Federal Court  Cour fédérale

**Date: 20101207**

**Docket: T-541-09**

**Citation: 2010 FC 1233**

**Ottawa, Ontario, December 7, 2010**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**DAVID SUZUKI FOUNDATION, DOGWOOD INITIATIVE,**
**ENVIRONMENTAL DEFENCE CANADA,**
**GREENPEACE CANADA,**
**INTERNATIONAL FUND FOR ANIMAL WELFARE,**
**RAINCOAST CONSERVATION SOCIETY,**
**SIERRA CLUB OF CANADA, and**
**WESTERN CANADA WILDERNESS COMMITTEE**

**Applicants**

**and**

**THE MINISTER OF FISHERIES AND OCEANS,**
**THE MINISTER OF THE ENVIRONMENT**

**Respondents**

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## REASONS FOR JUDGMENT AND JUDGMENT

[1] At issue are two consolidated applications for judicial review to challenge related decisions. The first application (Protection Statement Application) challenges the Minister of Fisheries and Oceans' *Northern and Southern Resident Killer Whales (Orcinus orca) in Canada: Critical Habitat Protection Statement* (Protection Statement), which was issued pursuant to subsection 58(5)(*b*) of the *Species at Risk Act*, S.C. 2002, c. 29 (SARA, or the Act) on September 10, 2008.

[2] The second application (Protection Order Application) challenges a protection order made in February 2009 by the Minister of Fisheries and Oceans and the Minister of the Environment (Ministers) to limit the scope of the *Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (Orcinus orca) Order* (Protection Order), made pursuant to subsection 58(5)(*a*) of SARA.

## BACKGROUND

### Procedural History and Parties

[3] These two consolidated applications for judicial review are concerned with the Respondents' obligations under section 58 of SARA to provide legal protection for the critical habitat of two populations of killer whales.

[4] The first application challenges the September 10, 2008 decision of the Minister of Fisheries and Oceans to issue the Protection Statement pursuant to subsection 58(5)(*b*) of SARA.

[5] The second application challenges the February 2009 decision made jointly by the Minister of Fisheries and Oceans and the Minister of the Environment to issue the Protection Order under subsections 58(4) and (5) of SARA. Specifically, it challenges the Respondents' decision to limit the scope of the Protection Order such that it applies only to geospatial areas or geophysical attributes of critical habitat.

[6] The nine Applicants are non-profit environmental organizations from across Canada. They each have a genuine interest in the survival and recovery of the Resident Killer Whales and in the interpretation and application of SARA. The Respondents do not contest the Applicants' public interest standing before this Court.

[7] The Respondent Minister of Fisheries and Oceans is charged with the duty to protect the critical habitat of any aquatic species, including the Resident Killer Whales.

[8] The Respondent Minister of the Environment, as the Minister responsible for the Parks Canada Agency, is charged with the duty to protect critical habitat on federal lands administered by Parks Canada, tiny portions of which overlap with the Resident Killer Whales' critical habitat at issue in this proceeding.

**Southern and Northern Resident Killer Whales**

[9] Two distinct populations of killer whales, known as the northern residents and the southern residents (and herein jointly referred to as the Resident Killer Whales) occupy the waters off the west coast of British Columbia.

[10] The southern Resident Killer Whale is an endangered species. Section 2 of SARA defines an "endangered species" as "a wildlife species that is facing imminent extirpation or extinction."

[11] The northern Resident Killer Whale is a threatened species. Section 2 of 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."

[12] The Resident Killer Whale populations are considered at risk because of their small population size and low reproductive rate as well as their exposure to a variety of human-caused threats to both the whales and their habitat. These threats have the potential to prevent their recovery or to cause further declines in population. Principal among these anthropogenic threats are reductions in the availability of salmon prey (i.e. food), environmental contamination and physical and acoustic disturbance.

**Listing and Recovery Planning for the Resident Killer Whales**

[13] SARA prescribes a process whereby species at risk are listed and given legal protections, with the objective of ensuring recovery of the species back to healthy population levels. To achieve this objective, a recovery strategy is developed and implemented for each species listed as endangered or threatened. Central to the recovery process is the identification and protection of the species' critical habitat.

[14] Pursuant to the mandatory timelines under section 42(2) of SARA, the Department of Fisheries and Oceans (DFO) was required to include a proposed recovery strategy for the Resident Killer Whales on the public registry by June 5, 2006. The SARA public registry is established under section 120 for the purpose of facilitating access to documents relating to matters under the Act.

[15] In 2004, DFO convened the Resident Killer Whale Recovery Team (Recovery Team). The Recovery Team, made up of leading independent and governmental experts, was tasked with creating a recovery strategy for the Resident Killer Whales in accordance with SARA.

[16] Over the next year, the Recovery Team met periodically to develop the recovery strategy. The Recovery Team was instructed to identify the critical habitat of the Resident Killer Whales as well as examples of activities likely to destroy critical habitat.

[17] At meetings and in electronic communications, the Recovery Team discussed the biological or ecosystem features of critical habitat. The discussion of biological features of critical habitat focused on the association between salmon abundance and the use of an area by Resident Killer Whales, as well as the acoustic and environmental quality of critical habitat.

[18] The first draft of the recovery strategy was completed on March 15, 2005. It identified critical habitat as well as threats to both the "abiotic" (i.e. geophysical) and "biotic" (i.e. biological) features of critical habitat.

[19] Following extensive review and comment, a final draft recovery strategy was completed for submission to the Minister of Fisheries and Oceans on May 15, 2006 (May 2006 Draft Recovery Strategy). The May 2006 Draft Recovery Strategy identified critical habitat as a set of physical and biological features occurring at a specific geospatial location. It also identified threats to those features.

[20] The May 2006 Draft Recovery Strategy was never delivered to the Minister. Instead, in August 2006, the Recovery Team was informed that the May 2006 Draft Recovery Strategy had been edited and that information identifying critical habitat had been removed pursuant to DFO policy.

[21] A lengthy dispute followed between members of the Recovery Team and DFO bureaucrats. In March 2007, the critical habitat section of the May 2006 Draft Recovery Strategy was reinstated.

[22] In May 2007, the now-restored document was again sent out for review by government agencies. During the course of that review another attempt was made, this time by the Department of National Defence, to edit the critical habitat section. The proposed revisions related to the acoustic features of critical habitat and to threats to critical habitat caused by underwater noise. Members of the Recovery Team successfully objected to many of the proposed editorial changes.

[23] On June 21, 2007, pursuant to section 42(1) of SARA, DFO posted the Proposed Recovery Strategy for the Resident Killer Whales to the public registry (Proposed Recovery Strategy). It was similar but not identical to the May 2006 Draft Recovery Strategy.

[24] Posting of the Proposed Recovery Strategy was followed by a public comment period that ended in August 2007. According to the mandatory timelines under SARA, the Final Recovery Strategy for the Northern and Southern Killer Whales (Recovery Strategy) should have been finalized 30 days later, by September 19, 2007. Instead, it was delayed as DFO bureaucrats once again attempted to make edits.

[25] During the fall of 2007, DFO officials heavily edited the critical habitat section of the Proposed Recovery Strategy. DFO removed all reference to two threats to critical habitat: acoustic degradation and reduction in the availability of salmon prey. Additionally, future scientific studies regarding these threats were removed from the proposed “schedule of studies to identify critical habitat” required under section 41(1) (c.1).

[26] Members of the Recovery Team strongly objected to these editorial changes and sought to resolve their concerns with DFO. At some point before March 14, 2008, DFO reinstated most of the excised portions identifying noise and reduced availability of salmon prey as threats to critical habitat. On March 14, 2008, DFO posted the Recovery Strategy to the public registry.

**Recovery Strategy Identifies Critical Habitat**

[27] As required by subsection 41(1)(*c*) of SARA, section 3 of the Recovery Strategy identified critical habitat for the Resident Killer Whales, the components of the critical habitat and threats to critical habitat.

[28] The geospatial location of critical habitat of the Resident Killer Whales is identified on maps in Figures 4 and 5, and in the marine coordinates in Appendix B of the Recovery Strategy.

[29] The components of critical habitat clearly include the presence and availability of salmon prey for the Resident Killer Whales.

[30] Threats to critical habitat (in section 3.2) include diminished prey availability, chemical and biological contamination and acoustic degradation.

**180 Days Later, DFO Must Protect Critical Habitat**

[31] Section 58 of SARA required that, by September 10, 2008, the critical habitat identified in the Recovery Strategy be legally protected from destruction under subsection 58(5). Legal protection of critical habitat can take one of two forms: direct protection under SARA or indirect protection under other Acts of Parliament.

[32] Direct protection under SARA is engaged through the issuance of a protection order under subsection 58(4). A protection order applies the prohibition against destruction of critical habitat in subsection 58(1) to the critical habitat areas and components set out in the protection order. If critical habitat is not already protected, then a competent minister must issue a protection order.

[33] Indirect protection under other federal laws is confirmed through a protection statement under subsection 58(5)(*b*) of SARA. A protection statement describes how critical habitat is already protected from destruction by provisions in or measures under other Acts of Parliament. A protection statement cites the other federal legislative provisions that already legally protect critical habitat from destruction.

[34] On September 10, 2008, DFO bureaucrats delivered to the Deputy Minister of Fisheries and Oceans a memorandum explaining their recommendation for protection of critical habitat of the Resident Killer Whales (Protection Statement Memo). This memorandum recommended issuing a

protection statement. It attached a table containing a proposed list of tools available to protect critical habitat, as well as a draft protection statement for approval by the Minister's delegate.

[35] The Applicants posit that the Protection Statement Memo and accompanying attachments described the section 58 legal duty to protect critical habitat as being limited to the protection of the "geophysical attributes" of the critical habitat. The Applicants say that the Protection Statement Memo and attachments consistently make a policy distinction, which is challenged here by the Applicants. The distinction made is between DFO's duty to legally protect geophysical attributes of critical habitat, on one hand, and DFO's discretion to "manage and mitigate" the biological, chemical and acoustic components of critical habitat on the other.

[36] On September 10, 2008, the final Protection Statement was posted to the SARA public registry. The Applicants say that the Protection Statement maintains the distinction between the duty to provide legal protection for the geophysical attributes of critical habitat and the discretion to "manage and mitigate" threats to biological and other ecosystem features.

**Applications for Judicial Review**

[37] On October 8, 2008, a judicial review application was commenced challenging the lawfulness of the Protection Statement. In Application T-1552-08, the Applicants alleged that DFO erred in law and jurisdiction in issuing a Protection Statement that relies on non-binding policy, prospective legislation and ministerial discretion – none of which legally protect critical habitat

within the meaning of section 58 of SARA. The Notice of Application was amended on January 23, 2009.

[38] By February 9, 2009, DFO had reversed itself, recommending that its Minister replace the Protection Statement with a protection order under SARA.

[39] On February 13, 2009, DFO sought the cooperation of the Minister of the Environment, as the Minister responsible for Parks Canada, to issue a joint order under subsections 58(4) and (5) of SARA. Alan Latourelle, CEO of Parks Canada made recommendations to the Minister regarding the proposed protection order in a February 13, 2009 memorandum (Latourelle Memo). Paraphrased, this memorandum explains that:

1. DFO is currently facing a legal challenge in Federal Court regarding the Protection Statement. DFO is encouraging Parks Canada to issue a joint order quickly before DFO has to proceed any further with the existing lawsuit;
2. A new protection statement from Parks Canada would be open to challenge on the same grounds as the Protection Statement issued by DFO;
3. DFO's proposed protection order does not define which activities are prohibited as destructive of critical habitat. Enforcement of DFO's proposed order might thus prove difficult.

[40] Issuing a Protection Order under subsection 58(4) of SARA usually involves pre-publication in the *Canada Gazette Part I*, to allow 30 days for public comment. However, on the

recommendation of DFO officials, the Ministers agreed to forego public consultation on the Protection Order. Thus, the Applicants say they were denied any opportunity to comment on the Protection Order before it was finalized.

[41] On March 4, 2009, the Protection Order was published in the *Canada Gazette Part II*. The Protection Order states that the prohibition against destruction of critical habitat in subsection 58(1) of SARA applies to the critical habitat of the Resident Killer Whales described in Schedule I. Schedule I is a list of marine coordinates for the geospatial location of critical habitat.

[42] The Protection Order was published with an accompanying Regulatory Impact Analysis Statement (RIAS). The Applicants take the position that the RIAS, quoted below, continues to reflect DFO's distinction between its duties towards geophysical areas and its discretion to manage and mitigate the biological features of critical habitat:

> [t]he recovery strategy identifies at section 3 the critical habitats as defined geophysical areas where these populations concentrate. In addition DFO recognizes that other ecosystem features such as the availability of prey for foraging and the quality of the environment are important to the survival and recovery of the Northern and Southern Resident Killer Whales.

[43] On March 6, 2009, the Applicants wrote to DFO advising that they had serious concerns that the Protection Order may not legally protect the biological elements of critical habitat. The Applicants also sought clarification on other matters, including whether DFO had abandoned its position that the laws and policies set out in the Protection Statement "legally protected" the critical habitat of Resident Killer Whales.

[44] On March 10, 2009, the Government of Canada responded, through counsel. As paraphrased by the Applicants, the response stated that:

1. DFO characterizes the Protection Order as an "optional alternative" to the Protection Statement, rather than a required alternative given the unlawfulness of the Protection Statement;
2. DFO refuses to disavow reliance on policy and discretionary tools that do not legally protect critical habitat in protection statements; and
3. DFO refuses to confirm that the Protection Order protects the biological features of critical habitat from destruction.

[45] On April 3, 2009, the Applicants filed the second judicial review application against DFO and the Minister of the Environment. The Protection Order Application challenges DFO's practice of limiting the application and scope of section 58 of SARA to protect only geospatial areas and/or geophysical elements of critical habitat, and it challenges the application of this practice or policy to the Protection Order.

**Consolidation**

[46] On March 18, 2009, the Respondents filed a motion to have the Protection Statement Application, in File No. T-1552-08 dismissed on the ground of mootness.

[47] On April 9, 2009, the Applicants filed a motion seeking to have the two applications for judicial review consolidated.

[48] By the Order of Justice O'Reilly, the Respondents' motion to dismiss the Protection Statement Application on the ground of mootness was denied. The Applicants' motion to consolidate the two applications into one proceeding was granted. While Justice O'Reilly held that the Protection Statement Application in File No. T-1552-08 was technically moot, he refused to strike the application so as to preserve this Court's discretion to issue the relief sought in the Protection Statement Application for judicial review.

**ISSUES**

[49] The issues on the application can be summarized as follows:

1. Whether the Court ought to exercise its discretion to hear the moot Protection Statement Application;
2. Whether the Minister of Fisheries and Oceans erred in issuing a Protection Statement that relies on policy and other non-statutory instruments, prospective laws and ministerial discretion to provide legal protection for critical habitat;
3. Whether there is a justiciable issue for review in the Protection Order Application;
4. Whether the Ministers erred in limiting the application of the Protection Order to the geophysical area to the exclusion of the other components of critical habitat.

[50] The following provisions of the Act are applicable in these proceedings:

| | |
|---|---|
| **Definitions** | **Définitions** |
| 2.(1) The definitions in this subsection apply in this Act. | 2. (1) Les définitions qui suivent s'appliquent à la présente loi. |
| … | … |
| "COSEWIC" | « COSEPAC » |
| "COSEWIC" means the Committee on the Status of Endangered Wildlife in Canada established by section 14. | « COSEPAC » Le Comité sur la situation des espèces en péril au Canada, constitué en application de l'article 14. |
| … | … |
| **Contents if recovery feasible** | **Rétablissement réalisable** |
| **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 | **41.** (1) Si le ministre compétent conclut que le rétablissement de l'espèce sauvage inscrite est réalisable, le programme de rétablissement doit traiter des menaces à la survie de l'espèce — notamment de toute perte de son habitat — précisées par le COSEPAC et doit comporter notamment : |
| (*a*) a description of the species and its needs that is consistent with information provided by COSEWIC; | *a*) une description de l'espèce et de ses besoins qui soit compatible avec les renseignements fournis par le COSEPAC; |
| (*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 | *b*) une désignation des menaces à la survie de l'espèce et des menaces à son habitat qui soit compatible avec les renseignements fournis par le COSEPAC, et des grandes |

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.

lignes du plan à suivre pour y faire face;

*c*) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible, notamment les informations fournies par le COSEPAC, et des exemples d'activités susceptibles d'entraîner sa destruction;

*c.1*) un calendrier des études visant à désigner l'habitat essentiel lorsque l'information accessible est insuffisante;

*d*) un énoncé des objectifs en matière de population et de dissémination visant à favoriser la survie et le rétablissement de l'espèce, ainsi qu'une description générale des activités de recherche et de gestion nécessaires à l'atteinte de ces objectifs;

*e*) tout autre élément prévu par règlement;

*f*) un énoncé sur l'opportunité de fournir des renseignements supplémentaires concernant l'espèce;

*g*) un exposé de l'échéancier prévu pour l'élaboration d'un ou de plusieurs plans d'action relatifs au programme de rétablissement.

**Contents if recovery not feasible**

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

**Rétablissement irréalisable**

(2) Si le ministre compétent conclut que le rétablissement de l'espèce sauvage inscrite est irréalisable, le programme de rétablissement doit comporter une description de l'espèce et de ses besoins, dans la mesure du possible, et la désignation de son habitat essentiel, ainsi que les motifs de la conclusion.

**Multi-species or ecosystem approach permissible**

(3) The competent minister may adopt a multi-species or an ecosystem approach when preparing the recovery strategy if he or she considers it appropriate to do so.

**Plusieurs espèces ou écosystème**

(3) Pour l'élaboration du programme de rétablissement, le ministre compétent peut, s'il l'estime indiqué, traiter de plusieurs espèces simultanément ou de tout un écosystème.

