Federal Court of Appeal | Cour d'appel fédérale

Date: 20120209

Docket: A-2-11

Citation: 2012 FCA 40

CORAM: **NADON J.A.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

MINISTER OF FISHERIES AND OCEANS

Appellant

and

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

Respondents

Heard at Vancouver, British Columbia, on November 30, 2011.

Judgment delivered at Ottawa, Ontario, on February 9, 2012.

REASONS FOR JUDGMENT BY: **MAINVILLE J.A.**

CONCURRED IN BY: **NADON J.A.**
SHARLOW J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The Minister of Fisheries and Oceans ("Minister") is appealing a judgment of the Federal Court cited as 2010 FC 1233 ("Reasons") in which Russell J. ("Federal Court judge") declared that ministerial discretion does not "legally protect" critical habitat under section 58 of the *Species at*

Risk Act, S.C. 2002, c. 29 ("SARA") and which further declared that it was unlawful for the Minister to have cited discretionary provisions of the *Fisheries Act*, R.S.C. 1985, c. F-14 in a protection statement concerning the critical habitat of the Northeast Pacific Northern and Southern populations of killer whales.

[2] Subsection 58(5) of the SARA provides that the Minister must make an order under subsections 58(1) and (4) protecting the critical habitat of listed endangered or threatened aquatic species if such critical habitat "is not legally protected by provisions in, or measures under, this or any other Act of Parliament". The Minister had determined that the *Fisheries Act* legally protected some aspects of the critical habitat of killer whales and could thus be resorted to as a substitute to a protection order under the SARA.

[3] The Federal Court judge ruled that the Minister may avoid issuing a critical habitat protection order under the SARA only where the legal protection offered that habitat under another Act of Parliament is the same as that provided under a protection order. He further ruled that the measures available to the Minister under the *Fisheries Act* could be diluted under the sweeping and largely unfettered discretions granted to the Minister under that statute. Consequently, he concluded that the *Fisheries Act* could not be resorted to as a substitute to a critical habitat protection order under the SARA.

Overview of conclusions

[4] The Minister is appealing to this Court on two main grounds.

[5] The first ground of appeal concerns the standard of review. The Minister submits that Parliament made him responsible for the administration of the regulatory schemes of the SARA and of the *Fisheries Act*; hence, his interpretation of their provisions is entitled to deference. The Minister bases that submission on a judgment rendered fairly recently by the Supreme Court of Canada: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"). That judgment emphasized the deference owed to an administrative tribunal when it interprets a provision of its enabling (or "home") statute or statutes closely related to its functions.

[6] In my view, no deference is owed to the Minister as to the interpretation of the relevant provisions of the SARA or of the *Fisheries Act*. The Minister's interpretation of the Supreme Court's most recent pronouncements is erroneous as it fails to consider the context in which they were developed and the reasons which may warrant deference to an administrative tribunal when it interprets its enabling statute. The reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless Parliament has provided otherwise. I thus conclude – as did the Federal Court judge in this case – that where an application for judicial review of a decision as to the implementation of the SARA is based on an allegation that the Minister has misinterpreted a provision of the SARA – or of the *Fisheries Act* as it relates to the SARA – the Minister's interpretation must be reviewed on a standard of correctness. The courts owe no deference to the Minister in that respect.

[7] The second ground of appeal concerns the interpretation of the SARA. The Minister does not dispute that the protection of critical habitat under the SARA is compulsory. However, the Minister submits that Parliament intended that there should be some flexibility as to the modalities of that compulsory protection. The Minister states that he does not wish to retain discretion under the *Fisheries Act* to undermine that protection or to provide protection which is inferior to that afforded under a SARA protection order. Rather, the Minister submits that certain measures under the *Fisheries Act* do protect critical habitat against destruction, and that he should therefore be able to resort to such measures as alternatives to a SARA protection order even though they might be subject to his discretion.

[8] I do not accept the Minister's interpretation of the SARA on this point. When Parliament adopted section 58 of the SARA, its intent was to provide for compulsory and non-discretionary legal protection from destruction for the identified critical habitat of listed endangered or threatened aquatic species. This protection can be achieved through a provision or measure under an Act of Parliament which legally protects from destruction that habitat and which is not subject to dilution through discretionary ministerial action. In the absence of such a legally enforceable provision or measure, the Minister must make a protection order under subsections 58(1) and (4) of the SARA to ensure the protection of that habitat.

[9] While the Minister submits that, by retaining his discretion under the *Fisheries Act*, he does not intend to undermine the protection provided under the SARA or to provide protection that is inferior to that available under a SARA protection order, he fails to explain how his discretion under

the *Fisheries Act* would be legally fettered. Parliament adopted section 58 of the SARA precisely to avoid the destruction of the identified critical habitat of listed endangered and threatened aquatic species though any means. If the Minister's position were accepted, the compulsory and non-discretionary protection scheme set out by Parliament under the SARA would be transformed into a protection scheme largely subject to ministerial discretion. Such was not Parliament's intent in adopting the SARA.

[10] However – and contrary to the conclusions of the Federal Court judge in this case – there may be circumstances in which the Minister may rely on section 36 of the *Fisheries Act* (which I take to include regulations made under that section) in a protection statement made under paragraph 58(5)(*b*) of the SARA. Section 36 of the *Fisheries Act* prohibits the deposit of deleterious substances in water frequented by fish, unless such deposit is authorized under regulations adopted by the Governor in Council. In a given case, the combined operation of section 36 of the *Fisheries Act* and of its regulations may afford a particular endangered or threatened species the legal protection mandated by section 58 of the SARA. In such a case, it may be appropriate for the Minister to rely on those provisions for the purposes of paragraph 58(5)(*b*) of the SARA.

[11] However, in this case, the record contains no evidence as to the effect, if any, of section 36 and its regulations on the killer whale critical habitat at issue. Therefore, there was no basis in these proceedings upon which the Federal Court judge could have determined whether the Minister's reliance on section 36 could have been justified in light of the provisions of section 58 of the SARA.

Overview of the provisions of the Species at Risk Act relevant to this appeal

[12] The SARA was assented to in 2002 as the first comprehensive federal legislation seeking (a) to prevent wildlife species from being extirpated or becoming extinct and (b) to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity. That legislation was adopted partly to meet Canada's obligations under the United Nations Convention on the Conservation of Biological Diversity. Some of the relevant provisions of the SARA are reproduced in a schedule to these reasons.

[13] The SARA identifies different categories of species at risk and distinguishes between extirpated species, endangered species, threatened species and species of special concern. For the purposes of this appeal, we need only concern ourselves with the scheme pertaining to listed endangered and threatened aquatic species.

[14] An endangered species is a wildlife species that is facing imminent extirpation or extinction, while a threatened species is a species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction. An aquatic species includes fish, shellfish, crustaceans, marine animals, and marine plants. It is not disputed that killer whales are an aquatic species for the purposes of the SARA: subsection 2(1) of SARA concerning the definitions of "aquatic species", "endangered species" and "threatened species"; section 2 of the *Fisheries Act* concerning the definition of "fish".

[15] While the Minister of the Environment is responsible for the administration of the SARA, the appellant Minister is the competent minister under that statute with respect to aquatic species, including with regard to the preparation of recovery strategies, action plans and the protection of critical habitat for such species which are endangered or threatened: subsection 2(1) "competent minister" and "Minister", subsections 8(1) and 37(1), section 47, and subsection 58(5) of the SARA.

[16] The SARA sets out a listing process to identify species at risk. An initial list (distinguishing between extirpated, endangered, and threatened species and species of special concern) is included in Schedule 1 of the SARA. Wildlife species may be added to, or removed from, this list – or reclassified within the list – by the Governor in Council taking into account the recommendations of an expert committee designated the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") and after consultation with relevant stakeholders: section 27 of the SARA.

[17] The listing of an aquatic wildlife species as endangered or threatened extends important legal protections to that species. To kill, harm, harass, capture or take an individual of a listed endangered or threatened aquatic wildlife species is prohibited by subsection 32(1) of the SARA. Possessing, collecting, buying, selling or trading an individual of such a species – or any part or derivative thereof – is prohibited by subsections 32(2) and (3). Furthermore, section 33 prohibits any person from damaging or destroying the residence or dwelling place (such as a den, nest or other similar area or place) of one or more individuals of such a species. Those who fail to respect these prohibitions are liable to large fines and to imprisonment: sections 97 and 98.

[18] The listing of an aquatic species in Schedule 1 of the SARA as endangered or threatened also requires the Minister to prepare a recovery strategy for that species within specified timelines: subsections 37(1) and 42(2) of the SARA. Such a recovery strategy must be prepared in cooperation with various stakeholders: section 39. If the Minister determines that the recovery of the endangered or threatened aquatic species is feasible, the recovery strategy must address the threats to the survival of the species identified by the COSEWIC, including any loss of habitat, and must include, *inter alia*, an identification of the species' critical habitat to the extent possible, based on the best available information, including information provided by COSEWIC, and examples of activities that are likely to result in its destruction: paragraph 41(1)(*c*).

[19] The proposed recovery strategy is then subject to public consultations. The Minister must consider any comments received, and make the changes he considers appropriate. Finally, the Minister must finalize the recovery strategy by including a copy in the public registry established for the purposes of the SARA: section 43. The Minister must also publicly report every five years on the implementation of the recovery strategy and the progress towards meeting its objectives: section 46.

[20] The Minister must prepare one or more action plans based on the recovery strategy, and such plans must include, *inter alia*: an identification of the aquatic species critical habitat and examples of activities which are likely to result in its destruction; a statement of measures which are proposed to be taken to protect the species critical habitat; an identification of any portions of the

species critical habitat that have not been protected; and a statement of the measures that are to be taken to implement the recovery strategy : section 47 and paragraphs 49(1)(*a*)(*b*)(*c*) and (*d*).

[21] A final recovery strategy for a listed endangered or threatened aquatic species has important legal consequences under the SARA since the entire critical habitat identified in the recovery strategy must be protected: section 57 and subsections 58(1) to (5) of the SARA. This protection is achieved either,

> (a) through provisions in or measures under the SARA or any other Act of Parliament; in such case, the Minister must identify how the critical habitat is legally protected in a protection statement made pursuant to paragraph 58(5)(*b*); or
>
> (b) through a protection order made by the Minister under subsections 58(1) and (4) in respect of the critical habitat or portion of the critical habitat specified in the order.

[22] Since many endangered and threatened species are not aquatic species or migratory bird species falling under primary federal jurisdiction, the SARA provides that federal action to prohibit the destruction of the critical habitat of most species must be exercised in close collaboration with provincial and territorial authorities. Consequently, different provisions of the SARA govern the protection of the critical habitat of these other species on lands which are not federal lands: sections 60 and 61 of the SARA. It is not however necessary to examine these other provisions of the SARA for the purposes of this appeal, and nothing in these reasons should be understood as pertaining to them.

[23] The Minister may also use his permitting and licensing authorities under the SARA or under another Act of Parliament to protect listed wildlife species, their critical habitat or their residences or dwelling places: sections 73, 74 and 75 of the SARA.

[24] The prohibitions under the SARA preventing the harvesting and trading in endangered or threatened aquatic species, the destruction of their dwelling places and the destruction of their critical habitat do not apply to activities related to public safety, health or national security that are authorized by, or under, an Act of Parliament: subsections 83(1) to (4) of the SARA.

Background to these proceedings

[25] Killer whales are the largest members of the dolphin family. They are long-lived animals with no natural predators. They are found in all three of Canada's oceans, as well as occasionally in Hudson Bay and the Gulf of St. Lawrence. In British Columbia, they have been recorded in almost all salt-water areas. Three distinct forms of killer whale inhabit Canadian Pacific waters: transient, offshore and resident. These forms are sympatric but socially isolated and differ in their dietary preferences, genetics, morphology and behaviour.

[26] Resident killer whales are the best understood. Their social organization is highly structured and their fundamental unit is matrilineal, comprising all surviving members of a female lineage. A typical matrilineal unit comprises an adult female, her offspring, and the offspring of her daughters. Both sexes remain within their natal matrilineal unit.

[27] There are two communities of resident killer whales in British Columbia: the northern resident population and the southern resident population. These resident killer whale populations are considered at risk because of their small population size, low reproductive rate, and the existence of a variety of man-made threats that have the potential to prevent recovery or to cause further declines. Principal among these threats are environmental contamination, reductions in the availability and quantity of prey, and both physical and acoustic disturbance. In 2003, the southern resident killer whale population counted 85 members, while the northern resident population counted 205 members.

