Federal Court Cour fédérale

Date: 20210407

Docket: T-716-20

Citation: 2021 FC 301

Ottawa, Ontario, April 7, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

LINDA SKIBSTED, RICK SKIBSTED, SPRUCE COULEE FARMS LTD., RICHARD CLARK, WENDY CLARK, HALF-DIAMOND HC LIMITED, SAMANTHA ANDERSEN, AND H&A ANDERSEN FARMS LTD.

Applicants

and

CANADA (MINISTER OF ENVIRONMENT AND CLIMATE CHANGE) AND CANADA (ATTORNEY GENERAL)

Respondents

and

BADLANDS RECREATION DEVELOPMENT CORP.

Intervener

ORDER AND REASONS

[1] The Bank Swallow is a small bird – the smallest of the swallow species in North America. It builds its nests by burrowing into the steep banks of rivers or other similar terrain. In 2013, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) determined that the Bank Swallow is a "threatened" species under the *Species at Risk Act*, SC 2002, c 29 [*SARA*] because "[t]his widespread species has shown a severe long-term decline amounting to a loss of 98% of its Canadian population over the last 40 years" (COSEWIC Report, Application Record at p 23). The Bank Swallow was officially listed as a threatened species under *SARA* in November 2017.

[2] There are some Bank Swallow nesting sites on the shores of Rosebud River in Alberta. The Applicants are landowners whose properties border the Rosebud River, close to the site where the Intervener, Badlands Recreation Development Corp. (Badlands), proposes to develop a private automobile racetrack and associated facilities (Development).

[3] On July 7, 2020, the Applicants filed a Notice of Application asking the Court to direct the Minister of Environment and Climate Change (Minister) to take a number of steps to protect the Bank Swallow under *SARA*. The relief the Applicants seek in that application includes:

> 1. A writ of *mandamus* compelling the Minister of Environment and Climate Change (the "Minister") to prepare a recovery strategy for a species known as the 'Bank Swallow' or '*riparia riparia*' pursuant to section 37(1) of the *Species at Risk Act* ("*SARA*");
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> 2. A writ of *mandamus* compelling the Minister to prepare an action plan or action plans based on the recovery strategy pursuant to section 47 of *SARA*;
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> 3. A writ of *mandamus* compelling the Minister to recommend, identify and/or designate critical habitat for the Bank Swallow pursuant to sections 41(1)(c), 58(5) and (5.1) of *SARA*; and

> 4. A writ of *mandamus* compelling the Minister to recommend that the Governor in Council make an emergency Order providing for the protection of the Bank Swallow pursuant to section 80(1) of *SARA*, particularly in or around the lands subject to *Water Act*, RSA 2000, c W-3, Approval No. 00406489-00-00.

[4] The Notice of Application filed by the Applicants did not name Badlands as a Respondent, and so it brought a motion for leave to intervene in the proceeding, given its interest in the outcome. This was granted on December 21, 2020.

[5] On February 23, 2021, the Applicants filed a Notice of Motion seeking an interlocutory injunction against Badlands, to prevent it from proceeding with the Development pending the determination of its application for *mandamus*. This matter was heard on March 9, 2021, and these are my reasons for denying the requested injunction.

[6] It should be noted that subsequent to the hearing of this motion, the Respondent advised the Applicants that the Minister had decided not to make an emergency Order under section 80 of *SARA*, and so the fourth claim has been rendered moot. Later, the Applicants confirmed that they were discontinuing their claim under the fourth ground, and that they were no longer seeking specific interim protections for the Badlands property in connection with their *mandamus* application. However, the Applicants did not discontinue or withdraw their motion for an interlocutory injunction.

[7] This case raises a number of somewhat unusual features, largely tied to the fact that the Applicants seek an interlocutory injunction not against the Respondents named in its underlying *mandamus* application (the Minister of Environment and Climate Change and the Attorney

General of Canada) but rather, against a third party corporation that is an intervener in that proceeding.

[8] The Intervener and Respondents argue that the Federal Court does not have jurisdiction to deal with the matter, because the Intervener is a private, provincially regulated corporation and the injunction seeks to prevent it from carrying out activities on land that it owns. The Intervener also argues that the first part of the test for an interlocutory injunction must be adapted in this case to reflect the fact that the relief the Applicants are seeking is not available to them in their underlying application.

[9] It is not necessary to deal with all of these issues in great detail, in view of my finding that the Applicants have failed to demonstrate an imminent risk of irreparable harm between now and the determination of the *mandamus* application, which has been set for hearing on April 26, 2021.