**Regulations**

(4) The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations for the purpose of paragraph (1)(*e*) prescribing matters to be included in a recovery strategy.

**Règlement**

(4) Sur recommandation faite par le ministre après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut prévoir par règlement, pour l'application de l'alinéa (1)*e*), les éléments additionnels à inclure dans un programme de rétablissement.

**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.

**Projet de programme de rétablissement**

**42.** (1) Sous réserve du paragraphe (2), le ministre compétent met le projet de programme de rétablissement dans le registre dans l'année suivant l'inscription de l'espèce sauvage comme espèce en voie de disparition ou dans les deux ans suivant l'inscription de telle espèce comme espèce menacée ou disparue du pays.

**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.

**Liste des espèces en péril originale**

(2) En ce qui concerne les espèces sauvages inscrites à l'annexe 1 à l'entrée en vigueur de l'article 27, le ministre compétent met le projet de programme de rétablissement dans le registre dans les trois ans suivant cette date dans le cas de l'espèce sauvage inscrite comme espèce en voie de disparition ou dans les quatre ans suivant cette date dans le cas de l'espèce sauvage inscrite comme espèce menacée ou disparue du pays.

**…**

…

**Destruction of critical habitat**

**58.** (1) Subject to this section, no person shall destroy any part of the critical habitat of any

**Destruction de l'habitat essentiel**

**58.** (1) Sous réserve des autres dispositions du présent article, il est interdit de détruire un

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

élément de l'habitat essentiel d'une espèce sauvage inscrite comme espèce en voie de disparition ou menacée — ou comme espèce disparue du pays dont un programme de rétablissement a recommandé la réinsertion à l'état sauvage au Canada :

(*a*) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;

*a*) si l'habitat essentiel se trouve soit sur le territoire domanial, soit dans la zone économique exclusive ou sur le plateau continental du Canada;

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

*b*) si l'espèce inscrite est une espèce aquatique;

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

*c*) si l'espèce inscrite est une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*.

**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*, 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

**Zone de protection**

(2) Si l'habitat essentiel ou une partie de celui-ci se trouve dans un parc national du Canada dénommé et décrit à l'annexe 1 de la *Loi sur les parcs nationaux du Canada*, une zone de protection marine sous le régime de la *Loi sur les océans*, un refuge d'oiseaux migrateurs sous le régime de la *Loi de 1994 sur la convention concernant les oiseaux migrateurs* ou une réserve nationale de la faune sous le régime de la *Loi sur les espèces sauvages du Canada*, le ministre compétent est tenu,

public registry, publish in the *Canada Gazette* a description of the critical habitat or portion that is in that park, area or sanctuary.

dans les quatre-vingt-dix jours suivant la mise dans le registre du programme de rétablissement ou du plan d'action ayant défini l'habitat essentiel, de publier dans la *Gazette du Canada* une description de l'habitat essentiel ou de la partie de celui-ci qui se trouve dans le parc, la zone, le refuge ou la réserve.

**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**

(3) Le paragraphe (1) s'applique à l'habitat essentiel ou à la partie de celui-ci visés au paragraphe (2) après les quatre-vingt-dix jours suivant la publication de sa description dans la *Gazette du Canada* en application de ce paragraphe.

**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.

**Application**

(4) Le paragraphe (1) s'applique à l'habitat essentiel ou à la partie de celui-ci qui ne se trouve pas dans un lieu visé au paragraphe (2), selon ce que précise un arrêté pris par le ministre compétent.

**Obligation to make order or statement**

(5) Within 180 days after the recovery strategy or action plan that identified the critical

**Obligation : arrêté ou déclaration**

(5) Dans les cent quatre-vingts jours suivant la mise dans le registre du programme de

| | |
|---|---|
| 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), | rétablissement ou du plan d'action ayant défini l'habitat essentiel, le ministre compétent est tenu, après consultation de tout autre ministre compétent, à l'égard de l'habitat essentiel ou de la partie de celui-ci qui ne se trouve pas dans un lieu visé au paragraphe (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 | *a*) de prendre l'arrêté visé au paragraphe (4), si l'habitat essentiel ou la partie de celui-ci ne sont pas protégés légalement par des dispositions de la présente loi ou de toute autre loi fédérale, ou une mesure prise sous leur régime, notamment les accords conclus au titre de l'article 11; |
| (*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. | *b*) s'il ne prend pas l'arrêté, de mettre dans le registre une déclaration énonçant comment l'habitat essentiel ou la partie de celui-ci sont protégés légalement. |

**STANDARD OF REVIEW**

[51] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only

where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

**Applicants' Arguments on Standard of Review**

[52] The Applicants submit that DFO's decision to rely on non-statutory instruments such as policies and ministerial discretion to provide legal protection in the Protection Statement is reviewable on a standard of correctness. Similarly, the Applicants contend that the Ministers' decision to limit the Protection Order to protect only geophysical parts of critical habitat requires review on a standard of correctness, since it is an error of interpretation. See, for instance, *Dunsmuir*, above, at paragraphs 124, 128.

[53] The Applicants offer the following analysis to determine the appropriate standard of review based on the factors enumerated in *Dunsmuir*, above. First, the Act contains no privative clause, which demonstrates that Parliament did not intend to insulate decisions made under the Act from judicial review.

[54] Second, the purpose of the Act is to prevent at-risk species from becoming extinct and to facilitate their survival, and section 58 of the Act is integral to achieving the Act's objectives.

[55] Third, the questions at issue involve statutory interpretation. As such, they are clearly more within the expertise of the Court than that of government bureaucrats. The Act is not a home statute

to the Respondents. Moreover, DFO did not consult its Recovery Team experts about either the Protection Statement or the Protection Order. As such, the Applicants submit that it would be absurd to award deference to either decision on the basis of expertise.

[56] Finally, this question involves issues of law and jurisdiction. Accordingly, a standard of correctness ought to apply. In recent judicial review applications under the Act, the nature of the question has been a heavily-weighed factor in determining the appropriate standard of review. See, for example, *Alberta Wilderness Association v. Canada (Minister of the Environment)*, 2009 FC 710, [2009] F.C.J. No., 876 (*Alberta Wilderness Association*) at paragraphs 40-46; and *Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans)*, 2009 FC 878, [2009] F.C.J. No. 1052 (*Environmental Defence*) at paragraphs 31 and 44. Based on the above factors, the Applicants contend that correctness is the appropriate standard of review.

**Respondents' Arguments on the Standard of Review**

[57] The Respondents submit that there is no justiciable issue for the Court to review in this case and, as such, the issue of standard of review does not arise. However, following the oral hearing of this matter in Vancouver on June 14, 2010, the Court directed the Respondents to address the merits of the Applicants' Protection Statement Application. As part of their subsequent supplemental submissions the Respondents argue that the standard of review should be reasonableness.

**Appropriate Standard of Review**

[58] I believe that the Applicants are correct with regard to the appropriate standards of review for issues 2 and 4.

[59] Considering whether the Minister of Fisheries and Oceans erred in issuing a Protection Statement that relies on policy and other non-statutory instruments is, essentially, an issue of statutory interpretation. More simply put, if the Court chooses to exercise its jurisdiction to consider the first moot application, the Court must consider whether such non-statutory instruments fulfil the requirements to provide legal protection for critical habitat, pursuant to subsection 58(5) of the Act. This is an issue of statutory interpretation that should be reviewed on a standard of correctness. See *Dunsmuir*, above.

[60] I believe that statutory interpretation is also the crux of issue 4. Consequently, correctness is also the appropriate standard for review in determining whether the Ministers adhered to statutory requirements in issuing the Protection Order made pursuant to subsection 58(5) of the Act.

## ARGUMENTS

### The Applicants

#### The Court should exercise its discretion to hear first moot application

[61] The Applicants submit that the Court should hear and resolve all of the legal issues before it, since judicial clarification of the Respondents' duty to provide legal protection for critical habitat will have significant effects on the survival of all aquatic species at risk.

[62] The first application before the Court raises an issue of statutory interpretation: whether policies, prospective laws, discretionary laws and provincial laws can be said to provide legal protection for critical habitat pursuant to section 58 of the Act. This issue was not resolved by the subsequent Protection Order issued by the Respondents. The Applicants contend that this issue must be decided, and declaratory relief be given to guard against future violations of section 58 of SARA.

[63] DFO's incorrect belief that section 58 protects only geospatial areas of critical habitat arises in both applications and continues to limit the scope of the Protection Order. Similar facts and legal issues are raised in both applications. Accordingly, judicial resources will be well spent in resolving the two applications simultaneously.

**Hearing a moot application**

[64] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14 (*Borowski*) at page 353 sets out a two-step test to determine if the Court should exercise its discretion to hear a moot case:

1) First, has the required tangible dispute disappeared and have the issues become academic (the live controversy test)?
2) Second, if the answer to (1) is yes, should the Court exercise its discretion to hear the case even though it may have become moot?

To make its decision, the Court must consider the presence of an adversarial context, the concern for judicial economy, and the need for the Court to be sensitive to its role. See *Borowski*, above, at pages 353, 358-363.

[65] In this instance, the Applicants say that the adversarial context remains present because the parties still dispute the nature and the scope of the Respondents' duty under section 58 of the Act. It is important for the Court to exercise its discretion to resolve this issue because the issue might otherwise evade review. While the Respondents also attempted to strike the Applicants' application in *Environmental Defence*, above, the Court held in paragraph 2 of that case that "a review of the Minister's decision-making under SARA applied to the Nooksack Dace provides ample proof that the bringing of the present Application was absolutely necessary."

[66] In the case at hand, any legal uncertainty will have environmental costs. Failure to address fully this Consolidated Proceeding would risk providing less than full protection of critical habitat for vulnerable species. Moreover, this test case will have implications for all aquatic species. Endangered species do not have time to wait for DFO to "get it right." Furthermore, not every protection statement issued can be challenged in court. As such, other unlawful protection statements could easily evade judicial review.

[67] Although the dispute in the Protection Statement Application is technically moot, the remaining issue is squarely within the Court's function. Because the Protection Statement Application raises facts and issues that overlap with the Protection Order Application, it is efficient to resolve both applications together.

[68] If the Protection Statement Application is not resolved, it may immunize from judicial scrutiny DFO's approach to protection statements. Furthermore, if the issue remains unresolved, the Respondents will continue to rely on non-binding policies, prospective laws and discretionary laws that do not legally protect critical habitat. Clearly, the public interest will be served by providing judicial guidance on the nature and scope of the Respondents' duty under section 58 of the Act.

**Minister's duty**

[69] The Applicants submit that section 58 imposes on both Respondent Ministers a duty to provide legal protection against destruction for all components of a species' critical habitat. Justice

Campbell in paragraphs 4, 45-46, 58 of *Environmental Defence*, above, determined that critical habitat encompasses not only a defined geographic area but also a set of essential components. The Applicants contend that, in the context of the Act, the destruction of critical habitat includes the destruction of the features and components of that habitat.

**Recovery Strategy**

[70] The Federal Court has held that it is mandatory to identify critical habitat in a recovery strategy; it is the Minister's duty to identify both the location and components of critical habitat. See *Alberta Wilderness Association*, above, at paragraphs 24-25 and *Environmental Defence*, above, at paragraph 61.

[71] In the instance case, the Recovery Strategy identifies critical habitat as including areas in coastal waters where the Resident Killer Whales concentrate to feed on salmon. The presence and availability of salmon is a feature of this critical habitat. The Recovery Strategy also identifies key threats to components of the critical habitat, including reduced availability of prey, environmental contaminants, and physical and acoustic disturbance. It is important that any measure taken under the Act fully and adequately addresses each of these components.

**Protection Statement**

**Protection Statement is unlawful**

[72] The Applicants submit that the Protection Statement made by the Minister of Fisheries and Oceans is unlawful because it relies on non-statutory instruments, provincial laws, prospective laws and discretionary laws to protect critical habitat.

[73] The Applicants contend that a provision contained in a protection statement issued under subsection 58(5)(*b*) must meet the following criteria:

a. It must be a legal provision;

b. It must be a federal law (with the exception of section 11 conservation agreements);

c. The legal protection relied on must be in force at the time the protection statement is issued;

d. Because the legal protection acts as a substitute for the prohibition in section 58(1) of SARA, it must be a mandatory and enforceable prohibition;

e. The legal provisions must protect all components of the critical habitat.

[74] Within the statutory scheme of the Act, a protection statement can act as a substitute for a protection order. As such, the provisions cited within a protection statement are intended to provide the same protection for critical habitat as would the provisions of a protection order.

[75] Parliament clearly intended that habitat protection be mandatory and meaningful and did not leave it to ministers to choose whether or not to protect critical habitat. In the first reading of Bill C-5, section 58 was weaker and offered more discretion: see Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada,* 1st session, 37th Parliament (1st reading, 2 February 2001). However, some Parliamentarians objected to this discretion and pushed for mandatory protection of critical habitat. Consequently, amendments were proposed to strengthen protection for critical habitat, and these are reflected in section 58 in its current form.

[76] For a protection statement to act as a substitute for the mandatory enforceable legal protection of a protection order, the legal provisions cited in a protection statement must be mandatory and enforceable. However, the Protection Statement issued by the Minister in the present case cites numerous non-statutory instruments, including:

a. code of conduct and outreach initiatives;

b. whale-watching guidelines;

c. statement of practice regarding the mitigation of seismic sound in the marine environment;

d. sensitive benthic areas policy;

e. wild salmon policy;

f. integrated fisheries management plans; and

g. military sonar protocols.

These instruments are not laws that legally protect critical habitat from destruction; rather, they are policies, which cannot bind the Minister and do not compel behaviour. See *Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494, [2009] B.C.J. No. 2155 (*Ahousaht Indian Band*) at paragraph 752; and *Arsenault v. Canada (Attorney General)*, 2009 FCA 300, [2009] F.C.J. No. 1306 (*Arsenault*) leave to appeal to the S.C.C. requested, at paragraphs 33, 38, 43.

[77] In a few rare cases a guideline or a policy has been given legal effect by a court. However, in these instances the enabling statute mandated the issuance of the policy, making it a mandatory policy. Furthermore, a prohibition attaches for failure to follow such a policy. See, for example, *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1 (*Oldman River*) at paragraphs 33, 36-37 and *Glowinski v. Canada (Treasury Board)*, 2006 FC 78, [2006] F.C.J. No. 99 (*Glowinski*) at paragraphs 40 and 43. This is not the case with the policies listed in the Protection Statement under review in this application. At the time the Protection Statement was issued, some of the policies it cited were not yet finalized or implemented. Moreover, some of the policies are simply not applicable to the Resident Killer Whales' critical habitat.

[78] The Applicants submit that a protection statement also cannot cite prospective laws, since provisions that rely on the prospective exercise of legislative authority cannot, and do not, legally protect until that authority is exercised. This finding has been upheld by the U.S. Federal Court in *Greater Yellowstone Coalition Inc. v. Christopher Servheen*, 672 F. Supp. 2d 1105, 2009 U.S. Dist. LEXIS 111139 (*Greater Yellowstone Coalition*) at pages14-16 in which the Court held that

"[p]romises of future, speculative action are not existing regulatory mechanisms." In the present case, the Protection Statement erroneously relies on speculative or future regulatory action to protect critical habitat under subsection 58(5) of SARA.

[79] The legal provisions cited in a protection statement must be mandatory and enforceable. While the prohibition in subsection 58(1) is engaged by a protection order, so too are sections 73 and 74, which limit the Minister's ability to issue any permit that will affect critical habitat. Indeed, the Act provides that no permits can be issued that could jeopardize the survival and recovery of the species.

[80] Furthermore, the provisions cited in the Protection Statement grant a broad, unstructured discretion to permit harmful activities, including those that would destroy critical habitat. Discretionary protection does not legally protect critical habitat from destruction, since it is neither mandatory nor enforceable.

[81] The Protection Statement also listed the *Fisheries Act*, R.S.C. 1985, c. F-14, the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA) and provincial laws as providing protection to the population in question. Each of these are addressed as follows, by the Applicants.

***Fisheries Act***

[82] The Applicants say that a proper evaluation of whether the Protection Statement meets the legal standard required pursuant to section 58 of SARA demands a comparison between the legal provisions that the Statement cites and the protection provided by SARA. The Applicants submit that there is a clear difference between the legal protection afforded critical habitat under subsection 58(1) of SARA and the broad discretion under the *Fisheries Act*.

[83] While the *Fisheries Act* and its associated regulations are designed to protect critical habitat, the regulatory scheme under the *Fisheries Act* is highly discretionary. Furthermore, this discretion is not limited by policy or plans. See, for example, *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548, [1997] F.C.J. No. 1811 (*Carpenter Fishing Corp.*)(F.C.A.) at paragraphs 35 and 37 and *Ahousaht Indian Band*, above, at paragraph 752.

[84] The Applicants draw particular attention to sections 35 and 36 of the *Fisheries Act*, which allow DFO a much broader discretion to authorize habitat destruction than is allowed under SARA. See, for example, Janice Walton, *Blakes Canadian Law of Endangered Species* (Toronto: Carswell, 2007) at pp. 2-31 to 2-33. Indeed, sections 35 and 36 of the *Fisheries Act* prohibit only unauthorized destruction of fish habitat, while SARA prohibits any destruction of critical habitat. According to the Applicants,

> SARA's permitting provisions limit activities that could affect critical habitat and preclude authorization of any activity that could jeopardize survival and recovery of the species. The s. 58(1)

> prohibition against destruction of critical habitat applies to all critical habitat and against any activity that might destroy it.

[85] While it is possible to use the *Fisheries Act* to provide legal protection for critical habitat, the Applicants contend that no such action has been taken. As such, the Applicants contend that, absent a specific regulation protecting critical habitat, the *Fisheries Act* cannot lawfully substitute for an order under SARA.