[28] In 2001, COSEWIC designated the southern population as endangered, and the northern population as threatened. These populations were listed accordingly in Schedule 1 of the SARA when that statute was adopted by Parliament. Consequently, under subsections 37(1) and 42(2) of the SARA, the Minister was required to prepare a recovery strategy for these killer whale populations within specified timelines. For this purpose, a Resident Killer Whale Recovery Team (the "Recovery Team") comprising independent and government experts was convened in 2004.

[29] Following extensive study and review, a final draft recovery strategy was completed in May of 2006 for submission to the Minister. The manner in which critical habitat was described in this draft led to disputes between the Recovery Team and officials from the Department of Fisheries and Oceans. These disputes delayed the posting and approval of the recovery strategy, which was only included in the public registry established under the SARA in March of 2008.

[30] Pursuant to subsection 58(5) of the SARA, the inclusion of the recovery strategy in the public registry required the Minister to ensure that the critical habitat identified in that strategy be protected within 180 days. That protection could be achieved either through a protection order made by the Minister under subsections 58(1) and (4) or through a statement by the Minister setting out how the critical habitat or portions of it, as the case may be, would be legally protected under an Act of Parliament. The Minister did not make a protection order under the SARA. Rather, he included in the public registry a statement setting out how the critical habitat of the concerned killer whale populations was legally protected (the "Killer Whales Protection Statement").

[31] The Killer Whales Protection Statement restricted the concept of critical habitat for the purposes of the SARA to geophysical attributes. Consequently, the Killer Whales Protection Statement identified three types of human activity which could potentially destroy the geophysical attributes of the critical habitat of the concerned killer whale populations in the identified areas. It further identified various legislative provisions, including section 35 of the *Fisheries Act* and subsection 22(1) of the *Fishery (General) Regulations*, SOR/93-53 which were deemed to ensure the protection of these geophysical attributes. The pertinent paragraphs of the Killer Whales Protection Statement read as follows:

> Human activity which could potentially destroy the geophysical attributes of critical habitat for these species, as identified in the Final Recovery Strategy, and the federal legislations, regulations and/or policies which would be used to provide protection against such destruction are:
>
> > -Industrial activities such as construction, drilling, pile driving, pipe-laying, and dredging, and construction of physical structures such as wharves and net pens for aquaculture

> -Protected under provisions of the *Fisheries Act* s. 35 and the *Canadian Environmental Protection Act* (Part VII, Division 3). This protection is supported by processes under the *Canadian Environmental Assessment Act*.

-Fishing vessels using gear that drags along the bottom

> -Protected through provisions of the *Fisheries Act* or regulations made thereunder, in particular s. 22(1) of the *Fishery (General) Regulations*. This protection is supported by processes under the Fisheries and Oceans Canada policy on Managing the Impacts of Fishing on Sensitive Benthic Areas.

-Use of vessel anchors which may permanently damage the seabed, or which may serve to destroy a rubbing beach

> -Protected through provisions of the *Fisheries Act* s. 35, or of the *Oceans Act* s. 35 and/or s. 36. In addition, a Code of Conduct and outreach initiatives to inform and sensitise Canadians to the need to protect Resident Killer Whale habitat will continue to be developed and implemented.

[32] The difficulty in defining critical habitat in terms of geophysical attributes was that some of the most important elements of the critical habitat which had been identified in the recovery strategy were left without protection. The recovery strategy had indeed identified acoustic degradation, chemical and biological contamination and diminished prey availability as key components of the critical habitat of killer whales. Yet the Killer Whales Protection Statement did not consider these components as part of "critical habitat" for the purposes of protection under the SARA. Rather, the Killer Whales Protection Statement treated these components as "ecosystem features" to be dealt with through "legislative and policy tools", and not under the SARA. The Killer Whales Protection Statement thus treated these components as follows:

> While the Recovery Strategy identifies the critical habitat as a defined geophysical area, Fisheries and Oceans Canada (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. A variety of

legislative and policy tools are available to manage and mitigate threats to these functions of the Resident Killer Whale critical habitat, to individuals and to populations.

-Disturbance

-Threat management and mitigation is afforded under the *Marine Mammal Regulations* and the Whale Watching Guidelines developed cooperatively by industry and DFO.

-Degradation of the Acoustic Environment

-Threat management and mitigation is afforded under the *Marine Mammal Regulations*, the Statement of Practice with Respect to the Mitigation of Seismic Sound in the Marine Environment, and protocols for military sonar use.

-Marine Environmental Quality

-Threat management and mitigation is afforded under provisions of the *Fisheries Act*, or regulations made thereunder, and the *Canadian Environmental Protection Act* or regulations made thereunder.

-Availability of Prey

-Threat management and mitigation is afforded under the *Fisheries Act* or regulations made thereunder, supported by the Wild Salmon Policy and use of Integrated Fisheries Management Plans.

History of the Litigation

[33] The respondents in this appeal challenged the lawfulness of the Killer Whales Protection Statement by initiating a judicial review application before the Federal Court in October of 2008, wherein they asked that Court to make various declarations, set aside the Killer Whales Protection Statement, and a refer the matter back to the Minister for a new decision under section 58 of the SARA.

[34] In their application, the respondents argued that the critical habitat of the concerned killer whale populations included not only the geophysical elements of that habitat, but also all the other components identified in the recovery strategy. They further argued that, in a protection statement, the Minister could not resort to non-binding policy, prospective legislation or on ministerial discretion.

[35] Before this judicial review application could be heard, the Minister reversed himself. Both he and the Minister of the Environment jointly issued a protection order under subsections 58(1) and (4) of the SARA, which order was registered on February 19, 2009 as the *Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of Killer Whale (Orcinus orca) Order*, SOR/2009-68 (the "Killer Whales Protection Order"). Maps identifying the critical habitat areas contemplated by that order are attached in a schedule to these reasons. These are the same critical habitat areas as identified in the recovery strategy.

[36] Soon after this order was published, the respondents in this appeal sought clarification as to the scope and meaning of the order. In response, the Minister (a) asserted that the Killer Whales Protection Order was an optional alternative to the Killer Whales Protection Statement; (b) further asserted that policy and discretionary tools could be resorted to; and (c) did not give assurances to confirm that the Killer Whales Protection Order protected the biological features of critical habitat from destruction: Reasons at para. 44.

[37] The respondents in this appeal were unsatisfied and consequently filed a second judicial review application before the Federal Court. This second application challenged the practice of limiting the scope of a protection order made under subsections 58(1) and (4) of the SARA to geospatial areas and geophysical elements of critical habitat.

[38] Both judicial review applications were consolidated before the Federal Court after O'Reilly J. rejected the Minister's motion to dismiss as moot the judicial review application challenging the Killer Whales Protection Statement. O'Reilly J. was satisfied that in light of the Killer Whales Protection Order, the application for judicial review challenging the Killer Whales Protection Statement was moot. However, he was also of the view that there was a serious issue as to whether that judicial review application should nevertheless be heard in the exercise of the Federal Court's discretion in such circumstances; a discretion which, he opined, would be better exercised by the judge hearing both applications on the merits.

The reasons and judgment of the Federal Court

[39] The Federal Court judge hearing both applications on their merits granted most of the declarations sought and provided detailed reasons in support thereof.

[40] Turning his attention to the standard of review, the Federal Court judge found that since the issues raised were essentially questions of statutory interpretation, the correctness standard applied.

[41] As to the scope of "critical habitat" under the SARA, the Federal Court judge concluded that the issue had been conclusively decided by Campbell J. of the Federal Court in *Environmental Defence Canada v. Canada (Fisheries and Oceans)*, 2009 FC 878, 349 F.T.R. 225 ("*Environmental Defence*").

[42] The issue in *Environmental Defence* mainly concerned the scope of the expression "critical habitat" for the purposes of inclusion in a recovery strategy under paragraphs 41(1)(*c*) and (*c.1*) of the SARA. The applicants in *Environmental Defence* submitted that the constituents of habitat – and by implication of critical habitat – for specified species "are an identifiable location and the attributes of that location": *Environmental Defence* at para. 46. Campbell J. agreed, and ruled that for the purposes of the SARA, the word "areas" in the definition of "habitat" set out in the SARA did not just connote a location, "but a location that includes its special identifiable features": *Environmental Defence* at para. 58. The order of Campbell J. in *Environmental Defence* was not appealed from by the Minister, who now accepts that both the location and the components of critical habitat are contemplated by the SARA.

[43] Since, in this case, the recovery strategy identified reduced availability of prey, environmental contaminants and physical and acoustic disturbance as components of the critical habitat of the concerned killer whale populations, the Federal Court judge found that the Killer Whales Protection Order had to apply to all these components: Reasons at paras. 163-164 and 337 to 339. Moreover, in light of *Environmental Defence*, the Minister had in fact conceded this point before the Federal Court judge: Reasons at paras. 159 and 163. By necessary implication, the Killer

Whales Protection Statement was also flawed since it did not include these elements as critical habitat: Reasons at paras. 337 to 339.

[44] The Federal Court judge then went on to reject the Minister's contention that the declarations sought in regard to the Killer Whales Protection Order were beyond the jurisdiction of the Federal Court. The Minister had indeed submitted that the Killer Whales Protection Order was not a "decision" subject to judicial review; he argued that the order was rather a "regulation" within the meaning of the *Statutory Instruments Act*, R.S.C., 1985, c. S-22, and that it was thus immune from judicial review. The Federal Court judge was not persuaded, ruling instead that Parliament had not shielded decisions under subsection 58(5) of the SARA from judicial review through the use of a privative clause or otherwise. In his view, the SARA was clearly a justiciable statute that imposed duties on the Minister, and whose actions under that statute were subject to review before the Federal Court: Reasons at paras 183-184.

[45] The Federal Court judge also decided to hear the application concerning the Killer Whales Protection Statement even if the Killer Whales Protection Order had made that application moot. Applying the factors established in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Federal Court judge concluded that, in view of the fundamental points of law raised by the proceedings, a quite live controversy between the parties did remain: Reasons at paras. 242 to 245. He also concluded that these points were of general importance for the interpretation and application of the SARA: Reasons at paras. 250-251.

[46] The Federal Court judge then ruled that a competent minister may not resort to another federal statute as a substitute for a protection order unless that statute provides an equal level of legal protection for critical habitat as would be engaged through a protection order: Reasons at paras. 257 and 272. The Federal Court judge made that ruling on the basis of a purposive reading of the pertinent provisions of the SARA; he concluded that Parliament had sought to limit ministerial discretion where the protection of critical habitat of endangered and threatened species was at issue: Reasons at paras. 277 to 280.

[47] The Federal Court judge then went on to conclude that the *Fisheries Act*, and the regulations adopted under that statute, could not be used as a substitute for a protection order. His conclusion was based on the highly discretionary nature of the broad powers afforded to the Minister under the scheme of the *Fisheries Act*, including a broad discretion to authorize the destruction of fish habitat under subsection 35(2) and to attach conditions to a fishing licence under section 22 of the *Fishery (General) Regulations*: Reasons paras. 320-321.

[48] The Federal Court judge also discarded section 36 of the *Fisheries Act* – which prohibits the deposit of a deleterious substance into waters frequented by fish – on the basis that such deposits may nevertheless be authorized through regulations adopted "at the Cabinet's discretion": Reasons at para. 325.

[49] The Federal Court judge then went on to make eleven declarations of law. These declarations read as follows:

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.

The issues in this appeal

[50] Though the Minister of the Environment was also a respondent before the Federal Court, only the Minister of Fisheries and Oceans has appealed to this Court. Moreover, that Minister's appeal only concerns one of the declarations made by the Federal Court judge, namely declaration 1(d) providing that ministerial discretion does not legally protect critical habitat within the meaning of section 58 of the SARA, and that it was consequently unlawful for the Minister to have cited discretionary provisions of the *Fisheries Act* in the Killer Whales Protection Statement.

[51] The Minister raises the standard of review as a first ground of appeal. He submits that Parliament entrusted him with the responsibility to manage aquatic species under both the SARA and the *Fisheries Act*, and that, consequently, he is entitled to deference as to the interpretation of both these statutes.

[52] As a second ground of appeal, the Minister submits that he lawfully invoked the provisions of the *Fisheries Act* in the Killer Whales Protection Statement, and that he may resort to such provisions in any protection statement made under subsection 58(5) of the SARA.

[53] This appeal consequently raises the following questions:

a. What is the standard of review?

b. Did the Minister err by relying on the provisions of the *Fisheries Act* and of its regulations in making the Killer Whales Protection Statement?

[54] In addition, as a preliminary matter, I must consider whether this appeal should be dismissed on the basis that the issues raised by the Minister are moot.

Preliminary issue: Should this appeal be dismissed on the ground that the issues raised by the Minister are moot?