I. Background

[10] The Applicants own properties that are near the proposed site of the Badlands Development. The Rosebud River runs through all of these properties. It is not disputed that Bank Swallow nesting sites have been identified on the banks of the Rosebud River in the vicinity of the Development, although there is some debate about the extent to which the Bank Swallow has been observed using the habitat on the site of the proposed Development.

[11] The designation of the Bank Swallow as a threatened species triggers a number of obligations under *SARA*, including the requirement that the Minister prepare a recovery strategy

for the species. In connection with that work, Environment and Climate Change Canada (ECCC) has identified draft critical habitat for the Bank Swallow, which includes known nesting sites and foraging locations up to a distance of 500 metres from the nests. As of the date of the hearing, this draft was the subject of ongoing consultations. The document shows the nesting sites and foraging area along the Rosebud River near the Applicants' and Intervener's properties, and it indicates that the draft critical habitat covers some of the area within the boundaries of the proposed Development.

[12] The Intervener's proposed Development is described in the following way:

> Badlands Motorsports Resort will be a country-club style resort featuring two European-style road courses, with a combined track length of almost 10 km. It is designed for non-spectator recreational driving and instruction, and other leisure activities. The development will include a driver training facility with a smaller practice course, associated facilities, condominium resort residences, a clubhouse, a hotel, commercial activities, and several other recreational amenities for the whole family. Badlands Motorsports Resort includes two race tracks that allows for auto racing of motor vehicles that are street legal (i.e., motor vehicles licenced for use on public highways).

[13] The Intervener has been pursuing the necessary approvals to allow it to proceed with the Development since 2008. It says that at virtually every stage, the Applicants have opposed the project, including by making submissions to the various approval bodies and launching applications for judicial review to challenge unfavourable decisions. It is not necessary to trace the complete history of this, which is set out in detail in the Intervener's materials. For the purposes of this matter, it is sufficient to note the following:

a) The Development has received some of the necessary approvals from municipal and provincial bodies, including approval under the Alberta *Water Act*, RSA 2000, c W-3

[*Water Act*], subject to a number of conditions which are intended to mitigate its environmental effects, including its impact on the Bank Swallow;

b) In response to the approval received under the Alberta *Water Act*, the Applicants and others filed notices of appeal with Alberta's Environmental Appeals Board (EAB);

c) In April 2020, the EAB made a preliminary ruling that some of the appellants lacked standing to challenge the approval;

d) The EAB appellants brought an application for judicial review of this decision in the Alberta Court of Queen's Bench, and that matter has been adjourned;

e) The EAB agreed to reconsider its earlier ruling because of an intervening decision of the Alberta Court of Appeal on the issue of standing before the Board in an unrelated case., The appellants and the Intervener have filed submissions on this before the EAB;

f) The Intervener has given an undertaking not to physically alter any of the wetlands that are included in the *Water Act* approval until the Alberta Minister makes a decision following the EAB hearing;

g) The EAB hearing had not been scheduled as of the date of this proceeding, and it had not yet reconsidered its decision on the standing of the appellants.

[14] The Applicants say they are seeking the interlocutory injunction because they fear that work on the Development will harm critical habitat of the Bank Swallow before the Court can rule on the *mandamus* request. They argue that without the protections that *SARA* offers, there is nothing to stop the Intervener from proceeding with construction work that may cause harm to habitat that is critical to the survival of the Bank Swallow in this area. The Applicants submit that the injunction is needed to bridge a gap in the protections available under *SARA*.

[15] In particular, the Applicants say that there is a risk that construction on the Development will begin soon because Badlands' approvals include deadlines for it to complete certain aspects of the project. They note, for example, that the approval requires Badlands to complete the work upgrading and extending the existing access road by September 2022; other work must be done by 2023.

[16] If the road construction work begins, the Applicants fear it may destroy some of the critical habitat in the draft designation prepared by ECCC. The Applicants say that the Minister cannot stop this, because the process to finalize the critical habitat designation and complete the recovery strategy is not yet completed. They argue that if the critical habitat is destroyed, the Minister does not have the power under *SARA* to order the Intervener to rehabilitate the affected land, and furthermore, that once the destruction occurs, this area will no longer qualify as "critical habitat". This is the critical gap that the Applicants submit they are seeking to fill through this injunction application.

II. Issues

[17] There are two issues: (A) does this Court have jurisdiction to grant the interlocutory injunction; and (B) if so, should the Court exercise its discretion to grant an injunction?

III. Analysis

A. *Does this Court have jurisdiction to grant the interlocutory injunction?*

[18] The jurisdiction of this Court to grant injunctive relief is set out in the *Federal Courts Act*, RSC 1985, c F-7 [*Act*]. There are two references to injunctions in the *Act*. First, paragraph 18(1)(a) provides that the Court has exclusive original jurisdiction to "issue an injunction… against any federal board, commission or other tribunal". This obviously does not apply here, because the Applicants seek an injunction not against the Respondent Minister, but rather against the Intervener Badlands, which is not a "federal board, commission or other tribunal".

