

**Date: 20070917**

**Docket: T-942-06**

**Citation: 2007 FC 921**

**Ottawa, Ontario, September 17, 2007**

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

**BETWEEN:**

**HARRY IAN ROUNTHWAITE**

**Applicant**

**and**

**THE MINISTER OF THE ENVIRONMENT**

**Respondent**

**REASONS FOR ORDER AND ORDER**

1. **Introduction**

[1] This is a motion brought by the Respondent, the Minister of the Environment (the Minister), to dismiss the application for *mandamus* made by the Applicant, Harry Ian Rounthwaite, on the basis that the matter is now moot.

[2] In the underlying judicial review, the Applicant seeks an order of *mandamus* to compel the Minister to form his opinion pursuant to section 29 of the *Species at Risk Act*, L.C. 2002,

c. 29 (SARA) as to whether there is an imminent threat to the survival of the Sakinaw Lake sockeye salmon (Sakinaw Lake sockeye).

[3] The Minister has formed the opinion that there is an imminent threat to the survival of the Sakinaw Lake sockeye, and made the recommendation to the Governor in Council pursuant to section 29(1) of the SARA that the List of Wildlife Species at Risk (the List) be amended to list the Sakinaw Lake sockeye salmon as an endangered species. On May 17, 2007, the Governor in Council published an Order in Council setting out its decision declining to amend Part 2 of Schedule 1 to the SARA and list the Sakinaw Lake sockeye as an endangered species.

## 2. Facts

[4] The *Oncorhynchus nerka*, Sakinaw Lake sockeye is a wildlife species as defined in the SARA, which spawns exclusively in Sakinaw Lake, located in the British Columbia sunshine coast north of Pender Harbour, draining into the waters of Georgia Strait.

[5] On October 25, 2002, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) conducted an emergency assessment of the status of the Sakinaw Lake sockeye and recommended to the then Minister that the Sakinaw Lake sockeye should be listed as endangered under Schedule 1 of the SARA.

[6] By letter dated April 23, 2004, the Minister advised the Chair of the COSEWIC that he had decided that an emergency listing of the Sakinaw Lake sockeye was not warranted at that

time and that the addition of the salmon to the List would be considered through the normal listing process.

[7] On October 23, 2004, the Minister announced his decision that he would not recommend to the Governor in Council that the Sakinaw Lake sockeye be added to SARA, Schedule 1.

[8] The actual return of adult Sakinaw Lake sockeye to Sakinaw Lake in 2004 was only 99 fish. The return in 2005 declined to only 28 adult fish. In 2006, only one female adult returned to spawn.

[9] On February 10, 2006, the Applicant, Harry Ian Rounthwaite, applied to the COSEWIC under subsection 28(1) of the SARA for an emergency assessment of the population status of the Sakinaw Lake sockeye.

[10] On February 20, 2006, the Chair of the COSEWIC advised the Minister that he had established an Emergency Assessment Subcommittee for the Sakinaw Lake sockeye.

[11] By a letter dated April 20, 2006, the Chair of the COSEWIC advised the Minister that the Sakinaw Lake sockeye faces an imminent threat to its survival and recommended that the Sakinaw Lake sockeye be added to SARA, Schedule 1 on an emergency basis.

[12] The second COSEWIC emergency assessment of the Sakinaw Lake sockeye was received on April 20, 2006, by the Acting Head of Policy Development in the Policy Branch, Department of Fisheries and Oceans (DFO), Pacific Region, Mary Hobbs.

[13] On April 24, 2006 and May 29, 2006, the Applicant wrote to the Minister asking the Minister whether he had formed the opinion that the Sakinaw Lake sockeye faces an imminent threat to its survival.

[14] By e-mail, dated May 23, 2006, the Minister acknowledged receipt of an April 23, 2006 e-mail from the Chair of the COSEWIC advising him of the emergency assessment and recommendation for the Sakinaw Lake sockeye.