### ***Canadian Environmental Assessment Act***

[86] The Protection Statement also relies on the *Canadian Environmental Assessment Act* (CEAA) to provide legal protection for critical habitat. However, the CEAA is largely a procedural statute that sets out a series of steps to be taken before projects may proceed at the discretion of the Minister. Consequently, the CEAA does not prohibit approval of environmentally destructive projects.

### **Provincial laws are not laws of Parliament**

**[87]** Section 58 of the Act requires that critical habitat be protected under a "Law of Parliament," or, in the alternative, under a section 11 conservation agreement. As such, provincial laws and municipal laws should not be cited in a protection statement.

**Protection Statement fails to protect all components**

[88] The Protection Statement is unlawful because it provides legal protection for only certain elements or components of critical habitat. In so doing, it fails to address the most significant threats to critical habitat, including reduction in the availability of prey, toxic contamination, and physical and acoustic disturbance.

[89] The first part of the Protection Statement purports to protect the "geospatial and geophysical attributes" of the critical habitat against threats from industrial activity, destructive fishing gear and vessel anchors. According to the Recovery Strategy, these threats are not the most significant to critical habitat, and yet they are the only activities for which the Protection Statement cites the legislation, regulations and/or policies to be used to protect the critical habitat.

[90] The second part of the Protection Statement addresses degradation of the acoustic environment, degradation of marine environmental quality and declining availability of prey. It attempts to address these issues by listing tools that are, according to the Protection Statement, "available to manage and mitigate threats to [ecosystem] functions." The Applicants submit that the division between the first and second parts of the Protection Statement reflects the unlawful policy distinction, which recognizes DFO's duty to protect geophysical components but ignores its duty to protect biological components of critical habitat.

**Protection Order**

[91] The Applicants say that in creating a limited Protection Order that includes geophysical areas of critical habitat but excludes identified components of the critical habitat, the Respondent Ministers have implemented an unlawful policy and thereby have failed to respond to a duty assigned them by statute. See, for example, *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, [1980] S.C.J. No. 99.

[92] The Federal Court determined in *Environmental Defence*, above, that such policies are unlawful. Accordingly, the Court ought to confirm that section 58 of the Act requires legal protection of all components of critical habitat.

**Interpretation of section 58**

**Bilingual interpretation**

[93] The Applicants contend that the proper interpretation of section 58 of the Act obliges the Respondents to ensure legal protection of all of the components of critical habitat. This interpretation is supported by numerous grounds, including a plain language examination of that section as well as the French version of section 58 and the case of *Environmental Defence*, above.

[94] The creation of a protection order under subsections 58(4) and (5) triggers the subsection 58(1) prohibition against the destruction of critical habitat. The Applicants contend that the proper

construction of the phrase "any part of the critical habitat" in subsection 58(1) includes any *component* of the critical habitat, since it is the combination of each component that makes up the critical habitat as a whole.

[95] In this case, the Resident Killer Whales' critical habitat consists of prey availability, unpolluted water and a quiet environment. Indeed, the Recovery Strategy and other government publications note that these habitat components are necessary for the survival of the species.

[96] The term "part" in subsection 58(1) may be interpreted to mean "component." See, for example, *Merriam-Webster's Collegiate Dictionary*, 10th ed., *s.v.*, at "component." Moreover, section 58 uses the word "part" differently from the way it uses the word "portion." According to the Applicants, where Parliament intends to refer to a geospatial portion of critical habitat – so as to denote a sub-area – it refers to a "portion of the critical habitat": see subsections 58(2)-(4). However, Parliament uses the word "part" in subsection 58(1) to refer to a constituent element or component.

[97] Furthermore, the French version of section 58 of the Act requires legal protection of all *components* of critical habitat. Accordingly, a bilingual interpretation of section 58 demonstrates that the Respondents' duty includes the protection of all components of the habitat. According to the Supreme Court of Canada in *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217 at paragraph 28,

> [w]e must determine whether there is an ambiguity, that is, whether one of both versions of the statute are "reasonably capable of more than one meaning"… . If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look

> for the meaning that is common to both versions… . The common meaning is the version that is plain and not ambiguous [citations omitted].

[98] When this approach is applied to the interpretation of subsection 58(1) of SARA it becomes clear that the common meaning between both versions is a prohibition against the destruction of the *components* of critical habitat. While the English version of the Act states that no person shall destroy any part of the critical habitat, the French version states that "il est interdit de détruire un élément de l'habitat essentiel." "Élément" is defined in *Le Nouveau Petit Robert*, 2002 as "Partie constitutive d'une chose. 1. Chacune des choses dont la combinaison, la réunion forme une autre chose." Furthermore, in a leading French-English dictionary, "élément" is translated to mean "component." See *Le Robert & Collins Dictionnaire Français-Anglais*, 4e ed., and *Collins Robert French Dictionary*, 7th ed., *s.v.* "élément."

[99] Although "part" may be capable of being construed in more than one way within subsection 58(1), "élément" is not; rather, "un élément" refers to one of the number of constituent parts or components that, in combination, form a whole.

[100] This interpretation is further supported by the broad structure of section 58. The French version of section 58 of the Act uses the term "partie" rather than "élément" to make reference to a sub-area or portion of critical habitat. In subsections 58(2)-(4), the word "partie" is consistently used as the French counterpart to the English word "portion."

[101] It becomes clear in applying bilingual interpretation principles that the common meaning of "any part" and "un élément" includes all integral components of a species' critical habitat.

**The Case of *Environmental Defence***

[102] The Applicants submit that section 58 of the Act must be given a purposive interpretation that ensures meaningful legal protection, as occurred with paragraph 41(1)(*c*) of SARA in *Environmental Defence*, above. Justice Campbell held in *Environmental Defence* that critical habitat is not just a geospatial area. Rather, Justice Campbell determined at paragraphs 57-66 that when identifying a species' critical habitat, the Minister must identify both the location of the habitat as well as its essential attributes or features. Identification of the components of critical habitat is undertaken to ensure that these components are later legally protected under the Act.

[103] At paragraph 53 of *Environmental Defence*, Justice Campbell examined the relationship between the identified components of critical habitat and its geospatial coordinates:

> Except perhaps by nuclear Armageddon, one cannot destroy a place in its entirety. Nor can one destroy a set of geospatial co-ordinates. Rather, the destruction of critical habitat involves destruction of the *components* of that habitat. Put concretely, to destroy a spotted owl's habitat involves clear-cutting the old-growth forest it relies on for food and protection from predators. To destroy an endangered frog's habitat may involve filling and paving a wetland and placing a shopping mall atop it. To destroy the Nooksack Dace's habitat could involve removal of riparian vegetation, which the dace rely on to regulate temperature, erosion, and pollution; or removing water from the streambed. Clear-cutting trees, filing wetlands and draining streams does not destroy the location; rather, it destroys the *features* and *components* that were relied on by endangered species.

[104] Moreover, in making his decision, Justice Campbell considered the *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818 (entered into force 29 December 1993) and determined that critical habitat should be interpreted to include both its physical and biological features so as not to put Canada in breach of its international treaty obligations (paragraphs 38-39, 55, 62). Because the Act was created in part to implement Canada's commitments under the *Convention on Biological Diversity*, the Act should be interpreted in harmony with the treaty's values and principles.

**Unlawful limitation of the scope of the Protection Order**

[105] The Applicants contend that the evidence before the Court, including the Regulatory Impact Analysis Statement (RIAS) in both official languages and DFO's conduct and positions before and after the issuance of the Protection Order, demonstrates that the Respondents have unlawfully limited the scope of the Protection Order.

[106] The RIAS demonstrates the Respondents' decision to limit the Protection Order to protect only "geophysical area" of critical habitat:

> Critical habitat for the Northern and Southern Resident Killer Whales was identified in the Final Recovery Strategy posted on March 14, 2008 on the SARA Public Registry. The Recovery Strategy identifies at section 3 the critical habitats as defined geophysical areas where these populations concentrate. In addition, … DFO recognizes that other ecosystem features such as the availability of prey for foraging and the quality of the environment are important to the survival and recovery of Northern and Southern Resident Killer Whales.

[107] This passage of the RIAS demonstrates both an error of law and an error of fact.

[108] While the Respondents characterize their legal obligation as extending only as far as protecting "geophysical areas," they acknowledge that there are biological, acoustic and chemical components of critical habitat. However, despite recognizing component features, the Respondents do not extend legal protection to these features. This is an error of law.

[109] Also, the Respondents do not properly understand the Recovery Strategy. One cannot argue that the Recovery Strategy, as a whole, identifies critical habitat as only an area. This is an error of fact.

[110] A comparison of the French and English versions of the RIAS demonstrates that the Respondents have misconstrued section 58 of SARA and, consequently, have misunderstood their duty under this section.

[111] Furthermore, prior to the publication of the Protection Order DFO exerted bureaucratic pressure to weaken the legal protection of critical habitat and remove references to ecosystem features of critical habitat.

[112] The Respondents' position that critical habitat is only a geospatial location did not change after the Protection Order was published, a position that DFO maintained in *Environmental Defence*, above. This reflects DFO's legally incorrect understanding of the scope of its duty under

section 58 as well as the Respondents' intention to limit the Protection Order so as not to cover all physical and biological components of the critical habitat.

**The Respondents**

[113] The Respondents contend that the Protection Order provides the Resident Killer Whales with the protection they require. No greater protection will be provided if the Court considers the moot Protection Statement, and there is nothing for the Court to review with regard to the Protection Order.

**Court should not exercise its jurisdiction**

[114] Because Justice O'Reilly determined that the Protection Statement is moot, the Court must now decide whether the first application made by the Applicants is so exceptional that it justifies a departure from the general practice of striking moot cases. It is the Applicant's burden to demonstrate that this is the case. See *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*, 2008 ONCA 265, [2008] O.J. No. 1353 at paragraph 32.

[115] The Respondents submit that the adversarial context required by *Borowski*, above, does not exist in this case. There is no longer any live issue with respect to the Protection Statement since it has been replaced by the Protection Order. The fact that the Applicants believe that they have an adversarial relationship with the Minister of Fisheries and Oceans is not an adequate reason for the

Court to hear a moot case; rather, there must be consequences arising from the moot proceeding that justify hearing the matter. As stated by Justice Rothstein in *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)* (1997), 128 F.T.R. 222, [1997] F.C.J. No. 347 (F.C.T.D.) at paragraph 15,

> [t]he continuing adversarial relationship does not simply mean that the parties are competitors or that they do not like each other or that there is other litigation pending between them. The adversarial relationship that must prevail must have some logical nexus to the proceedings that have become moot.

In this instance, there is no logical nexus between any adversarial relationship that the Applicants believe exists and the Protection Statement Application, which has been deemed to be moot.

[116] There are no special circumstances in this case to justify the investment of further judicial resources. Because the Protection Order contains a prohibition against the destruction of critical habitat, the Court's decision on the Protection Statement Application will have no practical effect on the rights or obligations of the parties. The Protection Order is broad, and declarations with regard to the tools outlined in the Protection Statement will not impact the protection provided by the Protection Order.

[117] The circumstances leading to the Protection Statement Application are unique and fact-specific. Likewise, each future protection statement made pursuant to SARA will be unique to the species at issue.

[118] Moreover, the Protection Statement Application is not one that is recurring in nature and evasive of the Court's review. As the Court in *Borowski*, above, determined at pages 360-361, the mere fact that a case raising the same point may recur is not by itself sufficient reason to hear an appeal that is moot. Rather, it must be demonstrated that the "circumstances suggests that the dispute will have always disappeared before it is ultimately resolved."

[119] Finally, abstract pronouncements of rights or obligations are not in the public interest since they do not promote judicial economy or orderly and incremental development of the law. There is no public interest in resolving issues with regard to the Protection Statement when it has already been replaced by the Protection Order.

**Protection Statement**

[120] In their initial materials the Respondents did not provide the Court with evidence or argument dealing with the merits of the Applicants' position on the unlawful nature of the Protection Statement. Following the hearing, the Court decided that it was impossible to address the Respondents' mootness and jurisdiction arguments without a full debate on the merits of the Protection Statement Application. The Court directed the Respondents to provide written submissions and the Applicants to provide any reply in writing. The Respondents submissions on the merits as contained in their Supplemental Written Submissions are set out below.

[121] The Respondents say that the instruments relied upon in the Protection Statement provide "legal protection" as that term is intended to be interpreted under SARA.

[122] Under section 58(5) of SARA, Parliament has given the Minister the option of issuing a protection order, which prohibits the destruction of critical habitat, or a Protection Statement, which enumerates other statutory and non-statutory instruments that prohibit such destruction. Parliament's purpose in so doing was to provide flexibility with respect to the manner in which critical habitat protection is achieved. Although the "provisions in, and measures under" other Acts of Parliament, which are enumerated in a Protection Statement, may provide protection in a manner different from that of a protection order, this violates no requirement under SARA. The protection is equally effective unless proven otherwise.

[123] The Applicants' argument that such "provisions" and "measures" must be "legal provisions" or "federal laws" that provide protection in the form of a "mandatory, enforceable prohibition against destruction" renders meaningless the flexibility Parliament so clearly intended to provide the Minister under section 58(5)(*b*). That this intention has meaning is confirmed by the notable absence of such flexibility in other SARA provisions.

[124] The Respondents argue that non-statutory instruments can also function as "provisions in, and measures under" other Acts of Parliament within the meaning of section 58(5). For example, sections 57 and 58 of SARA include section 11 agreements as an example of instruments that can be used to protect critical habitat. Section 11 agreements, as non-statutory instruments, are not

"federal laws," as the Applicants suggest all instruments included in a protection statement must be. Their inclusion as examples in section 57 and 58 evidences Parliament's intention that the "provisions" and "measures" relied upon in a protection statement can take a different form that the protection provided by the prohibition against destruction that would be contained in a protection order. That Parliament includes these non-statutory instruments among the "provisions" and "measures" that may be relied upon indicates a flexible approach.

[125] In addition, section 56 provides that codes of conduct, policies and guidelines may also be used to protect critical habitat. The Applicants' assertion that such instruments cannot be relied upon because they do not "legally protect" critical habitat assumes that legal protection is available only through a "mandatory, enforceable prohibition against destruction." However, the above examples taken from SARA indicate, first, that such instruments need not take the form of a "mandatory, enforceable prohibition against destruction"; and, second that lack of enforceability is not relevant to a determination as to whether such instruments legally protect critical habitat.

[126] Moreover, the Respondents argue, the possibility that such "provisions" and "measures" may be altered in future does not affect the validity of the Protection Statement. Section 35 of the *Fisheries Act* protects the critical habitat of killer whales. The fact that the Minister has discretion under section 35(2) of that statute to authorize activities that destroy critical habitat does not negate the fact that, until such authorization occurs, section 35 provides protection and that this protection can be relied upon in a protection statement. There is no evidence that such

authorization has occurred. Similar logic applies to the protection set out in section 36 of the *Fisheries Act*.

[127] The *Fisheries Act* and Regulations respecting fisheries activity protect killer whale prey and geophysical habitat. The issuance of licences and the opening and closing of fisheries are "measures under" an Act of Parliament. A protection statement relying upon these measures would fail to satisfy the requirements of paragraph 58(5)(b) only if the Minister exercised his or her discretion not to limit fishing, resulting in the destruction of available killer whale prey. There is no evidence that the Minister's discretion has been exercised in such a way.

[128] Finally, the Respondents argue that the question of whether the instruments relied upon in a protection statement provide the protection required under section 58 of SARA is one of mixed fact and law and therefore attracts a reasonableness standard.

**Protection Order application is misguided**

[129] The Respondents say that it is unclear in the Protection Order Application what exactly the Applicants seek to have judicially reviewed. Because the majority of the Applicants' arguments concern the Protection Statement Application, it appears that the second Protection Order Application is simply an attempt to keep moot issues before the Court.

[130] While the Applicants appear to be seeking judicial review of the Protection Order, they do not seek to quash it or set it aside. Instead, the Applicants are seeking declarations to prevent the

Protection Order from being applied in a particular manner. Such declarations are inappropriate and beyond the jurisdiction of the Court.

[131] The Protection Order is a regulation within the meaning of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22. Subsection 2(1) of that Act states that all orders "made in the exercise of a legislative power conferred by or under an Act of Parliament" are regulations. Accordingly, the Protection Order made under subsections 58(4)-(5) of the Act is a regulation.

[132] The content of regulations is legislative in nature when it embodies a rule of conduct, has the force of law and affects an undetermined number of persons, or where the regulation is a component of a series of instruments which do so. See *Sinclair v. Quebec (Attorney General)*, [1992] 1 S.C.R. 579, [1991] S.C.J. No. 76 at paragraph 15 (QL) (*Sinclair*).

[133] In this case, the Protection Order completes the statutory scheme by creating a prohibition against the destruction of any part of the critical habitat, pursuant to section 58(1) of SARA. Because the content of this regulation is intimately connected to the legislation, it is legislative in nature. See, for example, *Sinclair*, above, at paragraphs 14-18.

[134] Because the Protection Order is a regulation and its content is legislative in nature, the Court is limited to considering whether it was within the authority of the Ministers to make the order and whether it offends the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter): see *Dixon v. Canada (Governor in Council)*, [1997] 3 F.C. 169, [1997] F.C.J. No. 985 at paragraph 17.1.

[135] The Applicants do not allege that the Protection Order was *ultra vires* or that it offends the Charter. Rather, they seek declarations that the Ministers are acting unlawfully in limiting the application and the scope of the Protection Order. However, the Court cannot review the content of the Protection Order beyond the issues of *vires* and Charter compliance without infringing on parliamentary sovereignty; jurisprudence has held that review of the content of validly enacted legislation is undertaken only by the electorate. See *Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576, [1976] S.C.J. No. 86.

