

**Basic killer whale facts:**

- Killer whales, also known as orcas, are top predators in the marine food web and are considered a “sentinel species,” meaning their health is an overall indicator of the ocean’s ecological health.
- This lawsuit is about two populations of resident killer whales found off British Columbia’s coastline: The **northern residents** (264 remaining) and the **southern residents** (87 remaining).

**The *Species at Risk Act* (SARA) and critical habitat:**

- SARA’s mandate is to protect vulnerable species and ensure they recover to healthy population levels.
- The act lists the southern residents as an endangered species and the northern residents as a threatened species.
- According to SARA, the government (in this case, the Department of Fisheries and Oceans) must legally protect the identified **critical habitat** of endangered and threatened species from destruction.
- SARA defines critical habitat as the habitat necessary for the survival or recovery of a listed wildlife species that is identified in a recovery strategy or action plan.
- The critical habitat of southern resident killer whales includes waters around the San Juan and Gulf Islands and into Georgia Strait; northern resident critical habitat includes the Johnstone Strait, the south-eastern Queen Charlotte Strait and the channels connecting these straits.

**Threats to killer whales:**

- Declining food availability, particularly salmon
  - Killer whales rely principally on large, fatty Chinook salmon. Once abundant in B.C.’s coastal waters, this salmon’s numbers are now reduced due to several factors.
  - Poor Chinook returns result in increased whale mortality, as was the case in the mid-late 1990s and early 2000s.
- Physical and acoustic disturbance
  - Boat traffic, seismic surveys and military sonar all create noise pollution that impacts killer whales’ acoustic environment.
  - Noise pollution makes it harder for the whales to locate and hunt for fish, causes physical injury and renders habitat unsuitable for whales and other marine mammals.
- Toxic contamination
  - Recent studies indicate Chinook salmon are contaminated with PCBs, flame retardants and other chemicals. Toxins make their way into the marine environment from a broad range of land and marine based activities (e.g. agricultural run-off, municipal wastewater, industrial effluent, boating and shipping, etc).
  - These toxins build up in the whale’s body fat over time. Because whales can live up to 90 years, they are vulnerable to the accumulation of high levels of persistent organic pollutants (POPs).
  - Because of their small population sizes, B.C.’s whales are particularly vulnerable to catastrophic events like oil spills:
    - Whales do not appear to avoid oil spills and can be injured or killed after inhaling petroleum vapours.
    - Exposure to petrochemicals as a result of an oil spill can lead

to dramatic population declines and poor fertility (as was the case with Alaskan killer whales in aftermath of the 1989 Exxon Valdez spill).

**To survive, the whales need:**

- Legal protection of Chinook stocks when and where the whales need them.
  - Salmon allocation for whales must be part of the fisheries management process.
- Legal protection of from excessive noise pollution in the ocean.
  - Ambient quality of the marine environment must be understood, regulated and monitored.
- Legal protection from pollution.
  - Critical habitat must be protected by stronger laws that help lower the already significant load of chemical pollutants found in the whales' critical habitat from ongoing discharges and small spills.
  - Critical habitat must be protected from the threat of a catastrophic pollution event such as an oil spill. This is especially critical given that oil tanker traffic along B.C.'s coastline may increase in coming years.

**Ecojustice's lawsuit:**

- Ecojustice's killer whale lawsuit began in October 2008 in response to the Critical Habitat Protection Statement issued by the Minister of Fisheries and Oceans the same year. In 2009, Ottawa issued a Critical Habitat Protection Order.
  - Ecojustice challenged the statement and the order because they both ignored biological aspects of critical habitat — such as water quality, reduced noise pollution and food supply — that the whales need to survive
- This case was argued and decided in 2010. In his decision, Justice Russell of the Federal Court held that that DFO had failed to legally protect critical habitat. Justice Russell made 13 declarations including that:
  - DFO unlawfully relied on non-binding policies and guidelines, as well as government discretion, to protect habitat.
  - DFO unlawfully limited the scope of legal protection to exclude biological elements of critical habitat.
  - DFO has a legal obligation to protect the biological aspects of critical habitat, such as prey (food) availability and marine environment quality, through law.
- In January 2011, the Minister of Fisheries and Oceans appealed one of Justice Russell's 13 declarations.
- The appeal centres around whether the Minister may retain discretion to authorize the destruction of identified critical habitat.