[19] The second possible source of jurisdiction is set out in section 44 of the *Act*:

***Mandamus*, injunction, specific performance or appointment of receiver**	***Mandamus*, injonction, exécution intégrale ou nomination d'un séquestre**
44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	**44** Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

[20] The Applicant argues that this case falls within section 44, as that provision was interpreted by the Supreme Court of Canada in *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 [*Liberty Net*]. In that case, the Canadian Human Rights Commission sought an interlocutory injunction pending the determination of a human rights

complaint before the Canadian Human Rights Tribunal. The Tribunal did not have the authority to grant interlocutory relief, and so the Commission went to the Federal Court to seek an order prohibiting the continued broadcast of allegedly hateful messages by Canadian Liberty Net, pending the determination of the complaint by the Tribunal.

[21] The Supreme Court of Canada ruled at paragraphs 36 and 37 that the Federal Court had jurisdiction to grant an injunction by virtue of its power to grant "other relief" under section 44:

> 36. …Parliament intended to grant a general administrative jurisdiction over federal tribunals to the Federal Court. Within the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion. This means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction.
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> 37. In this case, I believe it is within the obvious intendment of the *Federal Court Act* and the *Human Rights Act* that s. 44 grant jurisdiction to issue an injunction in support of the latter. I reach this conclusion on the basis that the Federal Court does have the power to grant "other relief" in matters before the Human Rights Tribunal, and that fact is not altered merely because Parliament has conferred determination of the merits to an expert administrative decision-maker.…

[22] The Applicants submit that this guidance applies here, because the Minister lacks the authority to grant interim relief. They say that because the Minister lacks the necessary power to prevent the destruction of the critical habitat before it has officially designated it as such, they have turned to this Court to seek an interlocutory injunction to prevent irreparable harm from occurring. This is a type of "other relief" that is available from this Court under section 44, and the Applicants argue it is ancillary and collateral to their underlying application.

[23] The Respondents contend that section 44 provides for supervisory jurisdiction over federal boards, commissions or other tribunals who will ultimately determine the issue between the parties. Under this interpretation, the ruling in *Liberty Net* is limited to situations where the underlying proceeding will be heard by an administrative decision maker that cannot issue injunctions or other interim relief (*Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 63; *Habitations Ilôt St-Jacques Inc v Canada (Attorney General)*, 2017 FC 535 at para 50).

[24] The Respondents also assert that, unlike the situation in *Liberty Net* where the Tribunal did not have any authority to deal with urgent situations, in this case the Minister has been granted powers to deal with emergencies under section 80 of *SARA*. The Respondents submit that this emergency power has been used in the past to deal with the very type of harm that the Applicants allege here, citing *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2020 FCA 88 [*Groupe Maison*]. As noted earlier, after the hearing the Respondent advised the Applicants that the Minister had decided not to exercise his power under section 80, but that does not affect the Respondents' argument, which is based on the existence of the Minister's power to issue emergency orders.

[25] The Respondents and Intervener point to the test for the jurisdiction of the Court set out in *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752. In that case, the Supreme Court of Canada held that this Court has jurisdiction to deal with claims where there is:

1) a statutory grant of jurisdiction by Parliament;
2) an existing body of federal law, essential to the disposition of the case, which nourishes the statutory grant of jurisdiction; and

3) law underlying the case falling within the scope of the term “a law of Canada” used in section 101 of the *Constitution Act, 1867*.

[26] The Respondents and Intervener submit that this test is not met here *vis-à-vis* Badlands, which is a private, provincially regulated company proposing to develop the property that it owns. There is no dispute that the Court has jurisdiction in relation to the Minister and the obligations under *SARA*, which is the subject of the underlying application here. However, the injunction application is not directed towards the Minister, and therefore this Court lacks jurisdiction to deal with it.

[27] As indicated above, in light of my determination on the interlocutory injunction issue, it is not necessary to rule on the jurisdiction question. The point was not fully canvassed by the Applicants, who did not make any written submissions on the point and addressed it only briefly in oral submissions.

[28] In light of the implications of such a ruling for future cases, this is a question that is better left for another day. I would simply add the following comments. While there is some force to the submission that this case is different than *Liberty Net* because the Minister does have certain emergency powers, I find that the argument of the Respondents and Intervener does not give sufficient weight to the opening words of section 44, which expressly grant this Court jurisdiction to grant an injunction “[i]n addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award…”. Their position also does not give any meaning to the clear difference in wording between paragraph 18(1)(a), which is limited to relief granted “against any federal board, commission or other tribunal”, and the phrasing of section 44, which does not contain any similar words of limitation.