[136] Subsection 58(5) of the Act provides that an order can be made "with respect to all of the critical habitat or portion of the critical habitat that is not in a place referred to in subsection (2)." In this instance, as noted by the Applicants, "portion" refers to a geographical portion. Consequently, a protection order is required to specify the geographic area to which it applies. Because none of the critical habitat in the case at hand is referred to in subsection 58(2), the Protection Order specifies the entire area of the critical habitat.

[137] The Protection Order does not define critical habitat; rather, it specifies the portion of the critical habitat to which the subsection 58(1) prohibition applies. The Act provides that critical habitat must be identified in a recovery strategy or an action plan. This is made clear in the definition of critical habitat which is habitat "…that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species." Issuing an order under subsections 58(4)-(5) does not change the critical habitat identified in these documents.

**Future intentions**

[138] Unable to challenge the Protection Order, the Applicants have instead attempted to challenge what they believe to be the intentions of the Respondents with regard to the subsection 58(1) prohibition. This is reflected in the Applicants' arguments, which focus heavily on subsection 58(1), despite the fact that the Protection Order was issued under subsections 58(4)-(5).

[139] The Respondents submit that the Protection Order neither contains the prohibition against destruction nor identifies critical habitat. Instead, the Protection Order specifies the portion of the critical habitat to which the prohibition against destruction applies, that is, the physical part. It is subsection 58(1) that contains the prohibition, and not the Protection Order itself. Similarly, it is the Recovery Strategy that identifies the critical habitat, and not the Protection Order.

[140] The Applicants argue that the Ministers unlawfully excluded the ecosystem features of the critical habitat from the scope of the Protection Order; however, this is not possible. What is prohibited is determined on the basis of the interaction of subsection 58(1) with the critical habitat as identified in the Recovery Strategy, and not by the Protection Order. In this case, it is the application of the prohibition with which the Applicants take issue. However, their arguments are based on speculation and vague evidence that the Respondents will apply the Protection Order in a way that the Applicants believe is unlawful. While the Applicants attempt to rely on the conduct of the DFO officials before the Protection Order was issued, this conduct is irrelevant. Meanwhile, the

Applicants' arguments with regard to the RIAS fail to examine and appreciate the document as a whole.

[141] At the time the Protection Order was issued and the RIAS was published, the nature of critical habitat was being considered in *Environmental Defence*, above. *Environmental Defence* made it clear that the prohibition in subsection 58(1) of the Act applies to the attributes of critical habitat identified in the Recovery Strategy. It is unreasonable for the Applicants to assume, now that *Environmental Defence* has been issued, that the Respondents intend to simply ignore the Court's decision on this issue.

**Lack of jurisdiction**

[142] Without being requested to review the decision to issue the Protection Order, the Court does not have jurisdiction to grant the declaratory relief that the Applicants seek in the Protection Order Application. The Federal Court is a creature of statute and must find a statutory grant of jurisdiction. See *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, [1986] S.C.J. No. 38 (QL) at paragraph 11. The Federal Court has the power to declare a "decision, order, act or proceeding" to be unlawful: see subsection 18.1(3) of the *Federal Courts Act*, R.S., 1985, c. F-7. However, the Applicants do not seek to have the Protection Order declared unlawful nor have they identified any other decision, act or proceeding which they seek to have declared unlawful.

[143] Moreover, although the Applicants have challenged the Ministers' decision to apply the allegedly unlawful policy to limit the application of the Protection Order, the Applicants have identified no occasion on which the Protection Order has been so applied.

[144] In the absence of a challenge to a decision, order, act or proceeding, the Court lacks jurisdiction to issue the declarations requested.

**Improper submissions**

[145] The Respondents submit that the affidavit of Dr. Scott Wallace includes "outdated evidence, opinion and argument and portions of it are clearly improper and should be given no weight." What is more, the Applicants have attempted to submit a number of documents as secondary material. However, this should have been put into evidence through an affidavit, since not doing so has prevented the Respondents from filing evidence in response. Consequently, these documents should be disregarded.

**Applicants' Reply**

[146] Following the Respondents' written submissions on the merits of the Applicants' allegations, the unlawfulness of the Protection Statement, the Applicants provided the Court with a written reply. The Applicants' submissions in this regard are set out below.

[147] The Applicants argue that the modern approach to statutory interpretation supports their interpretation of section 58(5)(b) of SARA. The words of that section, read in their ordinary meaning and in a manner that is harmonious with the scheme and object of the Act and the intention of Parliament, indicate the criteria that a provision of a Protection Statement must meet. First, it must be a legal provision. Second, excepting section 11 agreements, it must be a federal law. Third, it must be in force when the Protection Statement is issued. Fourth, the protection offered by the provision must be a substitute for the prohibition against destruction set out in section 58(1); in other words, it must be mandatory and enforceable. Fifth, the provisions together must protect all components of critical habitat. As the Respondents have conceded the second, third and fifth criteria, the Applicants' submissions address the first and fourth criteria.

[148] The provisions in a Protection Statement must be "legal provisions." The term "legal provision" is used by the Applicants to mean any provision that sets a standard for conduct that can be understood by the public and that must be followed, enforced and interpreted by a court in the case of conflict. Since the purpose of a Protection Statement is to set out how other provisions act in lieu of the legal protection provided by section 58, it follows that such provisions must also be "legal provisions."

[149] In addition, section 58 expressly requires a Protection Statement to set out how the listed provisions "legally" protect critical habitat. The Respondents point out that section 58(5)(a) includes section 11 conservation agreements as among the provisions that may be cited in a

Protection Statement. The Applicants submit that this inclusion is consistent with their argument because conservation agreements are legal "measures" under an Act of Parliament.

[150] The legal protection relied on in a Protection Statement must act as a substitute for the protection in section 58(1); in other words, it must provide nothing less than a mandatory, enforceable prohibition against the destruction of critical habitat. Contrary to the Respondents' arguments, discretionary provisions of statutes of general application are insufficient to meet the requirement under section 58.

[151] Section 58 provides two different means for achieving the same end, which is the securing of meaningful and enforceable legal protection for critical habitat. Contrary to the Respondents' argument, Parliament did not intend flexibility with respect to the standard or rigor of that protection. The Respondents posit that there are two different levels of protection, which leaves open the possibility that the Minister could choose to allow critical habitat to be destroyed. This interpretation was clearly rejected by Parliament and is contrary to the purpose of SARA and its legislative history. Where Parliament intends less than mandatory protection, as in section 63 of SARA, its intention is express. No such intention is evident in the case of section 58.

[152] The Respondents argue that sections 35 and 36 of the *Fisheries Act* protect critical habitat and that the *Fisheries Act* and its Regulations governing fishing activity protect killer whale prey availability and geophysical habitat components. However, only section 35 of the *Fisheries Act* and section 22(1) the *Fishery (General) Regulations* are listed in the Protection Statement.

Otherwise, the Protection Statement refers only generally to provisions of *Fisheries Act* and the Regulations. The Applicants argue that such vague and non-specific references fail to discharge the Respondents' duty under section 58(5)(b) to "set out how" the provisions therein legally protect both critical habitat and the availability of prey for killer whales. Further, the protection available under section 35—a provision which grants to the Minister a broad discretion to destroy critical habitat—could never be considered an equally effective alternative to the protection available under a section 58(1) Protection Order. In short, the Minister cannot rely on her absolute discretion to manage the fishery to discharge her duty to protect a component of critical habitat.

[153] Finally, the Applicants argue that they are asking this Court to interpret the statutory requirements of a Protection Statement under section 58(5)(b) and to find that the Respondents lack the jurisdiction to rely on policy and discretion in providing "legal protection" for critical habitat. This raises a question of law. The Applicants submit that the appropriate standard of review is correctness.

## ANALYSIS

### General introduction

[154] I have before me two consolidated applications for judicial review both of which are concerned with the obligations of the Respondents under section 58 of SARA to provide legal protection for the critical habitat of the Resident Killer Whales.

[155] The Applications are the result of a continuum of dealings between the Applicants and the Respondents about the proper legal interpretation of SARA and whether the Respondents have correctly interpreted and carried out their legal obligations to protect the Resident Killer Whales in accordance with SARA. Hence, the applications make up a single narrative that has led to the present appearance before the Court and they overlap significantly as regards both facts and law. Justice O'Reilly consolidated the applications for this very reason.

[156] The Respondents initially took a similar approach to both applications. Until directed by the Court, they resisted on mootness and jurisdictional grounds rather than challenge the facts or confront the merits directly. As the proceedings unfolded before me, however, it became apparent that the Respondents do not take issue with many of the points made by the Applicants on the merits. They say, however, that the Court should not exercise its discretion to hear the Protection Statement Application because it has been adjudged moot and there are no grounds to consider a moot application in this case.

[157] As regards the Protection Order Application, the Respondents resist on the grounds that the application is unclear, that the review of the Protection Order is beyond the jurisdiction of the Court, that the Court is being asked to review future intentions, and various other related grounds.

[158] What is strange about the Respondents' resistance to the Protection Order Application is that, when questioned by the Court on the merits at the hearing, the Respondents conceded

important arguments made by the Applicants. This was not their intention when the Order issued but it has come about as a result of the clarification of the law concerning the meaning and scope of "critical habitat" provided by Justice Campbell in *Environment Defence*.

[159] The Respondents agree that the Order should now be read as the Applicants assert it should be read, that is to cover the protection of critical habitat as the Applicants say critical habitat should be defined for the Resident Killer Whales.

[160] In addition, following supplemental written submission on the Protection Statement Application, it is apparent that much of what the Applicants say about the content of protection statements is acceptable to the Respondents, apart from certain fundamental points of disagreement that I will come to later.

[161] Given the level of agreement on the merits of the Protection Order Application, the Court cannot help but wonder why it has been resisted on technical grounds and why the Respondents do not think the Court should deal with it. Had the Respondents clarified their agreement on the definition of critical habitat and corrected the relevant public documentation where a different interpretation is evident, or at least possible, the Protection Order Application need never have come before the Court. The fact that it has will have an impact upon the way I deal with the exercise of the Court's discretion to hear the Protection Statement Application.

[162] As regards the outstanding points of difference concerning the Protection Statement, it is evident to me that the significance of the disagreement between the parties means that fundamental points of legal interpretation are very much a live issue between the parties. These points, as well as being specific to the facts of these applications, are of importance generally for the interpretation and application of SARA.

**Protection Order application**

[163] It is my view that the Applicants' statement of the law and their conclusions regarding the Protection Order and its application to all components of critical habitat are correct. Also, notwithstanding subsequent changes of position by DFO since the Protection Order originally issued in February 2009, the Ministers did act unlawfully in limiting the Protection Order made under subsection 58(4) of SARA. The Respondents now appear not to take issue with the Applicants' position regarding the scope of "critical habitat," and they say that they recognize the implications of Justice Campbell's decision in *Environmental Defence* for this issue. Notwithstanding the Respondents' evolving change of position on the scope of "critical habitat," it still seems to me that the Protection Order was and is incorrect and unlawful because, in limiting its application to geophysical areas, the Respondents failed to respond to a duty assigned to them by statute, in this case, SARA. See *Inuit Tapirisat*, above, at page 752.

[164] The Applicants' interpretation of the Ministers' duty under SARA to protect all components of critical habitat for the Resident Killer Whales is fully supported by the plain language of section

58 read in the full context of SARA, the bilingual version of the section and the decision of the Court in *Environmental Defence*. The relevant authorities are set out fully in the Applicants' submissions. There is no need to repeat them here because the Respondents do not take issue with the Applicants' arguments on this issue.

[165] Instead, the Respondents argue that the Court should, nevertheless, refuse to grant the declaratory relief requested by the Applicants for a variety of reasons that I will examine in turn.

**Respondents' grounds**

[166] I will deal briefly with each of the Respondents' grounds for resisting the Protection Order Application.

**Application is misguided**

[167] The Respondents say that the Protection Order Application is misguided because it is unclear what the Applicants are attempting to have reviewed and, in any event, the Applicants are seeking declarations aimed at preventing the Protection Order from being applied in a particular manner in the future. Such declarations, say the Respondents, are beyond the jurisdiction of this Court.

[168] This issue has already been identified and dealt with by Prothonotary Lafrenière. In May 2009 the Applicants requested that the Respondents produce the record for the Protection Order, required under Rule 317 of the *Federal Courts Rules*. The Respondents posited that there was no decision at issue, and so they were not obliged to produce a record. Prothonotary Lafrenière agreed with the Applicants that there was a decision and ordered the Respondents to produce the record. The Respondents did so in November 2009. Because the Court may order production of a record under Rule 317 only if there is a "decision or order" that is the subject of a judicial review application, it is clear that the Court has already decided that there is a decision for review, and it is the Protection Order. See *Gaudes v. Canada (Attorney General)*, 2005 FC 351, [2005] F.C.J. No. 434 at paragraphs 6, 15-19. The Respondents have not appealed Prothonotary Lafrenière's ruling, so that is where things currently stand.

[169] My review of the Protection Order will address what the Applicants have characterized as a consistent misinterpretation and misapplication of the law that has led to, and become manifest in, the Protection Order.

[170] I will also review the legality of the Protection Order at the time it was promulgated. My decision will have an impact upon the future actions of the Ministers, but this does not prevent me from reviewing the Protection Order and declaring it to be invalid because of reviewable error.

**Order cannot be challenged**

[171] The Respondents also say that because the Protection Order is a regulation within the meaning of the *Statutory Instruments Act*, its content is legislative in nature. Therefore, the Court's jurisdiction is limited to determining whether it was within the authority of the Ministers to make the Order or whether it offends the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[172] In effect, this is an argument that the Protection Order (indeed any protection order issued under SARA) is immunized from review, other than review for jurisdiction or Charter compliance, by the concept of Parliamentary sovereignty.

[173] In my view, however, the Respondents are here attempting to assert ministerial sovereignty rather than Parliamentary sovereignty. See *Saskatchewan Wheat Pool v. Canada (Attorney General)* (1993), 107 D.L.R. ($4^{th}$) 190 (FCTD) at paragraph 68. The Respondents have conceded that when the Protection Order issued it was issued under a mistake of law, i.e. that "critical habitat" was limited to geographical space. This mistake is not evident on the face of the Protection Order, which one must read in conjunction with the Recovery Strategy and the RIAS to understand its scope and impact. The wording of the Recovery Strategy does reveal the mistake of law, and this is further evidenced by the wording in the RIAS.

[174] While conceding this mistake of law (an extremely serious mistake given the purpose of SARA and the possible fate of the Resident Killer Whales and any other species at risk) the

Respondents suggest, in effect, that an illegal Protection Order and the actions of the Minister in promulgating an illegal Protection Order are beyond the review of this Court.

[175] In my view, however, SARA is not a statute, such as the *Fisheries Act*, that delegates to the Minister a broad discretion to do a wide range of things in order to manage a national resource on behalf of all of the people of Canada. SARA is a statute that compels the competent Minister – and the Parliamentary debates are clear on this crucial point – to act in specific ways to protect the critical habitat of species at risk. The protection of critical habitat and what constitutes critical habitat are not left to ministerial discretion in SARA. If the Ministers were allowed to illegally apply SARA free of the scrutiny of this Court, and in breach of what Parliament has said must occur, then Parliamentary sovereignty would be replaced by ministerial sovereignty. I see nothing in SARA or in the Parliamentary debates brought into evidence to suggest that this was Parliament's intention.

[176] The Executive branch, including ministers and their delegates, is distinct from, and subordinate to, Parliament. When the Executive is alleged not to have lawfully performed a duty assigned to it by Parliament, the Court's role is to interpret the nature and scope of the statutory duty and adjudicate upon whether the Executive has complied with its duty. Judicial review is the means by which ministers who fail to perform their legislated duties are held to account. As stated by the Supreme Court of Canada in *Canada (Commission des droits de la personne) v. Canada (Attorney General)*, [1982] 1 S.C.R. 215, at page 216, "[I]t is important not to confuse the statute adopted by Parliament with the action of the Executive performed in accordance with that statute."

[177] This position was confirmed by the Supreme Court of Canada in the leading administrative law decision in *Inuit Tapirisat* (cited to S.C.R. at page 752):

> [I]n my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

[178] In the context of SARA, Parliament charged the Respondent Ministers with a duty to ensure that critical habitat is legally protected. The Ministers must perform this duty in accordance with the law. While a sovereign Parliament enacted section 58 of SARA, the Ministers are subordinate to Parliament when they perform their section 58 duties.

[179] The Respondents support their argument with the uncontroversial submission that the Protection Order is designated as a "regulation" under the *Statutory Instruments Act*. In my view, however, there is no principle of law stating that an enactment covered by the *Statutory Instruments Act* is unreviewable.

[180] The Respondents further submit that, because the Protection Order is a regulation, it becomes "legislative in nature" and, therefore, this Court cannot review it without violating Parliamentary sovereignty. The Respondents' analysis of the "legislative nature" of section 58 decisions is based on *Sinclair v. Quebec (Attorney General)*, above, and *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. It seems to me that these decisions confirm that the

*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. II, No. 5, requires all instruments of a "legislative nature" to be published in English and French, which is not the issue before me. The Applicants do not quarrel with the proposition that the Protection Order was constitutionally required to be published in English and French. However, the Respondents take this constitutional jurisprudence out of its proper legal context in an attempt to claim that the Protection Order is unreviewable.

[181] In my view, other case law relied on by the Respondents to immunize this decision against review is equally unavailing. *Dixon*, above, simply confirms that the courts may review a Cabinet decision for legal error but not for political motivations. The Supreme Court of Canada's decision in *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, [1991] S.C.J. No. 60 confirms that a question of statutory interpretation is justiciable regardless of whether it may have political connotations. The Supreme Court of Canada's decision in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, [1989] S.C.J. No. 80 confirms that the ouster of judicial remedies is a question of legislative intent: Parliament's intent to make a statutory matter non-justiciable must be expressed in particular statutory provisions. In holding that the *Auditor General Act*, R.S.C., 1985, c. A-17, limited the Auditor General, an officer of Parliament, to the alternative non-judicial remedy of reporting to Parliament, the Court emphasized at paragraph 79 that this "should be viewed as limited to the interpretation of a unique statute as informed by the particular role played by the Auditor General."