[15] Ms Hobbs appointed a cross-sectoral team from the DFO which met on July 12, 2006. At that time Ms. Hobbs instructed the team to gather information on the 2006 smolt counts, the exploitation rates for 2006 as well as a review of the 2006 Integrated Fisheries Management Plan. The cross-sectoral team met again on September 18, 2006 and, as a result of these two meetings, Ms. Hobbs submitted a Decision Paper to the Regional Management Committee (RMC) of the DFO dated September 26, 2006.

[16] The Decision Paper concludes that there is no basis to refute COSEWIC's conclusion that Sakinaw Lake sockeye is endangered, and that listing on an emergency basis does not allow an assessment of the social and economic impacts associated with an emergency listing decision, nor does it permit consultation with those potentially affected. The DFO has also concluded that

the Minister must consult with Ministers of the Government of British Columbia pursuant to the Canada-British Columbia Agreement on Species at Risk and states that such consultations have not yet occurred.

[17] In June 2006, the Applicant brought an Application for *mandamus* essentially to compel the Minister to form an opinion pursuant to section 29 of the SARA as to whether there is an imminent threat to the Sakinaw Lake sockeye.

[18] The Respondent's evidence establishes that the Minister made a recommendation to the Governor in Council that there is an imminent threat to the survival of the Sakinaw Lake sockeye. However, on May 30, 2007, the Canada Gazette, Part 1 published SOR/207-102 dated May 17, 2007 reported the following decision of the Governor in Council:

Her Excellency the Governor General in Council, having considered the recommendation of the Minister of the Environment, made pursuant to subsection 29(1) of the *Species at Risk Act*, and social, economic and other factors, hereby declines to amend Part 2 of Schedule 1 to the *Species at Risk Act* to list the sockeye salmon, Sakinaw Lake population, as an endangered species.

### 3. Issue

[19] The issue in this motion is whether the judicial review ought to be dismissed as the matter is now moot.

#### 4. The Law

[20] The leading case on mootness is *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342. In that case, the Supreme Court provided guidance on the application of the doctrine of mootness, particularly in respect to when courts should exercise discretion in departing from the usual practice of not deciding hypothetical or abstract questions. As a general principle, the Supreme Court held that a court should not render a judgment in circumstances where its decision will have no effect in resolving a controversy that affects (or may affect) the rights of the parties. Further, at paragraph 15 of its reasons, the Supreme Court held that if events subsequent to the initiation of proceedings occur and as a result, the controversy between the parties ceases, the case is said to be moot.

[21] In determining whether an issue is moot, at paragraph 16 of its reasons, the Supreme Court sets out the following two step analysis. First, determination of whether there remains a live controversy. If the controversy has disappeared, then the issue will be considered to be moot. Second, if the issue is moot, the Court must then decide whether it should exercise its discretion and hear the case in any event. The following three factors are to be considered in the exercise of discretion: (1) the requirement of an adversarial context; (2) the concern for judicial economy; and (3) the need for the Court to demonstrate a measure of awareness of its proper law-making function.

#### 5. Analysis

[22] In his notice of application the Applicant seeks the following relief:

1. An order or orders:

- (a) declaring that the Minister's delay in responding to the Applicant's demand that the Minister make a recommendation pursuant to s. 29(1) for the Sakinaw Lake sockeye salmon constitutes a refusal to make such a recommendation;
- (b) declaring that the refusal by the Minister to recommend that the Governor in Council make a recommendation, on an emergency basis, that the List of Wildlife Species at Risk be amended to list the Sakinaw Lake sockeye salmon as endangered pursuant to s. 29(1) is unreasonable or patently unreasonable;
- (c) declaring that the Minister's recommendation to the Governor in Council pursuant to s. 29(1), or the reasons for failing to make a recommendation be made public;
- (d) declaring that the only considerations that are relevant to the Minister's opinion pursuant to s. 29(2) are the Emergency Assessment of the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), the opinion of the Minister of Fisheries and Oceans and the scientific and biological information directly related to whether the Sakinaw Lake sockeye salmon faces an imminent threat to its survival in the wild in Canada, and that the following considerations are irrelevant to the Minister's opinion pursuant to s. 29(1):
  - (i) the socio-economic impacts of amending the List of Wildlife Species at Risk to list the Sakinaw Lake sockeye salmon as endangered; or
  - (ii) the impacts on the west coast sockeye salmon fishery or on intergovernmental relations of a listing of the Sakinaw Lake sockeye salmon as endangered.