[29] The precise contours of the jurisdiction of this Court in matters where the Minister has not acted under *SARA* in the face of an imminent threat to protected critical habitat (or potentially protected critical habitat), and where the threat originates with the activities of a private landowner, is best left for final determination in a case where such a ruling is necessary to the outcome. That is not the situation here, and so I will turn to the analysis of the merits of the interlocutory injunction application.

B. *Should an interlocutory injunction be granted?*

[30] The familiar three-part test for the grant of an interlocutory injunction was recently summarized by the Supreme Court of Canada in *R v Canadian Broadcasting Corp*, 2018 SCC 5 at paragraph 12 [*CBC*]:

> … At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a “serious question to be tried”, in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
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> [Footnotes omitted.]

[31] The three elements of the test are cumulative, but strength in one factor may overcome weakness on another (see the discussion in *Monsanto v Canada (Health)*, 2020 FC 1053 at para 50 [*Monsanto*]). At the end of the day, it is important to remember that an interlocutory injunction is equitable relief, and a degree of flexibility must be preserved in order to ensure that the remedy can be effective when it is needed to prevent a risk of imminent harm pending a

ruling on the merits of the dispute. This was reaffirmed in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Google*] at paragraph 1, where the Supreme Court of Canada noted that "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case."

(1) Serious Issue to be Tried

[32] In most interlocutory injunction cases, the "serious issue to be tried" threshold is not a high bar – it is often summarized as merely requiring the judge to make a preliminary assessment of the case to ensure that the claim is neither "vexatious nor frivolous": *RJR – MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at p 337 [*RJR – MacDonald*]. This is particularly the case where the interlocutory injunction seeks to stop something from happening. There are exceptions, such as where the injunction will likely put an end to the litigation, but that does not apply here.

[33] The focus in most cases is on the strength of the underlying case. An interlocutory injunction is, by its nature, intended to preserve the *status quo* pending a determination of the underlying dispute. This branch of the test seeks to ensure that otherwise lawful activity is not stopped where the main lawsuit is destined to fail because it is totally lacking in merit. As noted earlier, this case involves an unusual circumstance because the injunction is sought against Badlands, but the underlying matter is an application for a writ of *mandamus* against the Minister. In light of this, Badlands argues that the strength of the case should be tested with reference to the application for an injunction, not the underlying dispute, citing *Federation of Newfoundland Indians v Canada*, 2011 FC 683 at paras 85-86.

[34] I am not entirely persuaded by this argument but I acknowledge that given the unusual nature of this case, the equities of the situation demand an assessment of the strength of both matters. The underlying *mandamus* application should be examined, because if the Applicants' case against the Minister is hopeless, there is no good reason to stop Badlands beginning work on the Development.

[35] In addition, I find that it is necessary to make a very preliminary assessment of the strength of the injunction application itself, because it is the only Order here that will have any direct impact on Badlands. The *mandamus* application, if granted, will affect the Minister and may indirectly affect Badlands once the Minister completes the work on the critical habitat designation and recovery strategy. However, this will not affect Badlands until that work is complete, if at all (depending on the scope of habitat that is found to be critical and its impact on the site of the proposed Development). It would be incongruous and illogical to fail to consider the strength of the injunction case at this stage, because of its possible impact on Badlands.

[36] I find that the Applicants have met the low threshold of demonstrating a serious issue to be tried in relation to the underlying application. This is meant to be a preliminary assessment, and at this stage of the proceeding, I do not find that their application for *mandamus* against the Minister is frivolous or vexatious.

[37] I also find that their application for an injunction is not frivolous or vexatious. This motion is brought by adjoining landowners who say that they are seeking to preserve critical habitat for a threatened species in the face of an imminent risk of the destruction of that habitat by construction work done by Badlands. The motion is supported by a substantial record and seeks an interlocutory injunction – relief that is generally available from this Court. There is no

doubt that the Bank Swallow, a species that has been designated as threatened, nests in the area close to the Development. A part of the land on which the Development will be built is included in a draft critical habitat designation prepared by ECCC. The Applicants submit that this habitat is at risk of destruction by the planned construction to be undertaken by the Intervener.

[38] Without pronouncing on the merits of the other elements of the test, and applying the very low threshold of the serious issue to be tried test based on a preliminary view of the merits, I am not persuaded that the motion fails on the first element of the test.