[182] Further, at paragraph 17 of their factum, the Respondents submit that the lawfulness of DFO's Protection Statement is an issue within the Court's adjudicative function. That is, the Respondents concede that the Court has jurisdiction to adjudicate a claim that a competent minister issued an unlawful protection statement under subsection 58(5)(*b*). Yet the Respondents argue that the Court lacks jurisdiction to adjudicate a claim that a competent minister unlawfully issued a protection order under subsection 58(5)(*a*). In my view, this distinction is nowhere reflected on the face of the provision.

[183] In my opinion, the analysis of the Court's jurisdiction to review a statutory decision must ask whether Parliament intended, in enacting SARA, to shield subsection 58(5) decisions from judicial review. When Parliament intends to shield a decision from review, it typically uses a privative clause. There is in SARA no privative clause and no other provision shielding subsection 58(5) decisions from judicial scrutiny. The Respondents have not pointed to any provisions of SARA that have this intended effect.

[184] In my view, then, SARA is clearly a justiciable statute that imposes mandatory duties on competent ministers. This Court has previously reviewed ministerial actions under SARA and issued declaratory relief against these same Respondent Ministers.

**Order cannot be more than it is**

[185] The Respondents further argue that subsection 58(5) of SARA provides that an order be made "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)." They say that "portion" refers to a geographical portion. As a result, what an order is required to do is specify the geographic area to which it applies. In this case, as none of the critical habitat is in a place referred to in subsection 58(2), the Protection Order specifies the entire area of the critical habitat, and under subsection 58(4) no more could be done.

[186] The Protection Order does not, however, define the critical habitat; it merely specifies the portion of the critical habitat to which the subsection 58(1) prohibition applies. SARA provides for critical habitat to be identified in one of two places: a recovery strategy or an action plan. This is set out in the section 2 definition of critical habitat which is the habitat "that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species." An order issued under subsections 58(4) and (5) does not, and cannot, in my view, change the critical habitat identified in those documents. Nothing in section 58 permits this.

[187] It is true that the Protection Order depends for its full meaning and effect upon the critical habitat identified in the Recovery Strategy. The Respondents concede that, at the time the Protection Order was made, their view of what was included in critical habitat as expressed in the Recovery Strategy was wrong and contrary to SARA. The Respondents have changed their mistaken view of "critical habitat" as a result of Justice Campbell's decision in *Environmental Defence*, above. Yet the Respondents have not changed the Recovery Strategy to reflect this change in their understanding of the law. Moreover, they have not clarified for those who may seek to ascertain the

law on protection of critical habitat for the Resident Killer Whales that the Protection Order should not be read in the way they intended it to be read when it was issued and as it could still be read if some of the wording contained in the Recovery Strategy and the RIAS is relied upon.

[188] In other words, the fact that the Protection Order is worded so broadly that it can be taken by the Respondents to cover their new understanding of the aspects of critical habitat that require protection under SARA does not render the Protection Order legal. Furthermore, it does not mean that those who seek to know the law on this crucial issue will not be misled if clarification is not provided by this Court.

**Attempt to review speculated future intentions**

[189] The Respondents say that the Court should not entertain the Protection Order Application because the Applicants are really challenging what they see as the future intention of the Respondents with regard to the application of the prohibition in section 58 of SARA.

[190] The Respondents say that this is evidenced by the focus of the Applicants' statutory interpretation argument, which concerns subsection 58(1), even though the Protection Order is issued under subsections 58(4) and (5).

[191] The Protection Order neither contains the SARA prohibition against destruction nor identifies critical habitat. As per subsections 58(4) and (5), the Protection Order simply specifies the

"portion" of the critical habitat, i.e. the physical part, to which the prohibition against destruction applies. It is subsection 58(1) that contains the prohibition. Similarly, as per the definition of critical habitat in SARA, it is the Recovery Strategy that identifies the critical habitat.

[192] Despite the Applicants' claim in the relief sought that the Ministers have unlawfully "excluded the ecosystem features" of the critical habitat "from the scope of the Protection Order," the Respondents say that this is simply not possible. What is prohibited is determined by the interaction of subsection 58(1) with the critical habitat, which has been identified in the Recovery Strategy and not by the Protection Order.

[193] The Respondents say it is the application of the prohibition, triggered by the Protection Order, with which the Applicants take issue. However, the Respondents say that the Applicants' complaints are based entirely on speculation. The Applicants speculate that the Respondents will apply the Protection Order in a manner which the Applicants say is unlawful.

[194] It is the Respondents' contention that, where jurisdiction exists, a declaration can issue to affect future rights unless the dispute in issue is merely speculative. See *Solosky v. The Queen*, [1980] 1 S.C.R. 821, [1979] S.C.J. No. 130 (QL) (*Solosky* cited to S.C.R.).

[195] The Respondents say that the evidence the Applicants rely on creates nothing more than speculation and that the conduct of DFO officials prior to the issuance of the Protection Order is irrelevant for two reasons. First, although the Applicants complain that DFO attempted to remove

the identification of critical habitat from the recovery strategy, the fact is that in the end, it was not removed or even significantly altered. Second, all of these actions predate the decision to issue the Protection Order and do not prove the Respondents' future intentions in regards to the Protection Order.

[196] The Respondents say that it is indeed their intention to apply and enforce the Protection Order in accordance with their new understanding of the scope of critical habit and that they now concede that the Applicants' position on the scope of critical habitat is correct. However, it is difficult for the Court to understand, first, why the Respondents have not clarified their new position and their concessions to the Applicants before the hearing and, second, why they have not taken steps to ensure that the Recovery Strategy and the RIAS are absolutely clear about the Respondents legal obligations to protect critical habitat so that all those who need to know what is protected are in no doubt. In my view, it is disingenuous for the Respondents to argue that a Recovery Strategy and a RIAS that initially supported the Respondents' earlier mistaken view of the law is now adequate and clear enough to support and explain a totally different view. If this were the case, then the Recovery Strategy and the RIAS would be inadequate for either interpretation of what is protected under the Protection Order. What the Ministers appear to mean is that, having been educated in the correct interpretation of their obligations since the Protection Order issued, they can now be counted upon to enforce the full protection required, irrespective of what the Recovery Strategy and the RIAS may say. This obviously leaves out of account the many other people who do not know what the Ministers' new position is and who may well rely upon the Recovery Strategy and the RIAS to interpret the Protection Order.

[197] The Respondents say that the Applicants' arguments in relation to the RIAS do not look at the document as a whole. The RIAS contains several references to the protection of the critical habitat as identified in the Recovery Strategy. When the RIAS is read as a whole, the Respondents say it is clear that the intention, in so far as that may be relevant, was to apply the Protection Order to the critical habitat identified in the Recovery Strategy. This is precisely what the statutory scheme of SARA requires. It is difficult to accept this view, in my opinion, because the same RIAS was initially intended to support and explain a completely incorrect view of what aspects of critical habitat were protected by the Protection Order.

[198] The Respondents say that the Applicants' allegation that the Respondents refused to confirm that the Protection Order prohibited destruction of biological elements of critical habitat is a mischaracterization. The Respondents say that they simply explained the statutory scheme of SARA, which the Protection Order applies to the critical habitat identified in the Recovery Strategy.

[199] In addition, the Respondents say it is important to keep in mind that, at the time the Protection Order was issued, and at the time the RIAS was published, the issue of the nature of critical habitat was before the Court in *Environmental* Defence, above. Now that the Court in that case has recognized that critical habitat consists of location and attributes, it is not reasonable for the Applicants to assume that the Respondents will ignore that.

[200] As a result of *Environmental Defence*, the Respondents say it is now clear that the prohibition in subsection 58(1) applies to those attributes of critical habitat that are identified in the

Recovery Strategy. As the Applicants' complaints are merely speculative, no declarations should issue, even if jurisdiction to do so existed.

[201] As the Applicants point out, the Protection Order Application is not based on speculative evidence of any future events. Rather, it is based on existing evidence of DFO's ongoing policy to limit the scope of critical habitat protection under section 58. It is also worth pointing out that, while they could have easily done so, the Respondents did not file any affidavit evidence to indicate that they have abandoned their existing and documented interpretation of section 58. Whatever Respondents' counsel may say about the Respondents' revised interpretation, the uncontested evidentiary record reveals DFO's clear and continuing policy to interpret section 58 of SARA so as limit the scope of protection for critical habitat.

[202] In arguing that this dispute is "speculative," the sole authority discussed by the Respondents is *Solosky*, above. Yet it seems to me that *Solosky* assists the Applicants. In *Solosky*, the Supreme Court of Canada confirmed that the fact that declaratory relief would influence future events was no bar to such relief, provided the dispute was not hypothetical. The Court held that Mr. Solosky's challenge to a prison censorship order was not hypothetical; rather it was a "direct and present challenge" to the order: *Solosky*, above, at page 832. As the order continued from the past through the present and into the future, it raised a non-academic controversy properly resolved by declaration: "The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order": *Solosky*, above, at page 833. In my view, the Applicants correctly argue that the

Protection Order is entirely analogous. The declarations sought will resolve any ongoing controversy about the Protection Order.

**Applicants cannot obtain the declaration sought**

[203] Finally, in resisting the Protection Order Application the Respondents argue that, absent a request to review the decision to issue the Protection Order itself, which would not have been available in any event, this Court lacks the ability to grant the declarations sought by the Applicants.

[204] The Respondents' point is that the Court, as a creation of statute, does not have a jurisdiction at large to issue declaratory relief but must find a statutory grant of jurisdiction. The jurisdiction to grant the declaratory relief sought in the Protection Order Application does not, say the Respondents, exist in the circumstances of this case.

[205] Declaratory relief against a federal board, commission or other tribunal lies within the exclusive jurisdiction of the Court pursuant to subsection 18(1)(*a*) of the *Federal Courts Act*. Such relief may be sought only by judicial review pursuant to subsection 18(3). However, the powers of the Court to grant relief are set out in subsection 18.1(3), as follows:

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| (3) On an application for judicial review, the Federal Court may | (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : |
| (*a*) order a federal board, commission or other tribunal to do any act or thing it has | *a*) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou |

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| unlawfully failed or refused to do or has unreasonably delayed in doing; or | refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable; |
| (*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal. | *b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral. |

[206] The Respondents say that the Court has the power to declare unlawful a "decision, order, act or proceeding" only. It is the Respondents' position that the Applicants do not seek to have the Protection Order itself declared unlawful and that the Applicants also do not identify any other decision, act or proceeding that they wish to have declared unlawful.

[207] I think the short answer to this is that the Applicants are asking the Court to declare the Protection Order unlawful. Paragraph 192 of the Applicants' Memorandum of Fact and Law clarifies that the Applicants wish the Court to declare, *inter alia*, that it was "an error of law for the Ministers to limit the application and scope of the Protection Order to legally protect only geophysical parts of critical habitat."

[208] What appears to lie behind the Respondents' objections to the relief claimed is that the Protection Order, on its face, does not reveal the mistake of law that was made at the time it was issued, and now that *Environmental Defence*, above, has made them fully aware of their mistake

there is no need for the Court to pronounce upon the illegality of the Protection Order when it was made.

[209] I see several problems with this approach. First of all, the Ministers have provided in this application no clear acknowledgement of the legal mistake that lies behind the Protection Order nor any suggestions for rectifying the confusion that may result if matters are left as they are. In the lead up to the hearing of these applications, the Ministers simply disregarded the merits of the Applicants' position and tried to persuade the Court that it had no jurisdiction to hear the Protection Order Application and should not hear the Protection Statement Application.

[210] This, together with the Respondents' unhelpful responses to the Applicants' attempts to clarify with them the legal issues raised in these applications, suggests to the Court that the Ministers are reluctant to acknowledge the mistake that was made and to take steps to rectify it. It was only in response to questions put to legal counsel by the Court at the hearing of the Protection Order Application that the Ministers acknowledged that they did regard "critical habitat" as being confined to geophysical components prior to the decision in *Environmental Defence*, above, and that the Protection Order had been issued under their misapprehension of the law.

[211] Even if the Ministers now intend to apply the Protection Order in accordance with *Environmental Defence*, so that all components of critical habitat – including the crucial factors of reductions in the availability of salmon prey, environmental contamination and physical and

acoustic disturbance – will now be protected in accordance with section 58 of SARA, this does not resolve the problems caused by the issuance of the Protection Order.

[212] As the Respondents themselves point out, the Protection Order, on its face, does not indicate what is included in critical habitat for the Resident Killer Whales. Recourse has to be made to the Recovery Strategy and the RIAS. This causes a problem because the Recovery Strategy contains language that reflects the Respondents' mistaken view of the law at the time the Protection Order was made. Anyone who wants to know which components of critical habitat of the Resident Killer Whales are protected under SARA has to go to the Recovery Strategy for guidance. The Respondents have made no suggestion as to how they intend to clarify the situation for anyone who is implementing, or attempting to follow, the Recovery Strategy but who was not in Court to hear counsel concede that all components of critical habitat for the Resident Killer Whales should now be regarded as being covered by the Protection Order. Given the history of this matter, and the obvious reluctance by the Respondents to acknowledge that critical habitat is more than just geophysical space, this crucial issue cannot be left in doubt. Otherwise, the lack of clarity could well lead to the thwarting of the purpose of SARA as regards the range of protection that must be afforded the Resident Killer Whales.

[213] The Protection Statement that was posted to the SARA public registry on September 10, 2008 distinguished between the legal protection required by SARA for the geophysical attributes of critical habitat and the management and mitigation of other threats to the biological and ecosystem features of the habitat of the Resident Killer Whales. This, together with the lead-up to the

Protection Statement, gave rise to a concern that the Ministers perceived of two levels of protection for the Resident Killer Whales. One of them was the geophysical space which they occupied and which the Ministers regarded as having the full mandatory protection afforded by subsection 58(1) of SARA. The other was the biological and other ecosystem aspects of the whales' habitat, which the Ministers considered should be managed and mitigated and which would not have the full protection of subsection 58(1) of SARA.

[214] As we now know, the Protection Statement of September 10, 2008 was replaced by the Protection Order of February 2009.

[215] However, both the Protection Statement and the Protection Order can be understood only by reference to the Recovery Strategy which, after much debate about what should be included under "critical habitat," was posted to the public registry on March 14, 2008.

[216] Notwithstanding the above-mentioned debate, the Protection Statement makes clear DFO's determination to maintain a distinction between geophysical features of critical habitat and biological and other ecosystem features.

[217] When the Protection Order was published in the *Canada Gazette Part II* on March 4, 2009 it indicated that the prohibition in subsection 58(1) of SARA applies to the critical habitat of the Resident Killer Whales that are described in Schedule 1. Schedule 1 is a list of marine coordinates for the geospatial location of critical habitat.

[218] Confusion occurred because the Protection Order was published with an accompanying RIAS that, at least in one section, appears to continue the distinction between the geophysical areas and the biological features of critical habitat:

> [t]he recovery strategy identifies at section 3 the critical habitats as defined geophysical areas where these populations concentrate. In addition … DFO recognizes that other ecosystem features such as the availability of prey for foraging and the quality of the environment are important to the survival and recovery of the Northern and Southern Resident Killer Whales.

[219] More confusion is caused by the following wording from paragraph 3.2 of the Recovery Strategy which also suggests a distinction between geophysical features and the other components or features of critical habitat:

> While for the purposes of SARA the critical habitat itself is a defined geophysical area (see above), other ecosystem features such as the availability of prey for foraging and the quality of the environment must be managed as threats so as not to compromise the function of the critical habitat and thus potentially impede survival and recovery.

[220] Clearly, there is a suggestion here of a distinction between the geophysical area, to which the protections of SARA are available, and "other ecosystem features," which are not protected by SARA and which may have to be "managed."

[221] This confusion is confirmed by the Memorandum that went to the Minister of Fisheries and Oceans dated September 10, 2008:

> The potential measures which could be used to provide legal protection for the Resident Killer Whale populations have been

> difficult to determine, given the complexities of the nature of the possible threats to the animals and to their critical habitat. The Recovery Strategy identifies the critical habitat in geophysical terms; it is the geophysical attributes of the critical habitat which must be protected by SARA. However, the Recovery Strategy also identifies a number of potential threats to the killer whales which need to be managed to ensure the survival and recovery of the species; these include availability of prey, acoustic degradation, and a variety of environmental pollutants [emphasis added].

[222] The clear implication of these words is that the mandatory protection of SARA is required only for the geophysical features, while other features of critical habitat are subject to discretionary management. As confirmed by Justice Campbell in *Environmental Defence*, above, this is a fundamental misreading of what constitutes critical habitat for the purposes of mandatory protection under SARA. This same misreading of SARA is evident in the analysis chart that accompanies the Memorandum to the Ministers.

[223] If the DFO can read the Recovery Statement in this way, then presumably so can anyone else who consults it in order to determine the full scope of the Protection Order.

[224] These are confusions that could have, and should have, been cleared up and addressed without the need for legal action. This is precisely what the Applicants attempted to do. On March 6, 2009, the Applicants wrote to advise DFO of their concerns that the Protection Order might not legally protect the biological components of critical habitat of the Resident Killer Whales and asking a series of pertinent questions aimed at clarification. DFO replied through counsel in a letter dated March 10, 2009.

[225] The precise question put to DFO by the Applicants was:

> Does the Order prohibit the destruction of the biological elements (or ecosystem features) of critical habitat? Or does the Order only prohibit destruction of geophysical features of habitat (namely, the seabed)?

