Federal Court  Cour fédérale

Date: 20110728

Dockets: T-1437-10
T-1439-10

Citation: 2011 FC 962

Ottawa, Ontario, July 28, 2011

PRESENT: The Honourable Mr. Justice Crampton

Docket: T-1437-10

BETWEEN:

ALLAN ADAM on his own behalf and
on behalf of all other members of
Athabasca Chipewyan First Nation;
ATHABASCA CHIPEWYAN FIRST NATION;

ALPHONSE LAMEMAN on his own behalf and
on behalf of all other members of
Beaver Lake Cree Nation;
BEAVER LAKE CREE NATION;

HARRY SHARPHEAD on his own behalf and
on behalf of all other members of
Enoch Cree Nation; and
ENOCH CREE NATION

Applicants

and

MINISTER OF THE ENVIRONMENT and
ATTORNEY GENERAL OF CANADA

Respondents

Docket: T-1439-10

AND BETWEEN:

ALBERTA WILDERNESS ASSOCIATION; and PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT

Applicants

and

MINISTER OF THE ENVIRONMENT and ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are First Nation bands, members of those bands and environmental organizations who have been attempting to persuade the Minister of the Environment to: (i) finalize a recovery strategy for boreal caribou located in Northeastern Alberta; and (ii) recommend, pursuant to subsection 80(2) of the *Species at Risk Act*, SC 2002, c 29 (SARA), that the Governor in Council make an emergency Order providing for the protection of those caribou.

[2] Having been unsuccessful to date in those attempts, they filed applications with this Court seeking, among other things:

1. An Order declaring that the Minister has failed to prepare a recovery strategy for the caribou within the time period mandated by subsection 42(2) of SARA;

2. an Order in the nature of *mandamus* compelling the Minister to comply with his duties under subsection 80(2) of SARA, as described above; and

3. in addition or in the alternative to the foregoing, an Order declaring that the Minister's failure to recommend that the Governor in Council make an emergency Order to provide for the protection of the boreal caribou in north eastern Alberta is unlawful or unreasonable.

[3] Subsequent to filing their applications, the Minister explicitly declined to make a recommendation under subsection 80(2), when he accepted a recommendation of the Deputy Minister, Environment Canada, that he conclude that "there are no imminent threats to the national survival or recovery of boreal caribou in Canada," as contemplated by that provision.

[4] It is common ground between the parties that even if the Minister had made a recommendation to the Governor in Council pursuant to subsection 80(2), the Governor in Council may have declined to issue the requested emergency Order, after weighing and balancing relevant public-interest considerations.

[5] For the reasons set forth below, I have decided to:

(i) set aside the Minister's decision and remit the matter back to him for reconsideration in accordance with these reasons;

(ii) defer, until September 1, 2011, ruling on the Applicants' request for the above-described declaratory relief; and

(iii) reject the Applicants' request for an Order in the nature of *mandamus*.

I. Background

[6] There are two main groups of Applicants in these proceedings. The first group, (collectively, the First Nations), consists of three individuals representing themselves, the other members of their respective First Nations bands, and the bands themselves, namely: Athabasca Chipewyan First Nation, Beaver Lake Cree Nation, and Enoch Cree Nation. All three of these First Nations have traditionally hunted boreal caribou. The other group of Applicants consists of the Alberta Wilderness Association and the Pembina Institute for Appropriate Development (the ENGOs), which are not-for-profit environmental associations that have a genuine interest in the survival and recovery of the boreal caribou.

[7] On July 15, 2010, the First Nations wrote to the Minister of the Environment requesting that he recommend, within 45 days, that the Governor in Council make an emergency Order under section 80 of the SARA for the protection of the seven herds (the Seven Herds) of boreal caribou that roam in north eastern Alberta.

[8] On August 17, 2010, the ENGOs wrote to the Minister in support of the First Nations, and essentially repeated their request that he recommend that an emergency Order be made to protect the Seven Herds.

[9] After failing to receive a response from the Minister, the First Nations and the ENGOs filed their respective applications for relief from this Court, on September 8, 2010. The applications were consolidated by Prothonotary Tabib on October 21, 2010.

II. The Relevant Legislation

[10] Pursuant to subsection 15(1), the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) is mandated to, among other things, assess the status of each wildlife species that it considers to be at risk and, as part of the assessment: (i) identify existing and potential threats to the species; and (ii) classify the species as extinct, extirpated, endangered, threatened or of special concern.

[11] Pursuant to subsection 27(1.1), the Governor in Council may review assessments made by COSEWIC and may, on the recommendation of the Minister, accept such assessments and add the species in question to the List of Wildlife Species at Risk (the List) set forth at Schedule 1 to the SARA.

[12] Pursuant to subsection 37(1), the Minister must prepare a strategy (Recovery Strategy) for the recovery of any species listed on the List.

[13] To supplement the various provisions in SARA regarding the protection and recovery of species, subsections 80(1) and (2) provide for the issuance of emergency protective Orders as follows:

Species at Risk Act, SC 2002, c 29	*Loi sur les espèces en péril*, LC 2002, ch 29
Emergency order	Décrets d'urgence
80.(1) The Governor in Council may, on the recommendation of the competent minister, make	80.(1) Sur recommandation du ministre compétent, le gouverneur en conseil peut

an emergency order to provide for the protection of a listed wildlife species.	prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.
Obligation to make recommendation	Recommandation obligatoire
(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.	(2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.
[…]	[…]

III. The Decision under Review

[14] After summarizing the procedural history in this matter, the recommendation that was endorsed by the Minister (the Decision) addressed the current status of the boreal caribou. Among other things, this part of the Decision noted the following: Boreal caribou is one of six different populations that make up the population of "woodland caribou." There are approximately 39,000 boreal caribou in Canada, distributed across 57 herds that live in the boreal forest region of seven provinces and two territories. In order to thrive, those caribou need large areas of suitable habitat, low levels of human disturbance, and low numbers of predators. In 2002, COSEWIC assessed the general population of boreal caribou in Canada to be threatened, within the meaning of the SARA. The basis for that assessment was that sub-populations had decreased throughout most of the boreal caribou's range, the distribution of boreal caribou had contracted, and boreal caribou was threatened by habitat loss and increased predation. In 2008, a scientific review conducted by Environment Canada (the 2008 Scientific Review) concluded that 30 of 57 herds, also known as local populations, across Canada are not currently self-sustaining, meaning that they are not stable or growing and are not sufficiently large enough to withstand random events and human-caused

pressures. Of those 30 herds, 21 were considered to be the subject of high levels of disturbance, indicating that their habitat conditions need to be improved to restore the herds to self-sustaining levels and reduce their risk of extirpation. Those 21 herds include all 13 herds in Alberta, which face an elevated risk of extirpation. With respect to the Seven Herds in particular, their numbers are "insufficient for these populations to be self-sustaining."