(2) Irreparable Harm

[39] The term irreparable harm refers to the nature of the harm rather than its scope or reach; it is generally described as a harm that cannot adequately be compensated in damages or cured (*RJR – MacDonald* at p 341). It has often been stated that this harm cannot be based on mere speculation, it must be established through clear and compelling evidence: see *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16; *Newbould v Canada (Attorney General)*, 2017 FCA 106 at paras 28-29. In addition, the evidence must demonstrate a high likelihood that the harm will occur, not that it is merely possible. This will obviously depend on the circumstances of each case (see the discussion in *Letnes v Canada (Attorney General)*, 2020 FC 636 at paras 49-58 [*Letnes*]).

[40] However, equitable relief must retain its necessary flexibility, and it must be admitted that some forms of harm do not readily admit of proof, especially in interlocutory proceedings where speed is of the essence and the ability to prepare a complete evidentiary record is

necessarily somewhat limited. What is required, at the end of the day, is a "sound evidentiary foundation" for the assessment of the harm; mere assertions or speculation on the part of the applicant will never be sufficient (see *e.g. Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 at para 60; *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at paras 87-88.

[41] The Applicants face two hurdles on this branch of the test. First, the Respondents and Intervener argue that the Applicants have failed to demonstrate any harm to their own interests, and since they have never been granted public interest standing in the matter, their claim must therefore fail.

[42] In *RJR – MacDonald*, the Supreme Court of Canada ruled that in regard to irreparable harm, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied…" (*RJR – MacDonald* at p 341). This has recently been affirmed by the Federal Court of Appeal in two recent decisions: *Air Passengers Rights v Canada (Transportation Agency)*, 2020 FCA 92 at para 30 (leave to appeal to SCC refused, 39266 (23 December 2020)) [*Air Passengers Rights*]; and *Arctic Cat, Inc v Bombardier Recreational Products Inc*, 2020 FCA 116 at para 32.

[43] The Respondents contend that while Canada has an interest in protecting vulnerable species from harm, previous decisions involving *SARA* have found that injunctive relief is not the proper tool to provide that protection. In *RJR – MacDonald*, the Supreme Court held that consideration of wider public interest claims should be done under the third branch of the test dealing with the balance of convenience, and so the Applicants' arguments relating to harm to the wider public interest is not relevant at this stage.

[44] The Respondents point to two decisions in which this Court has ruled that animal protection goals do not serve to alter the irreparable harm test. In *Zoocheck Canda Inc v Canada (Parks Canada Agency)*, 2008 FC 540 [*Zoocheck*], public interest groups with the goal of animal protection sought an injunction to stop a planned cull of a population of double-crested cormorants. The Court accepted that irreparable harm would be caused to the birds, but found that this did not meet the test; the applicants were required to demonstrate irreparable harm to their own interests (*Zoocheck* at para 49).

[45] To a similar effect, in *Zerafa v Canada (Canadian Food Inspection Agency)*, 2010 CanLII 96851 (FC), the Court relied on *Zoocheck* to find that the harm to the animals that had been demonstrated in the evidence did not meet the test; instead, the applicant had to demonstrate a harm to her own interests.

[46] The Respondents and Intervener submit that the Applicants have not demonstrated any harm to their own interest. In oral argument, the Intervener went further, and argued that the Applicants have demonstrated more dedication to stopping the project than to the protection of the Bank Swallow, noting that out of the over 10,000 kilometres of shoreline identified in the draft critical habitat designation, the Applicants have only demonstrated an interest in protecting the approximately one kilometre that is adjacent to the site on which Badlands proposes to construct its Development.

[47] The Applicants point to the affidavit evidence of Rick Skibsted, who states that he is "an avid bird watcher and ha[s] studied the nesting habits of the birds in the Rosebud River Valley for decades." He goes on to state that he has seen "numerous bank swallows killed by collisions with vehicles" along a roadway that runs near the river and passes close to two Bank Swallow

colonies. They submit that they are acting to fill a gap that has been caused by the Minister's delay in acting on the COSEWIC designation of the Bank Swallow as a threatened species.

[48] In view of my finding on the other element of this branch of the test, I will not address this argument in great detail. It is sufficient to indicate that I find the evidence of the Applicants to be lacking because they do not demonstrate in any tangible way how the loss of critical Bank Swallow habitat in the area of concern would harm their own interests. The fact that one of the Applicants says that he is an "avid bird watcher" falls well short of the mark.

[49] The Applicants did not seek to obtain public interest standing in this motion, or in the underlying application; rather, they assert they are acting because of their interest as adjoining landowners. They have not demonstrated how any possible destruction of Bank Swallow critical habitat affects their interests directly, and they therefore do not meet the test as stated in *RJR – MacDonald*.