[55] The Minister's appeal concerns the Killer Whales Protection Statement, which statement was replaced by the Killer Whales Protection Order. As both O'Reilly J. and the Federal Court judge concluded in this case, the issues which are raised by these proceedings and which concern the Killer Whales Protection Statement are clearly moot. Hence, should this Court entertain those issues?

[56] The Minister and the respondents are not pursuing this argument before this Court, but the fact that they are not raising it does not mean that this Court can simply ignore the matter. Reluctant as this Court is to decide a matter not fully argued before it, determining if the issues are moot and if so, whether they should nevertheless be decided, is a prerequisite to the disposition of this appeal.

[57] The choice of the appropriate test to apply in deciding whether a matter is moot is a question of law. The decision of whether to hear a moot proceeding is discretionary: *Aktiebolaget Hassle v. Apotex Inc.*, 2008 FCA 88 at para. 11. The identification of the factors which must be considered in exercising that discretion is also a question of law: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 at para. 18.

[58] It cannot be disputed that the issues raised are moot. It is also clear from the Federal Court judge's reasons at paras. 236 to 252 that he identified the appropriate factors to consider in exercising his discretion to nevertheless hear these issues. In an appeal from such a judgment, should this Court review the exercise of the Federal Court judge's discretion on a standard of reasonableness or should this Court rather exercise anew judicial discretion and decide itself whether or not to hear the moot issues in appeal? In past appeals, this Court seems to have preferred to exercise anew the discretion: see *Baron v. Canada (Public Safety and Emergency Preparedness*, 2009 FCA 81 at paras. 26 to 46.

[59] In *Borowski v. Canada (Attorney General)*, above at pages 358-363, and in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, above at paras. 18 to 22, the Supreme Court of Canada has outlined the following criteria for courts to consider in exercising discretion to hear a moot case:

a. the presence of an adversarial context;

b. the concern for judicial economy; and

c. the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

[60] Applying these factors, I conclude that the Federal Court judge reasonably exercised his discretion to hear the issues relating to the Killer Whales Protection Statement. I also conclude that this Court should exercise its discretion to entertain those issues even though they are moot.

[61] These issues have been fully argued before both the Federal Court and this Court; and a very live controversy exists between the parties which will persist until they are finally decided.

[62] Judicial economy will be well served if this Court addresses the issues raised. They have been fully canvassed in these proceedings and they will likely arise in the future in the context of other protection statements under the SARA. It is thus appropriate to settle these issues now rather than to await another case which will require additional efforts and expenditures to pursue.

[63] The issues raised are of public importance, and their resolution is in the public interest. This case is the first to be heard by this Court concerning the scope of a protection statement under the SARA. Many other protection statements are being prepared and may have been issued for other endangered or threatened species. Consequently, both the Minister and the respondents seek guidance as to the interpretation and application of section 58 of the SARA.

[64] Finally, this Court is neither departing from its traditional role as an adjudicator nor intruding upon the legislative or executive sphere by deciding to hear this appeal. The issues raised are all questions of statutory interpretation. Moreover, the Minister – acting as a member of the Executive branch of government – seeks the opinion of this Court on these issues.

The standard of review

The Minister's position

[65] At its core, the principal question before this Court concerns the meaning of the words "legally protected by provisions in, or measures under, this or any other Act of Parliament" found in subsection 58(5) of the SARA. That is a question of statutory interpretation, and that is not disputed by the Minister.

[66] However, the Minister submits that Parliament has entrusted him with the responsibility to manage the regulatory schemes under the SARA and the *Fisheries Act,* and that consequently, his interpretation of section 58 of the SARA – and of the provisions of the *Fisheries Act* and of its regulations as they relate to that section – should be given deference.

[67] The Minister relies for this proposition on *Dunsmuir* and recent decisions of the Supreme Court of Canada which have all clearly emphasized the deference which courts must show to an administrative tribunal when it interprets a provision of its enabling (or "home") statute or statutes closely connected to its functions. The Minister notably relies on *Celgene Corp. v. Canada (Attorney General),* 2011 SCC 1, [2011] 1 S.C.R. 3 ("*Celgene*") at paragraphs 33-34, *Canada*

(Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53 ("*Mowat*") at paragraphs 15 to 27 and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 , [2011] 1 S.C.R. 160 ("*Smith*") at paragraph 26. In this regard, I note that the standard which applies when the interpretation of a statute by a government official is raised in a judicial review proceeding has been questioned by this Court following *Dunsmuir*: see *Global Wireless Management v. Public Mobile Inc.*, 2011 FCA 194, [2011] 3 F.C.R. 344 at para. 35 and *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, 420 N.R. 213 at para. 19.

[68] The Minister also finds support for his position in *Adam v. Canada (Environment)*, 2011 FC 962; *sub nom. Athabasca Chipewyan First Nation v. Canada (Minister of the Environment)*, [2011] 4 C.N.L.R. 17 ("*Adam*"), a recent decision of the Federal Court. The applicants in *Adam* were asking the Court to order the Minister of the Environment to (a) finalize a recovery strategy under the SARA for the boreal caribou located in North-eastern Alberta and (b) recommend the adoption of an emergency protection order for these caribou under subsection 80(2) of the SARA. Without proceeding with a standard of review analysis, the Court in *Adam* concluded – based on its understanding of *Dunsmuir* and *Smith* – that the Minister of the Environment's interpretation of subsection 80(2) of the SARA was subject to review under a reasonableness standard. Since that minister was interpreting his "home" statute (the SARA), and since no constitutional question, no question of law of central importance to the legal system as a whole, and no jurisdictional question was raised by the proceedings, the Minister of the Environment's interpretation of subsection 80(2) of the SARA was reviewed on a standard of reasonableness: *Adam* at para. 40.

[69] The Minister submits that as the "competent minister" with respect to aquatic species, he is entitled to the same deference as to his interpretation of the pertinent provisions of the SARA. Likewise, as the minister responsible for the *Fisheries Act*, deference should also be extended to his interpretation of that statute and of its regulations. In short, the Minister submits that pursuant to the most recent Supreme Court of Canada jurisprudence, a presumption of deference has been extended to administrative decision makers – such as himself – when they interpret their enabling (or "home") statutes.

[70] I disagree with the Minister. For the reasons which follow, I have concluded that no deference is owed by this Court to the Minister as to the interpretation of the relevant provisions of the SARA or of the *Fisheries Act* and its regulations

Historical and constitutional foundations of judicial review

[71] It is useful to set out briefly the foundations of judicial review in Canada. The two guiding principles of the British constitution – on which the constitution of Canada is modelled – are the sovereignty of Parliament and the rule of law. These constitutional principles were largely developed as a result of the English Civil War of the 17th Century and its aftermath. This long, difficult and often bloody struggle between the Crown and Parliament culminated in the victory of the Parliamentarians in the so-called "Glorious Revolution", which ensured the accession to the throne of William and Mary and led to the adoption of the *Bill of Rights* of 1689, later followed by the *Act of Settlement* of 1701.

[72] Through these historical events, the Crown's powers were made subject to the laws of Parliament. Prior to the *Bill of Rights* of 1689, the Crown had asserted that it could "assum[e] and exercis[e] a power of dispensing with and suspending of laws and the execution of laws without the consent of Parliament": Preamble to the *Bill of Rights* of 1689. While the *Bill of Rights* of 1689 firmly consecrated the principle of Parliamentary sovereignty, it also implicitly empowered the courts, and particularly the common law courts, to both interpret Parliament's laws and censure unlawful behaviour on the part of Crown officials. This was further entrenched by the subsequent *Act of Settlement* of 1701 which recognized the independence of the judiciary.

[73] The *Bill of Rights* of 1689, the *Act of Settlement* of 1701, and the constitutional principles flowing from those documents thus ensured that the Crown and its officials would be thereafter bound by Parliament's laws as interpreted by the independent common law courts: see Dussault and Borgeat, "Administrative Law – A Treatise" second edition, volume 4, Carswell, 1990 at pages 12-13 and 27 to 31; A. L. Goodhart and R. E. Megarry, "Judicial Review and the Rule of Law: Historical Origins" (1956), 72 L.Q.R. 345 at p. 362; Lord Hailsham of St. Marylebone, "Democracy and Judicial Independence" (1979), 28 N.B.L.J. 7 at page 9.

[74] The principles of Parliamentary sovereignty and of the rule of law are still today at the heart of judicial review: *Dunsmuir* at paras. 27 to 30.

[75] With the expansion of state intervention in the first part of the 20th Century, Parliament set up numerous intricate legislative schemes seeking to achieve complex economic and social goals. It

delegated more and more powers to various administrative bodies entrusted with the authority to implement these schemes. Parliament also created numerous administrative tribunals to adjudicate the disputes resulting from these complex schemes. In some cases, Parliament sought to protect these administrative bodies and tribunals from interference by the courts. This was principally achieved by the inclusion of various privative clauses in the legislation enabling these administrative bodies and tribunals to carry out their functions.

[76] Though the courts throughout the Commonwealth fiercely resisted these curtailments of their authority, they eventually relented in deference to the principle of Parliamentary sovereignty. However, the courts always maintained a right – albeit limited – to control administrative decisions on the ground that the rule of law required it in certain appropriate circumstances, notably in cases of excess of jurisdiction, abuse of power or failure to comply with principles of natural justice.

The modern Canadian approach to judicial review of questions of law

[77] The modern Canadian approach to judicial review of questions of law involving administrative tribunals can be ascertained from *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 ("*C.U.P.E.*") and *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 ("*Control Data*"). Justice Lamer summarized as follows the Canadian approach in *Control Data* at pages 492-493:

> In principle, where there is a privative clause the superior courts should not be able to review errors of law made by the administrative tribunals. However, it is now settled that some errors of law can cause the arbitrator to lose his jurisdiction. The debate turns on the question of *which* errors of law result in the loss of jurisdiction. Contrary to the decision of Lord Denning in *Pearlman v. Keepers and Governors of Harrow School,* [1979] 1 All

> E.R. 365, where he said (at p. 372) that "no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends" (subsequently disapproved by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union,* [1980] 3 W.L.R. 318, and *Re Racal Communications Ltd.,* [1980] *2* All E.R. 634), this Court has tended since *Nipawin, supra,* [*Service Employees'International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382]] and C.U.P.E., *supra,* to avoid intervening when the decision of the administrative tribunal was reasonable, whether erroneous or not. In other words, only unreasonable errors of law can affect jurisdiction. The following extract from C.U.P.E., *supra,* at p. 237, frequently referred to in later cases, has become the classic statement of the approach taken by this Court:
>
> > Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?
>
> This is a very severe test and signals a strict approach to the question of judicial review. It is nevertheless the test which this Court has applied and continues to apply […]

[78] Thus, if Parliament (or a provincial legislature) has adopted a privative clause providing that the decisions of an administrative tribunal – or of any other administrative decision maker – are not subject to judicial review for error of law, the courts should strive to respect that legislative intent and should only interfere where a given decision is unreasonable.

[79] In subsequent cases, the Supreme Court of Canada applied this approach, even in the absence of a privative clause, insofar as certain factors set out in the enabling legislation made the legislative intent clear.

[80] In *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557 ("*Pezim*') and in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 ("*Southam*") – both of which involved a statutory appeal – the Supreme Court of Canada did not apply a correctness standard to questions of law, but rather deferred to the original decision-maker's

legal analysis. In both cases, the application of the reasonableness standard flowed from legislative intent. As noted by Justice Iacobucci in *Pezim* at pages 589-590:

> The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

[81] In *Pezim* and *Southam*, privative clauses were found to be only one of many factors which may be considered for the purpose of ascertaining a legislative intent to limit the scope of a court's power to review an administrative tribunal's decision on questions of law. Factors such as the nature of the problem before the tribunal, the wording of the enabling (or "home") statute, the purpose of that statute, and the areas of expertise could be considered to ascertain legislative intent, in addition to the presence or absence of a privative clause. Consequently, a so-called "pragmatic and functional" approach – similar to the one developed in *U.E.S., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 for the identification of jurisdictional issues – was required in order to ascertain the scope of judicial review of an administrative tribunal's decision: *Pezim* at p. 592.

[82] Similar considerations were expressed in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 26: "The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed". This was also reiterated in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 21:

"…the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law".

Dunsmuir and the subsequent case law

[83] The Minister submits in this appeal that in view of the responsibilities conferred on him by the SARA and the *Fisheries Act*, his interpretation of those statutes is not susceptible to judicial review on a standard of correctness. The Minister's position implies that the standard of review analysis ends as soon as Parliament confers on a minister the responsibility to administer a federal statute. This, the Minister submits, is the conclusion which must be drawn from the recent jurisprudence of the Supreme Court of Canada. I disagree.