[226] DFO's response to this question reads as follows:

> Regarding your third question, as already mentioned, the consequence of issuing the s. 58 order is that destruction of the critical habitat becomes an offence. Two points arise from this. First, as you are aware, the critical habitats of these species were identified in the recovery strategy. That identification was not challenged by your clients, or by anyone else, and the time for doing so has long since passed. Second, the responsibility for prosecutions under s. 97 of *SARA* rests with the Attorney General of Canada and the prosecutorial discretion of the Public Prosecution Service of Canada and not the competent ministers. As has occurred with similar provisions, such as s. 35 of the *Fisheries Act*, the law surrounding the scope and application of the prohibition set out in s. 58(1) will no doubt evolve over time as prosecutions occur.

[227] In my view, as an answer to a straight question, this is highly evasive. It is difficult to see what prosecutions have got to do with the matter in hand. Unless all concerned are clear about what is included in "critical habitat" the Attorney General of Canada will not know who or what to prosecute. Prosecutions do not define critical habitat, they enforce the protections to critical habitat afforded by SARA.

[228] Also, to point out that critical habitats "were identified in the recovery strategy" is the equivalent of saying that the doubts created by the ambiguous wording in the Recovery Strategy and perpetuated by DFO's own Memorandum to the Ministers are the problem of the Applicants, and DFO has no interest in clarification. There may well be a reason for this, of course. In the absence of

an explanation, however, the record suggests to me that DFO was not interested in resolving the confusion caused by its own documents and former position and had hopes of carrying forward the distinction between geophysical space (protected by SARA) and other aspects of habitat (subject to discretionary management and not protected by SARA). I say this because, in the absence of an explanation, there is no other plausible reason why the simple question could not have been answered or why, given the answers and the concessions made in open Court before me by the Respondents as part of this application, the Applicants should have been forced to bring this matter before the Court.

[229] The fact that no meaningful answer was provided to the Applicants' request for clarification on the scope of protection provided by the Protection Order made the Protection Order Application inevitable, and it was commenced by the Applicants on April 3, 2009.

[230] What is interesting is that Justice Campbell clarified the full meaning of "critical habitat" under SARA in *Environmental Defence*, above. That decision was issued on September 9, 2009. At the hearing of the Protection Order Application before me, the Respondents conceded that Justice Campbell had decided the legal issue and the Respondents now took the position that the Protection Order covered all aspects of critical habitat that the Applicant felt it should cover.

[231] This tells the Court two things of note. First, at the time of the issuance of the Protection Order in February 2009, and as late as Respondents' counsel's reply letter of March 2009, the Respondents did not regard critical habitat as anything but geophysical space but were unwilling to

admit this fact to the Applicants, which is why their reply to the Applicants' question was so evasive. Second, it reveals that the Respondents changed their mind about the full scope of "critical habitat" following Justice Campbell's decision in *Environmental Defence*, above, but did not bother to inform the Applicants. Rather they resisted the Protection Order Application all the way, initially provided no argument on the merits and advised the Court it had no jurisdiction to hear the application. Only when the Court put specific questions to counsel at the hearing did the Respondents concede that they accepted the Applicants' version of what was included in critical habitat. The Respondents argued further that the Protection Order Application was unnecessary because the Protection Order now covered the biological and ecosystem aspects of critical habitat, a fact which the Respondents had refused to clarify when asked the question in March 2009 or at any time up to the hearing.

[232] All of this convinces me that the Protection Order Application was, and remains, absolutely necessary.

[233] The Respondents have, in effect, now indicated to the Court that they accept the Applicants' position on the meaning of critical habitat and the scope of protection afforded the Resident Killer Whales under SARA, but they do not want me to look at the merits of the Protection Order Application because, *inter alia*, I lack the jurisdiction.

[234] I am left wondering, then, what lies behind the Respondents' resistance. If they did not want me to hear the Protection Order Application, all they had to do, following the *Environmental*

*Defence* decision, was to clarify their new position with the Applicants and in the public record. I have been offered no explanation as to why this could not have happened.

[235] In any event, in light of the Respondents' evasive conduct and the confusing state of the public record as outlined above, I believe the Court has to bring to the issue at hand the clarification that the Respondents have refused to provide. The Applicants have satisfied the burden for the declaratory relief they seek in relation to the Protection Order.

**Protection Statement application**

**Should the Court hear it?**

[236] Justice O'Reilly has already decided that the Protection Statement Application is moot. Nevertheless, he has left it to me to decide whether the Court should exercise its discretion to hear and decide the application after hearing the merits of both applications and with the benefit of full submissions and relevant evidence from both sides.

[237] In both the Protection Order Application and the Protection Statement Application, the Respondents initially chose not to provide me with submissions on the merits. Instead, they focussed on mootness and why I should not hear either application. However, the Respondents have since conceded that there is some merit in both applications. With respect to the Protection Statement Application, for example, the Respondents conceded at the hearing that a protection statement cannot rely upon provincial laws and can rely only upon protection, other than SARA,

that is "presently in force" at the time the statement is issued. Following the Court's direction to the Respondents that they provide the Court with submissions on the merits of the Protection Statement Application, the Respondents have now in their Supplemental Written Submissions made further concessions on the merits of the Applicants' argument. These concessions are as follows:

i. Provincial laws cannot be relied on to provide the protection required by paragraph 58(5)(b);

ii. A protection statement cannot rely on future statutory or regulatory instruments that are not in place at the time that the protection statement is issued;

iii. The protection that must be provided is protection against destruction of critical habitat or any of its identified attributes—in this case, acoustics, water quality and availability of prey.

[238] As far as the merits are concerned then, this leaves the following outstanding points of contention between the parties:

i. Whether a provision of a protection statement under s. 58(5)(b) of SARA must be a legal provision;

ii. Whether the legal protection must act as a substitute for the prohibition in s. 58(1)—that is, it must be a mandatory, enforceable prohibition against destruction.

[239] There is no disagreement as to the applicable law when the Court has to consider exercising its discretion to hear a moot application. The discretion should be exercised only in exceptional

circumstances in accordance with the three factors established by the Supreme Court of Canada in *Borowski*, above, at pages 358-362:

a. the presence of an adversarial context;

b. the concern for judicial economy;

c. the need for the Court to demonstrate a measure of awareness of its proper law-making function, which means that the Court must be sensitive to its role as the adjudicative branch in the Canadian political framework.

[240] In setting out the relevant criteria to consider, the Supreme Court of Canada, in *Borowski*, above, was careful to point out (at page 363) that this is not a mechanical process:

> The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

**Adversarial context**

[241] Because the Ministers, on both applications, initially chose not to address fully the merits raised by the Applicants, it was not possible to assess precisely the full extent of the adversarial context. As already discussed, as part of the Protection Order Application, the Ministers conceded in oral argument that they did not now take issue with the scope of critical habitat put forward by the Applicants. This appears to have been prompted by Justice Campbell's decision in *Environmental Defence*, above.

[242] In relation to the Protection Statement Application, following questions and directions from the Court, the Respondents have conceded a great deal. However, they have also now revealed that their interpretation of section 58 of SARA is significantly at odds with that of the Applicants on fundamental issues that have far-reaching implications for the protection of the Resident Killer Whales as well as other species in danger of extinction and extirpation. The promptings of the Court have revealed that, indeed, there is an ongoing adversarial context between the parties that requires resolution.

[243] It emerged during argument that the Applicants are particularly concerned by the Ministers' reliance upon broad discretionary powers, such as those found in the *Fisheries Act*, as being equivalent to the mandatory protections contained in section 58 of SARA, and this crucial issue was not fully addressed by the Respondents.

[244] All in all, then, I think I have to conclude that there is significant dispute concerning the Respondents' duties under section 58 of SARA and that this dispute will continue unless the law is clarified concerning what non-SARA protections can legally be relied upon in a protection statement.

[245] I think it is also obvious that if this dispute is not resolved there could be serious collateral consequences for other species in need of protection but lacking champions to bring their cause before the Court. There is an urgency about species protection that is captured in the objectives and

timelines found in SARA and which suggests that this dispute should be settled quickly before collateral damage occurs.

**Judicial economy**

[246] The Respondents prefer that the dispute between the parties be settled on a case-by-case basis and that the Court not make decisions in a factual vacuum which might hamper future cases.

[247] While I recognize that I should not be making decisions in a factual vacuum, it seems to me that the dispute between the parties is not a factual dispute and that the question of what can be relied upon in a protection statement is clearly a question of law that is not fact dependent. For example, the Respondents themselves have now stated clearly that the Ministers cannot rely upon provincial laws and that they must refer to provisions that are in force at the time of the issuance of the protection statement.

[248] I recognize that, in theory at least, there could be some dispute concerning the effectiveness and scope of a particular provision or measure relied upon and set out in some "other Act of Parliament," but I do not think that future cases would be hampered by a statutory interpretation of what SARA requires in terms of any particular provision or measure. It seems to me, in fact, that

such statutory interpretation is inevitable before any particular provision or measure can be assessed.

[249] In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paragraphs 20-21, the Supreme Court of Canada directed that the Court should "weigh the expenditure of scarce judicial resources against the social cost of continued uncertainty in the law." In the case before me, significant judicial resources have already been expended in bringing before the Court a general point of law. This expenditure has a lot to do with the way the Respondents have continued to resist points put forward by the Applicants over time but which they now concede in open Court. If the continued uncertainty regarding the Ministers' obligations under SARA is allowed to continue this could put vulnerable species at risk. I see nothing to be gained, and much that could be lost, by postponing a decision on this issue until such time as another protection statement might be brought before the Court. As the Applicants point out, continuing legal uncertainty will have environmental costs and vulnerable species could well be deprived of the full protection that SARA says they should have. This uncertainty undermines the overall purpose of SARA. The present dispute has national implications for all aquatic species at risk and the Respondents' continued reliance upon ministerial discretion under statutes such as the *Fisheries Act* could affect endangered species generally. As the Applicants point out, an endangered species is one facing imminent extirpation or extinction. Such species should not have to await full protection, which may not come for some time if this issue is not decided now. Those with an interest must know how the law governing protection statements is intended to apply. Many choices depend upon

this, and those who educate the world about the scope of protection under SARA need to know now what the legal obligations of the Ministers are.

[250] The dispute in the Protection Statement Application raises a fundamental question of statutory interpretation based on the complete evidentiary record that is before me. The Ministers' approach to these applications convinces me that the issue must be decided. Otherwise, DFO will continue to rely upon provisions and measures that do not legally protect the critical habitat of species at risk as SARA says it should be protected. The Ministers have already conceded that: (a) a protection statement must, apart from section 11 conservation agreements, rely upon federal law; (b) the legal protection relied upon must be in force at the time the protection statement is issued; and (c) the provisions referred to and relied upon must protect all components of critical habitat. However, the Ministers do not agree that: (a) only legal provisions can be cited in a protection statement; and (b) the provisions cited in a protection statement must be a substitute for the prohibition contained in subsection 58(1) of SARA and may not lawfully provide a lesser standard of legal protection.

[251] The Court must be wary of pronouncing judgments in the absence of a dispute affecting the rights of the parties. In my view, however, a decision on this issue will not lead to an unnecessary precedent. It will, rather, lead to a necessary precedent in an ongoing dispute where the public interest calls out for a speedy resolution.

[252] All in all, I think the Applicants have established that, notwithstanding the mootness of the Protection Statement Application, the Court should nevertheless hear and decide the fundamental issues of disagreement between the parties concerning what can lawfully be relied upon in a protection statement and whether the Protection Statement in this case was illegal for failing to provide the protections that SARA says the Ministers owe to the Resident Killer Whales.

**Merits of Protection Statement application**

[253] Generally speaking, I believe the Applicants are correct in the assertions they make regarding the legal requirements for the provisions and measures that the Ministers may rely upon in a protection statement. They are equally correct, in my view, in their assessment of the illegality of the Protection Statement at issue in this application.

**Protection Statement**

[254] A protection statement cites the provisions of other federal laws that legally protect critical habitat. These other provisions are intended, in my view, to substitute for the prohibition against the destruction of critical habitat in subsection 58(1) of SARA.

[255] If critical habitat is not protected directly under SARA, but by other federal legislation, compliance with and enforcement of those other federal laws is the responsibility of the agency charged with administering the legislation in question. See: Canada, Environment Canada, *Species at Risk Act Policies*: *Policies and Guidelines Series – Draft* (Ottawa: Minister of the Environment, 2009) at page 18; online: Depository Services Program <http://dsp-psd.pwgsc.gc.ca/collection _2009/ec/En4-113-2009-eng.pdf. [*Draft Species at Risk Policies*].

[256] Two key points arise from this scheme. First, the protection against the destruction of critical habitat, provided by subsection 58(1) of SARA, applies only where a competent minister issues a protection order under subsection 58(4).

[257] Second, and importantly, the minister has, in my view, no discretion to "choose" to give critical habitat any lesser legal protection against destruction than the protection provided through a subsection 58(4) protection order. Put another way, in my view, a competent minister has no discretion to rely on a provision of another federal law unless that law provides an equal level of legal protection to critical habitat as would be engaged through subsections 58(1) and (4). If a provision cited in a protection statement does not legally protect critical habitat to a degree equalling the protection under subsection 58(1) and other SARA provisions, then the minister must issue a protection order.

**Disagreement between the parties**

[258] The Court's direction to the Respondents to provide supplementary submissions on the merits of the Protection Statement Application has, at last, allowed me to see precisely where and why the parties disagree. This was a necessary prelude to my decision on whether or not to hear a moot application and, having chosen to hear it, to my decision on the merits.

[259] The point of disagreement is fundamental and it involves an important point of statutory interpretation that has far-reaching implications for those who administer and/or who are bound by the scheme set up under SARA. Essentially, the main issue is as follows.

[260] The Respondents say that Parliament intended to afford some flexibility for the manner in which critical habitat protection is provided. Any protection statement, including the Protection Statement at issue in this application, does not have to rely upon statutory provisions and instruments which provide protection "in the same manner as the protection order …."

[261] The Respondents say that, under SARA, Parliament has provided the Ministers with two options to protect critical habitat. The Ministers can publish a protection statement setting out how critical habitat is "already protected," or the Ministers can make a protection order that puts in place a "prohibition against the destruction of any part of critical habitat."

[262] The Respondents concede that both options "must achieve the same goal – the protection of the location and identified attributes of critical habitat – but they are not required to do so in the same manner."

[263] The Respondents further concede as follows:

> To be clear, the respondent (*sic*) only takes issue with the manner in which the applicants say protection must be provided in every case. The respondent (*sic*) agrees that the protection which must be provided is protection against destruction of critical habitat or any of its identified attributes – in this case, acoustics, water quality, and availability of prey.

[264] As opposed to the Applicants, the Respondents say that, to achieve the conceded extent of protection, an instrument or provision relied upon in a protection statement need not be a legal provision and a federal law "which provides protection in the form of a mandatory, enforceable prohibition against destruction." The Applicants' approach, say the Respondents, "ignores the structure of the SARA and makes meaningless the options provided to the Minister by Parliament in the text of s. 58."

[265] It is immediately apparent, then, that the Respondents believe that the protection of critical habitat under SARA can, at the option of the minister, take one of two forms. The minister can always, if he chooses, issue a protection order which will engage the mandatory prohibitions contained in SARA. But she or he can also choose to do something else: i.e. to issue a protection statement that does not need to provide protection in the form of a mandatory, enforceable prohibition against destruction.

[266] At first blush, it is difficult for the Court to see how a protection statement that does not rely upon a mandatory, enforceable prohibition against destruction of critical habitat can, as the Respondents concede it must, provide protection against destruction of critical habitat or any of its

identified attributes – in this case, acoustics, water quality and availability of prey. However, as the Respondents explain it, the answer is to be found in the statutory interpretation of section 58 of SARA.

[267] The Respondents say that subsection 58(1) of SARA sets out the prohibition against the destruction of physical habitat. But the subsection 58(1) prohibition is "subject to this section." So this means, the Respondents argue, that the subsection 58(1) prohibition does not apply unless the minister issues a protection order in which the critical habitat, or a portion thereof, is specified.

[268] The Respondents agree that, although the Minister can always issue a protection order, she or he is "required to do so [only] if the critical habitat, or a portion of it, is not otherwise protected as required by s. 58(5)." Subsection 58(5) of SARA reads as follows:

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| (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), | (5) Dans les cent quatre-vingts jours suivant la mise dans le registre du programme de rétablissement ou du plan d'action ayant défini l'habitat essentiel, le ministre compétent est tenu, après consultation de tout autre ministre compétent, à l'égard de l'habitat essentiel ou de la partie de celui-ci qui ne se trouve pas dans un lieu visé au paragraphe (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 | *a*) de prendre l'arrêté visé au paragraphe (4), si l'habitat essentiel ou la partie de celui-ci ne sont pas protégés légalement par des dispositions de la présente loi ou de toute |

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| other Act of Parliament, including agreements under section 11; or | autre loi fédérale, ou une mesure prise sous leur régime, notamment les accords conclus au titre de l'article 11; |
| (*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. | *b*) s'il ne prend pas l'arrêté, de mettre dans le registre une déclaration énonçant comment l'habitat essentiel ou la partie de celui-ci sont protégés légalement. |

[269] Giving these provisions their ordinary meaning within the full context of SARA, it seems to me that the minister is obliged to ensure, either through a protection order or a protection statement that critical habitat is "legally protected." SARA itself tells us in section 57 that this is the overall purpose of section 58:

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| **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 | **57.** L'article 58 a pour objet de faire en sorte que, dans les cent quatre-vingts jours suivant la mise dans le registre du programme de rétablissement ou du plan d'action ayant défini l'habitat essentiel visé au paragraphe 58(1), tout l'habitat essentiel soit protégé : |
| (*a*) provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or | *a*) soit par des dispositions de la présente loi ou de toute autre loi fédérale, ou une mesure prise sous leur régime, notamment les accords conclus au titre de l'article 11; |
| (*b*) the application of subsection 58(1). | *b*) soit par l'application du paragraphe 58(1). |

[270] This brings us back to subsection 58(5) and the meaning of "legally protected."