[50] Turning to the substance of this branch of the test, as noted earlier, the law requires that the Applicants demonstrate with as specific evidence as is feasible in the circumstances that irreparable harm will likely occur if the injunction is not granted. The following summary of the jurisprudence set out in the *Letnes* decision, serves as a useful guidepost to the analysis that follows:

> [51] The FCA has frequently insisted on the attributes and quality of the evidence needed to establish irreparable harm in the context of injunctive reliefs such as stays or interlocutory injunctions. The evidence must be more than a series of possibilities, speculations, or hypothetical or general assertions. Assumptions, hypotheticals and arguable assertions unsupported by evidence carry no weight. There needs to "be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a

> stay is granted". It is not enough "to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable". In other words, to prove irreparable harm, "the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later".
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> [Citations omitted].

[51] In this case, the Applicants submit that the irreparable harm will happen if the critical habitat for the Bank Swallow that is shown in the draft critical habitat designation prepared by ECCC is harmed by construction work associated with the Development. They note the project approval deadlines that Badlands is facing and submit that this will pressure the organization to commence its work as soon as possible.

[52] The Applicants point to the deadline facing Badlands for the construction on the access road to the Development, which includes expanding an existing county road. One of the conditions in the latest Development agreement Badlands entered into with the local authority was that the access road construction is to be completed by September 15, 2022. The Applicants submit that in order to meet this deadline, the Intervener will need to begin construction work soon.

[53] The crux of the Applicants' argument is that irreparable harm will occur if the construction goes ahead before the Minister designates the critical habitat on the site of the Development. Once the habitat is disturbed or destroyed, it cannot be remediated and the Applicants say that if that happens, the Minister cannot then designate it as "critical habitat" under *SARA*. They submit that this would amount to irreparable harm.

[54] In addition, the Applicants point to the condition in the approval granted by Alberta Environment and Parks under the Alberta *Water Act* requiring Badlands to complete all construction relating to the wetlands or the storm water management system by December 31, 2023.

[55] The Applicants have no evidence that any of the work has actually begun, or that construction equipment or any preparatory activity has been observed on the site. Rather, they point to the calendar and the deadlines as the basis for their belief that there is a real risk that the critical habitat will be destroyed before their application for *mandamus* is ruled on, and before the Minister has completed the designation of critical habitat in connection with the recovery strategy. The Applicants also note that the Intervener's undertaking to the Alberta Court of Queen's Bench not to alter any wetlands does not stop it from starting the road construction, since that will not occur on a wetland.

[56] The Intervener and the Respondents both submit that the Applicants have failed to provide the type of "clear and convincing evidence" that is needed to obtain an interlocutory injunction. The Intervener points to the various conditions that have been attached to the approvals it has received, on top of the legal protections for the Bank Swallow by virtue of the fact that it is a migratory species. The Intervener notes that it is prohibited from destroying or interfering with any of the Bank Swallow nesting sites, which in any event are outside of the boundaries of the Development. It also notes that construction cannot occur in the wetlands during the nesting season, between April 15 and August 31.

[57] The Intervener submits that these and other conditions are sufficient to protect the Bank Swallow and their habitat. Furthermore, the evidence of Badlands' representative is that it does

not have any plans to begin construction until the project is approved by the Alberta Minister of Environment and Parks, assuming that the EAB recommends approval of the project. As a practical matter, they assert that this means that there will likely be no construction started until the fall of 2021, at the earliest.

[58] The Intervener and Respondents argue that the Applicants have not demonstrated that they will suffer any irreparable harm that is likely to occur between the date of the hearing of the injunction and the determination of the underlying application, which is set for hearing in a matter of weeks (the hearing is set for April 26-28, 2021).

[59] I agree with the Respondents and the Intervener. The Applicants' evidence does not establish a sufficiently imminent risk that the harm they fear will actually occur.

[60] The relevant period for assessing the risk of irreparable harm is the time between the hearing of the interlocutory injunction motion and the determination of the underlying application (*Air Passengers Rights* at para 28; *Iris Technologies Inc v Canada (National Revenue)*, 2020 FC 1133 at para 47; *Monsanto* at para 42). Therefore, in this case the relevant period runs from the hearing of this motion to the determination of the underlying application for *mandamus*, the hearing for which is set to begin on April 26, 2021, for a duration of three days.

[61] In assessing whether the Applicants have established irreparable harm, a number of considerations weigh against their position.

[62] First, as a practical matter, the evidence is that the Bank Swallow will be migrating back to the nesting sites on the banks of the Rosebud River now, and that the nesting season is from April to August. The nesting sites do not face a risk of destruction from any activity that is likely

to occur over the short-term, and it is also not clear that the nesting sites face any risk associated with the Development over the longer term.