[84] The Supreme Court of Canada, in *Dunsmuir*, and subsequently in *Celgene*, *Mowat* and *Smith*, has not repudiated the relevance of legislative intent, nor discarded the relevance of a standard of review analysis, as the Minister implies. This is not what these decisions stand for. As noted in *Dunsmuir* at paragraph 30, "…determining the applicable standard of review is accomplished by establishing legislative intent."

[85] As Justices Bastarache and LeBel jointly noted in *Dunsmuir* at paragraphs 27 to 31, judicial review is intimately connected with the preservation of the rule of law and with maintaining legislative supremacy. While developing a more coherent and workable framework for judicial review – notably by merging the "patently unreasonable" and "reasonableness *simpliciter*"

standards of review into a single "reasonableness" standard – *Dunsmuir* still requires that a proper standard of review analysis be carried out in appropriate circumstances.

[86] For this purpose, *Dunsmuir* has set out a two step process: first, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular question; second, where the first inquiry proves unfruitful, courts must proceed to a standard of review analysis involving the factors making it possible to identify the proper standard of review: *Dunsmuir* at para. 62.

[87] In the case of an administrative tribunal exercising adjudicative functions in the context of an adversarial process, and explicitly or implicitly empowered by its enabling statute to decide questions of law, judicial deference will normally extend to its interpretation of its enabling statute or of a statute closely connected to its functions. This conclusion was drawn in *Dunsmuir* on the basis of existing case law, which had already extensively canvassed the standard of review applicable to adjudicative administrative tribunals. As stated in *Dunsmuir* at para. 54:

> [54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[Emphasis added]

[88] However, deference on a question of law will not always apply, notably where the administrative body whose decision or action is subject to review is not acting as an adjudicative tribunal, is not protected by a privative clause, and is not empowered by its enabling legislation to authoritatively decide questions of law. A standard of review analysis is still required in appropriate cases. As noted by Justices Bastarache and LeBel at paragraphs 63 and 64 of *Dunsmuir*:

> [63] The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.
>
> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[89] What *Dunsmuir* has made clear is that "[a]n exhaustive review is not required in every case to determine the proper standard of review": *Dunsmuir* at para. 57. Further, *Dunsmuir* has also made clear that "at an institutional level, **adjudicators** … can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions": *Dunsmuir* at para. 68 (emphasis added); *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para. 53.

[90] Consequently, since *Dunsmuir*, unless the situation is exceptional, the interpretation by an adjudicative tribunal of its enabling statute or of statutes closely related to its functions should be presumed to be a question of statutory interpretation subject to deference on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 34 and 41, per Justice Rothstein ("*Alberta Teachers' Association*").

[91] The decisions of *Celgene*, *Mowat*, and *Smith* relied upon by the Minister are consistent with *Dunsmuir* and with the relevance of legislative intent. Properly understood, these cases do not support the Minister' position as to the standard of review.

[92] *Celgene* concerned the interpretation of an expression found in provisions of the *Patent Act*, R.S.C. 1985, c. P-4 by the Patented Medicine Prices Review Board. That issue of statutory interpretation was reviewed and decided on a standard of correctness. However, a question was raised as to whether correctness was the operative standard in the circumstances. This question was not answered by the Court in the light of its conclusion that the Board's decision was unassailable under a standard of review based either on correctness or on reasonableness. The Minister's reliance on this decision is therefore misplaced.

[93] *Mowat* concerned a decision to award legal costs made by the Canadian Human Rights Tribunal acting in its adjudicative capacity under the *Canadian Human Rights Act* following an adversarial process. In issue in that case was the Tribunal's interpretation of provisions in the

Canadian Human Rights Act. Justices LeBel and Cromwell concluded that, under *Dunsmuir*, deference should normally be extended to decisions of adjudicative tribunals as to the interpretation of their enabling statutes. Applying a reasonableness standard of review, Justices LeBel and Cromwell finally concluded that the Canadian Human Rights Tribunal's interpretation of its enabling legislation was not sustainable. Again, that case does not support the Minister's position since it concerned an adjudicative tribunal.

[94] *Smith* concerned a decision to award costs made by an Arbitration Committee established under Part V of the *National Energy Board Act*, R.S.C. 1985, c. N-7. The issue in that case was the Arbitration Committee's interpretation of the word "costs" in subsection 99(1) of the *National Energy Board Act*. Justice Fish, for the majority, ruled that since the Arbitration Committee was interpreting its enabling statute, a reasonableness standard of review applied in light of the principles set out in *Dunsmuir*. This conclusion flowed from Parliament's intent, as noted at para. 31 of this decision:

> […] in fixing the costs that must be paid by expropriating parties, the Committee has been expressly endowed by Parliament with a wide "margin of appreciation within the range of acceptable and rational solutions" (*Dunsmuir*, at para. 47): the only costs that must be awarded under s. 99(1) are those "determined by the Committee to have been reasonably incurred". This statutory language reflects a legislative intention to vest in Arbitration Committees sole responsibility for determining the nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve. [Emphasis added]

[95] The analytical framework and the presumption set out in *Dunsmuir* have been recently described as follows by Justice Fish in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, above at paras. 35 and 36:

> [35] An administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'", or a "true question of jurisdiction or *vires*". It will be reviewable for correctness as well if it involves the drawing of jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir*, at paras 58-61; *Smith*, at para. 26; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, *per* LeBel J.).
>
> [36] The standard of reasonableness, on the other hand, normally prevails where the tribunal's decision raises issues of fact, discretion or policy; involves inextricably intertwined legal and factual issues; or relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at paras. 51 and 53-54; *Smith*, at para. 26).

[96] This analytical framework and this presumption must be understood in the context in which they were developed: they concern adjudicative tribunals. The presumption is derived from the past jurisprudence which had extensively considered the standard of review applicable to the decisions of such tribunals. By empowering an administrative tribunal to adjudicate a matter between parties, Parliament is presumed to have restricted judicial review of that tribunal's interpretation of its enabling statute and of statutes closely connected to its adjudicative functions. That presumption may however be rebutted if it can be found that Parliament's intent is inconsistent with the presumption.

[97] The Minister is inviting this Court to expand the above-described *Dunsmuir* analytical framework and presumption to all administrative decision makers who are responsible for the administration of a federal statute. I do not believe that *Dunsmuir* and the decisions of the Supreme Court of Canada which followed *Dunsmuir* stand for this proposition.

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

[99] The issues in this appeal concern the interpretation of a statute by a minister who is not acting as an adjudicator and who thus has no implicit power to decide questions of law. Of course, the Minister must take a view on what the statute means in order to act. But this is not the same as having a power delegated by Parliament to decide questions of law. The presumption of deference resulting from *Dunsmuir*, which was reiterated in *Alberta Teachers' Association* at paras. 34 and 41, does not extend to these circumstances. The standard of review analysis set out at paragraphs 63 and 64 of *Dunsmuir* must thus be carried out in the circumstances of this case in order to ascertain Parliament's intent.

[100] In other words, does Parliament intend to shield the Minister's interpretation of the pertinent provisions of the SARA and of the *Fisheries Act* from judicial review on a standard of correctness? On the basis of the standard of review analysis further set out below, I answer in the negative.

Standard of review analysis

[101] First, neither the SARA nor the *Fisheries Act* contains a privative clause. This is a strong indication of Parliament's intent not to shield the Minister's legal interpretation of these statutes from judicial review.

[102] Second, as provided in section 57 of the SARA, the purpose of section 58 is "to ensure that […] all the critical habitat is protected". Hence, under subsection 58(5), the Minister "must" make a protection order to protect identified critical habitat unless that habitat is "legally protected by provisions in, or measures under, this or any other Act of Parliament". These are all indications that Parliament has greatly restricted the Minister's discretion. It would be strange indeed if the Minister's interpretation of such restrictive legislative language could somehow prevail in order to curtail Parliament's intent in adopting these provisions. Here again, Parliament's intent not to shield the Minister's legal interpretation from judicial review appears clear.

[103] Third, the Minister acts in an administrative capacity, and not as an adjudicator, when preparing and issuing a protection statement under subsection 58(5) of the SARA. The fact that Parliament has not to set up an independent administrative tribunal to adjudicate legal issues under the SARA – including legal issues resulting from section 58 – is a further indication of the legislative intent to empower the courts with authority to adjudicate these issues on a standard of correctness. The question in issue is one of statutory interpretation which the courts are best equipped to answer in the circumstances of this case.

[104] Finally, though the Minister – acting on the advice of the officials of the Department of Fisheries and Oceans – can certainly claim expertise in the management of the fisheries and of fish habitat, this does not confer on the Minister expertise in the interpretation of statutes. Expertise in fisheries does not necessarily confer special legal expertise to interpret the statutory provisions of the SARA or of the *Fisheries Act*.

[105] For these reasons, the issues of statutory interpretation raised by this appeal will be reviewed and determined on a standard of correctness.

Did the Minister err by relying on the provisions of the Fisheries Act and of its regulations in making the Killer Whales Protection Statement?

The Minister's position

[106] The Minister concedes that the protection of the critical habitat of endangered and threatened aquatic species under the SARA is not discretionary. However, the Minister submits that Parliament intended that he be allowed some flexibility as to how to provide that compulsory protection. The Minister further submits that such flexibility would not exist if the conclusions of the Federal Court judge are upheld by this Court.

[107] The Minister adds that not every instrument relied on in a protection statement need be a "legal provision" which provides mandatory, enforceable protection against the destruction of critical habitat. This alternative approach would give him a large degree of flexibility in determining how that protection should be best provided. This, the Minister submits, is what Parliament

intended. Had Parliament intended only a legal prohibition from destruction to protect critical habitat – as it has done for residences and the killing, harming or harassing of individuals – it would not have provided the alternative of a protection statement. Consequently, protection measures relied upon in a protection statement need not be prohibitions from destruction.

[108] The Minister also submits that he is seeking this flexibility not to undercut the protection of critical habitat or to provide protection which is inferior to what would be provided under a prohibition order. Rather, the Minister argues that there are other methods which can protect the critical habitat from destruction. The Minister specifically identifies provisions of the *Fisheries Act* as appropriate alternatives to a protection order. While the Minister recognizes that he has unfettered discretion under the *Fisheries Act* to manage fisheries, "where he has undertaken to comply with the SARA critical habitat protection requirements by reliance on the provisions of the *Fisheries Act*, the discretion will be exercised taking into account that reliance" (Appellant's Memorandum at para. 47).

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

Interpretation of the pertinent provisions of the SARA

[110] The preamble of the SARA recognizes that "the habitat of species at risk is key to their conservation". In this respect, section 57 of the SARA – which is an interpretative provision – provides that all critical habitat identified in a recovery strategy must be protected within 180 days after the recovery plan is included in the public registry:

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).
[Emphasis added]	[Je souligne]

[111] Section 58 of the SARA adds that this protection must be achieved through legally enforceable measures. The pertinent provisions of section 58 read as follows:

58. (1) Subject to this section, no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species — or of any listed extirpated species if a recovery strategy has recommended the	**58.** (1) Sous réserve des autres dispositions du présent article, il est interdit de détruire un 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

reintroduction of the species into the wild in Canada — if […]

(*b*) the listed species is an aquatic species; […]

(4) […] 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.

(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, […] with respect to all of the critical habitat or any portion of the critical habitat […]

(*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

(*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.

[Emphasis added]

un programme de rétablissement a recommandé la réinsertion à l'état sauvage au Canada : […]

b) si l'espèce inscrite est une espèce aquatique; […]

4) Le paragraphe (1) s'applique à l'habitat essentiel ou à la partie de celui-ci […] selon ce que précise un arrêté pris par le ministre compétent.

(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, […] :

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) 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.

[Je souligne]

[112] The proper approach to the interpretation of these statutory provisions consists in determining the intent of Parliament according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the SARA as a whole: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[113] The meaning of the word "protect" is defined as follows in the *Canadian Oxford Dictionary*, second edition: "attempt to preserve (a threatened plant or animal species) by legislating against hunting, collecting, etc.; restrict by law access to or development of (land) in order to preserve its wildlife or its undisturbed state". Likewise, the word "protéger" is defined as follows in the *Le Nouveau Petit Robert*: « Rendre inefficaces les efforts pour compromettre, faire disparaître (qqch.); garantir, sauvegarder; couvrir de manière à intercepter ce qui peut nuire, à mettre à l'abri des chocs, des agents atmosphériques, du regard d'autrui; abriter, défendre, garantir, préserver. »

[114] In view of these dictionary definitions, it can safely be concluded that Parliament's intent was to avoid interference with and destruction of critical habitat. We are far removed from the concept of critical habitat management advanced by the Minister. Moreover, the juxtaposition of the word "legally" ["légalement"] with the word "protected" ["protégés"] to form the expression "legally protected" ["protégés légalement"] leaves little ambiguity as to the intent of Parliament: critical habitat must be preserved through legally enforceable measures.

