinion that an existing plan relating to a wildlife species meets the requirements of subsection 41(1) or (2), and the plan is adopted by the competent minister as the proposed recovery strategy, he or she must include it in the public registry as the proposed recovery strategy in relation to the species.

Action Plan

Preparation

47 The competent minister in respect of a recovery strategy must prepare one or more action plans based on the recovery strategy. If there is more than one competent minister with respect to the recovery strategy, they may prepare the action plan or plans together.

Contents

49 (1) An action plan must include, with respect to the area to which the action plan relates,

> **(a)** an identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;

(b) a statement of the measures that are proposed to be taken to protect the species' critical habitat, including the entering into of agreements under section 11;

(c) an identification of any portions of the species' critical habitat that have not been protected;

(d) a statement of the measures that are to be taken to implement the recovery strategy, including those that address the threats to the species and those that help to achieve the population and distribution objectives, as well as an indication as to when these measures are to take place;

(d.1) the methods to be used to monitor the recovery of the species and its long-term viability;

(e) an evaluation of the socio-economic costs of the action plan and the benefits to be derived from its implementation; and

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

Proposed action plan

50 (1) The competent minister must include a proposed action plan in the public registry.

Comments

(2) Within 60 days after the proposed action plan is included in the public registry, any person may file written comments with the competent minister.

Finalization of action plan

(3) Within 30 days after the expiry of the period referred to in subsection (2), the competent minister must consider any comments received, make any changes to the proposed action plan that he or she considers appropriate and finalize the action plan by including a copy of it in the public registry.

Summary if action plan not completed in time

(4) If an action plan is not finalized in the time set out in the recovery strategy, the competent minister must include in the public registry a summary of what has been prepared with respect to the plan.

Purpose

57 The purpose of section 58 is to ensure that, within 180 days after the recovery strategy or action plan that identified the critical habitat referred to in subsection 58(1) is included in the public registry, all of the critical habitat is protected by

(a) provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or

(b) the application of subsection 58(1).

Destruction of critical habitat

58 (1) 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 Canada;

(b) the listed species is an aquatic species; or

(c) the listed species is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994*.

Protected areas

(2) If the critical habitat or a portion of the critical habitat is in a national park of Canada named and described in Schedule 1 to the *Canada National Parks Act*, the Rouge National Urban Park established by the *Rouge National Urban Park Act*, a marine protected area under the *Oceans Act*, a migratory bird sanctuary under the *Migratory Birds Convention Act, 1994* or a national wildlife area under the *Canada Wildlife Act*, the competent Minister must, within 90 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, publish in the *Canada Gazette* a description of the critical habitat or portion that is in that park, area or sanctuary.

Application

(3) If subsection (2) applies, subsection (1) applies to the critical habitat or the portion of the critical habitat described in the *Canada Gazette* under subsection (2) 90 days after the description is published in the *Canada Gazette*.

Application

(4) If all of the critical habitat or any portion of the critical habitat is not in a place referred to in subsection (2), subsection (1) applies in respect of the critical habitat or portion of the critical habitat, as the case may be, specified in an order made by the competent minister.

Obligation to make order or statement

(5) Within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, the competent minister must, after consultation with every other competent minister, with respect to all of the critical habitat or any portion of the critical habitat that is not in a place referred to in subsection (2),

> **(a)** make the order referred to in subsection (4) if the critical habitat or any portion of the critical habitat is not legally protected by provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or
>
> **(b)** if the competent minister does not make the order, he or she must include in the public registry a statement setting out how the critical habitat or portions of it, as the case may be, are legally protected.

Habitat of migratory birds

(5.1) Despite subsection (4), with respect to the critical habitat of a species of bird that is a migratory bird protected by the *Migratory Birds Convention Act, 1994* that is not on federal land, in the exclusive economic zone of Canada, on the continental shelf of Canada or in a migratory bird sanctuary referred to in subsection (2), subsection (1) applies only to those portions of the critical habitat that are habitat to which that Act applies and that the Governor in Council may, by order, specify on the recommendation of the competent minister.

Obligation to make recommendation

(5.2) The competent minister must, within 180 days after the recovery strategy or action plan that identified the critical habitat that includes habitat to which the *Migratory Birds Convention Act, 1994* applies is included in the public registry, and after consultation with every other competent minister,

> **(a)** make the recommendation if he or she is of the opinion there are no provisions in, or other measures under, this or any other Act of Parliament, including agreements under section 11, that legally protect any portion or portions of the habitat to which that Act applies; or

(b) if the competent minister does not make the recommendation, he or she must include in the public registry a statement setting out how the critical habitat that is habitat to which that Act applies, or portions of it, as the case may be, are legally protected.

Consultation

(6) If the competent minister is of the opinion that an order under subsection (4) or (5.1) would affect land in a territory that is not under the authority of the Minister or the Parks Canada Agency, he or she must consult the territorial minister before making the order under subsection (4) or the recommendation under subsection (5.2).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-716-20
STYLE OF CAUSE:	LINDA SKIBSTED, RICK SKIBSTED, SPRUCE COULEE FARMS LTD., RICHARD CLARK, WENDY CLARK, HALF-DIAMOND HC LIMITED, SAMANTHA ANDERSEN AND H&A ANDERSEN FARMS LTD. v CANADA (MINISTER OF ENVIRONMENT AND CLIMATE CHANGE) AND CANADA (ATTORNEY GENERAL) AND BADLANDS RECREATION DEVELOPMENT CORP.
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	APRIL 26, 2021
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	MAY 10, 2021

APPEARANCES:

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