[63] Second, there is no evidence that construction work of any sort is about to begin on the Intervener's property. It is not disputed that the Intervener does not yet have all of the approvals it requires in order to undertake the Development, and it makes common sense that it will want to wait until it has greater assurance that it will, in fact, receive the necessary approvals before it expends funds on any major construction related to the Development.

[64] The Applicants own properties that are adjacent to the site of the Development, but they have not submitted any evidence that they have observed construction equipment or any preparatory work being done on the property. In this respect, this case can be contrasted with the facts in *Groupe Maison*. The September 2022 deadline for construction relating to the access road that the Applicants point to can be extended by mutual consent. This deadline is not likely to prompt immediate activity by the Intervener until they are closer to having all of the approvals in place, because if they are delayed in obtaining those approvals they can seek the agreement of the local authority to extend the timeline for the completion of the road construction work.

[65] It is not necessary to rule on the question of whether the Minister would lose the ability to designate the critical habitat if the construction goes ahead, because the Applicants have not demonstrated that this is likely to occur prior to the determination of their *mandamus* application. The "gap" that the Applicants say they are seeking to fill through this application remains a speculative possibility, rather than a clear likelihood.

[66] I therefore conclude that the Applicants have not demonstrated in a detailed and concrete way that they will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later, as required by the governing jurisprudence (see *Letnes* at para 51).

[67] For these reasons, I find that the Applicants have not established, with sufficiently clear and convincing evidence, that the actions of the Intervener will cause irreparable harm between now and the determination of the underlying application.

(3) Balance of Convenience

[68] The third stage of the test "requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits" (*CBC* at para 12). The expression often used is "balance of inconvenience" (*RJR – MacDonald* at p 342). The factors that must be considered in assessing this element of the test are numerous and will vary with the circumstances of each case; it is at this stage that any public interest considerations may come into play (*RJR – MacDonald* at pp 342-43).

[69] The Applicants argue that the balance of convenience weighs in their favour because if the injunction is granted, at most, it will impose a slight delay on the Intervener's construction plans, but if the injunction is refused and the construction proceeds, the result will be irreversible destruction of critical habitat of the Bank Swallow in the area. They note that the habitat shown in the draft critical habitat designation is not likely to change as a result of the consultations that are currently underway. The Applicants contend that without an injunction, the harm to this

habitat will be irreversible, because the Minister will have no power to order Badlands to restore it to its original state, assuming that remediation is even possible. The Applicants say they are acting to protect the public interest and respect for the process set out in *SARA*, and that the balance of convenience therefore weighs in their favour.

[70] The Intervener argues that this factor weighs heavily in its favour. It has been working on this project for over a decade, and it has demonstrated its awareness of the potential environmental impacts at every step and has taken steps to mitigate these effects. The Development project has received approvals from various local and provincial regulatory bodies, and is subject to a number of conditions that will mitigate the risks to the critical habitat of the Bank Swallow, as well as other environmental effects. If an injunction is granted, Badlands says it will face increased difficulty obtaining financing for the project due to the added uncertainty this will introduce.

[71] According to the Intervener, two other factors weigh in its favour. First, the Applicants are seeking to be relieved of the requirement to provide an undertaking in damages. This is a normal requirement for obtaining an interlocutory injunction, and the Intervener argues that the Applicants are large property owners who have previously indicated that they have spent hundreds of thousands of dollars opposing the Development. Badlands submits that the Applicants have not demonstrated any reason to be relieved of the undertaking, and so their request to be relieved from it should weigh against them.

[72] Second, the Intervener submits that the scope of the injunction requested by the Applicants is a telling indication of their true aim, because they seek an injunction to stop any work on the project. The broad scope of the injunction that the Applicants requested would cover

any surveying or other preparatory work on the site, which would not pose any risk to the critical habitat of the Bank Swallow. The Intervener suggests that such a broad order could also prohibit it from taking any steps to obtain further financing or project approvals. The Intervener says that this is an indication that the Applicants seek to stop the project, not to protect the Bank Swallow, and this should tip the balance of convenience in favour of the Intervener. On this point, it should be noted that the Applicants say that that the scope of the injunction is a matter for the Court's discretion, but they did not present any concrete suggestions for narrowing it.

[73] The Respondents note that the Minister is required to consider the public interest in implementing the protections set out in *SARA*, and in this case, the work on the recovery strategy for the Bank Swallow is already well advanced. If the Minister determines that there is an imminent risk to the critical habitat of the Bank Swallow, an emergency order can be issued under section 80 of *SARA*, and experience demonstrates that this has been done when it became necessary (see *Groupe Maison*). It bears repeating here that since this matter was argued, the Respondents have advised the Applicants that the Minister has decided not to pursue an emergency order under section 80 of *SARA*.