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

[116] This textual analysis is reinforced by a contextual and purposive analysis.

[117] Section 57 of the SARA provides in no uncertain language that the purpose of section 58 is to ensure that all the critical habitat is protected by provisions in, or measures under, an Act of Parliament or by a protection order issued under subsections 58(1) and (4) of the SARA. Surely this is an indication that there must be some equivalence between the two contemplated means of protection. They need not be the same, but surely they must have the same objective. Pursuant to subsection 58(1), the objective of a protection order is to ensure that "no person […] destroy any part of the critical habitat of any listed endangered species or of any listed threatened species […] if the listed species is an aquatic species". Provisions in, or measures under, an Act of Parliament should thus – in principle – achieve the same objective if they are to be resorted to as a substitute to a protection order.

[118] The Minister however cites the reference to "agreements under section 11" found in paragraph 58(5)(*a*) of the SARA. He concludes from this reference that Parliament's intent was to allow non-compulsory discretionary measures as alternatives to a protection order. The Minister's argument, based on this reference, is misguided. Section 11 conservation agreements are simply

referred at paragraph 58(5)(*a*) as examples of alternative measures which may be taken to protect critical habitat from destruction. However, if a section 11 conservation agreement is to constitute a valid alternative to a protection order, it must ensure that the critical habitat is "legally protected" from destruction.

[119] There may be a wide variety of conservation agreements under section 11 of the SARA. Subsection 11(2) identifies agreements providing measures with respect to (a) monitoring the status of species; (b) developing and implementing education and public awareness programs; (c) developing and implementing recovery strategies, action plans and management plans; (d) protecting a species habitat, including its critical habitat; and (e) undertaking research projects in support of recovery efforts for the species. Only a section 11 conservation agreement under 11(2)(*d*) protecting a species critical habitat could qualify under section 58, and only insofar as that agreement legally protects that habitat from destruction through non-discretionary means. Were it otherwise, the Minister could simply "contract himself out" of section 58, which is an absurd proposition.

[120] Sections 74 and 77 of the SARA also support the view that the provisions in, or measures under, an Act of Parliament should achieve the same objective as a protection order if they are to be accepted as a substitute to such an order.

[121] Section 74 of the SARA restricts the authority of a "competent minister" – including the appellant Minister in this case – from entering into an agreement, issuing a permit or licence or

making an order under another Act of Parliament – such as the *Fisheries Act* – authorizing a person to engage in an activity "affecting" the critical habitat of a listed wildlife species unless (a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons; (b) the activity benefits the species or is required to enhance its survival; or (c) affecting the species is incidental to the carrying out of the activity: paragraph 74(*a*) and subsection 73(2) of the SARA.

[122] Even in such limited circumstances, the agreement may be entered into, or the permit issued, pursuant to section 74 only if the competent minister is of the opinion that all reasonable alternatives have been considered and the best solution has been adopted, measures have been taken to minimize the impact of the activity, and the activity will not jeopardize the survival or recovery of the species: paragraph 74(*a*) and subsection 73(3) of the SARA.

[123] Moreover, subsection 77(1) of the SARA provides that a person or body – other than a "competent minister" – authorized under any Act of Parliament to issue or approve a licence, a permit or any other authorization for an activity that may result in the destruction of critical habitat of a listed wildlife species may only proceed after consulting the competent minister and considering reasonable alternatives. However, where the critical habitat is subject to section 58 – such as the critical habitat of listed endangered or threatened aquatic species – subsection 77(2) of the SARA provides, for greater certainty, that section 58 applies even though such a licence, permit or other authorization has been issued. It is noteworthy that subsection 77(2) refers to section 58 of the SARA as a whole, including both a protection order made under subsections 58(1) and (4), and

a protection statement made under paragraph 58(5)(*b*), thus emphasising that both measures seek to protect critical habitat from destruction.

[124] It is apparent from the overall structure of the SARA that critical habitat of species subject to section 58 – such as listed endangered or threatened aquatic species – cannot be destroyed or detrimentally affected through a permit or other authorization issued in application of sections 74 or 77 of the SARA. This is another indication that the purpose of section 58 – under a protection order or through statutory provisions or measures identified in a protection statement – is to protect critical habitat from destruction, including from destruction resulting from activities authorized under federal permits, licences or authorizations issued or entered into under Acts of Parliament.

[125] In conclusion, a textual, contextual and purposive analysis of section 58 of the SARA shows that Parliament is precisely seeking to avoid the destruction of identified critical habitat of listed endangered and threatened aquatic species though any means, including through activities authorized under discretionary permits or licences. Consequently, a provision in, or a measure under, an Act of Parliament only legally protects critical habitat for the purposes of section 58 if that provision or measure prevents the destruction of critical habitat through legally enforceable means which are not subject to ministerial discretion.

Section 35 of the Fisheries Act

[126] I will now turn to the *Fisheries Act* to ascertain if the provisions of that statute may be relied upon by the Minister for the purposes of section 58 of the SARA.

[127] Subsection 35(1) of the *Fisheries Act* prohibits any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. However, subsection 35(2) allows the Minister to authorize the alteration, disruption or destruction of fish habitat under any conditions he deems appropriate. The prohibitions set out in subsection 35(1), when read in conjunction with subsection 35(2), thus constitute a legal means whereby the Minister is enabled to manage and control the alteration, disruption or destruction of fish habitat. In other words, subsection 35(2) allows the Minister to issue a permit to a person to engage in conduct harmful to fish habitat that would otherwise contravene subsection 35(1): *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 477 at para. 49.

[128] The provision reads as follows:

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.

[129] In the Minister's submission, it "is irrelevant" that subsection 35(2) allows for the alteration, disruption or destruction of fish habitat, since "the mere possibility of a future authorization can not

negate the fact that s. 35(1) provides habitat protection": Appellant's Memorandum at para. 51. He adds that "[a]lthough the Minister's discretion under the *Fisheries Act* is generally very broad, where the Minister has relied on the protections provided by the *Fisheries Act* to meet the requirements of the SARA, that reliance will guide the exercise of discretion to ensure that critical habitat remains protected": Appellant's Memorandum at para. 2.

[130] The Minister reads subsection 35(1) in isolation from subsection 35(2). However, both subsections are closely related and interdependent; they must be read and understood together. There is no dispute that the protection offered fish habitat under subsection 35(1) may be waived at the discretion of the Minister acting under subsection 35(2). Consequently, this provision cannot ensure that the critical habitat of endangered or threatened aquatic species is "legally protected" under the meaning of section 58 of the SARA.

[131] The Minister – through his counsel – states that he intends not to use his discretion under subsection 35(2) of the *Fisheries Act* to authorize the destruction of critical habitat. However, he does not explain how his intent can be legally enforced should he change his mind in the future for some presumably good reason; nor does he explain how his current intent would bind his successors. Intent not to use discretion is not legally enforceable. A mere intent does not ensure that critical habitat is "legally protected" under the meaning of section 58 of the SARA.

Section 36 of the Fisheries Act

[132] Section 36 of the *Fisheries Act* is meant to prevent the pollution of water frequented by fish – which includes marine animals – by prohibiting any person from depositing deleterious substances of any type in such water or in any place under any conditions where the deleterious substances may enter such water. However, subsection 36(4) of the *Fisheries Act* allows for the deposit of wastes, pollutants and deleterious substances in such waters or places in a quantity or concentration and under the conditions authorized by regulation made by the Governor in Council under any Act of Parliament or under subsection 36(5) of the *Fisheries Act*.

[133] The pertinent provisions of section 36 of the *Fisheries Act* read as follows:

(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.	(3) Sous réserve du paragraphe (4), il est interdit d'immerger ou de rejeter une substance nocive — ou d'en permettre l'immersion ou le rejet — dans des eaux où vivent des poissons, ou en quelque autre lieu si le risque existe que la substance ou toute autre substance nocive provenant de son immersion ou rejet pénètre dans ces eaux.
(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of	(4) Par dérogation au paragraphe (3), il est permis d'immerger ou de rejeter:
(*a*) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or	*a*) les déchets ou les polluants désignés par les règlements applicables aux eaux ou lieux en cause pris par le gouverneur en conseil en application d'une autre loi, pourvu que les conditions, notamment les quantités maximales, qui y sont fixées soient respectées;
(*b*) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or	*b*) les substances nocives des

pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).

(5) The Governor in Council may make regulations for the purpose of paragraph (4)(*b*) prescribing

(*a*) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);

(*b*) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (*a*) are authorized to be deposited;

(*c*) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (*a*) are authorized to be deposited;

(*d*) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (*a*) that are authorized to be deposited;

(*e*) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in

catégories désignées ou prévues par les règlements applicables aux eaux ou lieux en cause, ou aux ouvrages ou entreprises ou à leurs catégories, pris par le gouverneur en conseil en application du paragraphe (5), pourvu que les conditions, notamment les quantités maximales et les degrés de concentration, qui y sont fixées soient respectées.

(5) Pour l'application de l'alinéa (4)*b*), le gouverneur en conseil peut, par règlement, déterminer :

a) les substances ou catégories de substances nocives dont l'immersion ou le rejet sont autorisés par dérogation au paragraphe (3);

b) les eaux et les lieux ou leurs catégories où l'immersion ou le rejet des substances ou catégories de substances visées à l'alinéa *a*) sont autorisés;

c) les ouvrages ou entreprises ou catégories d'ouvrages ou d'entreprises pour lesquels l'immersion ou le rejet des substances ou des catégories de substances visées à l'alinéa *a*) sont autorisés;

d) les quantités ou les degrés de concentration des substances ou des catégories de substances visées à l'alinéa *a*) dont l'immersion ou le rejet sont autorisés;

e) les conditions, les quantités,

paragraph (*a*) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (*b*) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (*c*); and	les exigences préalables et les degrés de concentration autorisés pour l'immersion ou le rejet des substances ou catégories de substances visées à l'alinéa *a*) dans les eaux et les lieux visés à l'alinéa *b*) ou dans le cadre des ouvrages ou entreprises visés à l'alinéa *c*);
(*f*) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.	*f*) les personnes habilitées à autoriser l'immersion ou le rejet de substances ou de catégories de substances nocives en l'absence de toute autre autorité et les conditions et exigences attachées à l'exercice de ce pouvoir.

[134] The principal regulations made under subsection 36(5) of the *Fisheries Act* are the *Metal Mining Effluent Regulations*, SOR/2002-222, and the *Pulp and Paper Effluent Regulations*, SOR/92-269.

[135] The *Metal Mining Effluent Regulations* allow the deposit of mining effluent that contain deleterious substances into waters frequented by fish insofar as (a) the concentration of the deleterious substance in the effluent does not exceed the authorized limits set out in the regulations; (b) the pH of the effluent is equal to or greater than 6.0 but is not greater than 9.5; and (c) the deleterious substance is not an acutely lethal effluent. The authorization is subject to numerous

conditions set out in the regulations and which concern in particular environmental effects monitoring, effluent monitoring, and reporting.

[136] The *Pulp and Paper Effluent Regulations* allow, for the purpose of paragraph 36(4)(*b*) of the *Fisheries Act*, the deposit in any water or place – up to certain prescribed maxima – of any matter that consumes oxygen dissolved in water and of suspended solids by

> (a) the owner or operator of a pulp or paper mill: paragraph 6(1)(*a*) and section 14;
>
> (b) the owner or operator of a facility that treats effluent from a pulp or paper mill and who is specifically so authorized: subsection 6(2), paragraph 15(1)(*c*) and (*d*), subsections 16(4) and 18(1) and section 21;
>
> (c) the owner and operator of a pulp or paper mill that treats waste water in addition to its own effluent, that commenced operations before November 3, 1971, and who is specifically so authorized: paragraphs 6(1)(*b*) and 15(1)(*a*), subsections 16(1) and 18(1) and section 19;
>
> (d) the owner or operator of a pulp or paper mill that commenced operations before November 3, 1971, who has since that date treated effluent from the production of dissolving grade sulphite pulp, and who is specifically so authorized: paragraphs 6(1)(*b*) and 15(1)(*b*), subsections 16(2) and 18(1) and section 20;
>
> (e) the Port Alberni Mill: sections 33 and 34.

There are also numerous conditions set out in the regulations concerning monitoring and reporting.

[137] The Federal Court judge ruled that section 36 of the *Fisheries Act* could not be relied on by the Minister for the purposes of a protection statement under section 58 of the SARA. He based this ruling on his conclusion that though this section "prohibits the deposit of a deleterious substance into water frequented by fish [it] allows for the authorization of such deposits through regulation at Cabinet's discretion": Reasons at para. 325. I am unable to agree with that ruling.