[15] The Decision then addressed the emergency powers in section 80 of SARA. In this regard, it noted that the 2009 draft *Species At Risk Policies* issued by Environment Canada (the Draft Policies) "describe factors that the Minister will consider in forming his opinion" under subsection 80(2) as to whether "a species faces imminent threats to its survival or recovery." The Decision stated that these factors, (which are identified at page 17 of the Policies), include whether:

i. a serious, sudden decline in the species' population and/or habitat that jeopardizes the survival or recovery of the species is in progress and is anticipated to continue unless immediate protective actions are taken;

ii. there is a strong indication of impending danger or harm to the species or its habitat, with inadequate or no mitigation measures in place to address the threat, such that the survival or recovery of the species is at risk; or

iii. one or more gaps have been identified in the existing suite of protection measures for the species that will jeopardize its survival or recovery, and it is not possible to achieve protection by other means in a timely fashion.

[16] Based on the premise that the current range and conditions are sufficient for 27 of the 57 herds of boreal caribou in Canada, the Decision stated that "there are no imminent threats to the survival of boreal caribou" and thus a section 80 order is not warranted at this time to protect the survival of boreal caribou.

[17] That said, the Decision proceeded to assess whether such an order is warranted based on imminent threats to the recovery of the species. In this regard, the Decision began by noting that assessing the requirement for a section 80 order based on threats to the recovery of the species is less straightforward than it is for assessing the need to protect the survival of a species, because the objectives for the recovery of a species will be set forth in the national Recovery Strategy, which has not yet been finalized. The Decision also noted that Environment Canada has publicly acknowledged that the Recovery Strategy for boreal caribou was due in 2007, but on the basis of consultation with the Department's external Species at Risk Advisory Committee, the Department agreed that the Recovery Strategy should identify at least some critical habitat. The Decision added that the science needed to do this has been identified and that it has been publicly communicated that the Recovery Strategy will be posted in the summer of 2011.

[18] It was then observed that the provinces and territories are responsible for managing terrestrial species on provincial and territorial land, and that Alberta and other jurisdictions have developed their own recovery plans for their caribou that include population and distribution objectives.

[19] After briefly discussing Alberta's 2005 Woodland Caribou Recovery Plan, the decision repeated its earlier description of the situation faced by the 13 herds in that province, and observed

that achieving recovery of many of these caribou populations will be extremely challenging, given the current status and trend.

[20] With respect to the Seven Herds in particular, it was noted that the existing gap in national boreal caribou distribution will widen. It was acknowledged that this would: (i) have potential negative consequences, due to disruption of genetic and demographic processes that would further increase the risk to the recovery of boreal caribou in Canada; and (ii) represent a range retraction for boreal caribou in Canada. It was also observed that the extirpation of the Seven Herds would impact the boreal caribou populations in the Northwest Territories, British Colombia and especially Saskatchewan. Moreover, it was recognized that the ability of those jurisdictions to recover their portion of the shared populations of boreal caribou would be constrained by Alberta's approach to recovery.

[21] Notwithstanding all of the foregoing, it was then concluded that the boreal caribou population in Manitoba and eastern Canada, which appear to be healthy, widespread and with ample gene flow among them, could allow Canada to maintain a self-sustaining population of boreal caribou.

[22] In this regard, the Board noted that Alberta's local populations comprise only 6% of the total number of boreal caribou in Canada, and that the Seven Herds only represent 3% of the national boreal caribou population. The Board added that while the extirpation of the Seven Herds would result in further range retraction in the middle of the range of boreal caribou and would constrain national recovery objectives: (i) it is possible to maintain a self-sustaining population of boreal

caribou in eastern Canada; and (ii) the eastern Canadian local populations could provide the basis for achieving a national recovery objective.

IV. Issues

[23] In their initial submissions, the Applicants submitted that the Minister's delay in making a decision under subsection 80(2) constituted a reviewable refusal to recommend an emergency Order under that provision. However, given that the Minister subsequently rendered his Decision, the Applicants concede that it is no longer necessary for the Court to address this issue.

[24] The remaining issues that have been raised by the Applicants can be grouped as follows:

i. Did the Minister err in interpreting subsection 80(2)?

ii. Should an Order of *mandamus* be granted compelling the Minister to make a recommendation under subsection 80(2)?

iii. Did the Minister err in failing or refusing to recommend an emergency Order under subsection 80(2), by failing to consider relevant factors?

iv. Should the Court declare that the Minister has contravened subsection 42(2) by failing to post a proposed Recovery Strategy for woodland caribou in the public registry?

V. Standard of Review

[25] The interpretation of a decision-maker's enabling (or home) statute, or "statutes closely connected to its function, with which it will have particular familiarity" (Closely Related Statute), is usually accorded deference and subjected to review on a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 54, [2008] 1 SCR 190 [*Dunsmuir*]; *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at paragraph 34, [2011] 1 SCR 3; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at paragraph 26, [2011] 1 SCR 160 [*Smith*]). However, where there are constitutional considerations at play, no such deference is warranted, at least insofar as those considerations are concerned (*Dunsmuir*, above, at paragraph 58; *Smith*, above, at paragraph 37).

[26] In *R v Badger*, [1996] 1 SCR 771 at paragraph 41 (available on CanLII) [*Badger*], the Supreme Court stated that "[i]nterpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown." More recently, in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paragraph 42, [2010] 3 SCR 103 [*Little Salmon*], the Supreme Court observed that "[t]he honour of the Crown has thus been confirmed in its status as a constitutional principle." In addition, to the extent that an interpretation of a statute may have adverse implications for existing Aboriginal and treaty rights, section 35 of the *Constitution Act, 1867* may be brought into play.