2. An order in the nature of *mandamus* compelling the Minister to comply with her duties under s. 29 of the *Species at Risk Act* to recommend to the Governor in Council that the List of Wildlife Species at Risk be amended on an emergency basis to list the Sakinaw Lake sockeye salmon as endangered.

3. Such further and other relief as to this Honourable Court may deem just.

[23] As stated above, the Minister has made a recommendation to the Governor in Council. In his memorandum of fact and law, at paragraph 13, the Applicant states:

The Applicant concedes that the portion of the application for judicial review which seeks an order in the nature of mandamus is moot. The effect of the Minister's recommendation under s. 29(1) is that it is no longer

necessary for the Court to consider the question whether it should exercise its discretion and grant a mandamus order. (My emphasis.)

The Applicant submits, however, that there remains a live controversy between the parties regarding the correct interpretation of sections 25 and 27 of SARA and as a consequence, the application for judicial review is not moot. The Applicant argues that the Minister failed to include a statement of response in the public registry within 90 days as required by subsection 25(3) of SARA. The Applicant maintains that subsection 25(3) of SARA is an independent statutory requirement and is not derivative of the Minister forming an opinion under subsection 29(1). Additionally, the Applicant claims that the Minister and his department have been wilfully ignoring the will of Parliament by not respecting the timeline indicated at subsection 27(1.2) of SARA. This provision requires the Minister, with the Governor in Council, to include a statement in the public registry setting out the reasons for the decision taken to decline to add the Sakinaw Lake sockeye to the List as an endangered species.

[24] The Respondent argues that the application for *mandamus* should be dismissed since the Minister has formed an opinion and has made the required statutory recommendation to the Governor in Council. The Respondent contends that there is no longer any live controversy and as a consequence, the issue raised in the underlying application is moot.

[25] In my view, there is no longer a live controversy or concrete dispute as framed in the notice of application. The *substratum* of Mr. Rounthwaite's application was to compel the Minister of the Environment to conform to his statutory obligation and form an opinion as to whether the Sakinaw Lake sockeye faces imminent risk to its survival. This has been done.



While the Minister's obligation set out in subsection 25(3) of SARA may be separate and distinct from her obligation to form an opinion pursuant to subsection 29(1), the matter was not raised in the notice of application. The declaratory relief sought in the notice of application is premised on the Minister's failure to make a recommendation. In my view, the *substratum* of the Applicant's application has disappeared and the issue is now moot.

[26] Nor do I believe this is a case where the Court should exercise its discretion and hear the case in any event. The notice of application, as framed, fails to provide the requisite adversarial context to ensure that the subsidiary issues raised in argument are fully canvassed. The *substratum* of the underlying application does not provide the proper context for the preparation of a complete evidentiary record to allow these issues to be fully developed in argument. In such circumstances, in the absence of a proper adversarial context, considering the Court's adjudicative function and the concern for judicial economy, I decline to exercise my discretion and hear the application.

## 6. Conclusion

[27] For the above reasons the motion will be granted and the underlying application for judicial review will be dismissed by reason of mootness.

**ORDER**

**THIS COURT ORDERS that:**

1. The motion is granted.
2. The application for judicial review is dismissed by reason of mootness.
3. The Respondent shall have her costs.

“Edmond P. Blanchard”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-942-06

**STYLE OF CAUSE:** Harry Ian Rounthwaite v. Minister of the Environment

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** June 6, 2007

**REASONS FOR ORDER  
and Order:** BLANCHARD J.

**DATED:** September 17, 2007

**APPEARANCES:**

Mr. Harry Rounthwaite FOR THE APPLICANT

Ms. Tracy King FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Mr. Harry Rounthwaite FOR THE APPLICANT

John H. Sims, Q.C. FOR THE RESPONDENT  
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