[138] Compliance with subsection 36(3) of the *Fisheries Act* may not be waived by the Minister through a licence, permit or other authorization, nor may the Minister authorize derogations from the *Metal Mining Effluent Regulations* or the *Pulp and Paper Effluent Regulations*. Measures under this section and these regulations are legally enforceable and are not subject to ministerial discretion. This section and the regulations made under it thus provide for compulsory, non-discretionary and legally enforceable measures.

[139] Like most other regulatory provisions, regulations made under section 36 of the *Fisheries Act* may be adopted or amended from time to time. The fact a statutory provision or a regulatory provision may be eventually modified does not entail that it may not be relied upon by the Minister for the purposes of subsection 58(5) of the SARA. Where it otherwise, the Minister could rely on no statutory or regulatory provision. This is not what subsection 58(5) of the SARA provides. There is a fundamental difference between a non-discretionary and legally enforceable regulation and a discretionary ministerial licencing scheme.

[140] In a given case, the combined operation of section 36 of the *Fisheries Act* and of the regulations made under that section may afford protection from destruction for critical habitat. Indeed, the limits set out in the *Metal Mining Effluent Regulations* and the *Pulp and Paper Effluent Regulations* are legally enforceable and may, in appropriate circumstances, be viewed as protecting critical habitat. Where this is the case, section 36 and its regulations may afford a particular endangered or threatened species the legal protection mandated by section 58 of the SARA. In such appropriate cases, these provisions may be relied upon as ensuring that critical habitat is "legally protected" under section 58 of the SARA. Consequently, in appropriate circumstances, section 36 of the *Fisheries Act* and its regulations may be relied upon in a protection statement made under paragraph 58(5)(*b*) of the SARA.

[141] However, in this case, there is no evidence in the record before this Court showing whether the pollution controls set out in these regulations protect from destruction the critical habitat of the concerned killer whale populations. Therefore, there was no basis in these proceedings upon which the Federal Court judge could have determined whether the Minister's reliance on section 36 of the *Fisheries Act* could have been justified in light of the provisions of section 58 of the SARA.

[142] Consequently, to the extent that the Federal Court judge's declaration impedes the Minister from relying, in appropriate cases, on section 36 of the *Fisheries Act* and its regulations for the purposes of a protection statement made under paragraph 58(1)(*b*) of the SARA, it cannot stand. However, in light of the evidentiary record before us and the nature of these proceedings, we need

not decide if the Minister's reliance on this provision met the requirements of section 58 of the SARA in this case.

The regulation of fisheries

[143] In the Killer Whales Protection Statement, the Minister relied on the existing fishery management scheme adopted under the *Fisheries Act*. The Minister submits that the existing salmon fishery management scheme offers adequate protection to ensure the availability of salmon prey for the concerned killer whale populations.

[144] In his memorandum, the Minister cites, for this purpose, section 22 of the *Fishery (General) Regulations*, sections 51 to 60 and schedule VI of the *Pacific Fisheries Regulations, 1993*, SOR/94-54 and sections 42 to 50 and schedule VI of the *British Columbia Sport Fishing Regulations, 1996*, SOR/96-137. These regulations, in the Minister's view, are measures taken under an Act of Parliament which "legally protect" critical habitat within the meaning of section 58 of the SARA.

[145] Section 22 of the *Fishery (General) Regulations* empowers the Minister to specify, at his discretion, licence conditions for the proper management and control of fisheries and for the conservation and protection of fish. Sections 51 to 60 and schedule VI of the *Pacific Fisheries Regulations*, and sections 42 to 50 and schedule VI of the *British Columbia Sport Fishing Regulations* respectively outline a management regime for commercial and sports salmon fisheries in Pacific Ocean waters and in British Columbia.

[146] The Minister's reliance on these regulations is misguided. These regulations do not seek to prohibit the destruction of salmon prey as an element of critical habitat. Rather, they provide the framework for the management of the Pacific salmon fisheries under a highly discretionary ministerial licencing scheme.

[147] Subsection 7(1) of the *Fisheries Act* gives the Minister "absolute discretion" to issue fishing licences, while paragraph 22(1)(*a*) of the *Fishery (General) Regulations* allows the Minister to specify in a licence the quantities of fish that are permitted to be taken. These are very broad discretionary powers: *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12; *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548 (C.A.), 221 N.R. 372, at para. 37.

[148] This Court should not approve the substitution of the non-discretionary and compulsory critical habitat protection scheme of section 58 of the SARA by the discretionary fisheries management scheme established under the *Fisheries Act* and its regulations.

[149] The protection of critical habitat should not be confused with the management of critical habitat. The SARA calls for both the protection of critical habitat under section 58 and for management measures to ensure the recovery of that habitat through actions plans and other methods.

[150] As held in *Environmental Defence*, critical habitat connotes both a location – in this case the areas identified in the recovery strategy and illustrated in the maps attached to these reasons – and the attributes of that location – in this case the availability of salmon prey in those areas. Section 58 requires that the salmon prey in those identified areas be protected from destruction. SARA also requires that management measures be taken outside those areas to ensure the recovery of that critical habitat, i.e. improving the availability of salmon prey in the areas. These management measures can be provided for in action plans under sections 47 to 54 of the SARA or through licence conditions adopted under section 75 of the SARA.

[151] Though the Minister is justified to pursue management measures to improve salmon prey availability for the concerned killer whale populations, he cannot use these management measures as a substitute for the mandatory protection of such prey within the critical habitat areas identified in the recovery strategy, as required under section 58 of the SARA.

Conclusions

[152] For the reasons set out above, declaration 1(d) found in the judgment of the Federal Court judge should be upheld save insofar as, for the purposes of section 58 of the SARA, it impedes the Minister from relying, in appropriate cases, on section 36 of the *Fisheries Act* and the regulations adopted under that section. I would therefore allow this appeal to that extent only, and consequently quash in part declaration 1(d) of the Federal Court's judgment. Giving the judgment which should have been given, I would therefore replace that declaration with the following:

> Ministerial discretion does not legally protect critical habitat within the meaning of section 58 of the *Species at Risk Act*, and it was unlawful for the Minister to have cited provisions of the *Fisheries Act* in the Killer Whales Protection Statement where such provisions are subject to ministerial discretion.

[153] The respondents have been largely successful in this appeal. I would therefore award costs to the respondents.

"Robert M. Mainville"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
K. Sharlow J.A."

APPENDIX A

Pertinent Provisions of the *Species at Risk Act*, S.C. 2002, c. 29

Preamble	Préambule
Recognizing that	Attendu :
Canada's natural heritage is an integral part of our national identity and history,	que le patrimoine naturel du Canada fait partie intégrante de notre identité nationale et de notre histoire;
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;
Canadian wildlife species and ecosystems are also part of the world's heritage and the Government of Canada has ratified the United Nations Convention on the Conservation of Biological Diversity,	que les espèces sauvages et les écosystèmes du Canada font aussi partie du patrimoine mondial et que le gouvernement du Canada a ratifié la Convention des Nations Unies sur la diversité biologique;
providing legal protection for species at risk will complement existing legislation and will, in part, meet Canada's commitments under that Convention,	que l'attribution d'une protection juridique aux espèces en péril complétera les textes législatifs existants et permettra au Canada de respecter une partie des engagements qu'il a pris aux termes de cette convention;
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,
[…]	

knowledge of wildlife species and ecosystems is critical to their conservation,

the habitat of species at risk is key to their conservation

le manque de certitude scientifique ne soit pas prétexte à retarder la prise de mesures efficientes pour prévenir sa disparition ou sa décroissance;

[…]

que la connaissance des espèces sauvages et des écosystèmes est essentielle à leur conservation;

que l'habitat des espèces en péril est important pour leur conservation;

2. (1) The definitions in this subsection apply in this Act.

"aquatic species" means a wildlife species that is a fish, as defined in section 2 of the *Fisheries Act*, or a marine plant, as defined in section 47 of that Act.

"competent minister" means

(a) the Minister responsible for the Parks Canada Agency with respect to individuals in or on federal lands administered by that Agency;

(b) the Minister of Fisheries and Oceans with respect to aquatic species, other than individuals mentioned in paragraph (a); and

(c) the Minister of the Environment with respect to all other individuals.

"critical habitat" means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« espèce aquatique » Espèce sauvage de poissons, au sens de l'article 2 de la *Loi sur les pêches*, ou de plantes marines, au sens de l'article 47 de cette loi.

« ministre compétent »

a) En ce qui concerne les individus présents dans les parties du territoire domanial dont la gestion relève de l'Agence Parcs Canada, le ministre responsable de celle-ci;

b) en ce qui concerne les espèces aquatiques dont les individus ne sont pas visés par l'alinéa a), le ministre des Pêches et des Océans;

c) en ce qui concerne tout autre individu, le ministre de l'Environnement.

« habitat essentiel » L'habitat nécessaire à la survie ou au rétablissement d'une espèce sauvage

identified as the species' critical habitat in the recovery strategy or in an action plan for the species.

inscrite, qui est désigné comme tel dans un programme de rétablissement ou un plan d'action élaboré à l'égard de l'espèce.

"endangered species" means a wildlife species that is facing imminent extirpation or extinction.

« espèce en voie de disparition » Espèce sauvage qui, de façon imminente, risque de disparaître du pays ou de la planète.

"extirpated species" means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild.

« espèce disparue du pays » Espèce sauvage qu'on ne trouve plus à l'état sauvage au Canada, mais qu'on trouve ailleurs à l'état sauvage.

"habitat" means

(a) in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and

(b) in respect of other wildlife species, the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced.

« habitat »

a) S'agissant d'une espèce aquatique, les frayères, aires d'alevinage, de croissance et d'alimentation et routes migratoires dont sa survie dépend, directement ou indirectement, ou aires où elle s'est déjà trouvée et où il est possible de la réintroduire;

b) s'agissant de toute autre espèce sauvage, l'aire ou le type d'endroit où un individu ou l'espèce se trouvent ou dont leur survie dépend directement ou indirectement ou se sont déjà trouvés, et où il est possible de les réintroduire.

"Minister" means the Minister of the Environment.

« ministre » Le ministre de l'Environnement.

"residence" means a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles,

« résidence » Gîte — terrier, nid ou autre aire ou lieu semblable — occupé ou habituellement occupé par un ou plusieurs individus pendant tout ou partie de leur vie, notamment pendant

including breeding, rearing, staging, wintering, feeding or hibernating.

la reproduction, l'élevage, les haltes migratoires, l'hivernage, l'alimentation ou l'hibernation.

"species at risk" means an extirpated, endangered or threatened species or a species of special concern.

« espèce en péril » Espèce sauvage disparue du pays, en voie de disparition, menacée ou préoccupante.

"species of special concern" means a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats.

« espèce préoccupante » Espèce sauvage qui peut devenir une espèce menacée ou une espèce en voie de disparition par l'effet cumulatif de ses caractéristiques biologiques et des menaces signalées à son égard.

"threatened species" means 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.

« espèce menacée » Espèce sauvage susceptible de devenir une espèce en voie de disparition si rien n'est fait pour contrer les facteurs menaçant de la faire disparaître.

(3) A reference to a competent minister in any provision of this Act is to be read as a reference to the competent minister in respect of the wildlife species, or the individuals of the wildlife species, to which the provision relates.
2002, c. 29, ss. 2, 141.1; 2005, c. 2, s. 14.

(3) La mention de ministre compétent dans une disposition de la présente loi vaut celle du ministre compétent à l'égard d'une espèce sauvage, ou des individus d'une telle espèce, auxquels la disposition s'applique.
2002, ch. 29, art. 2 et 141.1; 2005, ch. 2, art. 14.

5. This Act is binding on Her Majesty in right of Canada or a province.

5. La présente loi lie Sa Majesté du chef du Canada ou d'une province.

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

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 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.

8. (1) The Minister is responsible for the administration of this Act, except in so far as this Act gives responsibility to another minister.

8. (1) Sous réserve des dispositions de la présente loi conférant une responsabilité particulière à un autre ministre, le ministre est responsable de l'application de la présente loi.

11. (1) A competent minister may, after consultation with every other competent minister, and with the Canadian Endangered Species Conservation Council or any of its members if he or she considers it appropriate to do so, enter into a conservation agreement with any government in Canada, organization or person to benefit a species at risk or enhance its survival in the wild.

11. (1) Après consultation de tout autre ministre compétent et, s'il l'estime indiqué, du Conseil canadien pour la conservation des espèces en péril ou de tout membre de celui-ci, le ministre compétent peut conclure avec un gouvernement au Canada, une organisation ou une personne un accord de conservation qui est bénéfique pour une espèce en péril ou qui améliore ses chances de survie à l'état sauvage.