[27] The First Nations Applicants have raised serious issues with respect to the impact of the Minister's interpretation of subsection 80(2) on their treaty rights and the honour of the Crown. Accordingly, in my view, the standard of review applicable to the Minister's interpretation of subsection 80(2) is correctness, at least insofar as his interpretation implicates those issues. As

discussed at paragraph 40 below, there are good reasons why the “usual” approach of applying a reasonableness standard of review to the Minister’s interpretation of his statutory mandate should apply to other aspects of his interpretation of the language in subsection 80(2).

[28] The issue of whether the Minister erred in failing or refusing to recommend an emergency order under subsection 80(2), by failing to consider relevant factors, is an issue of mixed fact and law that is reviewable on a standard of reasonableness (*Dunsmuir*, above, at paragraphs 51-55).

[29] With respect to the Minister's alleged contravention of subsection 42(2) of the SARA, the Respondents conceded in their submissions that the Minister did not prepare a Recovery Strategy for the boreal caribou within the time limit provided for in SARA. Accordingly, it is not necessary to address the standard of review applicable to this issue.

VI. Analysis

A. *Did the Minister err in interpreting subsection 80(2)?*

[30] In the course of reviewing the Applicants’ submissions, the Decision noted that the First Nations Applicants had submitted that “the Minister erred in law or acted unreasonably, or both, by failing to consider certain factors adequately or at all, including the Applicants’ Treaty Rights and the honour of the Crown.”

[31] In the latter regard, the Decision stated, among other things, that:

> [f]actors such as the potential impact of the decline of the boreal caribou on the applicants’ Treaty Rights and the Crown's obligation

> to act honourably in all of its dealings with Aboriginal peoples are not relevant in considering whether or not the species' survival or recovery is imminently threatened under section 80.

[32] On this point, the Respondents submitted that, in exercising statutory powers in relation to issues that affect both First Nations and non-First Nations people, officers of the Crown are obliged to have regard to the interest of all affected parties, not just the interests expressed by First Nations people. This submission is supported by *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paragraph 96, [2002] 4 SCR 245. However, it misses the point, because the Decision clearly stated that the "[A]pplicants' Treaty Rights and the Crown's obligation to act honourably in all of its dealings with Aboriginal peoples are not relevant" at all.

[33] The Respondents did not contest that the members of the Applicant Athabasca Chipewan First Nation band are beneficiaries of Treaty No. 8 and that the members of the Applicants Beaver Lake Cree Nation and Enoch Cree Nation are beneficiaries of Treaty No. 6. They also did not contest the evidence that:

i. Treaties No. 8 and No. 6 protect the First Nations Applicants' right to pursue their "avocations" or "usual vocations" of hunting and fishing, subject to certain limitations;

ii. the Report of the Commissioners who negotiated Treaty No. 8 on behalf of the Government of Canada confirmed that hunting and fishing rights were of particular concern to the First Nations and that the Commissioners "assured them that the treaty would not lead to any forced interference with their mode of life" (*R v Horseman*, [1990] 1 SCR 901 at paragraphs 12 and 63 (available on CanLII));

iii. the First Nations Applicants have traditionally hunted boreal caribou as an integral part of their traditional way of life and have a spiritual connection and relationship with the caribou;

iv. the First Nations Applicants have traditionally relied on caribou meat as a critical source of food, and also rely on caribou for a broad range of other purposes; and

v. the First Nations Applicants have voluntarily stopped hunting boreal caribou, in an attempt to address the current threat to the caribou's survival and recovery.

[34] In *R v Sundown*, [1999] 1 SCR 393at paragraph 6 (available on CanLII), the Supreme Court observed that "[i]t is clear from the history of the negotiations between [Lieutenant Governor] Alexander Morris and the First Nations who signed Treaty No. 6 that the government intended to preserve the traditional Indian way of life. Hunting and fishing were of fundamental importance to that way of life."

[35] Considering all of the foregoing, and keeping in mind that "[i]nterpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown" (*Badger*, above), the Minister clearly erred in reaching his decision by failing to take into account the First Nations Applicants' Treaty Rights and the honour of the Crown in interpreting his mandate under subsection 80(2). The Decision therefore warrants being set aside on that basis alone (*Little Salmon*, above). Additional support for this conclusion arguably is provided by the established principles that: (i) "any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians"; and

(ii) “any limitations which restrict the rights of Indians under treaties must be narrowly construed” (*Badger*, above).

[36] In reconsidering his decision, the Minister should not confine his consideration of the honour of the Crown to an assessment of whether any active course of conduct may negatively affect treaty rights of the First Nations. I agree with the Applicants that such an approach would present an impoverished view of the honour of the Crown. A broader view is required to be taken. This includes assessing the extent to which the ongoing violation of the SARA (by failing to post a Recovery Strategy) and continued inaction with respect to the boreal caribou would, in all of the circumstances discussed in this decision and in the more detailed Certified Record pertaining to the Decision, would be consistent with the honour of the Crown (*R v Marshall*, [1999] 3 SCR 456 at paragraphs 49-52 (available on CanLII); *West Moberly First Nations v British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2010 BCSC 359, [2010] BCJ No 488 (QL), at paragraphs 51-55, 59 and 63).

[37] The foregoing should not be interpreted as suggesting that a proper consideration of the First Nations Applicants’ Treaty Rights and the honour of the Crown would necessarily have led the Minister to reach a particular opinion in exercising his mandate under subsection 80(2) (see, for example, *Badger*, above, at paragraph 58). Rather, my conclusion is simply that the Minister erred in deciding that these matters were not relevant to his interpretation of subsection 80(2).

[38] With respect to the specific language in subsection 80(2), the Applicants requested the Court to endorse the following propositions:

i. Subsection 80(2) imposes a mandatory duty;

ii. subsection 80(2) is triggered by threats to recovery or survival, or both;

iii. a key purpose of section 80 is to protect habitat while awaiting a recovery strategy;

iv. subsection 80(2) requires an objective inquiry based on the best available scientific information;

v. inaction is not permitted due to a lack of full scientific certainty;

vi. section 80 orders can be made for only part of the range of the species;

vii. imminent threats need not be guaranteed to materialize;

viii. the impact of threats must be considered over a biologically appropriate timescale; and

ix. timely decision-making is required.

