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***Minister of Fisheries and Oceans v. David Suzuki et al.*, 2012 FCA 40**

Overview

Background Facts

The *Species at Risk Act* (SARA), passed in 2002, was the first comprehensive federal legislation to protect habitat of wildlife species that are threatened or endangered by human activity. The legislation was adopted in part to meet Canada's obligations under the UN Convention on the Conservation of Biological Diversity.

In 2001, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) designated the southern population of resident killer whales as endangered, and the northern population as threatened. The populations were accordingly listed in Schedule 1 of SARA.

Once a species is listed, SARA requires the development of a recovery strategy. A recovery strategy for the killer whale populations was developed and included in the public registry.

Section 58(5) of SARA provides that within 180 days of the recovery strategy being included in the public registry, the Minister must make an order protecting the critical habitat of listed endangered or threatened aquatic species if such critical habitat "is not legally protected by provisions in, or measures under, this or any other Act of Parliament." As is discussed later, much of the decision of the Federal Court Trial Division focused on the requirements of s.58 of SARA and whether the Minister could rely on the discretionary aspects of the *Fisheries Act* in order to say that the critical habitat was "legally protected by provisions in, or measures under, this or any other Act of Parliament."

The Minister issued a "Killer Whale Protection Statement" that restricted the concept of critical habitat for the purposes of SARA to geophysical attributes alone, meaning that some of the most important elements of the killer whales' critical habitat that had been identified in the recovery strategy (such as protecting against disturbance, addressing degradation of the acoustic environment, ensuring marine environmental quality, and addressing the availability of prey) were left without protection.

A coalition of environmental non-governmental organizations sought judicial review of the Killer Whale Protection Statement, and of the later Protection Order issued by the Minister after the first judicial review was launched. Both judicial reviews were consolidated, and the applications went forward before Justice Russell of the Federal Court.

Federal Court Decision

Before the Federal Court, DFO argued that the ministerial discretion provided in the *Fisheries Act* adequately protected critical habitat of aquatic species, such as the killer whales.

Russell J. of the Federal Court declared that ministerial discretion does not "legally protect" critical habitat under section 58 of SARA.

He ruled that a federal minister may not resort to another federal statute, here the *Fisheries Act*, as a substitute for a protection order unless that statute provides an equal level of legal protection for critical habitat as would be engaged through a protection order. Russell J. made that ruling on the basis that the relevant provisions of SARA limited ministerial discretion where the protection of critical habitat of endangered and threatened species was at issue; whereas, the *Fisheries Act* provided for Ministerial discretion, including a broad discretion to authorize the destruction of fish habitat under subsection 35(2) and to attach conditions to a fishing licence under section 22 of the *Fishery (General) Regulations*.

Russell J. went on to conclude that the *Fisheries Act* and its regulations could not be used as a substitute for a protection order.

Russell J. made 11 declarations of law including:

- That s. 58 of SARA requires all elements of critical habitat be legally protected by competent ministers;
- That ministerial discretion does not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited discretionary provisions of the *Fisheries Act* in the Protection Statement (declaration 1(d));
- The Ministers have a duty under s.58 of SARA to provide legal protection against destruction of all components of killer whales' critical habitat;
- The Ministers acted unlawfully when they limited the application of the scope of the destruction prohibit to certain components of the critical habitat but not others;
- It was unlawful for the Ministers to exclude ecosystem features of killer whales' habitat, including the availability of prey and acoustic environmental factors from the scope of the protection order.

DFO appealed declaration 1(d). First it raised the standard of review and argued that its interpretation of SARA and the *Fisheries Act* was entitled to deference. Second it argued that it was not an error to rely on the provisions of the *Fisheries Act* and its regulations in making the Protection Statement, and that Parliament intended that there should be some flexibility as to how to ensure the protection under SARA.

Federal Court of Appeal Decision

The Federal Court of Appeal (FCA) held as follows:

(1) the appropriate standard of review in considering the Minister's interpretation of SARA and the *Fisheries Act* is correctness, not reasonableness as the Minister had argued; and

(2) the Minister cannot avoid the compulsory and non-discretionary protection scheme set out by Parliament under SARA by instead invoking ministerial discretion. However, there may be circumstances where the Minister can rely on s.36 of the *Fisheries Act* (which prohibits the deposit of deleterious substances in water frequented by fish) in a protection statement made under s.58 of SARA.

The decision of the FCA addressed issues relating to administrative law (standard of review) and ministerial discretion provided under the *Fisheries Act*.

Standard of Review

The Minister argued that as Parliament had made him responsible for the administration of the regulatory schemes of SARA and the *Fisheries Act*, his interpretation of their provisions was entitled to deference. The Minister's position implied that the standard of review analysis ends as soon as Parliament confers on a minister the responsibility to administer a federal statute (para. 83).