(2) The agreement must provide for the taking of conservation measures and any other measures consistent with the purposes of this Act, and may include measures with respect to

(2) L'accord doit prévoir des mesures de conservation et d'autres mesures compatibles avec l'objet de la présente loi, et peut prévoir des mesures en ce qui concerne :

(a) monitoring the status of the species;

a) le suivi de la situation de l'espèce;

(b) developing and implementing education and public awareness programs;

b) l'élaboration et la mise en oeuvre de programmes d'éducation et de sensibilisation du public;

(c) developing and implementing recovery strategies, action plans and management plans;

c) l'élaboration et la mise en oeuvre de programmes de rétablissement, de plans d'action et de plans de gestion;

(d) protecting the species' habitat, including its critical habitat; or

d) la protection de l'habitat de l'espèce, notamment son habitat essentiel;

(e) undertaking research projects in

e) la mise sur pied de projets de

support of recovery efforts for the species.	recherche visant à favoriser le rétablissement de l'espèce.
32. (1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.	32. (1) Il est interdit de tuer un individu d'une espèce sauvage inscrite comme espèce disparue du pays, en voie de disparition ou menacée, de lui nuire, de le harceler, de le capturer ou de le prendre.
(2) No person shall possess, collect, buy, sell or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part or derivative of such an individual.	(2) Il est interdit de posséder, de collectionner, d'acheter, de vendre ou d'échanger un individu — notamment partie d'un individu ou produit qui en provient — d'une espèce sauvage inscrite comme espèce disparue du pays, en voie de disparition ou menacée.
(3) For the purposes of subsection (2), any animal, plant or thing that is represented to be an individual, or a part or derivative of an individual, of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species is deemed, in the absence of evidence to the contrary, to be such an individual or a part or derivative of such an individual.	(3) Pour l'application du paragraphe (2), tout animal, toute plante ou toute chose présentée comme un individu — notamment partie d'un individu ou produit qui en provient — d'une espèce sauvage inscrite comme espèce disparue du pays, en voie de disparition ou menacée est réputée, sauf preuve contraire, être tel individu, telle partie ou tel produit.
33. No person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.	33. Il est interdit d'endommager ou de détruire la résidence d'un ou de plusieurs individus soit d'une espèce sauvage inscrite comme espèce en voie de disparition ou menacée, soit d'une espèce sauvage inscrite comme espèce disparue du pays dont un programme de rétablissement a recommandé la réinsertion à l'état sauvage au Canada.
37. (1) If a wildlife species is listed as an extirpated species, an endangered species or a threatened species, the	37. (1) Si une espèce sauvage est inscrite comme espèce disparue du pays, en voie de disparition ou

competent minister must prepare a strategy for its recovery.

menacée, le ministre compétent est tenu d'élaborer un programme de rétablissement à son égard.

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.

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.

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 the broad strategy to be taken to address those threats;

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 lignes du plan à suivre pour y faire face;

(c) an identification of the species' critical habitat, to the extent possible,

c) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la

based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;

meilleure information accessible, notamment les informations fournies par le COSEPAC, et des exemples d'activités susceptibles d'entraîner sa destruction;

(c.1) a schedule of studies to identify critical habitat, where available information is inadequate;

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

(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;

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) any other matters that are prescribed by the regulations;

e) tout autre élément prévu par règlement;

(f) a statement about whether additional information is required about the species; and

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

(g) a statement of when one or more action plans in relation to the recovery strategy will be completed.

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

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.

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.

(2) With respect to wildlife species that

(2) En ce qui concerne les espèces

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.

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.

43. (1) Within 60 days after the proposed recovery strategy is included in the public registry, any person may file written comments with the competent minister.

43. (1) Dans les soixante jours suivant la mise du projet dans le registre, toute personne peut déposer par écrit auprès du ministre compétent des observations relativement au projet.

(2) Within 30 days after the expiry of the period referred to in subsection (1), the competent minister must consider any comments received, make any changes to the proposed recovery strategy that he or she considers appropriate and finalize the recovery strategy by including a copy of it in the public registry.

(2) Dans les trente jours suivant la fin du délai prévu au paragraphe (1), le ministre compétent étudie les observations qui lui ont été présentées, apporte au projet les modifications qu'il estime indiquées et met le texte définitif du programme de rétablissement dans le registre.

46. The competent minister must report on the implementation of the recovery strategy, and the progress towards meeting its objectives, within five years after it is included in the public registry and in every subsequent five-year period, until its objectives have been achieved or the species' recovery is no longer feasible. The report must be included in the public registry.

46. Il incombe au ministre compétent d'établir un rapport sur la mise en oeuvre du programme de rétablissement et sur les progrès effectués en vue des objectifs qu'il expose, à intervalles de cinq ans à compter de sa mise dans le registre, et ce, jusqu'à ce que ces objectifs soient atteints ou que le rétablissement de l'espèce ne soit plus réalisable. Il met son rapport dans le registre.

47. The competent minister in respect of a recovery strategy must prepare one or more action plans based on the recovery strategy. If there is more than

47. Le ministre compétent responsable d'un programme de rétablissement est tenu d'élaborer un ou plusieurs plans d'action sur le fondement de celui-ci. Si

one competent minister with respect to the recovery strategy, they may prepare the action plan or plans together.

plusieurs ministres compétents sont responsables du programme, les plans d'action peuvent être élaborés conjointement par eux.

49. (1) An action plan must include, with respect to the area to which the action plan relates,

49. (1) Le plan d'action comporte notamment, en ce qui concerne l'aire à laquelle il s'applique :

(a) an identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;

a) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible et d'une façon compatible avec le programme de rétablissement, et des exemples d'activités susceptibles d'entraîner sa destruction;

(b) a statement of the measures that are proposed to be taken to protect the species' critical habitat, including the entering into of agreements under section 11;

b) un exposé des mesures envisagées pour protéger l'habitat essentiel de l'espèce, notamment la conclusion d'accords en application de l'article 11;

(c) an identification of any portions of the species' critical habitat that have not been protected;

c) la désignation de toute partie de l'habitat essentiel de l'espèce qui n'est pas protégée;

(d) a statement of the measures that are to be taken to implement the recovery strategy, including those that address the threats to the species and those that help to achieve the population and distribution objectives, as well as an indication as to when these measures are to take place;

d) un exposé des mesures à prendre pour mettre en oeuvre le programme de rétablissement, notamment celles qui traitent des menaces à la survie de l'espèce et celles qui aident à atteindre les objectifs en matière de population et de dissémination, ainsi qu'une indication du moment prévu pour leur exécution;

(d.1) the methods to be used to monitor the recovery of the species and its long-term viability;

d.1) les méthodes à utiliser pour surveiller le rétablissement de l'espèce et sa viabilité à long terme;

(e) an evaluation of the socio-economic costs of the action plan

e) l'évaluation des répercussions socioéconomiques de sa mise en

and the benefits to be derived from its implementation; and

(f) any other matters that are prescribed by the regulations.

55. The competent minister must monitor the implementation of an action plan and the progress towards meeting its objectives and assess and report on its implementation and its ecological and socio-economic impacts five years after the plan comes into effect. A copy of the report must be included in the public registry.

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

(a) provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or

(b) the application of subsection 58(1).

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

oeuvre et des avantages en découlant;

f) tout autre élément prévu par règlement.

55. Cinq ans après la mise du plan d'action dans le registre, il incombe au ministre compétent d'assurer le suivi de sa mise en oeuvre et des progrès réalisés en vue de l'atteinte de ses objectifs. Il l'évalue et établit un rapport, notamment sur ses répercussions écologiques et socioéconomiques. Il met une copie de son rapport dans le registre.

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) 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) soit par l'application du paragraphe 58(1).

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

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

(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, 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.

(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*.

(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.

(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.

(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.

(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 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.

[…]

[…]

73. (1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an

73. (1) Le ministre compétent peut conclure avec une personne un accord l'autorisant à exercer une activité touchant une espèce sauvage inscrite,

activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.

(2) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

(a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons;

(b) the activity benefits the species or is required to enhance its chance of survival in the wild; or

(c) affecting the species is incidental to the carrying out of the activity.

(3) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

(a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;

(b) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and

(c) the activity will not jeopardize the survival or recovery of the species.

(3.1) If an agreement is entered into or a permit is issued, the competent

tout élément de son habitat essentiel ou la résidence de ses individus, ou lui délivrer un permis à cet effet.

(2) Cette activité ne peut faire l'objet de l'accord ou du permis que si le ministre compétent estime qu'il s'agit d'une des activités suivantes :

a) des recherches scientifiques sur la conservation des espèces menées par des personnes compétentes;

b) une activité qui profite à l'espèce ou qui est nécessaire à l'augmentation des chances de survie de l'espèce à l'état sauvage;

c) une activité qui ne touche l'espèce que de façon incidente.

(3) Le ministre compétent ne conclut l'accord ou ne délivre le permis que s'il estime que :

a) toutes les solutions de rechange susceptibles de minimiser les conséquences négatives de l'activité pour l'espèce ont été envisagées et la meilleure solution retenue;

b) toutes les mesures possibles seront prises afin de minimiser les conséquences négatives de l'activité pour l'espèce, son habitat essentiel ou la résidence de ses individus;

c) l'activité ne mettra pas en péril la survie ou le rétablissement de l'espèce.

(3.1) Si un accord est conclu ou un permis délivré, le ministre compétent

minister must include in the public registry an explanation of why it was entered into or issued, taking into account the matters referred to in paragraphs (3)(a), (b) and (c).

(6) The agreement or permit must contain any terms and conditions governing the activity that the competent minister considers necessary for protecting the species, minimizing the impact of the authorized activity on the species or providing for its recovery.

(7) The competent minister must review the agreement or permit if an emergency order is made with respect to the species.

(8) The competent minister may revoke or amend an agreement or a permit to ensure the survival or recovery of a species.

(9) No agreement may be entered into for a term longer than five years and no permit may be issued for a term longer than three years.

74. An agreement, permit, licence, order or other similar document authorizing a person or organization to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals that is entered into, issued or made by the competent minister under another Act of Parliament has the same effect as an agreement or permit under subsection 73(1) if

(a) before it is entered into, issued or

met dans le registre les raisons pour lesquelles l'accord a été conclu ou le permis délivré, compte tenu des considérations mentionnées aux alinéas (3)a) à c).

(6) Le ministre compétent assortit l'accord ou le permis de toutes les conditions — régissant l'exercice de l'activité — qu'il estime nécessaires pour assurer la protection de l'espèce, minimiser les conséquences négatives de l'activité pour elle ou permettre son rétablissement.

(7) Le ministre compétent est tenu de réviser l'accord ou le permis si un décret d'urgence est pris à l'égard de l'espèce.

(8) Il peut révoquer ou modifier l'accord ou le permis au besoin afin d'assurer la survie ou le rétablissement d'une espèce.

(9) La durée maximale de validité d'un permis est de trois ans et celle d'un accord, de cinq ans.

74. A le même effet qu'un accord ou permis visé au paragraphe 73(1) tout accord, tout permis, toute licence ou tout arrêté — ou autre document semblable — conclu, délivré ou pris par le ministre compétent en application d'une autre loi fédérale et ayant pour objet d'autoriser l'exercice d'une activité touchant une espèce sauvage inscrite, tout élément de son habitat essentiel ou la résidence de ses individus, si :

a) avant la conclusion, la délivrance

made, the competent minister is of the opinion that the requirements of subsections 73(2) to (6) and (9) are met; and

(b) after it is entered into, issued or made, the competent minister complies with the requirements of subsection 73(7).

ou la prise, le ministre compétent estime que les exigences des paragraphes 73(2) à (6) et (9) sont remplies;

b) après la conclusion, la délivrance ou la prise, le ministre compétent se conforme aux exigences du paragraphe 73(7).

75. (1) A competent minister may add terms and conditions to protect a listed wildlife species, any part of its critical habitat or the residences of its individuals to any agreement, permit, licence, order or other similar document authorizing a person to engage in an activity affecting the species, any part of its critical habitat or the residences of its individuals that is entered into, issued or made by the competent minister under another Act of Parliament.

75. (1) Le ministre compétent peut ajouter des conditions visant la protection d'une espèce sauvage inscrite, de tout élément de son habitat essentiel ou de la résidence de ses individus à tout accord, tout permis, toute licence ou tout arrêté — ou autre document semblable — conclu, délivré ou pris par lui en application d'une autre loi fédérale et ayant pour objet d'autoriser l'exercice d'une activité touchant l'espèce, tout élément de son habitat essentiel ou la résidence de ses individus.

(2) A competent minister may also revoke or amend any term or condition in any of those documents to protect a listed wildlife species, any part of its critical habitat or the residences of its individuals.