[74] The Respondents argue that the Applicants have not demonstrated any imminent risk, nor have they shown how their own interests would be affected by any destruction of critical habitat that might occur. They do not act in any public interest capacity, and therefore the balance of convenience must weigh in favour of the Intervener and the Respondents.

[75] Having considered the positions of the parties and in light of the evidence in the record, I find that the balance of convenience weighs in favour of the Intervener and Respondents.

[76] To the extent that the public interest is a relevant consideration in this case, the evidence shows that the Minister has been engaged in the work needed to designate critical habitat and to finalize a Recovery Strategy since the Bank Swallow was listed as threatened in November 2017. The record shows that this work is complex, because of the widespread distribution of the species across Canada (the evidence is that the Bank Swallow is present in all provinces and territories of Canada, except perhaps Nunavut), as well as the need to undertake the necessary scientific studies to identify critical habitat based on solid evidence. In addition, there is a requirement for consultations within the federal system and with provincial officials and private stakeholders. This work is underway, and although the Applicants are not satisfied with the pace of progress, there is no evidence that the Minister is shirking his duties under the law.

[77] I find that the harm that would be done to the Intervener's interests by the grant of an interlocutory injunction outweighs any harm that the Applicants may suffer pending the determination of their underlying application. As Badlands notes, the Applicants requested a very broad injunction, the effect of which would be to prohibit virtually any work on the site relating to the Development. I accept that the grant of an injunction would also add further uncertainty to a project that is already facing a number of hurdles, though I give this factor less weight since the injunction would only be in place for a matter of months pending the determination of the underlying application, at a time when Badlands says it did not plan to undertake any construction in any event.

[78] The grant of the injunction requested by the Applicants would stop Badlands, a private landowner, from undertaking any preparatory work on its own property relating to a project that has received approvals from local and provincial officials. It would grant a type of relief that the

Applicants have not sought in the underlying application. On this point, I note that if the Applicants are successful and receive an order in the nature of *mandamus*, the result of that order may have an indirect impact on Badlands by speeding up the process of designating critical habitat and finalizing the recovery strategy. However, it should also be noted that if the current draft critical habitat designation is approved in its current form, a significant portion of the Badlands property will not be included within it, and it is not clear that the designation would therefore have the effect of stopping the Development.

[79] Considering all of the circumstances of the matter, I find that the balance of convenience weighs in favour of the Intervener and the Respondents.

IV. Conclusion

[80] At the end of the analysis, it is important to step back and to recall that "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case" (*Google* at para 1).

[81] For the reasons set out above, I find that it would not be just and equitable to grant the Applicants' request for an injunction, in all the circumstances of the case. The threat of harm in the short period between now and the determination of the underlying *mandamus* application has not been established; the harm to the interests of the Applicants has not been proven; granting an injunction would stop the Intervener from doing any work relating to the Development on its own property; and the record does not demonstrate that the Minister is ignoring either a risk of imminent harm or his more general obligations under *SARA*.

[82] The Applicants' motion for an interlocutory injunction is therefore dismissed.

[83] In exercise of my discretion under Rule 400 of the *Federal Courts Rules,* SOR/98-106, I find no reason to depart from the usual costs award. Therefore, the Applicants will pay costs of this motion to the Intervener and the Respondents, to be calculated in accordance with Column III of the table to Tariff B (Rule 407). If the parties cannot come to an agreement on costs, they may make submissions not exceeding three (3) pages (excluding a draft bill of costs), within 14 days of the issuance of this Order.

ORDER in T-716-20

THIS COURT ORDERS that:

1. The Applicants' motion for an interlocutory injunction is dismissed.

2. The Applicants shall pay the costs of this motion to the Intervener and the Respondents, in accordance with Column III of the table to Tariff B. If the parties cannot agree on costs, they may make submissions not exceeding three (3) pages (excluding a draft bill of costs) within 14 days of the issuance of this Order.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-716-20
STYLE OF CAUSE:	LINDA SKIBSTED, RICK SKIBSTED, SPRUCE COULEE FARMS LTD., RICHARD CLARK, WENDY CLARK, HALF-DIAMOND HC LIMITED, SAMANTHA ANDERSEN, AND H&A ANDERSEN FARMS LTD. v CANADA (MINISTER OF ENVIRONMENT AND CLIMATE CHANGE) AND CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE IN CALGARY, ALBERTA, EDMONTON, ALBERTA AND OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 9, 2021
ORDER AND REASONS:	PENTNEY J.
DATED:	APRIL 7, 2021

APPEARANCES:

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R. Bruce Brander David Campbell	FOR THE INTERVENER

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