The FCA disagreed. The Court wrote at para. 6:

> In my view, no deference is owed to the Minister as to the interpretation of the relevant provisions of the SARA or of the *Fisheries Act*. The Minister's interpretation of the Supreme Court's most recent pronouncements is erroneous as it fails to consider the context in which they were developed and the reasons which may warrant deference to an administrative tribunal when it interprets its enabling statute. The reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless Parliament has provided otherwise.

The Court began by reviewing the principles of Parliamentary sovereignty, the rule of law, and the historical and constitutional foundations of judicial review, noting that the Bill of Rights of 1689, the Act of Settlement of 1701, and the constitutional principles flowing from those documents ensured that the Crown and its officials would be bound by Parliament's laws as interpreted by the independent common law courts (para. 73).

The Court wrote at paras. 98-100:

> What the Minister is basically arguing is that the interpretation of the SARA and of the *Fisheries Act* favoured by his Department and by the government's central agencies, such as the Department of Justice, should prevail. The Minister thus seeks to establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable. This harks back to the time before the *Bill of Rights* of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives. It would take a very explicit grant of authority from Parliament in order for this Court to reach such a far-reaching conclusion.

> The issues in this appeal concern the interpretation of a statute by a minister who is not acting as an adjudicator and who thus has no implicit power to decide questions of law. Of course, the Minister must take a view on what the statute means in order to act. But this is not the same as having a power delegated by Parliament to decide questions of law. The presumption of deference resulting from *Dunsmuir*, which was reiterated in *Alberta Teachers' Association* at paras. 34 and 41, does not extend to these circumstances. The standard of review analysis set out at paragraphs 63 and 64 of *Dunsmuir* must thus be carried out in the circumstances of this case in order to ascertain Parliament's intent.
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> In other words, does Parliament intend to shield the Minister's interpretation of the pertinent provisions of the SARA and of the *Fisheries Act* from judicial review on a standard of correctness? On the basis of the standard of review analysis further set out below, I answer in the negative.

In short, the Minister's interpretation of the *Fisheries Act* and SARA does not require deference. The Minister's interpretation is subject to review on a standard of correctness.

Minister's Discretion with Respect to Protection Orders

The Court was faced with the question of whether the Minister was wrong in relying on the provisions of the *Fisheries Act* and its regulations in making the Killer Whale Protection Statement.

The Minister argued that Parliament intended that he be allowed some flexibility as to how to provide compulsory protection as required by SARA (para. 106). The Minister argued that he was seeking this flexibility not to undercut the protections of critical habitat or to provide protection which is inferior to what would be provided under a prohibition order. Rather, the Minister argued that there were other methods that could protect critical habitat from destruction (para. 108).

The FCA had difficulty with this approach as it replaced a compulsory non-discretionary critical habitat protection scheme under SARA with the highly discretionary management/licencing scheme of the *Fisheries Act* (paras. 8, 109, 115, 146-149).

The FCA noted that with s.58 of SARA, Parliament's intent was to avoid interference with and destruction of critical habitat. The FCA wrote at para. 109:

> The difficulty I have with the Minister's position is that it is not compatible with the provisions of the SARA, which clearly require compulsory "legal protection" for all identified critical habitat of listed endangered or threatened aquatic species. If I were to accept the Minister's position, the compulsory non-discretionary critical habitat **protection** scheme under the SARA would be effectively replaced by the discretionary **management** scheme of the *Fisheries Act*. That is not what the SARA provides for. [emphasis in original]

With regard to the difference between a legal protection scheme and a regulatory management scheme, the FCA wrote, at para. 115:

> A legal protection scheme is not a regulatory management scheme. Had Parliament's intent been to authorize the Minister to regulate critical habitat of aquatic species through existing regulatory schemes – such as the *Fisheries Act* – it would not have adopted a provision requiring the compulsory non-discretionary legal protection of that habitat.

With regard to the Minister's argument that he did not intend to use his discretion under s.35(2) of the *Fisheries Act* to authorize the destruction of critical habitat, the FCA noted, at para. 131 that such an intent is not legally enforceable in the event the Minister changes his mind in the future, nor would such an intent be binding on future Ministers. In other words, a Ministerial intent to discretionarily do the right thing is not legally enforceable and does not ensure the legal protection for critical habitat required by s.58 of SARA.

Contrary to the conclusions of Russell J., the FCA held that there may be circumstances where the Minister may rely on s. 36 of the *Fisheries Act* (which prohibits the deposit of deleterious substances in water frequented by fish) in a protection statement made under s.58 of SARA. However, in this case, there was no evidence as to the effect of s.36 and its regulations on the killer whale critical habitat at issue.