[271] The Respondents appear to suggest that the "option" available to the minister under subsection 58(5) does not require that the protection relied upon in a protection statement be the same as, or equivalent to, the protection afforded by a protection order that brings into play the subsection 58(1) mandatory prohibition against destruction of critical habitat. The Respondents put it as follows:

> If the goal of Parliament was that critical habitat protection always take the form of a "mandatory, enforceable prohibition against destruction," then paragraph 58(5)(*b*) would not have been included in the SARA…. This Court should not presume that the option of a protection statements (*sic*) was meaningless or that the provision of that option does not have a specific role to play in achieving the legislative purpose.

[272] In my view, this argument contains several fallacies. First of all, the meaning that the Respondents ascribe to the word "option" is their meaning. It is not part of the SARA scheme nor a defined term. The Respondents are saying that the minister can choose between a protection order and a protection statement provided there are provisions or measures under SARA or any other Act of Parliament that protect the critical habitat in question, or some portion thereof. It seems to me, however, that subsection 58(5) cannot be used to define "option" in this way. When read in context, subsection 58(5) mandates the minister to ensure that critical habitat is "legally protected." The minister is obliged to make a protection order under subsection 58(5)(*a*) "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." Subsection 58(5)(*b*) is there to oblige the minister to publish a protection statement, which will reveal why a protection order under

subsection 58(5)(*a*) is not required because the legal protection required under subsection 58(5)(*a*) is already in place. I do not think that subsection 58(5)(*a*) should, or can, be read so as to provide the Minister with an "option" to forgo making a protection order under subsection 58(5)(*a*) unless the alternative sources of protection are of the same kind, degree and scope as the protection afforded by subsection 58(5)(*a*), which brings into play the mandatory legal prohibition against the destruction of critical habitat contained in subsection 58(1).

[273] I believe the Respondents are aware of this because they concede that they take issue only with the "manner in which the applicants say protection must be provided in every case." The Respondents agree that "the protection which must be provided is protection against destruction of critical habitat or any of its identified attributes – in this case, acoustics, water quality, and availability of prey."

[274] There are, however, several important issues that are not made clear in this concession:

a. Must the degree, scope and kind of alternative protection relied upon in a protection statement be the same as that which a protection order would provide?

b. Must the alternative protection relied upon be mandatory?

c. Does the "option" claimed by the Respondents allow the minister to rely upon alternative protection in a protection statement (provided all aspects of critical habitat are covered) even if the alternate provision or measure provides something less than a mandatory prohibition against the destruction of critical habitat, and/or the alternate provision or measure allows the Minister a discretion in whether or not

> to enforce a prohibition or in granting licences and dispensations that would excuse compliance with the mandatory prohibitions the protection order brings into play?

[275] Reading the Respondents' submissions as a whole, it is clear to me that they are taking issue with more than the "manner" in which the Applicants say protection must be provided in every case.

[276] They concede that the alternate provisions and measures under subsection 58(5)(*b*) must protect all aspects of critical habitat. However, they deny that the mandatory prohibitions that a protection order brings into play are required, and they, in my view, wish to reserve to the minister a discretion to trim and undercut the mandatory prohibitions of SARA where the minister feels that other competing interests (economic or otherwise) so require.

[277] In the end, the Respondents wish to reserve to the minister as much discretion as possible concerning the extent to which the protection of critical habitat is required under SARA. DFO has already lost the first round of the debate about ministerial discretion that arose in the *Environmental Defence*, above, case and has been forced to confront the reality that critical habitat is more than just geospatial and includes all components of critical habitat.

[278] The submissions made by the Respondents in this case – to the effect that Parliament intended to grant the minister an "option" that will give the minister, under certain circumstances, a

discretion to modify and/or undercut the mandatory prohibitions of SARA – are a further attempt, in my view, to reserve as much discretion to the minister as possible.

[279] This approach is problematic in two ways. First, it conflicts with a plain and ordinary reading of SARA in context. Second, it is contrary to Parliament's expressed intent that the basic protections of SARA (to which there are exceptions) should be mandatory and should not rest with the discretion of particular ministers. These ministers, no doubt, will face enormous pressures from time to time to back away from or modify those mandatory prohibitions for purposes of political or economic expedience. As the Parliamentary debates show, however, this is the very reason why Parliament opted for mandatory prohibition over ministerial discretion, and I believe that, when read in context, subsection 58(5)(*b*) cannot be read in the way suggested by the Respondents.

[280] As the submissions and the evidence before me show, the Ministers would much prefer to use the discretionary powers under a statute such as the *Fisheries Act* than accept the mandatory prohibitions of SARA. I can understand why. However, I think Parliament intended otherwise. The Ministers are free to take this matter up with Parliament if they feel the SARA scheme does not allow them the discretion they need.

[281] In order to support their reading of subsection 58(5)(*b*) the Respondents evoke the specific reference to section 11 agreements found in that subsection:

> [T]he specific reference to s. 11 agreements is an important piece of the puzzle when conducting a statutory interpretation exercise. Section 11 agreements are not listed as an exception to the criteria

> which precedes the reference to them, but as an example of something which meets those criteria – the word used is "including."

[282] The Respondents cite the reference to section 11 agreements as "evidence of Parliament's intention that the instruments relied on in a protection statement can take a different form than the protection provided by an order putting in place the prohibition against destruction."

[283] The Respondents' argument on this point is important and should be referred to in full:

> 18. Section 11 agreements "must provide for the taking of conservation measures" including monitoring the status of the species, implementing education programs, recovery strategies, action plans and management plans, protecting the species' habitat and undertaking research projects. They are not a "federal law" and do not necessarily provide "a mandatory, enforceable prohibition against destruction' as the applicants suggest any instruments included in a protection statement must. Section 11 agreements are designed to be used in a wide variety of different circumstances involving many different kinds of parties to such agreements and flexibility in the terms of such agreements is important and provided for by s. 11 itself.
>
> 19. It is apparent, based on the inclusion of s. 11 agreements in the list of instruments that provide legal protection, that Parliament intended that the alternative to a protection order contain some flexibility in the manner of protection. This is logical as habitats are often complicated ecosystems and may cover vast areas which are also utilized by humans and other species, some of which may also be at risk and have different needs. Flexibility in how to address the complicated issue of the protection of such areas is necessary. A straight prohibition against the destruction of habitat would not, in all circumstances, be the most appropriate approach.

[284] The Respondents appear to be suggesting that, provided a section 11 agreement exists, then the minister is thereby granted "some flexibility in the manner of protection" that is less than, or different from a "straight prohibition against the destruction of habitat." In my view, subsection

58(5)(*a*) cannot be read in this way. Once again, the Respondents are attempting to incorporate into subsection 58(5) a ministerial discretion that was not intended by Parliament.

[285] In my view, it cannot be just any section 11 agreement that allows the minister to opt out of the mandatory obligation imposed by subsection 58(5) to provide legal protection for critical habitat. The section 11 agreement referred to in subsection 58(5)(*a*) would have to be one that legally protects critical habitat in such a way that the mandatory prohibitions triggered by a protection order are not required. This can occur only if the protection to critical habitat provided by a section 11 agreement is the same as, or equivalent to, a mandatory prohibition under section 58. I do not think subsection 58(5)(*a*) can be read as giving the minister the flexibility to dispense with the prohibition against the destruction of critical habitat because that minister may decide, in her or his discretion, that "in all circumstances" such a prohibition would not be appropriate. This would be to import political and other expediencies into the SARA scheme when Parliament has clearly decided to relieve individual ministers of the problems associated with expediency by requiring a mandatory prohibition.

[286] In a further attempt to support the Respondents' interpretation of section 58 of SARA, the following argument is adduced:

> 21. However, when assessing the protection provided it is important to keep in mind that the protection is against *destruction*. In contrast, the *Fisheries Act*, R.S.C. 1985, c. F-14, protects fish habitat against harmful alteration, disruption or destruction. Despite the long established law under the *Fisheries Act*, Parliament chose not to use those terms in the SARA, but to only protect against destruction. Given the use of the separate terms in the *Fisheries Act*, destruction must mean something greater than harmful alteration or disruption.

[287] It is apparent throughout the Respondents' submissions that the Ministers much prefer the discretions and flexibility of the *Fisheries Act* to the mandatory obligations of SARA. Given the demands of ministerial office, this is perfectly understandable. The problem with the discretionary approach to species protection in this context, however, is that it was extensively urged and debated in Parliament, and it was rejected by Parliament. DFO is attempting, in its interpretation of SARA, to maintain this rejected approach, which may very well have been a more convenient one, given the many competing interests DFO is bound to consider. That said, the *Fisheries Act* is an old statute. Parliament recognized that times have changed and that a more coercive approach was necessary for species protection. If the *Fisheries Act* provided the ministers with the kind of approach to species protection that Parliament considered necessary under today's circumstances, it is difficult to see why SARA was considered necessary or why Parliament did not make it clear that the older, discretionary approach that is embodied in the *Fisheries Act* would continue under SARA. The debates in Parliament show a clear intention that SARA would not continue the old approach.

[288] The use of different terms in the *Fisheries Act* cannot, in my view, support the Respondents' interpretation of section 58 of SARA. The meaning of "destruction" is not before me in this application and has not been fully argued with proper evidence and legal authority.

[289] The Respondent here seeks to explain some of the inappropriate policies, guidelines and instruments actually referred to in the Protection Statement as being "additional measures which assist in or support the protection of critical habitat provided by other instruments."

[290] This is a rationalization after the fact. There is no evidence before me to support an argument that the Ministers were referring to "additional measures" other than those provisions and measures upon which they relied to avoid having to make a protection order. The Protection Statement itself does not make this distinction, and I have no evidence to suggest that this is what DFO intended.

**Legal requirements of a Protection Statement**

[291] The Applicants challenge the lawfulness of the Protection Statement because it relies on "tools," such as non-statutory instruments, provincial laws, prospective laws and discretionary laws, to protect critical habitat. The Applicants submit that a provision cited in a protection statement under subsection 58(5)(*b*) of SARA must, at a minimum, meet the following five criteria:

1. it must be a legal provision;
2. apart from section 11 conservation agreements, it must be a federal law;
3. the legal protection relied on must be in force at the time the protection statement is issued;
4. the legal protection must act as a substitute for the prohibition in subsection 58(1) – it must be a mandatory, enforceable prohibition against destruction;
5. the legal provisions must protect all components of critical habitat.

**[292]** These criteria are derived from an examination of the words in subsection 58(5)(*b*), read in their entire context and in their grammatical and ordinary sense, in a way that is harmonious with the scheme of the Act, the object of the Act and the intention of Parliament. See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at paragraph 26.

**Plain language interpretation of subsection 58(5)(*b*)**

**[293]** At the material time, subsection 58(5)(*b*) of SARA described a protection statement as "a statement setting out how the critical habitat or portions of it, as the case may be, are legally protected.

[294] The use of the word "legally" to modify "protected," taken in conjunction with the reference to "provisions of" or "measures under" an "Act of Parliament," in subsection 58(5)(*b*) confirm that a provision cited in a protection statement should be a law or regulation as opposed to a policy or guideline. It is also clear that a protection statement is supposed to cite provisions of or under a federal law, as opposed to provisions of provincial or municipal laws.

[295] Sections 57 and 58 communicate urgency. Subsection 58(5)(*b*) is written in the present tense. A protection statement must set out how the critical habitat or portions of it, "are" legally protected – not how critical habitat could be or will be legally protected. Such protection must be in place within 180 days of the Recovery Strategy. As now conceded by the Respondents, provisions cited in a protection statement cannot include plans for future legal protection.

**Role of a Protection Statement within the SARA Scheme**

[296] As the Applicants point out, a protection statement recognizes that protection under SARA is not required in certain instances where that protection is already provided under some other federal law. A protection statement avoids duplication of already existing legal protection.

[297] Within the SARA scheme, a protection statement acts as a substitute for a protection order. Hence, the provisions cited in a protection statement act in place of the prohibition in subsection 58(1) and the permitting provision in section 73 of SARA. Importantly, in my view, the provisions cited in a protection statement are intended to provide the same protection for critical habitat as that provided by a protection order.

[298] According to a draft policy recently released by Environment Canada, the determination of whether critical habitat is legally protected requires consideration of whether the provisions cited in the protection statement prevent potentially destructive activities (such as the activities identified in the relevant recovery strategy) that are likely to destroy critical habitat. This approach confirms that, like the prohibition in subsection 58(1), provisions cited in protection statements must prevent

activities that could destroy parts of the critical habitat. See *Draft Species at Risk Policies*, above, at page 15.

**Intention of Parliament – Habitat protection must be mandatory and meaningful**

[299] The legislative history of section 58, as cited by the Applicants, illustrates that Parliamentarians recognized that critical habitat protection under SARA must be mandatory and not discretionary. Parliament did not intend to allow ministers to "choose" whether to protect critical habitat.

**Protection Statement unlawfully includes non-statutory instruments**

[300] The Protection Statement in this application cites the following non-statutory instruments: code of conduct and outreach initiatives; whale-watching guidelines; a statement of practice with respect to the mitigation of seismic sound in the marine environment; sensitive benthic areas policy; wild salmon policy; integrated fisheries management plans; and military sonar protocols. These are policies, not laws that legally protect critical habitat from destruction.

[301] The Federal Court of Appeal has confirmed that it is trite law that ministerial policy does not, and cannot, bind the minister. While non-statutory instruments may affect behaviour, they do

not compel behaviour. Policies may guide, but they do not bind. See *Arsenault*, above, at paragraph 38; and *Carpenter Fishing Corp.*, above, at paragraph 28.

[302] As Canada conceded in *Ahousaht Indian Band*, above, at paragraph 752, "DFO policies … do not bind or confine the Minister in his or her exercise of that discretion." Judicial consideration of DFO policy has consistently held that it is non-binding. Courts have also held that whale-watching guidelines and fisheries management plans are not legally binding. See *Carpenter Fishing Corp.*, above, at paragraph 28; *R. v. Richards*, [1991] B.C.J. No. 4101 (BC Prov. Ct.) (QL) and *Arsenault*, above, at paragraphs 33, 38, 43.

[303] Courts have given legal effect to a "guideline" or "policy" in limited instances where the enabling statute mandates the issuance of the policy, the policy is mandatory and a prohibition attaches to a failure to follow the policy. This is not the case with the policies cited in the Protection Statement presently before the Court. See *Oldman River*, above, at paragraphs 33, 36-37; and *Glowinski*, above, at paragraphs 40, 43.

[304] Additionally, as explained in the Wallace Affidavit, at the time the Protection Statement was issued a number of the policies cited therein were not yet finalized or implemented and some of the policies do not even apply to the Resident Killer Whales' critical habitat.

**Protection Statement unlawfully cites possible future provisions**

[305] The Protection Statement cites legislative tools that the DFO might use in the future to protect critical habitat from destruction.

[306] As the Respondents now concede, a protection statement cannot cite and rely upon prospective laws or those that require some subsequent step, such as the issuance of a regulation, to engage or trigger legal protection. Provisions that rely on the prospective exercise of legislative authority cannot and do not legally protect until that authority is exercised.

[307] This point is confirmed in case law under the American *Endangered Species Act of 1973*, Pub. L. No. 93-205, 87 Stat. 884. For example, in *Greater Yellowstone Coalition*,above, at pages 14-16, the U.S. Federal Court, in considering whether existing regulatory mechanisms were adequate to protect the grizzly bear population, held that "[p]romises of future, speculative action are not existing regulatory mechanisms."

[308] The Protection Statement in the present case unlawfully relies on speculative or future regulatory action to protect critical habitat. For example, the Protection Statement cites sections 35 and 36 of the *Oceans Act*, S.C. 1996, c. 31, as legally protecting critical habitat. These provisions allow the Minister of Fisheries and Oceans to designate and manage marine protected areas. However, there are no legally designated marine protected areas in existence, under sections 35 or 36 of the *Oceans Act*, in the critical habitat of the Resident Killer Whales. See *Oceans Act*, sections 31, 35 and 36; Wallace Affidavit at paragraphs 75-77.

[309] In addition, a marine protected area under the *Oceans Act* cannot be cited in a protection statement under subsection 58(5). Critical habitat falling within a marine protected area already requires a distinct type of protection order under sections 58(2) and (3).

[310] DFO's reliance on the prospective or future ability to regulate toxins that could destroy critical habitat pursuant to the *Canadian Environmental Protection Act* 1999, S.C. 1999, c. 33, or to set conditions on fishing licences pursuant to section 22 of the *Fishery (General) Regulations*, SOR/93-53, suffers from this same legal defect.

[311] As the Applicants point out, if implemented, some provisions of the *Oceans Act* could be lawfully cited in a protection statement. For example, sections 31 and 32 allow DFO to create integrated management plans that govern all activities affecting marine areas. Such plans can include measures to provide legal protection for the critical habitat of the Resident Killer Whales.

**Protection Statement unlawfully relies on ministerial discretion**

[312] The role of ministerial discretion appears to be the principal area of contention between the parties. As I have discussed above, a protection statement is intended to identify the substitutes for a protection order within the SARA scheme. In my view, therefore, to appropriately substitute for the mandatory enforceable legal protection afforded by subsection 58(1), the legal provisions cited in a protection statement must be mandatory and enforceable.

[313] It is not only the prohibition in subsection 58(1) that is engaged by a protection order but also the permitting provisions. As noted above, sections 73 and 74 limit a minister's ability to issue

any permit that will affect critical habitat. Importantly, under SARA no permits may be issued that could jeopardize the survival and recovery of the species.

