



Western Canada Wilderness Committee v Canada (Fisheries and Oceans), 2014 FC 148

By Camille Israël

In the fall of 2012, five Canadian environmental non-governmental organizations (NGOs) filed in the Federal Court of Canada for a declaration that the Minister of Fisheries and Oceans and the Minister of the Environment had acted unlawfully in failing to comply with the *Species at Risk Act (SARA)*, and orders requiring them to comply.

The Ministers failed to prepare and finalize recovery strategies for the a number of endangered and threatened species: the Pacific Northwest humpback whale, the marbled murrelet, the southern Woodland Caribou and the Nechako River white sturgeon. *SARA* provides filing deadlines for these species which expired in 2007-2009. The Ministers argued that recovery planning work had been done for these species, but filing was delayed to allow for further consultation with stakeholders and to overcome challenges in properly identifying critical habitat.

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Ahousaht Indian Band and Nation v Canada (Attorney General)



By Laura Bonenfant

On January 30, the Supreme Court of Canada (SCC) denied Canada's application for leave to appeal the decision of the British Columbia Court of Appeal in *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2013 BCCA 300. The Court of Appeal's decision upheld the claimed aboriginal right to a commercial fishery.

This was Canada's second application for leave to appeal in this case. The first application was denied on March 29, 2012, when the SCC remanded the decision back to the Court of Appeal to be determined in accordance with its decision in *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56.

Upon reconsideration, the BC Court of Appeal upheld its earlier decision (2011 BCCA 237) that the plaintiff First Nations have an Aboriginal right to a commercial fishery, with the exception of geoducks. The most recent denial by the SCC of Canada's leave application is a huge victory in a long court battle waged by those Nuu-chah-nulth communities to establish their fishing rights.

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UPCOMING EVENTS:

March 5 & 6 - Drew Mildon is speaking on *Impact of Section 87 of the Indian Act on Transaction Taxes* at Federated Press's 2nd Aboriginal Tax Conference (Federated Press).

Madam Justice Mactavish held that the Ministers had acted unlawfully in not complying with the SARA deadlines, noting that the Act requires that protective measures “should not be postponed for lack of full scientific certainty”. She noted that the legislated timelines reflect the clear will of Parliament that these species should be protected in a quick and timely fashion, stating that SARA “was enacted because some wildlife species in Canada *are at risk* ... many are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake” [para 100].

Recovery strategies are crucial because they involve, among other things, the identification of critical habitats for these species. Madam Justice Mactavish noted that these four species will be affected by the proposed Northern Gateway pipeline, and that the Joint Review Panel concluded that there would be no significant adverse effects on these species *without* the benefit of seeing these full recovery strategies or knowing the location of these species’ critical habitat.

The filing of this application triggered immediate action from Canada, and proposed recovery strategies for these four species had already been filed by the time the hearing occurred. However, as Madam Justice Mactavish noted, there are still 167 other species at risk for which the SARA deadlines have lapsed. ❖

Ahousaht Indian Band and Nation v Canada

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What remains an open question is the extent of this right. At trial, Justice Garson refrained from defining the scope of the right beyond stating that it does not extend to a modern industrial fishery or to an unrestricted right of commercial sale. The Court of Appeal did not address the scope of the right any further than the partial dissent by Justice Chiasson J.A., who would have seen the right characterized as an “aboriginal right to sell fish for the purpose of attaining the modern equivalent of sustenance, a moderate livelihood, being the basics of food, clothing and housing, supplemented by a few amenities.”

The ultimate determination on the scope of the right was to be settled by the parties through consultation and negotiation. However, at trial, Justice Garson noted that if the parties are not able to reconcile the various interests at stake after two years, they are free to return to court to present further evidence on justification. The parties are currently set to appear before the BC Supreme Court on March 02, 2015, where a ruling on the extent of the commercial right is expected. ❖

Federal Government Rejects New Prosperity Mine Proposal



On February 26, 2014, the Minister of the Environment, Hon. Leona Aglukkaq, issued a decision statement regarding the New Prosperity Mine in British Columbia's Chilcotin district, concluding that “the New Prosperity Mine project is likely to cause significant adverse environmental effects that cannot be mitigated. The Governor in Council (the cabinet) has determined that those effects are not justified in the circumstances; therefore the project may not proceed.”

Minister’s Press Release: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=98459>
Decision Statement: <http://www.ceaa-acee.gc.ca/050/documents/p63928/98458E.pdf>
Backgrounder: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=98460>

Woodward & Co Updates

Welcome Nicole!



Please join us in welcoming Nicole Garvey to the firm as our new receptionist. Nicole replaces Kylaina Bellman who left to pursue academic interests. Nicole is originally from Calgary, an avid cat lover and cello player.