[39] Generally speaking, these propositions are supported either by the plain meaning of the language in the statute, including the preamble thereto, or the legislative history of the SARA (see, for example, *House of Commons Debates*, 37th Parl, 1st Sess, No 149 (26 February 2002) at 1150 (Hon Karen Redman); Standing Committee on Environment and Sustainable Development, *Minutes/Evidence*, March 22, 2001, at 09:35-09:40). That said, in my view, the following is equally clear:

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

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

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

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

v. The fact that an Order may be made (under subsection 80(4)(c)) for only part of the range of a listed species, and the fact that the term "wildlife species" is defined in subsection 2(1) to include a "subspecies, variety or geographically or genetically distinct population," do not imply that an Order must always be made whenever the listed species faces threats to its survival or recovery in only a part of its habitat. The

Minister's decision will properly depend on the nature of the scientific information, legal advice and other information that he receives and that is relevant to the determination to be made under subsection 80(2), including with respect to the biologically appropriate timescale within which to assess a particular threat.

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

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

[40] I should add that, in my view, there is nothing about any of the above-listed propositions of the Applicants that warrants a departure from the principle that a Minister's interpretation of his or her home statute, or a Closely Related Statute, should be subject to review on a reasonableness standard (*Dunsmuir*, above, at paragraph 54). In short, those propositions do not raise: (i) any constitutional issue; (ii) any questions of "general law 'that are both of central importance to the legal system as a whole and outside the Minister's specialized area of expertise'"; (iii) the drawing of jurisdictional lines between two or more competing specialized tribunals; or (iv) any "true question of jurisdiction or *vires*" (*Smith*, above, at paragraphs 26 and 37). Therefore, to the extent that the Minister's interpretation of the language in subsection 80(2) in any given case may be inconsistent with any of the above listed propositions put forth by the Applicants, the Minister's decision as it relates to those particular points will be subject to review on a standard of

reasonableness, as I am satisfied that the SARA is either a Closely Related Statute for the Minister, as contemplated by *Dunsmuir* and *Smith*, above. In this respect, *David Suzuki Foundation v British Columbia (Minister of Fisheries & Oceans)*, 2010 FC 1233, at paragraphs 53 to 60, is distinguishable, as it does not appear that consideration was given in that case to whether the SARA was a Closely Related Statute for the Respondents in that case. Similarly, *Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, 2009 FC 878, at paragraph 31 is also distinguishable, as the issue there concerned the Minister's authority to alter the provisions of the SARA by government policy and, once again, no consideration was given to whether the SARA was a Closely Related Statute, insofar as other issues involving the interpretation of the SARA were concerned.

[41] The Applicants' also submitted that the word "recovery" should be interpreted as meaning whatever "recovery" is defined to mean in any final Recovery Strategy that has been posted on the public registry in respect of any particular species. In my view, this submission is inconsistent with another position advanced by the Applicants, which I accept, that the emergency power established in subsection 80(1) may be exercised pending the completion of such final recovery strategies. For this reason alone, it would not be reasonable to confine the meaning of the word "recovery," as it is used in subsection 80(2), to whatever that word has been defined to mean in any final Recovery Strategy that has been posted in respect of any particular species. In the case at bar, such an interpretation would: (i) preclude giving any meaning to the word "recovery" until such time as a final Recovery Strategy has been posted in respect of the listed species of woodland caribou (boreal population); and (ii) prevent the Minister from recommending a protective order under section 80 in one of the very types of situations in which Parliament intended such orders to be available (*House*

of Commons Debates, above, at 1150); see also the position adopted by the Minister of Fisheries and Oceans, in *Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, 2009 FC 878, at paragraph 50; and Environment Canada's Draft Policies, above, at 17).

[42] That said, I agree with the Applicants' position that any recovery objectives that are identified in any draft Recovery Strategy which may have been issued in respect of a particular species are relevant factors that should be considered by the Minister in reaching an opinion under subsection 80(2). This is not to suggest that a failure to reach an opinion that is consistent with such draft recovery objectives would, on that basis alone, render the opinion unreasonable. Rather, this would simply be one factor for a reviewing court to take into account in determining whether the Minister's opinion was reasonable. This will be further discussed in the next section below.

[43] The ENGO Applicants submitted that a decision-maker's interpretation of his or her "home" statute or a Closely Related Statute should be reviewed on a standard of correctness whenever the statutory provision in question has never been the subject of review by a court. I disagree. This position is inconsistent with the Supreme Court's clear statements, discussed above, regarding the standard of review applicable to interpretations of such statutes. It is also inconsistent with the Supreme Court's movement away from reviewing administrative interpretation of such statutes on a correctness standard of review (*Dunsmuir*, above at paragraph 54; *Smith*, above, at paragraphs 26 and 37-39), outside of the four types of situations listed at paragraph 42 above. Moreover, this position is difficult to square with the principle that "there might be multiple valid interpretations of a statutory provision" (*Dunsmuir*, above, at paragraph 41; *Smith*, above, at paragraph 39). In short, it would lead to a situation in which the first interpretation of a statutory provision by a court would be

subject to review on a correctness standard, whereas subsequent interpretations would be subject to review on a reasonableness standard, even if one or more of those interpretations were inconsistent with the first interpretation.

[44] In addition to the foregoing, the First Nations Applicants submitted that any interpretation of the words "survival" or "recovery" that would allow for the extirpation of one or more of the Seven Herds would violate the basic purposes of the SARA. They added that a threat to the survival or recovery of any of the Seven Herds is by definition a threat to the survival or recovery of boreal caribou generally. The ENGO Applicants went further by submitting that "[t]he only reasonable interpretation of "survival" or "recovery" in subsection 80(2) is therefore one that aims to conserve and recover all of the Herds to self-sustaining levels." In their joint Reply submissions, the Applicants added the words "throughout their current ranges" to the latter assertion.

[45] To the extent that the Applicants are suggesting that any time the survival or recovery of any herd or particular group of any listed species, or a sub-species or individual population thereof, is threatened in any area of its range or habitat, the Minister is required to make a recommendation for an emergency protective order under subsection 80(2), I respectfully disagree. In my view, this interpretation of subsection 80(2) is not supported by the plain language of that provision.

