



**EDITOR'S NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Federal Courts Reports*.

## ENVIRONMENT

Application for judicial review by applicant seeking declaration that respondent Minister's unreasonable delay in making recommendation to Governor-in-Council for issuance of emergency order providing for measures designed to protect endangered Northern Spotted Owl unlawful under *Species at Risk Act*, S.C. 2002, c. 29 (Act), s. 80(2) — Critical habitat of Spotted Owl constituting threat to its survival — Loss of mature old growth forest habitat from logging identified as primary reason for Spotted Owl's decline — In case at bar, three individuals left in wild when opinion formed, only one appearing to have been left by May 2023 — Applicant requested that Minister make recommendation in accordance with s. 80(2) in October 2020 — Minister formed his opinion on January 17, 2023 by agreeing in memorandum that Spotted Owl facing imminent threat — Made recommendation for Governor-in-Council to issue emergency order Issue September 26, 2023 — Question then becoming why did it take from January 17, 2023 to September 26, 2023 to make recommendation for Governor-in-Council to issue emergency order? — Issue whether taking more than eight months to present recommendation satisfying obligation created by s. 80(2) on facts of this case — In essence, applicant pleaded that recommendation must be timely; but timely, in context of s. 80, implying urgency — Applicant claimed that the only factors that should be considered in timing of recommendation are imminency, severity of threats — Conceded that Minister must consider Indigenous rights in reaching decision on imminent threats to endangered species — Respondents sought to justify timing of recommendation through factors other than nature of threats — Sought to create two stages: opinion stage, recommendation stage, with latter requiring different information from opinion stage — In the end, according to respondents, nature, timing of threat facing species cannot be only factors; Minister's ability to gather information required by Governor-in-Council cannot be constrained to those two factors — Applicant entitled to declaration that Minister's delay in making recommendation for emergency order not in this case in accordance with obligation created by s. 80(2) — Respondents' arguments having to be tempered by text, context, purpose of Act — Machinery of government cannot undermine clear statutory obligations made to Minister — Clearly purpose of Act, intention of Parliament are the protection of endangered species — Difficult to see how protection of species not calling for measures to be taken urgently — Scheme of Act including action to be taken, in form of emergency orders, where other measures proving to be less effectual than expected — Existence of s. 82, recommendation to repeal once imminent threat is no longer, making it equally mandatory for Minister to act — This constituting another signal that initial recommendation must be done very quickly, subject to emergency order to be repealed once opinion that threats not present has been reached — Difficult to fathom how period of more than eight months could be reasonable once opinion has been formed that there exist imminent threats to species' survival or recovery — Period of more than eight months to submit recommendation mandated by s. 80(2) not in line with scheme of Act — Here, not known how Minister concluded that more than eight months could satisfy legal obligation he operates under pursuant to s. 80(2) — Minister had to account for legal constraint represented by case law of federal courts — In view of specific declaration sought by applicant, not necessary to seek to prescribe what period of time reasonable between opinion made, submission of recommendation — Nevertheless, delay until recommendation is made should be function of nature of threat, its severity — In this case, with three individual Spotted Owls left in wild when imminent threat identified, with consultations with province not being pre-requisite, long delay could not be justified — Applicant entitled to declaration sought — Application allowed.

WESTERN CANADA WILDERNESS COMMITTEE V. CANADA (ENVIRONMENT AND CLIMATE  
CHANGE) (T-1177-23, 2024 FC 870, Roy J., reasons for judgment dated June 7, 2024, 33 pp.)