[314] In contrast, it seems to me that the provisions cited in the Protection Statement grant a broad, unstructured discretion to permit harmful activities, including those that would destroy critical habitat. Such discretion does not legally protect critical habitat from destruction because discretionary protection is neither mandatory, nor enforceable.

**The *Fisheries Act* and *Regulations***

[315] As counsel's submissions have now made clear, the competing interpretations of section 58 of SARA offered by the parties come to a head over the Ministers' reliance upon the *Fisheries Act* to support the legality of the Protection Statement.

[316] The Respondents say that "section 35 of the *Fisheries Act* provides protection which meets the requirements of paragraph 58(5)(*b*)." The Respondents, however, also concede as follows:

> 30. It is true that the statutory scheme of the *Fisheries Act* allows for the issuance of habitat alteration, disruption or destruction ("HADD") authorisations at the discretion of the Minister of Fisheries and Oceans. However, the ability to issue authorisations does not negate the fact that s. 35 provides habitat protection, nor does it mean that s. 35 can not be relied upon for the purposes of paragraph 58(5)(b).

[317] The Respondents further argue that the

> same logic applies to the protection provided by the prohibition set out in s. 36 of the *Fisheries Act*, with the difference that the authority to breach the prohibition is provided by regulation, not by authorisation of the Minister of Fisheries and Oceans.

[318] In answer to the argument that the Ministers' discretionary powers under the *Fisheries Act* could mean that he or she could allow activities that would undermine the mandatory prohibitions of SARA and compromise or undercut the protection of critical habitat for the Resident Killer Whales, the Respondents argue as follows:

> 35. The applicants argue both that s. 35 of the *Fisheries Act* does not provide protection from the destruction of the geophysical habitat caused by fishing, and that the management of fishing under the *Fisheries Act*.
>
> 36. At any given time, the way in which fishing can be conducted and the quantity of fish which can be harvested is managed through the issuance of licences with gear conditions, and in some cases quota restrictions, and through opening and closing the fishery for various users. In the case of salmon fishing in killer whale critical habitat, restrictions on fishing are provided in the *Fisheries Act*, *The Fishery (General) Regulations*, s. 22, the *Pacific Fisheries Regulations, 1993*, SOR/93-54, ss. 51-60 and schedule VI, and the *British Columbia Sport Fishing Regulations 1996*, SOR/96-137, ss. 42-50 and schedule VI. The issuance of licences with conditions, and the opening and closing of fisheries are "measures under" an Act of Parliament as they are specifically provided for in the *Fisheries Act* and its regulations.
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> 37. These measures are not static, and nor should they be, as conditions in the fisheries change over time and the measures must be adjusted accordingly. The discretion of the Minister of Fisheries and Oceans to vary these measures over time is necessary to allow for the appropriate management of the fisheries and the protection of fish. However, the existence of that discretion does not negate the protection provided.
>
> 38. At any given time, a variety of these measures are in place to protect fish and hence the availability of prey. The protection statement would only fail to meet the requirements of paragraph

> 58(5)(b) if there was a point in time when the Minister of Fisheries and Oceans exercised his or her discretion to not put in place measures to limit the harvest such that the availability of killer whale prey could be destroyed. This is a question of fact. The respondent says that the measures in place at the time of the protection statement were sufficient to protect the availability of killer whale prey from destruction. In any event, the burden is on the applicants to show otherwise and there is no evidence in this case that the measures in place at the time of the protection statement were insufficient to prevent the destruction of the availability of prey.

[319] I agree with the Applicants that to evaluate whether the Protection Statement meets the legal standard required under section 58, the legal provisions cited in the Protection Statement must be compared with the protection offered through SARA. There is a clear contrast between the legal protection afforded critical habitat under subsection 58(1) of SARA and the broad discretion under the *Fisheries Act*.

[320] The *Fisheries Act* and regulations are cited in the Protection Statement purportedly to protect critical habitat from numerous threats. However, the regulatory scheme under the *Fisheries Act* affords far more discretion than SARA. Absent a specific regulation protecting critical habitat, the *Fisheries Act* scheme, including section 35, cannot, in my view, lawfully substitute for an order under subsection 58(4).

[321] The *Fisheries Act* creates a comprehensive scheme for the management of fisheries in Canada. It is highly discretionary legislation that grants broad powers to the Minister of Fisheries and Oceans to manage the fishery with few statutory limitations. As recognized by the Court of Appeal in *Carpenter Fishing Corp.*, above, at paragraphs 35 and 37, Parliament has given DFO the

"widest possible freedom to manoeuvre" in regulating the fishery. For example, section 7 grants the Minister "absolute discretion" over the issuing of fisheries licences. Subsection 35(2) grants the Minister complete discretion to authorize the destruction of fish habitat. Section 22 of the *Fishery (General) Regulations*, above, grants the Minister complete discretion to attach conditions to a fishing licence. See *Ecology Action Centre Society v. Canada (Attorney General)* 2004 FC 1087, 262 F.T.R. 160 (*Ecology Action Centre*) at paragraph 54 and *Ahousaht Indian Band*, above, at paragraph 752.

[322] DFO's discretion under the *Fisheries Act* is not limited by policy or plans. See *Carpenter Fishing Corp.*, above, at paragraph 28, *Ahousaht Indian Band*, above, at paragraph 752; and *Arsenault*, at paragraphs 38, 43.

[323] The only provisions of the *Fisheries Act* specifically referenced in the Protection Statement are sections 35 and 36. Section 35 of the *Fisheries Act* states as follows:

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| 35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. | 35. (1) Il est interdit d'exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson. |
| (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act. | (2) Le paragraphe (1) ne s'applique pas aux personnes qui détériorent, détruisent ou perturbent l'habitat du poisson avec des moyens ou dans des circonstances autorisés par le ministre ou conformes aux règlements pris par le gouverneur en conseil en |

application de la présente loi.

[324] As this Court confirmed in *Ecology Action Centre*, above, at paragraph 74, "section 35 does not impose a blanket prohibition on HADD [harmful alteration, disruption and destruction of fish habitat]." The approval of destruction of fish habitat under section 35 is at the complete discretion of the Minister.

[325] While, on its face, the *Fisheries Act* may appear to provide protection for critical habitat that is similar to SARA, it would appear that DFO has a much broader discretion to authorize habitat destruction under the *Fisheries Act* than under SARA. Under the *Fisheries Act*, the Minister's ability to affect critical habitat is unlimited. For example, section 36 of the *Fisheries Act* prohibits the deposit of a deleterious substance into waters frequented by fish but allows for the authorization of such deposits through regulation at Cabinet's discretion. See Janice Walton, *Blakes Canadian Law of Endangered Species (*Toronto: Carswell, 2007*)*. By contrast, SARA restricts the Minister's ability to affect critical habitat. See Walton, 2007, at pages 2-31 to 2-33 and SARA, sections 73 and 74.

[326] Courts have been loath to interfere with the Minister's discretion under section 35 to permit or prohibit destruction of fish habitat. See *Ecology Action Centre*, above.

[327] Notably, as this Court has acknowledged, section 35 does not prevent all destruction of fish habitat. For example, it does not prevent destruction of fish habitat that results from fishing

activities – an identified threat to Resident Killer Whale critical habitat. See *Ecology Action Centre*, above, at paragraphs 75-78, 91.

[328] By contrast, there is no discretion granted under SARA to permit the destruction of critical habitat. As the Applicants point out, the SARA permitting provisions limit activities that could affect critical habitat and preclude authorization of any activity that could jeopardize survival and recovery of the species. I agree with the Applicants that the subsection 58(1) prohibition against destruction of critical habitat applies to all critical habitat and against any activity that might destroy it.

[329] The Applicants submit that it is possible that the *Fisheries Act* could be used to provide legal protection for critical habitat. For example, Canada could choose to pass a specific regulation that protects critical habitat or that governs the exercise of section 35 discretion where critical habitat might be altered or affected. However, those actions have not been taken. See *Fisheries Act*, sections 35(2) and 43.

[330] It seems to me that the arguments advanced by the Respondents to justify reliance upon the *Fisheries Act* in the Protection Statement are not persuasive for a number of reasons.

[331] First of all, the discretionary powers of the Minister under the *Fisheries Act* cannot, in my view, be equated with legislation that may at some future date be repealed or amended. The discretionary power was present, and relied upon, at the time the Protection Statement was made. This means that the Minister chose not to issue a protection order that would provide a mandatory

prohibition against the destruction of critical habitat and to substitute the discretionary powers under the *Fisheries Act*. In my view, that is not equivalent protection. Nothing in the *Fisheries Act* says that the Minister cannot exercise his or her discretion under that Act in ways that will modify or undercut the mandatory prohibitions provided by SARA. Moreover, nothing in SARA says that the protection that the *Fisheries Act* gives to critical habitat cannot be modified or undercut by the Minister exercising his or her powers under the *Fisheries Act*. The fact that the Minister may not yet have done this is, in my view, irrelevant. Under the Protection Statement the Minister has, in fact, retained the discretionary power to act towards the critical habitat of the Resident Killer Whales. In my view, the Parliamentary record, as cited by the Applicants, reveals that it was Parliament's intent, in bringing SARA into being, that the Minister would not have the discretion to deal with critical habitat of endangered species in accordance with the discretion powers and the scheme of the *Fisheries Act*.

[332] The Minister has not and, in my view, could not undertake to exercise her powers under the *Fisheries Act* in a way that would preserve the mandatory prohibitions under SARA. The Respondents' argument that the Protection Statement remains valid unless and until something happens in the future is, in my view, fallacious. The whole point of SARA is to provide protection for the critical habitat of species at risk in such a way that those protections cannot be set aside or modified through the exercise of ministerial discretion at some time in the future. The protection for critical habitat that a protection order brings into being is not protection that can be modified or compromised by ministerial discretion. The Minister cannot relinquish or curtail her discretionary powers under the *Fisheries Act*. Hence, reliance upon the *Fisheries Act* means that the critical

habitat of the Resident Killer Whales is protected subject to the Minister deciding otherwise. This was not the intent of Parliament when it brought SARA into being. The Parliamentary record is clear.

[333] As the Applicants point out, the following points are also supportive of this position:

a. The Minister's discretion to allow destruction under section 35 is broad and unfettered, and not limited by any other statutory provisions. In contrast, a section 58(1) protection order prohibits critical habitat from ever being destroyed; such critical habitat may only be "affected" and only for those limited purposes and under those strict pre-conditions set out in subsections 73(2) and 73(3) of SARA;

b. The *Pacific Fisheries Regulations* and the *British Columbia Sport Fishing Regulations* do not refer to, or make any provision for, salmon allocation for the Resident Killer Whales. Instead, these two regulations lay out the general rules that govern Pacific commercial and recreational fisheries – including the salmon fishery – and the Minister's broad discretion to manage those fisheries as she sees fit. No provision of either regulation requires the Minister's discretion to be exercised in a way that protects salmon for whales;

c. None of the provisions or the statutory instruments cited by DFO in the Protection Statement, namely the *Fisheries Act* and the *Fishery (General) Regulations*, refer to, or make any provision for salmon allocation for the Resident Killer Whales. Instead, these provisions further codify the Minister of Fisheries and Oceans' broad discretion to regulate the fishery however she sees fit. The *Fisheries Act* and the

*Fishery (General) Regulations* allow the Minister to take all kinds of actions for almost any reason – but do not require any particular action to protect Resident Killer Whale critical habitat, including prey availability;

d. The Protection Statement does not cite either the *Pacific Fisheries Regulations, 1993*, or the *British Columbia Sport Fishing Regulations, 1996*, referred to in paragraph 36 of the Respondents' submissions. Nor does the Protection Statement refer to any specific licenses, any existing licensing conditions, or any existing fisheries closures referred to by the Respondents in paragraph 36 of their Supplemental Submissions;

e. The Respondents suggest that it is the Applicants' burden to show that any licensing measures in place at the time of the Protection Statement were insufficient to prevent the destruction of the availability of prey. However, to be lawful, the Protection Statement would have had to "set out how" a particular license protected critical habitat. There is no evidence on the record that any such licenses, license conditions, or fisheries closures actually exist. As DFO chose not to cite any licenses in its Protection Statement or file any evidence of their existence, it must be inferred that no such licenses exist that could satisfy section 58;

f. The only evidence on the record concerning the Chinook salmon management at the time the Protection Statement was made is found in the Affidavit of Dr. Scott Wallace. Dr. Wallace avers that at the time the Protection Statement was made Chinook stocks were not being managed to ensure salmon availability for the Resident Killer Whales;

g. The Respondents submit that the Minister should be permitted to rely on her discretion to "vary fisheries measures over time" to protect salmon availability for Resident Killer Whales. However, as rightly conceded by the Respondents, the Protection Statement must be judged based on the law that exists at the time the statement is made. It is not lawful for a protection statement to rely on the *prospective ability* to regulate. Therefore, the Minister cannot rely on her prospective ability to issue licenses, or limit openings or any other management action that she has not taken at the time the statement is made;

h. As confirmed by the Federal Court, the Minister is not compelled in any way to issue licenses that have any conditions or provisions protecting critical habitat of the Resident Killer Whales. The Minister cannot rely on her absolute discretion to manage the fishery to discharge her mandatory duty to protect a component of critical habitat.

***Canadian Environmental Assessment Act* (CEAA)**

[334] The Applicants also submit that DFO's reliance on the *Canadian Environmental Assessment Act* to provide legal protection for critical habitat suffers from the same kind of legal defect that characterizes its reliance on the *Fisheries Act*. CEAA is largely a procedural statute that sets out the steps to be taken before projects may proceed at the discretion of the Minister. CEAA does not prohibit the approval of environmentally destructive projects. See David Boyd, *Unnatural Law*

(Vancouver: UBC Press, 2003) at pages 150-154. For reasons already given in relation to the *Fisheries Act*, I agree.

**Provincial laws are not laws of Parliament**

[335] As now conceded by the Respondents, section 58 of SARA clearly requires that critical habitat be protected under a "law of Parliament" or alternatively under a section 11 conservation agreement. Laws of other legislatures and municipal laws cannot be cited in a protection statement.

[336] The Protection Statement unlawfully cites the Robson Bight (Michael Bigg) Ecological Reserve created pursuant to British Columbia's *Ecological Reserve Act*, R.S.B.C. 1996, c. 103, which covers a minute portion of the critical habitat area of the Resident Killer Whales. There are no conservation agreements in place.

**Protection Statement fails to set out how all components of critical habitat are legally protected**

[337] I also agree with the Applicants that the Protection Statement is unlawful because it is intended to provide legal protection for only certain components of critical habitat and fails to

prevent the most significant threats to critical habitat: reduction in prey availability, toxic contamination, and physical and acoustic disturbance.

[338] The Protection Statement is divided into two sections. The first section purports to set out how the "geospatial and geophysical attributes" of critical habitat are legally protected. The threats to habitat included in this first page are from industrial activity, destructive fishing gear and vessel anchors. These are not the most significant threats to critical habitat identified by the Recovery Team, yet these activities threatening geophysical components of critical habitat are the only activities for which the Protection Statement cites any legislation, regulations and/or policies which would be used to "provide protection against such destruction."

[339] The second part of the Protection Statement addresses degradation of the acoustic environment, degradation of marine environmental quality and declining availability of prey. It lists tools that are "available to manage and mitigate threats to [ecosystem] functions." This division reflects DFO's unlawful policy distinction between geophysical components, which it has a duty to protect, and biological components of critical habitat which it has no duty to protect.

**Conclusions**

[340] I believe that the Applicants are correct in saying that the Minister of Fisheries and Oceans erred in law in issuing under subsection 58(5)(*b*) of SARA a Protection Statement that relies upon policy and other non-statutory instruments, prospective laws and ministerial discretion under the

*Fisheries Act* and the CEAA to provide legal protection for the critical habitat of the Resident Killer Whales.

## JUDGMENT

**THIS COURT hereby makes the following declarations:**

1. With respect to the Protection Statement Application:
    a. The Minister of Fisheries and Oceans erred in law in determining that the critical habitat of the Resident Killer Whales was already legally protected by existing laws of Canada;
    b. Section 58 of SARA requires that all elements of critical habitat be legally protected by the competent ministers;
    c. Outreach programs, stewardship programs, voluntary codes of conduct or practice, voluntary protocols and/or voluntary guidelines and policy do not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited policy documents in the Protection Statement;
    d. 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;
    e. Prospective laws and regulations that are not yet in force do not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited provisions in the Protection Statement that are not yet in force;

f. Provincial laws do not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited provincial laws in the Protection Statement.

2. With respect to the Protection Order Application:

a. The Ministers acted unlawfully in limiting the application and scope of the Protection Order made under section 58(4) of SARA;

b. The Ministers have a duty under section 58 to provide legal protection against destruction for all components of the Resident Killer Whales' critical habitat;

c. The Ministers acted unlawfully when they limited the application and scope of the destruction prohibition in section 58(1) of SARA to certain components of critical habitat but not others;

d. It was an error of law for the Ministers to limit the application and scope of the Protection Order to provide legal protection for geophysical parts of critical habitat only;

e. It was unlawful for the Ministers to exclude the ecosystem features of Resident Killer Whales' critical habitat, including availability of prey and acoustic and environmental factors from the scope of the Protection Order.

3. The parties are at liberty to address the Court on the issue of costs. This should be done, initially at least, by way of written submissions.

"James Russell"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | T-541-09, T-1552-08 |
| **STYLE OF CAUSE:** | Georgia Strait Alliance et al. |
| **PLACE OF HEARING:** | VANCOUVER |
| **DATE OF HEARING:** | June 14, 2010 |
| **REASONS FOR Judgment And Judgment:** | RUSSELL, J. |
| **DATED:** | December 7, 2010 |

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