[46] The operative words in that provision are "is of the opinion that the species faces imminent threats to its survival or recovery" (emphasis added). The species in question is the "listed wildlife species" referred to in subsection 80(1). There is no mention of herds or other local populations of species or subspecies in subsection 80(2). The logical extension of the Applicants' position on this

point would require the Minister to make a recommendation for an emergency Order under subsection 80(2) even where only a small herd, group or local population of a species or a subspecies is facing a threat to its ability to be self-sustaining in a small area of a particular province. A plain reading of the above quoted words in subsection 80(2) does not support such an interpretation of that provision. Such an interpretation would also be inconsistent with Parliament's decision to grant some scope for the exercise of subjective discretion by the Minister, as evidenced by the words "if he or she is of the opinion that …".

[47] In short, the Minister is not required to make a recommendation for an emergency Order under subsection 80(2) in the circumstances described immediately above, unless he or she comes to the opinion that the listed species in question (in this case, woodland caribou, boreal population) faces imminent threats to its survival or recovery.

[48] The Applicants further submitted that, based on the facts which appear to have been accepted by the Minister, it was not reasonably open to the Minister to reach the opinion that "there are no imminent threats to the national survival or recovery of boreal caribou in Canada." Those facts, as set forth in the Decision, include the following:

i. In 2002, COSEWIC assessed the population of boreal caribou in Canada to be threatened because populations have decreased throughout most of its range, the distribution of boreal caribou has contracted and boreal caribou are threatened by habitat loss and increased predation.

ii. Environment Canada's 2008 Scientific Review concluded that 30 of 57 local populations across Canada are not currently self-sustaining.

iii. All 13 local populations of boreal caribou in Alberta are at an elevated risk of extirpation, and the current population and habitat conditions of the Seven Herds are insufficient for those herds to be self-sustaining.

iv. Extirpation of Alberta herds or even just the Seven Herds would not be consistent with Alberta's plans. However, achieving recovery of many of those caribou populations will be extremely challenging given the current status and trend.

v. The scientific subcommittee of Alberta's Endangered Species Conservation Committee recommended in 2010 that woodland caribou be uplisted from threatened to endangered in that province.

vi. Maps of the current boreal caribou distribution show a developing gap centered on north eastern Alberta/north eastern Saskatchewan.

vii. If the Seven Herds are extirpated (i.e., no longer existing in Alberta), the existing gap in national boreal caribou distribution will widen. This would have potential negative consequences due to disruption of genetic and demographic processes that would further increase the risk to recovery of boreal caribou in Canada. This would also represent a further range retraction for caribou in Canada. If all Alberta herds were extirpated, the challenge to recovery would be exacerbated. Given that there is some migration between local populations, this situation with respect to the herds in Alberta has implications beyond the boundaries of that province. Specifically, the

> ability of Saskatchewan, the Northwest Territories and British Columbia to recover their portion of shared populations will be constrained by the approach that is taken with respect to the recovery of the herds in Alberta.

[49] I acknowledge that it is not immediately apparent how, given the foregoing facts, the Minister reasonably could have concluded that there are no imminent threats to the national recovery of boreal caribou.

[50] However, in the absence of any meaningful discussion in the Decision of the basis upon which the Minister's conclusion was reached, I am not prepared to agree with the Applicants' position that it was not reasonably open to the Minister to reach that conclusion.

[51] In my view, the better approach is to set aside the Minister's Decision on the basis that it did not "fit comfortably with the principles of justification, transparency and intelligibility" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 59), because it failed to adequately explain the basis for the decision. This is discussed in part VI.C of these reasons below.

[52] In the absence of additional submissions from the parties regarding the specific meaning of the words "imminent threats to its survival or recovery," I am reluctant to make any further determinations in that regard, particularly given my finding that the Decision should be set aside for the reasons discussed above and below. In my view, it would be better to defer any such further determinations to another day, when the meaning of those words has been the subject of more fulsome submissions. My conclusion in this regard is reinforced by the fact that counsel to the

respondent was unable, during the oral hearing in this matter, to articulate the specific interpretation of subsection 80(2) that was or even may have been adopted by the Minister in reaching his Decision.

B. *Should an Order of mandamus be granted compelling the Minister to make a recommendation under subsection 80(2)?*

[53] The Applicants submitted that the scientific evidence that was acknowledged in the Minister's Decision was such that the only reasonable decision available to the Minister was to: (i) conclude that there are imminent threats to the recovery of boreal caribou; and (ii) make a recommendation to the Governor in Council, as contemplated by subsection 80(2). Based on this proposition, the Applicants assert that this Court should compel the Minister to make the recommendation that he should have made under subsection 80(2).

[54] In the case at bar, the Applicants concede that subsection 80(2) contemplates the making of the decision by the Minister that is discretionary in nature. This is clear from the words "if he or she is of the opinion that" (emphasis added). Accordingly, the well established principle that *mandamus* is not available to compel the exercise of discretion in a particular way applies (*Canada (Chief Electoral Officer) v Callaghan*, 2011 FCA 74, at paragraph 126; *St Brieux (Town) v Canada (Minister of Fisheries & Oceans)*, 2010 FC 427, at paragraph 57).

[55] In an attempt to avoid that principle, the Applicants state that they "do not seek to compel the Minister to form a certain opinion." Rather, they assert that "they seek to compel him to recommend an emergency Order based on concessions he has made about the status of the [Seven] Herds and about the threat this poses to the survival or recovery of Boreal Caribou." In this regard,

they rely on *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772, at paragraphs 41 and 43. However, that case is distinguishable on the basis that the only reason given by the British Columbia College of Teachers (BCCT) for refusing certification of the appellant was the latter's adoption of discriminatory practices, a matter that was found to be beyond the jurisdiction of the BCCT to consider.

[56] In my view, the factual "concessions" made by the Minister, which are summarized at paragraph 48 above, together with the other evidence in the Certified Record, are not such that the only reasonable conclusion available to the Minister was that there are imminent threats to the recovery of boreal caribou.

