



THROUGHOUT AMERICA'S EXPERIENCE WITH endangered species legislation, tiny fish have often found themselves in the headlines. Now, Canada has its own poster minnow: the nooksack dace. Its only Canadian habitat consists of four streams located within BC's Lower Mainland. Not surprisingly, the nooksack dace is listed as an 'endangered species' under Canada's federal *Species at Risk Act* (SARA). On September 9, our federal court released what Canadian environmentalists have heralded as a "whale of a lawsuit" and a "barn-burner of a decision" with respect to the nooksack dace.

Among other things, a wildlife species is listed as 'endangered' under SARA



Canada's poster minnow, the nooksack dace.

Photo: Mike Pearson

A Legal Triangle: Nooksack Dace, *Species at Risk Act* and *Obiter Dictum*

if it faces imminent extirpation. (In other words, it will no longer exist in the wild within Canada.) A listing triggers an obligation upon the competent minister to prepare a recovery strategy that must include various components described in paragraph 41(1) of SARA, including the identification of critical habitat. Under SARA, habitat protection can flow from the identification of critical habitat in a recovery strategy.

Before a recovery plan was completed for the nooksack dace, senior officials with the Department of Fisheries and Oceans (DFO) implemented a blanket-policy to remove critical habitat from all recovery strategies in the department's Pacific Region. This policy became the focus of the nooksack dace decision when various environmental advocacy groups petitioned the federal court to declare that the Minister of Fisheries and Oceans's failure to identify critical habitat in the nooksack dace recovery strategy was contrary to section 41(1) of SARA. Not surprisingly, the court ruled in favour of the petitioners: in its submissions to the court, the minister conceded that the "[d]irection to remove critical habitat from all recovery strategies was unwarranted and fettered the minister's discretion".

The surprising aspect of the decision was the court's willingness to interpret the meaning of 'critical habitat' in section 41(1) of SARA. In this respect, the court insisted that "the decision-making conducted by [the DFO] ... requires a definitive interpretation of

s.41 of SARA to dispel any idea that policy can supersede Parliament's purpose as expressed in SARA." However, in this case, the interpretation of section 41 was not at issue given the Minister of Fisheries and Oceans's admission that the recovery strategy did not comply with section 41. At that point, the court was in a position to make the exact same order that it eventually made: "I declare that the minister acted contrary to law by failing to meet the mandatory requirements of s.41(1)(c) of SARA ... " Nothing further was needed to dispel any notion that "policy can supersede ... SARA."

The court actually directed the minister to submit arguments on the issue, so the minister argued that 'critical habitat' meant a geographic location. On the other hand, the applicants argued that it meant not only a geographic location, but also the attributes necessary for a species' survival. The court sided with the applicants.

The court's decision on this issue—that 'critical habitat' means both location and attributes—is potentially significant if the ruling is followed. An interpretation of critical habitat that includes geographic locations and attributes is, obviously, more expansive than one that merely includes a geographic location. Consequently, the protection provided to critical habitat under SARA would also become more expansive if it included attributes as well as locations.

However, whether the court's ruling is binding in this respect is not clear. Typically, a

court will only offer its opinion on those questions that are necessary to resolve the litigation at hand and will not offer its opinion on those questions that are not strictly at issue. In this case the court described the controversy in terms of whether "the minister knowingly failed to follow the mandatory requirements of s.41(1)(c) and (c.1) of SARA." The minister admitted that the recovery strategy did not comply with the requirements of SARA and that would normally have ended the matter.

When a court expresses an opinion that is not essential for the disposition of a case, it is referred to in the litigation business as *obiter dictum*. While *obiter dictum* may have persuasive authority it is not, strictly speaking, lawfully binding as precedent. Certainly, the court in the nooksack dace case appeared to think that a 'definitive interpretation' of section 41(1) was necessary for the disposition of that case; however, other courts may disagree. They may conclude that, under the circumstances, the nooksack dace decision went a step further than was necessary: the only issue that the court needed to resolve was whether the minister's recovery plan failed to comply with section 41(1). Once the minister admitted as much, nothing else was necessary to dispose of the case. 🐟

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