(2) Il peut aussi annuler ou modifier les conditions d'un tel document pour protéger une espèce sauvage inscrite, tout élément de son habitat essentiel ou la résidence de ses individus.

(3) The competent minister must take into account any applicable provisions of treaty and land claims agreements when carrying out his or her powers under this section.

(3) Pour l'exercice des pouvoirs qui lui sont conférés en vertu du présent article, le ministre compétent prend en compte les dispositions applicables des traités et des accords sur des revendications territoriales.

77. (1) Despite any other Act of Parliament, any person or body, other than a competent minister, authorized under any Act of Parliament, other than this Act, to issue or approve a licence, a

77. (1) Malgré toute autre loi fédérale, toute personne ou tout organisme, autre qu'un ministre compétent, habilité par une loi fédérale, à l'exception de la présente loi, à délivrer un permis ou

permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species may enter into, issue, approve or make the authorization only if the person or body has consulted with the competent minister, has considered the impact on the species' critical habitat and is of the opinion that

une autre autorisation, ou à y donner son agrément, visant la mise à exécution d'une activité susceptible d'entraîner la destruction d'un élément de l'habitat essentiel d'une espèce sauvage inscrite ne peut le faire que s'il a consulté le ministre compétent, s'il a envisagé les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce et s'il estime, à la fois :

(a) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and

a) que toutes les solutions de rechange susceptibles de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce ont été envisagées, et la meilleure solution retenue;

(b) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.

b) que toutes les mesures possibles seront prises afin de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce.

(2) For greater certainty, section 58 applies even though a licence, a permit or any other authorization has been issued in accordance with subsection (1).

(2) Il est entendu que l'article 58 s'applique même si l'autorisation a été délivrée ou l'agrément a été donné en conformité avec le paragraphe (1).

83. (1) Subsections 32(1) and (2), section 33, subsections 36(1), 58(1), 60(1) and 61(1), regulations made under section 53, 59 or 71 and emergency orders do not apply to a person who is engaging in

83. (1) Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1), les règlements pris en vertu des articles 53, 59 ou 71 et les décrets d'urgence ne s'appliquent pas à une personne exerçant des activités :

(a) activities related to public safety, health or national security, that are authorized by or under any other Act of Parliament or activities under the *Health of Animals Act* and the *Plant Protection Act* for the health of animals and plants; or

a) en matière soit de sécurité ou de santé publiques ou de sécurité nationale autorisées sous le régime de toute autre loi fédérale, soit de santé des animaux et des végétaux autorisées sous le régime de la *Loi sur la santé des animaux* et la *Loi*

sur la protection des végétaux;

(b) activities authorized under section 73, 74 or 78 by an agreement, permit, licence, order or similar document.

b) autorisées par un accord, un permis, une licence, un arrêté ou un autre document visé aux articles 73, 74 ou 78.

(2) A power under an Act described in paragraph (1)(a) may be used to authorize an activity prohibited by subsection 32(1) or (2), section 33, subsection 36(1), 58(1), 60(1) or 61(1), a regulation made under section 53, 59 or 71 or an emergency order only if the person exercising the power

(2) Toute activité interdite aux termes des paragraphes 32(1) ou (2), de l'article 33, des paragraphes 36(1), 58(1), 60(1) ou 61(1), des règlements pris en vertu des articles 53, 59 ou 71 ou d'un décret d'urgence peut être autorisée au titre d'une loi visée à l'alinéa (1)a) si la personne qui l'autorise :

(a) determines that the activity is necessary for the protection of public safety, health, including animal and plant health, or national security; and

a) conclut qu'elle est nécessaire à la protection de la sécurité ou de la santé publiques — notamment celle des animaux et des végétaux — ou de la sécurité nationale;

(b) respects the purposes of this Act to the greatest extent possible.

b) respecte, dans la mesure du possible, l'objet de la présente loi.

(3) Subsections 32(1) and (2), section 33, subsections 36(1), 58(1), 60(1) and 61(1) and regulations made under section 53, 59 or 71 do not apply to a person who is engaging in activities in accordance with conservation measures for wildlife species under a land claims agreement.

(3) Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1) et les règlements pris en vertu des articles 53, 59 ou 71 ne s'appliquent pas à une personne exerçant des activités conformes aux régimes de conservation des espèces sauvages dans le cadre d'un accord sur des revendications territoriales.

(4) Subsections 32(1) and (2), section 33 and subsections 36(1), 58(1), 60(1) and 61(1) do not apply to a person who is engaging in activities that are permitted by a recovery strategy, an action plan or a management plan and who is also authorized under an Act of Parliament to engage in that activity,

(4) Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1) ne s'appliquent pas à une personne exerçant des activités autorisées, d'une part, par un programme de rétablissement, un plan d'action ou un plan de gestion et, d'autre part, sous le régime d'une loi

including a regulation made under section 53, 59 or 71.

fédérale, notamment au titre d'un règlement pris en vertu des articles 53, 59 ou 71.

SCHEDULE 1
(Subsections 2(1), 42(2) and 68(2))
LIST OF WILDLIFE SPECIES AT RISK

ANNEXE 1
(paragraphes 2(1), 42(2) et 68(2))
LISTE DES ESPÈCES EN PÉRIL

PART 2
ENDANGERED SPECIES

PARTIE 2
ESPÈCES EN VOIE DE DISPARITION

Whale, Killer (*Orcinus orca*) Northeast Pacific southern resident population
Épaulard population résidente du sud du Pacifique Nord-Est

Épaulard (*Orcinus orca*) population résidente du sud du Pacifique Nord-Est
Whale, Killer Northeast Pacific southern resident population

PART 3
THREATENED SPECIES

PARTIE 3
ESPÈCES MENACÉES

Whale, Killer (*Orcinus orca*) Northeast Pacific northern resident population
Épaulard population résidente du nord du Pacifique Nord-Est

Épaulard (*Orcinus orca*) population résidente du nord du Pacifique Nord-Est
Whale, Killer Northeast Pacific northern resident population

APPENDIX B
MAP OF CRITICAL HABITAT FOR SOUTHERN RESIDENT KILLER WHALES

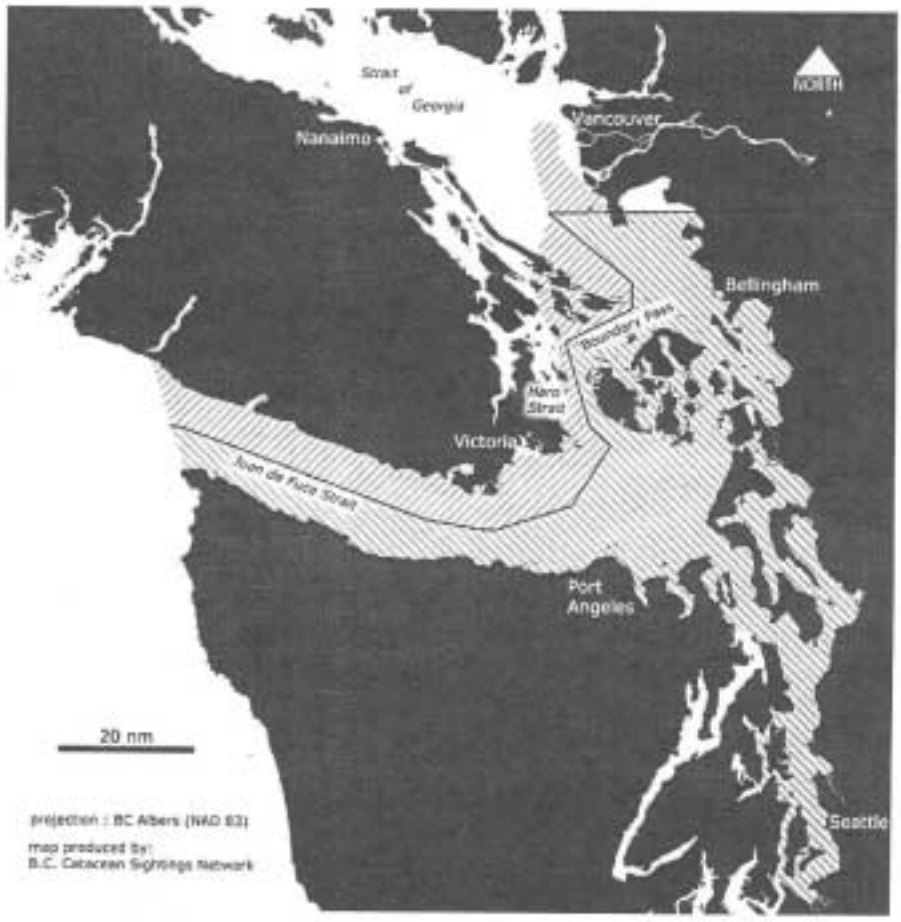

Figure 4 Critical habitat for southern resident killer whales. The hatched area in US waters shows the approximate areas designated as southern resident critical habitat under the US *Endangered Species Act* (ESA).

(Map enlarged from Appeal Book, Volume 1, Tab 5B, p 74)

APPENDIX C
MAP OF CRITICAL HABITAT FOR NORTHERN RESIDENT KILLER WHALES

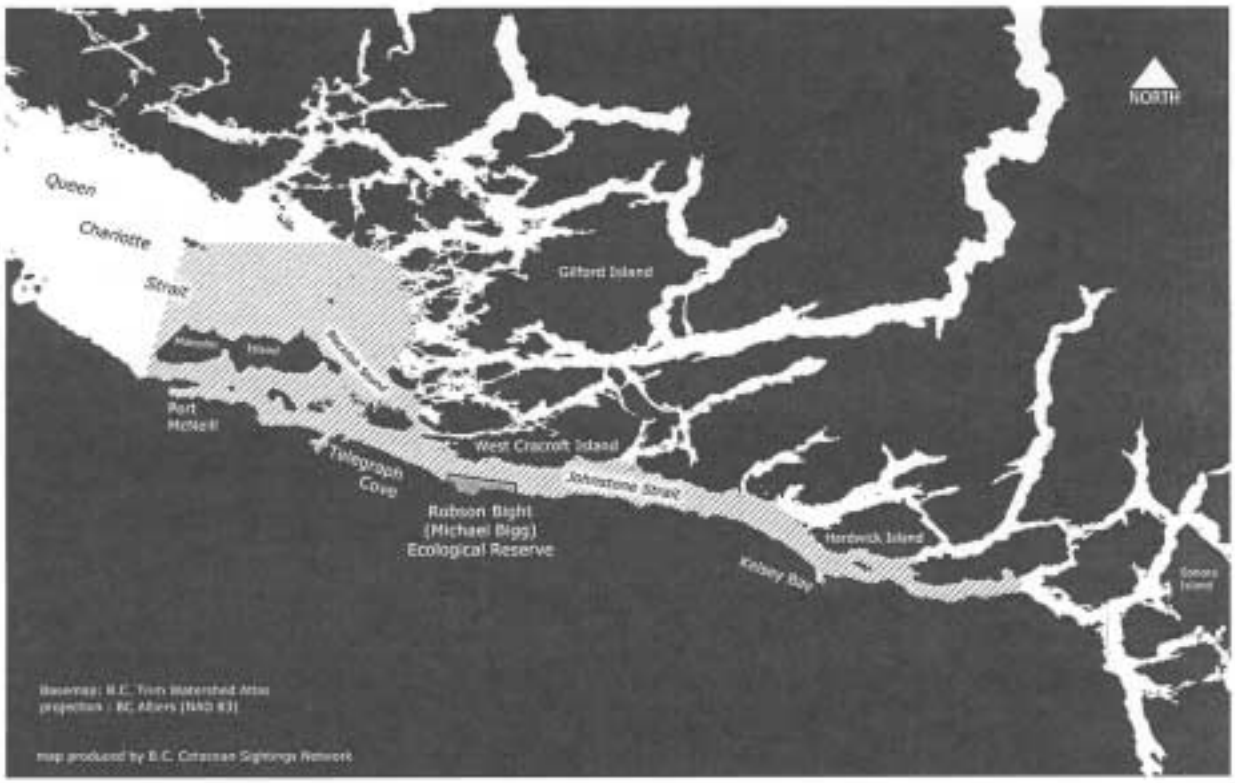

Figure 5 The critical habitat for northern resident killer whales in summer and fall in British Columbia.

(Map enlarged from Appeal Book, Volume 1, Tab 5B, p 76)

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-2-11
APPEAL FROM AN ORDER OF MR. JUSTICE RUSSELL DATED DECEMBER 7, 2010.	
STYLE OF CAUSE:	MINISTER OF FISHERIES AND OCEANS V. DAVID SUZUKI FOUNDATION ET AL.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 30, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NADON J.A. SHARLOW J.A.
DATED:	February 9, 2012

APPEARANCES:

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