[57] As discussed at paragraphs 48-51 of these reasons, I acknowledge that it is not immediately apparent how the Minister could have reasonably reached his conclusion that "eastern local populations could provide the basis for achieving a national recovery objective." This is because, as explained in the next section below, the Minister's decision did not explain the basis for that conclusion. In these circumstances, and given the other errors made by the Minister, the appropriate remedy is to set aside the Minister's decision and to remit it back to him for reconsideration in accordance with these reasons.

C. *Did the Minister err in failing or refusing to recommend an emergency Order under subsection 80(2), by failing to consider relevant factors?*

[58] In the alternative to an Order of *mandamus*, the Applicants seek a declaration that, in refusing to make an affirmative recommendation under subsection 80(2), the Minister erred in law or acted unreasonably, or both, by failing to consider various relevant factors, including:

i. The First Nations Applicants' treaty rights and the honour of the Crown;

ii. The Minister's ongoing breach of his mandatory obligation to prepare a Recovery Strategy for boreal caribou and post it on the public registry within the time period mandated by subsection 42(2) of the SARA;

iii. The purposes of the SARA;

iv. The draft recovery objectives for boreal caribou set forth in the Draft Policies; and

v. The best available science.

[59] Given my determinations in Part VI.A above with respect to the Minister's position regarding First Nations Applicants' treaty rights and the honour of the Crown, it is not necessary to revisit those issues again.

[60] With respect to the remaining considerations that the Applicants allege were not taken into account by the Minister, I am satisfied that all but the purposes of the SARA were in fact considered by the Minister.

[61] As to the overdue Recovery Strategy, this was addressed near the outset of the Decision and again when the Decision addressed whether an Order under section 80 should be recommended

based on whether there are imminent threats to the recovery of boreal caribou. In this regard, it was specifically recognized that "given that the draft recovery strategy will only be posted [in] summer 2011, assessing the requirement for a Section 80 order based on imminent threats to recovery is less straightforward than it is for survival." The Decision proceeded to recognize that "[t]he department has publicly acknowledged that the recovery strategy for boreal caribou was due in 2007." Then, in the penultimate paragraph of the Decision, the following was stated: "[t]he proposed national recovery strategy to be posted in the summer of 2011 will set out boreal caribou population and distribution objectives. Once these recovery objectives are formulated, it may be necessary to re-examine whether a section 80 order is warranted for the species, or any population." Additional discussion of the status of the Recovery Strategy was provided in the Background appendix to the Decision. Based on all the foregoing, I am satisfied that the Minister did not err by failing to consider the ongoing breach of his obligation to prepare a Recovery Strategy for boreal caribou and post it on the public registry within the time period mandated by subsection 42(2) of the SARA.

[62] With respect to the draft recovery objectives for boreal caribou set forth in the Draft Policies, once again, these were adequately addressed in the Decision. Specifically at page 3, the Decision reproduced the three factors that the Draft Policies state will be considered by the Minister in determining whether or not there is an imminent threat to the survival or recovery of a species, as contemplated by section 80. The ensuing discussion in the Decision then discussed information that was clearly relevant to a consideration of the three factors. Significant additional information that was relevant to a consideration of these three factors was discussed in the preceding section of the Decision, under the heading "Status of Caribou", as well as in the Background appendix to the Decision. In my view, what was missing in the Decision was not a consideration of the recovery

objectives set forth in the Draft Policies, but rather a meaningful explanation for how the Minister reached his overall conclusion, notwithstanding all of the contrary evidence that was addressed in the Decision with respect to the threats faced by boreal caribou in Alberta. This is addressed below.

[63] With respect to the best available science, I am satisfied that the decision reasonably addressed the scientific information that was included in the Certified Record which was before the Minister when he made the Decision. That Certified Record included extensive information that was reasonably addressed in the Decision (including the Background appendix that was attached thereto), including:

- COSEWIC's 2002 assessment that boreal caribou in Canada are threatened because populations have decreased throughout most of the range, the distribution of boreal caribou has contracted and boreal caribou are threatened by habitat loss and increased predation;
- the basis for that conclusion, in Environment Canada's 2008 Scientific Review, that 30 of 57 local populations of boreal caribou across Canada are not currently self-sustaining;
- maps of the current boreal caribou distribution in Alberta, which depict (i) a developing gap centered on northeastern Alberta and northwestern Saskatchewan, and (ii) the probability of self-sustaining local populations given current range and conditions;
- an updated woodland caribou status report for Alberta, released in October, 2010 by the Alberta government, which outlines the continued decline of Woodland caribou in the province; and

- Alberta's 2005 Woodland Caribou Recovery Plan and the implications for the existing gap in national boreal caribou distribution if the Seven Herds are extirpated.

[64] Although the Decision did not specifically address certain other scientific information that was submitted to Environment Canada by the Applicants prior to the Minister's Decision, I am satisfied that such information was consistent with the information that was addressed in the Decision, and that therefore the Minister did not err by failing to specifically address such information, including reports authored by Dr. Stan Boutin and by the Athabasca Landscape Team, respectively.

[65] Given all of the information that was specifically addressed in the Decision, it was not a reviewable error for the Minister to have failed to have specifically addressed the objectives of the SARA in his Decision. In my view, the manner in which the Decision addressed the relevant scientific and other information in the Certified Record was not inconsistent with the purposes of the SARA, which are "to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened" (s. 6).

[66] Instead, where the Minister erred was in failing to provide a meaningful explanation for how he reached his conclusion not to recommend an emergency Order, given (i) the scientific and other information that was reviewed over the course of several pages in the Decision, (ii) the recovery

objectives for boreal caribou set forth in the Draft Policies, and (iii) the language of subsection 80(2), the purposes of the SARA, as set forth in section 6, and the overall scheme of that legislation.

[67] Notwithstanding the substantial scientific and other evidence that was discussed and that contradicted the overall conclusion reached by the Minister in the Decision, the Minister concluded that there are no imminent threats to the national recovery of boreal caribou in Canada. The sole basis that was provided in the Decision for that conclusion was the following:

> Although the extirpation of even the [Seven Herds] would result in further range retraction in the middle of the range of boreal caribou, it is possible to maintain a self sustaining population of boreal caribou in eastern Canada. As such, even though national recovery objectives and approaches would be constrained by the extirpation of even the 7 Alberta herds in question, the Eastern local populations could provide the basis for achieving a national recovery objective.

[68] In my view, these very short reasons provided for the conclusion reached by the Minister do not enable me to conduct a meaningful review of the Decision (*Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151, at paragraph 14). This is because the basis for the overall conclusion reached by the Minister, particularly the evidentiary basis, was not meaningfully discussed (*Law Society of Upper Canada v Neinstein*, 2010 ONCA 193, at paragraph 61; *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670, at paragraph 40; *Khosa*, above), and the record does not otherwise explain the Minister's decision in a satisfactory manner (R v Sheppard, 2002 SCC 26, at paragraphs 15, 24 and 28, [2002] 1 SCR; R v REM, 2008 SCC 51 at paragraph 37, [2008] 3 SCR). In the context of the Decision as a whole, this conclusion essentially came "out of the blue". The Applicants, the public and the Court are left to speculate as to:

i. the scientific basis for the conclusion that it is possible to maintain a self sustaining population of boreal caribou in eastern Canada;

ii. the content of "the national recovery objectives and approaches that would be constrained by the extirpation of" the Seven Herds;

iii. the basis upon which it was concluded that the eastern local populations could provide the basis for achieving a national recovery objective;

iv. the likelihood of achieving such national recovery objective if the Seven Herds become extirpated; and

v. the basis upon which this conclusion was considered to be consistent with the language of subsection 80(2), the purposes of the SARA, as set forth in section 6, and the SARA as a whole (Elmer Dredger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths Ltd., 1983) at page 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at paragraph 21).

[69] Accordingly, the Decision cannot stand and must be set aside.

D. *Should the Court declare that the Minister has contravened subsection 42(2) by failing to include a proposed Recovery Strategy for woodland caribou in the public registry?*

[70] The Respondents have conceded that the Minister failed to prepare a Recovery Strategy within the three year time limit set forth in subsection 42(2), namely, by June 5, 2007. The Respondents explained that the posting of a recovery strategy to the public registry "was delayed to allow for further scientific studies and to work with aboriginal organizations and stakeholders affected by the recovery strategy, because it was found that there was not enough information to identify critical habitat for the boreal caribou," presumably in the draft Recovery Strategy. The

Applicants have not alleged any bad faith on the part of the Minister with respect to his desire to further consult with aboriginal organizations and stakeholders.

[71] That said, the Applicants note that they made clear, in their initial request for an emergency Order under subsection 80(2), their view that no such further consultation is required. They also appropriately noted that (i) section 38 of the SARA codifies the precautionary principle that "cost-effective measures to prevent the reduction or loss of [a] species should not be postponed for lack of full scientific certainty" (*Alberta Wilderness Assn*, above, at paragraph 25; *Environmental Defence Canada*, above, at paragraphs 34 – 39); (ii) section 38 was enacted in part to satisfy Canada's obligations under the *1992 United Nations Convention on Biological Diversity* ; and (iii) the precautionary principle is also reflected in the preamble to the SARA, which, among other things, provides that:

> the Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty …

[72] With the foregoing in mind, and considering that the Minister was required to post the Recovery Strategy to the public registry approximately four years ago, the Applicants urged the Court to declare that the Minister has breached his obligation under subsection 42(2) of the SARA, to "send a clear message to the federal government and to the Canadian public that it is not acceptable for responsible ministers to continue to miss mandatory deadlines established by Parliament."

[73] Given that there has been no suggestion, let alone a demonstration, that the Minister's delay in posting a Recovery Strategy is attributable to bad faith on his part, and particularly given that the Minister has publicly committed to posting the Recovery Strategy "in the summer of 2011", i.e. sometime in the next five weeks, I have decided to defer making a decision with respect to the requested declaration, until September 1, 2011. This will give the Minister the opportunity to meet his previously announced commitment.

VII. Conclusion

[74] The application is granted in part. The Minister's Decision will be set aside. The matter is remitted to the Minister for reconsideration in accordance with these reasons.

[75] The Applicants' request for an Order in the nature of *mandamus* is denied.

[76] The Applicants' request for an Order declaring that the Minister has failed to prepare a Recovery Strategy for the listed species of woodland caribou (boreal population) within the time period established in the SARA, is deferred until September 1, 2011.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is granted in part.

2. The Minister's Decision is set aside. The matter is remitted to the Minister for reconsideration in accordance with these reasons.

3. The Applicants' request for an Order in the nature of *mandamus* is denied

4. The Applicants' request for an Order declaring that the Minister has failed to prepare a Recovery Strategy for the listed species of woodland caribou (boreal population) within the time limit established by subsection 42(2) of the SARA, is deferred until September 1, 2011.

5. The Applicants are awarded 75% of their costs on this application, calculated in accordance with Column III of Tariff B, together with their disbursements and HST, if applicable.

"Paul S. Crampton"

Judge

APPENDIX A

Selected provisions of the *Species at Risk Act*

Preamble	Préambule
Recognizing that	Attendu :
… wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons,	[…] que les espèces sauvages, sous toutes leurs formes, ont leur valeur intrinsèque et sont appréciées des Canadiens pour des raisons esthétiques, culturelles, spirituelles, récréatives, éducatives, historiques, économiques, médicales, écologiques et scientifiques;
…	[…]
the Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty,	que le gouvernement du Canada s'est engagé à conserver la diversité biologique et à respecter le principe voulant que, s'il existe une menace d'atteinte grave ou irréversible à une espèce sauvage, le manque de certitude scientifique ne soit pas prétexte à retarder la prise de mesures efficientes pour prévenir sa disparition ou sa décroissance;
…	[…]
knowledge of wildlife species and ecosystems is critical to their conservation	que la connaissance des espèces sauvages et des écosystèmes est essentielle à leur conservation;
…	[…]

Purposes	Objet
6. The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered	6. La présente loi vise à prévenir la disparition - de la planète ou du Canada seulement - des espèces sauvages, à permettre le rétablissement de celles qui, par suite de l'activité humaine, sont

or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.

devenues des espèces disparues du pays, en voie de disparition ou menacées et à favoriser la gestion des espèces préoccupantes pour éviter qu'elles ne deviennent des espèces en voie de disparition ou menacées.

Functions

15. (1) The functions of COSEWIC are to considered by COSEWIC to be at risk and, as part of the assessment, identify existing and potential threats to the species and
(i) classify the species as extinct, extirpated, endangered, threatened or of special concern,
(ii) indicate that COSEWIC does not have sufficient information to classify the species, or
(iii) indicate that the species is not currently at risk;
(*b*) determine when wildlife species are to be assessed, with priority given to those more likely to become extinct;
(*c*) conduct a new assessment of the status of species at risk and, if appropriate, reclassify or declassify them;
(*c.1*) indicate in the assessment whether the wildlife species migrates across Canada's boundary or has a range extending across Canada's boundary;
(*d*) develop and periodically review criteria for assessing the status of wildlife species and for classifying them and recommend the criteria to the Minister and the Canadian Endangered Species Conservation Council; and
(*e*) provide advice to the Minister and the Canadian Endangered Species Conservation Council and perform any other functions that the Minister,

Mission

15. (1) Le COSEPAC a pour mission :
a) d'évaluer la situation de toute espèce sauvage qu'il estime en péril ainsi que, dans le cadre de l'évaluation, de signaler les menaces réelles ou potentielles à son égard et d'établir, selon le cas :
(i) que l'espèce est disparue, disparue du pays, en voie de disparition, menacée ou préoccupante,
(ii) qu'il ne dispose pas de l'information voulue pour la classifier,
(iii) que l'espèce n'est pas actuellement en péril;
b) de déterminer le moment auquel doit être effectuée l'évaluation des espèces sauvages, la priorité étant donnée à celles dont la probabilité d'extinction est la plus grande;
c) d'évaluer de nouveau la situation des espèces en péril et, au besoin, de les reclassifier ou de les déclassifier;
c.1) de mentionner dans l'évaluation le fait que l'espèce sauvage traverse la frontière du Canada au moment de sa migration ou que son aire de répartition chevauche cette frontière, le cas échéant;
d) d'établir des critères, qu'il révise périodiquement, en vue d'évaluer la situation des espèces sauvages et d'effectuer leur classification,
ainsi que de recommander ces critères au ministre et au Conseil canadien pour la conservation des espèces en péril;
e) de fournir des conseils au ministre

after consultation with that Council, may assign.

et au Conseil canadien pour la conservation des espèces en péril et d'exercer les autres fonctions que le ministre, après consultation du conseil, peut lui confier.

Best information and knowledge

(2) COSEWIC must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.

Critères

(2) Il exécute sa mission en se fondant sur la meilleure information accessible sur la situation biologique de l'espèce en question notamment les données scientifiques ainsi que les connaissances des collectivités et les connaissances traditionnelles des peuples autochtones.

Treaties and land claims Agreements

(3) COSEWIC must take into account any applicable provisions of treaty and land claims agreements when carrying out its functions.

Traités et accords sur des Revendications Territoriales

(3) Pour l'exécution de sa mission, il prend en compte les dispositions applicables des traités et des accords sur des revendications territoriales.

LIST OF WILDLIFE SPECIES AT RISK

LISTE DES ESPÈCES EN PÉRIL

Decision in respect of assessment

27. …

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

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

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

or

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

Gouverneur en conseil

27. …

(1.1) Sous réserve du paragraphe (3), dans les neuf mois suivant la réception de l'évaluation de la situation d'une espèce faite par le COSEPAC, le gouverneur en conseil peut examiner l'évaluation et, sur recommandation du ministre :

a) confirmer l'évaluation et inscrire l'espèce sur la liste;

b) décider de ne pas inscrire l'espèce sur la liste;

c) renvoyer la question au COSEPAC pour renseignements supplémentaires ou pour réexamen.

37. (1) If a wildlife species is listed as

37. (1) Si une espèce sauvage est

an extirpated species, an endangered species or a threatened species, the competent minister must prepare a strategy for its recovery.

(2) If there is more than one competent minister with respect to the wildlife species, they must prepare the strategy together and every reference to competent minister in sections 38 to 46 is to be read as a reference to the competent ministers.

38. In preparing a recovery strategy, action plan or management plan, the competent minister must consider the commitment of the Government of Canada to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.

Emergency order

80.(1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.

Obligation to make recommendation

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.
[…]

inscrite comme espèce disparue du pays, en voie de disparition ou menacée, le ministre compétent est tenu d'élaborer un programme de rétablissement à son égard.
(2) Si plusieurs ministres compétents sont responsables de l'espèce sauvage, le programme de rétablissement est élaboré conjointement par eux. Le cas échéant, la mention du ministre compétent aux articles 38 à 46 vaut mention des ministres compétents.

38. Pour l'élaboration d'un programme de rétablissement, d'un plan d'action ou d'un plan de gestion, le ministre compétent tient compte de l'engagement qu'a pris le gouvernement du Canada de conserver la diversité biologique et de respecter le principe selon lequel, s'il existe une menace d'atteinte grave ou irréversible à l'espèce sauvage inscrite, le manque de certitude scientifique ne doit pas être prétexte à retarder la prise de mesures efficientes pour prévenir sa disparition ou sa décroissance.

Décrets d'urgence

80.(1) Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.

Recommandation obligatoire

(2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.
[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1437-10 and T-1439-10
STYLE OF CAUSE:	BETWEEN: ALLAN ADAM on his own behalf and on behalf of all other members of Athabasca Chipewyan First Nation et al v MINISTER OF THE ENVIRONMENT et al AND BETWEEN: ALBERTA WILDERNESS ASSOCIATION et al v MINISTER OF THE ENVIRONMENT et al
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	June 22, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Crampton J.
DATED:	July 28, 2011

APPEARANCES:

Sean Nixon David Rosenberg	FOR THE APPLICANTS ATHABASCA SHIPEWYAN FIRST NATIONS; BEAVER LAKE CREE NATION; ENOCH CREE NATION
Mark Kindrachuk	FOR THE RESPONDENT
Devon Page Melissa Gorrie	FOR THE APPLICANTS FOR THE APPLICANTS ALBERTA WILDERNESS ASSOCIATION ET AL

Mark Kindrachuk	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DEVON PAGE & MELISSA GORRIE Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT