Federal Court Cour fédérale

Date: 20240201

Docket: T-849-22

Citation: 2024 FC 167

Ottawa, Ontario, February 1, 2024

PRESENT: Chief Justice Paul Crampton

BETWEEN:

WESTERN CANADA WILDERNESS COMMITTEE AND SIERRA CLUB OF BRITISH COLUMBIA FOUNDATION

Applicants

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] These reasons concern the Respondent Minister's amended *Protection Statement for the habitat to which the* Migratory Birds Convention Act*, 1994 applies for migratory birds listed under the* Species at Risk Act (the **"Protection Statement"**).

[2] The Applicants maintain that the Protection Statement unreasonably limits the protection of critical habitat of threatened, endangered, and extirpated migratory birds. The Applicants assert that it does so by confining the critical habitat protection contemplated by subsection 58(5.2) of the *Species at Risk Act*, SC 2002, c 29 [**SARA**], to the nests of those birds. The Applicants state that this leaves the majority of the critical habitat of the Marbled Murrelet and at least 24 other at-risk migratory birds unprotected on non-federal lands across the country.

[3] The Applicants submit that the Minister's interpretation of subsection 58(5.2) is unreasonably narrow. They further assert that the Protection Statement is unreasonable because it was not sufficiently justified or intelligible in relation to (i) certain submissions that they made to the Minister, or (ii) the relevant factual constraints.

[4] I agree. Consequently, the Protection Statement will be set aside and remitted to the Minister for redetermination in accordance with these reasons.

II. The Parties

[5] The Applicants are environmental non-governmental organizations that work to protect Canada's environment and species at risk.

[6] The Respondent Minister is the competent minister for SARA-listed migratory birds.

III. Background

[7] Most of the migratory bird species covered by the Protection Statement have been listed as threatened or endangered under the SARA for many years, and are the subject of recovery strategies issued by the department of Environment and Climate Change Canada (**"ECCC"**). For example, the Marbeled Murrelet has been listed as threatened under the SARA since 2003 and is the subject of a recovery strategy issued in 2014. That strategy partially identified the critical habitat of that species by identifying the threshold amount of suitable nesting habitat required in each of six conservation regions in coastal British Columbia.

[8] In the absence of any evidence of action from the Minister under section 58 of the SARA in the six years following the issuance of the recovery strategy, the Applicants wrote to the Commissioner for Environment and Sustainable Development in January 2021. In their letter, they sought information on actions taken by the Minister to protect migratory birds under section 58.[1] The Applicants also asked how the Minister interprets the habitat contemplated by subsections 58(5.1) and 58(5.2).

[9] In July 2021, the Minister of the day responded to the Applicants' requests. The Minister advised that subsections 58(5.1) and 58(5.2) only apply to those portions of the critical habitat that are habitat to which the *Migratory Birds Convention Act,* SC 1994, c 22 [**MBCA**] applies. The Minister proceeded to state that the MBCA and the *Migratory Birds Regulations,* CRC c. 1035 [**MBR**], provide protection for migratory birds, eggs and nests.[2]

[1] The various communications of the Applicants described in these reasons were through their counsel, Ecojustice.
[2] The MBR were amended in 2022.

[10] In September 2021, the Applicants wrote a lengthy letter to the Minister expressing disagreement with the Minister's interpretation and demanding action under subsection 58(5.2) of the SARA in relation to the Marbled Murrelet. Among other things, the Applicants maintained that the MBCA must, at a minimum, apply to all migratory bird critical habitat under the SARA. They assert that this is the habitat "necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or action plan for the species": subsection 2(1), SARA. The Applicants also stated that Marbeled Murrelet populations have continued to decline, despite being listed under the SARA for many years. The Applicants further noted that the majority of the Marbeled Murrelet's critical habitat is on provincial lands and that the province of British Columbia had failed to adequately protect that habitat from industrial logging and other activities. This was despite the province's alleged recognition that there is now less remaining suitable nesting habitat in the East Vancouver Island Conservation Region (**"EVICR"**) than is necessary for the survival and recovery of the Marbeled Murrelet species. The Applicants added that, in the West and North Vancouver Island Conservation Region, the remaining amount of critical habitat for that species was fast approaching this threshold.

[11] In March 2022, the Minister issued an initial version of the Protection Statement, in which he maintained that the critical habitat contemplated by subsection 58(5.2) is confined to "nests."

[12] The following month, Applicants filed their Notice of Application in the present proceeding. Among other things, the Applicants maintained that, as of 2016, all remaining

suitable nesting habitat of the Marbeled Murrelet in the EVICR is critical habitat, and that this habitat continues to decline.

[13] In December 2022, the Minister issued a revised Protection Statement that included minor amendments to the initial version of that document, to reflect the coming into force of amended *Migratory Birds Regulations*, 2022, SOR/2022-105 [**MBR 2022**], and to update the list of species to which the Protection Statement applies. For the purposes of this decision, nothing turns on any of the minor changes that were made to the initial Protection Statement.

[14] The Protection Statement is the first statement ever issued by the Minister pursuant to section 58(5.2).

IV. The Decision Under Review

[15] It is common ground between the parties that because the Protection Statement is couched in conclusory terms, the decision under review includes the memoranda to the Minister that accompanied the initial and amended versions of the Protection Statement, respectively.

[16] In their Notice of Application and written submissions, the Applicants characterized the initial and amended versions of the Protection Statement as a "continuing course of conduct." They did so to avoid having to bring separate applications to this Court in respect of each of those versions of the Protection Statement.

[17] However, during the hearing, the parties agreed to proceed on the basis that the "decision" under review in this proceeding is the amended version of the Protection Statement. This agreement was based on their consensus that the record for the amended Protection Statement incorporates the record for the initial Protection Statement. I agree.

[18] The Protection Statement consists of four paragraphs and a chart consisting of the text of section 33 of the SARA, subsection 5(1) of the MBR 2022, and subsection 3(2) of the *Migratory Bird Sanctuary Regulations*, CRC, c 1036 [**MBSR**]. Those provisions, together with several additional provisions, were also reproduced in full in Appendix 1 to the Protection Statement. Those provisions are described in the next section of these reasons below, and then are further discussed in part VIII.2.(d).

[19] The first paragraph of the Protection Statement explains that the document will describe how the critical habitat contemplated by subsection 58(5.2) of the SARA is (already) protected on non-federal land in Canada.

[20] The second paragraph quotes language from paragraph 58(5.2)(b). That is the provision relied upon by the Minister in issuing the Protection Statement. Paragraph 58(5.2)(b) provides that if a recommendation for the protection of a listed species is not made pursuant to paragraph 58(5.2)(a), the competent minister must include in the public registry "a statement setting out how the critical habitat that is habitat to which [the MBCA] applies, or portions of it, as the case may be, are legally protected." This statement must be made within the 180 day period described below.

[21] The third, and critical, paragraph of the Protection Statement, provides as follows:

> This statement therefore applies to those portions of critical habitat of migratory birds listed as endangered, threatened, or extirpated on Schedule 1 of SARA that are protected under the *Migratory Birds Convention Act, 1994*, for which the critical habitat description includes a nest. For clarity, the language "habitat to which that Act applies" refers to the nest only.

[22] The final paragraph of the Protection Statement simply states that "[n]ests of migratory birds are legally protected through" the three provisions described in the first sentence of paragraph 18 above.

[23] The Memorandum to the Minister that accompanied the initial version of the Protection Statement reiterated that protection for the nests of the migratory birds listed under the SARA is already legally in place on non-federal land, pursuant to section 33 of that legislation, as well as section 6 of the MBR.[3] The memorandum also noted that the Applicants disagree with the interpretation that the critical habitat contemplated by section 58(5.2) is confined to "nests." In addition, the memorandum advised the Minister as follows:

> In practical terms, the protection statement would provide no additional protection. However, posting the statement would demonstrate publicly ECCC's determination of how the nest, which is "habitat to which that Act [the *Migratory Birds Convention Act, 1994*] applies," is legally protected, thereby fulfilling your statutory obligations under subsection 58(5.2). The protection of critical habitat beyond the nest for migratory birds on non-federal land would still fall under the regime set out under section 61 of SARA (protection of critical habitat on non-federal land).

[3] Section 6 of the MBR was superseded by subsection 5(1) of the MBR 2022, the provision that was mentioned in the amended Protection Statement.

[24] The memorandum to the Minister further observed that "[t]he protection of the critical habitat of species like the Marbled Murrelet that are dependent on old growth forests is linked to collaboration with British Columbia."

[25] The memorandum to the Minister that accompanied the revised version of the Protection Statement was much more streamlined than the initial memorandum, described immediately above. For the present purposes, it will suffice to note that it explained that its purpose was to seek the approval of minor amendments to the Protection Statement to reflect the modernized MBR 2022, and to update the list of species to which the Protection Statement applies. Under the heading "Context", it also noted that the posting of the initial Protection Statement "fulfilled your obligations under subsection 58(5.2) of SARA for 24 SARA-listed migratory birds that had critical habitat identified in a final recovery strategy or action plan." It further stated that "[w]hile the modernized MBR will no longer provide year-round protection of migratory bird nests, it will continue to protect migratory bird nests when they contain live birds or viable eggs."

V. The Issues

[26] There is a single, over-arching, issue in this proceeding. It is whether the Protection Statement, as supported by the two ministerial memoranda mentioned above, is reasonable. More specifically, the Applicants submit that the Minister's determination that the obligations contemplated by subsection 58(5.2) of the SARA were fulfilled by the Protection Statement was unreasonable.

[27] Within this over-arching issue, the Applicant's submissions raise the following two questions:

1. Was the Minister's interpretation of subsection 58(5.2) unreasonably narrow?

2. Is the Protection Statement insufficiently justified and intelligible in relation to (i) certain submissions that were made to the Minister, or (ii) the relevant factual constraints?

VI. Relevant Legislative Provisions

A. *The SARA*

[28] Section 6 of the SARA provides that the purposes of that legislation 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.

[29] Section 33 of the SARA prohibits the damage or destruction of the "residences" of certain listed wildlife species, including endangered and threatened species. Pursuant to subsection 34(1), that prohibition does not apply in "lands in a province that are not federal lands", unless an order to the contrary is made under subsection 34(2). However, subsection 34(1) does not apply to aquatic species or bird species that are migratory birds protected by the MBCA. Thus, the full protection of section 33 is retained for those species.

[30] Pursuant to subsection 37(1) of the SARA, the "competent minister" is required to prepare a recovery strategy for species listed as being endangered, threatened, or extirpated.

[31] Section 58 of the SARA is directed towards the protection of critical habitat. In furtherance of that objective, subsection 58(1) prohibits the destruction of any part of the "critical habitat" of listed endangered and threatened species, subject to certain qualifications regarding the location of that habitat. That prohibition is not qualified for migratory bird species protected by the MBCA.

[32] Subsections 58(5.1) and 58(5.2) specifically address the critical habitat of migratory bird species protected by the MBCA, that is not on federal land or in certain other specified locations that are unnecessary to describe for the present purposes.

[33] Pursuant to subsection 58(5.1), the prohibition in subsection 58(1) "applies only to those portions of the critical habitat that are habitat to which [the MBCA] applies," and that the Governor in Council may, by order, specify on the recommendation of the Minister.

[34] Pursuant to subsection 58(5.2), the Minister is required to take one of two types of action within 180 days after the relevant recovery strategy or action plan has been included in the public registry, and after consultation with every other competent minister. Specifically, the Minister must either:

> a) make the recommendation described in paragraph 33 above if the Minister is of the opinion that any portion or portions of the "habitat to which the [MBCA] applies" are not legally

protected by federal law or an agreement contemplated by section 11 of the SARA; or

b) post a statement in the public registry "setting out how the critical habitat that is habitat to which [the MBCA] applies, or portions of it, as the case may be, are legally protected."

[35] In addition to the foregoing, subsection 61(1) prohibits the destruction of the critical habitat of a listed endangered or threatened species that is in a province or a territory and is not part of federal lands. However, pursuant to subsection 61(1.1), this prohibition does not apply in respect of critical habitat to which the MBCA applies. Put differently, insofar as migratory birds protected by the MBCA are concerned, the prohibition only addresses habitat to which the MBCA does not apply.

[36] The provisions described above are reproduced in Appendix 1 to these reasons.

B. *The MBCA*

[37] Section 4 of the MBCA provides that the purpose of that legislation is to implement the **Convention** (as defined), "by protecting and conserving migratory birds – as populations and individual birds – and their nests." Pursuant to subsection 2(1), the Convention is the convention set out in the schedule to the MBCA, as amended from time to time, which the MBCA was enacted to implement.

[38] Subsection 5.1(1) of the MBCA prohibits depositing, and permitting the deposit of, a substance harmful to migratory birds, "*in waters or an area frequented by migratory birds* or in a place from which the substance may enter such waters or such an area" (emphasis added)

[39] Pursuant to paragraph 12(1)(i) of the MBCA, the Governor in Council may make regulations "prescribing protection areas for migratory birds *and* nests, and for the control and management of those areas" (emphasis added).

[40] The provisions described above are reproduced in Appendix 2 to these reasons.

C. *The MBR and the MBR 2022*

[41] At the time the initial Protection Statement was issued, section 6 of the MBR stated as follows:

6 Subject to subsection 5(9), no person shall	**6** Sous réserve du paragraphe 5(9), il est interdit
(a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird, or	**a)** de déranger, de détruire ou de prendre un nid, un abri à nid, un abri à eider, une cabane à canard ou un oeuf d'un oiseau migrateur, ou
(b) have in his possession a live migratory bird, or a carcass, skin, nest or egg of a migratory bird	**b)** d'avoir en sa possession un oiseau migrateur vivant, ou la carcasse, la peau, le nid ou les oeufs d'un oiseau migrateur
except under authority of a permit therefor.	à moins d'être le titulaire d'un permis délivré à cette fin.

[42] In the amended Protection Statement, the reference to section 6 of the MBR was replaced with a reference to section 5 of the MBR 2022, which states as follows:

Prohibitions	**Activités interdites**
5 (1) A person must not engage in any of the following	**5 (1)** Il est interdit d'exercer les activités ci-après à moins

activities unless they have a permit that authorizes them to do so or they are authorized by these Regulations to do so:	d'être titulaire d'un permis à cette fin ou d'y être autorisé par le présent règlement :
(a) capture, kill, take, injure or harass a migratory bird or attempt to do so;	**a)** capturer, tuer, prendre, blesser ou harceler un oiseau migrateur, ou tenter de le faire;
(b) destroy, take or disturb an egg; and	**b)** détruire, prendre ou déranger un oeuf;
(c) damage, destroy, remove or disturb a nest, nest shelter, eider duck shelter or duck box.	**c)** endommager, détruire, enlever ou déranger un nid, un abri à nid, un abri à eider ou une cabane à canard.

D. *The MBSR*

[43] Subsection 3(2) of the MBSR states as follows:

3 (2) No person shall, in a migratory bird sanctuary,	**3 (2)** Dans un refuge d'oiseaux migrateurs, il est interdit
(a) hunt migratory birds,	**a)** de chasser des oiseaux migrateurs,
(b) disturb, destroy or take the nests of migratory birds, or	**b)** de déranger, de détruire ou de prendre des nids d'oiseaux migrateurs, ou
(c) have in his possession a live migratory bird, or a carcass, skin, nest or egg of a migratory bird,	**c)** d'avoir en sa possession un oiseau migrateur vivant, ou le cadavre, la peau, le nid ou l'oeuf d'un oiseau migrateur,
except under authority of a permit therefor.	si ce n'est en vertu d'un permis délivré à cette fin.

VII. Standard of Review

[44] The issues raised by the Applicants are reviewable on a standard of reasonableness. For greater certainty, none of the exceptions to the presumption of reasonableness review apply in the present circumstances: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 16-17 [***Vavilov***]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras 39-44 [***Mason***].

[45] When reviewing a decision on a standard of reasonableness, the Court must approach the decision with "respectful attention" and consider the decision "as a whole": *Vavilov*, at paras 84–85. The Court's overall focus will be upon whether the decision is appropriately justified, transparent and intelligible. In other words, the Court will consider whether it is able to understand the basis upon which the decision was made and then determine whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, at paras 86 and 97, quoting *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47 [***Dunsmuir***].

[46] A decision which is appropriately justified, transparent and intelligible is one that reflects "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and the law that constrain the decision maker": *Vavilov*, at para 85; *Mason*, at para 8. The decision should also reflect that the decision maker "meaningfully grapple[d] with key issues or central arguments raised by the parties": *Vavilov*, at para 128.

[47] It is not the role of the Court to make its own determinations of fact, to substitute its view of the evidence or the appropriate outcome, or to reweigh the evidence. The Court's function is solely to assess whether the decision-maker's determinations and reasoning were unreasonable, having regard to the relevant legal and factual constraints: *Vavilov*, at paras 83, 99 and 125-126; *Mason*, at paras 62 and 66.

VIII. Analysis

A. *Was the Minister's interpretation of subsection 58(5.2) unreasonably narrow?*

(1) Overview of the parties' submissions

[48] The Applicants submit that the Minister's decision that the critical habitat contemplated by subsection 58(5.2) of the SARA is confined to "nests" is unreasonable for several reasons. These include the text of that provision, its purpose within the SARA, the overall scheme of that statute, the plain wording of subsection 5.1(1) and paragraph 12(i) of the MBCA, the purpose and scheme of the MBCA, and the purpose of the Convention.

[49] In response, the Minister submits that the interpretation of subsection 58(5.2) adopted in the Protection Statement is rational, transparent and intelligible. The Minister asserts that this is because subsection 58(5.2) explicitly defines his obligations in terms of the "habitat to which [the MBCA] applies," and the latter legislation focuses upon the protection of nests. The Minister notes that the same is true of the MBR, the MBR 2020, and the MBSR. The Minister adds that protection beyond nests may be implemented through the operation of sections 33, 61 and 80 of the SARA. Having regard to the foregoing, the Minister maintains that his

interpretation aligns harmoniously with both the text of subsection 58(5.2) and the broader legislative scheme contemplated by the SARA, the MBCA, the MBR, the MBR 2020 and the MBSR.

[50] The Minister further asserts that, when faced with the competing interpretations of subsection 58(5.2) that were advanced by the Applicants and officials in the ECCC, it was reasonable for him to prefer a narrower interpretation that provides a baseline level of protection for the migratory bird species covered by the Protection Statement. The Minister maintains that this interpretation maximizes the provinces' ability to act in an area of shared jurisdiction. The Minister adds that the broader interpretation advanced by the Applicants risks frustrating concurrent provincial interests and undermining cooperative federalism.

(2) Assessment

[51] For the following reasons, I agree with the Applicants that the Minister's interpretation of the critical habitat contemplated by subsection 58(5.2) of the SARA is unreasonably narrow. This is essentially for the reasons advanced by the Applicants.

[52] It is trite law that "the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'": *Vavilov*, at para 117, quoting *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [Rizzo]; and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, both quoting E. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

(a) *Subsection 58(5.1) and (5.2) of the SARA*

[53] Subsections 58(5.1) and (5.2) of the SARA establish a framework for protecting the critical habitat of migratory birds on non-federal lands.

[54] Specifically, subsection 58(5.1) limits the broad prohibition in subsection 58(1), which pertains to the destruction of any part of the critical habitat of listed endangered or threatened species on federal land or in certain other federal areas, as well as for certain species. In the latter case, the broad prohibition in subsection 58(1) is without limitation. This includes for species of migratory birds protected by the MBCA.

[55] Insofar as those species of migratory birds are concerned, subsection 58(5.1) limits the scope of the prohibition in subsection 58(1) by providing that where the critical habitat is not on federal land, the prohibition applies only to those portions of the critical habitat that (i) are habitat to which the MBCA applies, and (ii) the Governor in Council may, by order, specify on the Minister's recommendation. The same limitation is imposed in respect of critical habitat in the exclusive economic zone of Canada, on the continental shelf of Canada or in a migratory bird sanctuary referred to in subsection 58(2).

[56] Subsection 58(5.2) requires the Minister to take one of two types of action with respect to "critical habitat that includes habitat to which [the MBCA] applies," within 180 days after the posting of a recovery strategy identifying such habitat, and after consultation with every other competent minister.

[57] The Minister's obligation with respect to the first type of action is triggered when the circumstances described in paragraph 58(5.2)(a) are met. That is to say, it is triggered if the Minister becomes of the opinion that there are no provisions in, or other measures under, the SARA or any other Act of Parliament, including in any agreements entered into under section 11 of the SARA, that legally protect any portion or portions of that habitat. Upon reaching that opinion, the Minister *must* make a recommendation to the Governor in Council. Although subsection 58(5.2) does not describe the recommendation that must be made, it may be inferred from the use of the definitive article "the" in the phrase "make the recommendation", that the recommendation is the one described in subsection 58(5.1). That recommendation is a recommendation that the protections in subsection 58(1) apply to the critical habitat, or any portion(s) of such habitat, that is not legally protected, as described immediately above: see also paragraph 33 above.

[58] The Minister's obligation with respect to the second type of action is set forth in paragraph 58(5.2)(b). That is the provision under which the Protection Statement was issued. That provision applies when the Minister does not make the recommendation under paragraph 58(5.2)(a), described immediately above. In other words, it implicitly applies when the Minister concludes either that all of the critical habitat to which the MBCA applies is legally protected, or that a portion of that habitat is legally protected. In the former case, the Minister is required to post a statement to the public registry explaining how all of that habitat is legally protected. In the latter case, the required statement would have to explain how the portion of the habitat (in respect of which a recommendation under paragraph 58(5.2)(a) is not made), is legally protected.

[59] The Minister interprets the words “any portion or portions” in paragraph 58(5.2)(a) to mean that his obligation to make a recommendation is not triggered where federal legislation protects *any* portion of the relevant critical habitat. Stated differently, the Minister maintains that if he determines that *any* portion of that habitat is protected, then paragraph 59(5.2)(a) does not apply, even if he finds that one or more other portions of that habitat are not legally protected. The Minister appears to further maintain that this wording provides the latitude to limit legal protection to “portions” of the habitat to which the MBCA applies, even if he determines that a larger extent of such habitat is not legally protected.

[60] I disagree. The internal logic of section 58(5.2) and the scheme of the SARA, described in part VIII.A.2(d) below, contemplate that the Minister’s obligation under paragraph 58(5.2)(a) exists in respect of *any portion* of the relevant critical habit that the Minister may determine is not protected by the SARA or another Act of Parliament. This interpretation is also harmoniously aligned with the scheme and purposes of the MBCA and the Convention.

[61] In support of his position on this issue, the Minister relies on *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211, at para 192. There, the Court rejected the appellants’ argument regarding the Minister of Transport’s authority under subsection 86.11(2) of the *Canada Transportation Act*, SC 1996, c 10. Specifically, the appellants argued that the Minister’s authority to issue directions with respect to “any of the carrier’s other obligations”, was limited to the matters specifically listed in paragraphs 86.11(1)(a) to (f) of that legislation. The Court proceeded to find that in light of the broad power conferred under subsection 86.11(2), the Minister had the authority to issue a direction with

respect to tarmac delays of less than three hours, even though paragraph 86.11(1)(f) only authorizes the imposition of obligations in respect of tarmac delays in excess of three hours. In my view, that case is distinguishable from the present circumstances, because the Court relied on the broad language of one provision (subsection 86.11(2)) to find that the Minister could do *more than* what was described in a more specific provision (subsection 86.11(1)(f). In the present case, the Minister is attempting to justify doing *less than* what any reasonable interpretation of the statutory scheme discussed below suggests was intended by Parliament.

[62] Apart from the parties' disagreement on the interpretation of the words "any portion or portions", discussed above, they agree that the critical habitat contemplated by subsection 58(5.2) is *critical habitat that is habitat to which the MBCA applies*.[4] I will now turn to that issue.

(b) *The MBCA*

[63] The parties disagree with respect to the extent of the critical habitat contemplated by the words "the habitat to which [the MBCA] applies," in subsection 58(5.2). As previously noted, the Minister maintains that the focus on nests in the MBCA, the MBR, the MBR 2020 and the Convention is such that it is reasonable to conclude that the only critical habitat to which the MBCA applies is "nests." In support of this position, the Minister notes section 4 of the MBCA provides that the purpose of that legislation "is to implement the Convention by protecting and conserving migratory birds – as populations and individual birds – and their *nests*" (emphasis

[4] This agreement represents a refinement of the broader interpretation that was advanced by the Applicants prior to initiating this proceeding, and that is described in paragraph **[10]** above.

added). The Minister adds that, unlike the SARA, the MBCA does not include a definition of the terms “critical habitat” or “habitat.” The Minister’s submissions with respect to the Convention will be addressed in the next section below.

[64] With respect to the MBR, the Minister notes that section 6 of the MBR explicitly prohibited the disturbing, destruction and taking of a “nest” or a “nest shelter”, but did not extend similar protections to other bird habitat. The Minister adds that this did not change when that provision was superseded by subsection 5(1) of the MBR 2020.

[65] Concerning the MBSR, the Minister states the MBSR protects the disturbance, destruction or taking of “the nests of migratory birds”, but does not protect other habitat of migratory birds: MBSR, subsection 3(2).

[66] Notwithstanding the foregoing, the Applicants maintain that a number of provisions in the MBCA plainly indicate that it *applies* to migratory bird habitat that extends beyond “nests.” I agree.

[67] Specifically, subsection 5.1(1) prohibits depositing, and permitting the deposit of, a substance harmful to migratory birds, “*in waters or an area frequented by migratory birds* or in a place from which the substance may enter such waters or such an area” (emphasis added).

[68] The Minister interprets this language as simply prohibiting a specific *activity*, rather than as generally extending the application of the MBCA to waters and other areas frequented by

migratory birds. In support of this, the Minister draws an analogy to specific prohibitions in the MBR with respect to hunting methods, weapons that may be used, and vehicles from which those weapons can be deployed. The Minister maintains that these prohibitions simply regulate hunting and driving as they relate to particularized harms against migratory birds, rather than generally regulating hunting and driving in the provinces.

[69] I disagree. The Minister's analogy misses the point. The MBCA does not purport to *generally regulate* waters or areas frequented by migratory birds. It simply prohibits the deposit of substances harmful to migratory birds in waters or areas frequented by them, as well as in other places from which such substances may enter such waters or areas. To the extent that the deposit of those substances in those waters, areas or other places is prohibited by subsection 5.1(1), that provision plainly *applies* to those habitats, even if only in respect of the specified activity.

[70] According to Black's Law Dictionary, a statute will "apply" to a subject matter if that matter is "within its scope" or if the statute is "put to use with [that] particular subject matter": *Black's Law Dictionary*, 11th ed (St Paul: Thomson Reuters, 2019); *Black's Law Dictionary*, 6th ed (St Paul: West Publishing, 1991).

[71] In *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40 at para 140 [***David Suzuki***], the Federal Court of Appeal found that another statutory provision containing wording very similar to the language found in subsection 5.1(1) of the MBCA, "may be relied upon as ensuring that critical habitat is 'legally protected' under section 58 of the SARA." That

provision was subsection 36(3) of the *Fisheries Act*, RSC 1985, c F-14. It can reasonably be inferred from this finding that the Court was of the view that the *Fisheries Act* applied to the "water frequented by fish" as well as the related "places" mentioned in subsection 36(3), because it prohibited certain activities in those waters and places.

[72] The Applicants' interpretation of subsection 5.1(1) is supported by Section 4 of the MBCA. That provision provides that the purpose of that legislation is to implement the Convention (as defined), "*by protecting and conserving* migratory birds – *as populations* and individual birds – *and* their nests" (emphasis added). It is difficult to understand how the narrow interpretation of section 5.1 adopted by the Minister could achieve this purpose. Indeed, the Minister's interpretation would *undermine* the purpose of protecting and conserving migratory birds – as *populations*.

[73] To the extent that the Applicants' broader interpretation of subsection 5.1(1) is much more consistent than the Minister's interpretation with the legislative objective set forth in section 4 of the MBCA, the Applicants' interpretation is more reasonable.

[74] The view that the MBCA applies to migratory bird habitat beyond nests is also supported by paragraph 12(1)(i) of the MBCA. That provision permits the Governor in Council to make regulations "prescribing protection areas for migratory birds *and* nests, and for the control and management of those areas" (emphasis added). This language plainly conveys Parliament's view that the MBCA was intended to apply to migratory bird habitat beyond just nests.

[75] Given the foregoing, I consider that the Applicants' position that the MBCA applies to migratory bird habitat beyond simply the "nests" of those birds is harmonious with the scheme of that legislation, in particular section 4, subsection 5.1(1) and paragraph 12(1)(i) of the MBCA. By contrast, the Minister's narrower interpretation, pursuant to which the only migratory bird "habitat" to which the MBCA applies is "nests", does not fit comfortably within the overall scheme of the MBCA. This consideration weighs in favour of a finding that the Minister's interpretation of the MBCA is not reasonable.

[76] The Applicants' interpretation is also more consistent than the Minister's interpretation, with the broad interpretation of the MBCA found in the jurisprudence: see e.g., *Alberta Wilderness Assn v Cardinal River Coals Ltd.*, [1999] 3 FC 425, at paras 100-103; *Animal Alliance of Canada v Canada (Attorney General)*, [1999] FC 472, at paras 40-43 [***Animal Alliance***]; *R v JD Irving Ltd.*, [2008] NBJ No 371, at para 7 [***JD Irving***]; and *R v Stuart* (1924), 34 Man R 509 at 514 [***Stuart***].

(c) *The Convention*

[77] A further contextual factor that is relevant to consider in assessing the conflicting interpretations of the parties is the objectives of the Convention, which is found in Schedule 2 to the MBCA.

[78] The Minister maintains that at the time it was entered into in 1916, the focus of the Convention was upon hunting and the conservation of species that were in danger of

extermination. The Minister adds that, at that time, the Convention did not mention any habitat, other than “nests”, which were explicitly protected by Article V.

[79] I pause to note that the Minister appears to emphasize the original language of the Convention because it was entered into between the United Kingdom, on Canada’s behalf, and the United States, prior to the ratification of the *Statute of Westminster*, 1931, 22 Geo. V, c. 4 (U.K.). Pursuant to that legislation, Canada essentially gained legislative autonomy, except where it otherwise consented. By contrast, the 1995 modifications to the Convention were made directly between Canada and the United States. This is relevant because section 132 of the *Constitution Act, 1867*, states as follows:

Treaty Obligations	**Obligations naissant des traités**
132 The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.	**132** Le parlement et le gouvernement du Canada auront tous les pouvoirs nécessaires pour remplir envers les pays étrangers, comme portion de l’empire Britannique, les obligations du Canada ou d’aucune de ses provinces, naissant de traités conclus entre l’empire et ces pays étrangers.

[80] Recently, in *Reference re Impact Assessment Act*, 2023 SCC 23, at para 203, the Supreme Court of Canada observed in *obiter dictum* that “[i]t is far from obvious that s. 132 covers the substantial amendments made by Canada to an imperial treaty.” That observation was made with respect to the 1995 modernization of the Convention.

[81] In any event, the Minister notes that when the Convention was modified in 1995, Article V remained largely unchanged: *Protocol Between the Government of Canada and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, done at Washington, December 14, 1995 [**Amended Convention**]. The Minister adds that the Amended Convention specifically required each contracting party to pursue *cooperative arrangements* within its constitutional authority, to conserve habitats essential to migratory bird populations.

[82] Despite the fact that the initial Convention did not mention any migratory bird habitat other than "nests", I consider that its purposes reflected an intention to protect a much broader habitat of migratory birds. Specifically, the second recital referred to the "danger of extermination through lack of adequate protection during the nesting season or *while on their way to and from their breeding grounds*" (emphasis added). In addition, the third recital reflected a desire to ensure the preservation of migratory birds and "to adopt some uniform system of protection which shall effectively accomplish such objects."

[83] Having regard to these conservation and protection purposes of the initial Convention, it is reasonable to interpret it in a manner that brings critical habitat beyond nests within its purview. Once again, this is consistent with the broad interpretation of the Convention and its purposes found in the jurisprudence: *Animal Alliance*, at paras 40-43; *JD Irving*, at paras 5-7; *Stuart*, at 511; *R v Sikyea* (1964), 43 DLR (2d) 150, at 161. It is also consistent with one of the

goals of the Amended Convention, namely, to "protect the lands and waters on which [shared species of migratory birds] depend": Third Recital, Amended Convention.

[84] I pause to observe that this interpretation of the purposes of the Convention was endorsed in a legal opinion coauthored by the Honourable Gerard V. LaForest and Professor Dale Gibson, entitled "Constitutional Authority for Federal Protection of Migratory Birds, other Cross-Border Species, and their Habitat in Endangered Species Legislation," November 1999. At page 2 of their opinion, they observe that if Parliament's authority did not include the power to protect the habitat of migratory birds, "the main objective of the Convention – 'insuring the preservation of migratory birds' – would be frustrated." That view is reiterated at page 13 of the opinion, where the authors added: "It is widely recognized that destruction of habitat is the major threat to the 'preservation' of migratory birds in Canada today."

(d) *The scheme of the SARA*

[85] The Minister maintains that his interpretation of subsection 58(5.2) of the SARA is consistent with the scheme of that legislation. In this regard, he states that there are three other provisions in the SARA that provide protection of the critical habitat of listed migratory bird species, beyond "nests." The Minister characterizes those provisions, together with subsection 58(5.2), as consisting of four concentric circles, with subsection 58(5.2) at the centre, providing a core level of protection for nests on non-federal lands.

[86] The Minister states that the second, and slightly broader, circle of protection is provided by section 33. That provision prohibits the damaging or destruction of the "residences" of listed

wildlife species, without regard to whether the prohibited activity is in relation to federal or non federal lands.

[87] The third circle of protection identified by the Minister is provided by subsection 61(1), which prohibits the destruction of any part of the critical habitat of a listed, threatened or endangered species that is in a province or territory and that is not part of federal lands.

[88] Finally, the Minister states that the fourth circle of protection is provided by section 80 of the SARA. That section provides the Governor in Council with the power to make an emergency order to provide for the protection of a listed wildlife species, on the Minister's recommendation.

[89] One evident shortcoming with the Minister's "overlapping circles" approach is that it renders subsection 58(5.2) redundant. Specifically, to the extent that the prohibition in section 33 on the damaging or destruction of "residences" fully protects the nests of migratory birds protected by the MBCA, the Minister's interpretation of subsection 58(5.2) as protecting only "nests" would result in the latter provision being superfluous. As the Minister concedes, this is so regardless of whether the nests are situated on federal or non-federal lands. Consequently, the Minister's interpretation violates the presumption against interpretations that would render any portion of a statute meaningless or redundant. This is also known as the presumption against tautology: Ruth Sullivan, *The Construction of Statutes*, 7th Ed., at §8.03[1], citing *R v Proulx*, 2000 SCC 5, at para 28; and *R v Kelly*, [1992] 2 SCR 170 at 188.

[90] I pause to observe that the Memorandum to the Minister that accompanied the initial version of the protection statement explicitly recognized that "[i]n practical terms, the Protection Statement would provide no additional protection", beyond that already provided by section 33 of the SARA and section 6 of the MBR (now section 5 of the MBR 2022).

[91] The Minister maintains that the presence of overlap between section 33 and subsection 58(5.2) does not render the latter provision redundant. In support of this position, the Minister notes that paragraph 58(5.2)(a) requires the Minister to "make the recommendation if he or she is of the opinion that there are no provisions in, or other measures under, *this or any other Act of Parliament*, including agreements under section 11, that legally protect any portion or portions of the habitat to which [the MBCA] applies" (emphasis added). The Minister asserts that if he could not rely on section 33 in making the determination contemplated by paragraph 58(5.2(a), it would be illogical for him to be tasked with considering whether "*this* or any other Act of Parliament" already legally protect habitat to which the MBCA applies (emphasis added).

[92] The Minister's assertion is problematic for at least three reasons. First, it fails to recognize that sections 33 and 58 are part of two separate groups of provisions in the SARA. Specifically, sections 32 to 36 are addressed to the protection of the individual members of a species at risk and their "residences", whereas sections 58 to 64 are directed towards the protection of the critical habitat of those species: *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2018 FC 643, at paras 69-72. Second, the logical extension of the Minister's argument is that section 33 could always be relied upon to avoid making the recommendation described in paragraph 58(5.2)(a). This is because of the Minister's view that the critical habitat

contemplated by that provision is confined to “nests”, and that the scope of such habitat is narrower than what is contemplated by the term “residence”, in section 33. If the Minister could always rely on section 33 to avoid making the recommendation described in paragraph 58(5.2)(a), this would frustrate Parliament’s intention that the Government in Council exercise the discretion described in subsection 58(5.1). Third, the Minister’s interpretation fails to recognize that the extent of the habitat to which the MBCA applies varies by species, and that identifying such habitat is a very fact-intensive exercise. For some species, that habitat may well turn out to be co-extensive with the “residences” that are protected by section 33. However, for others, such as the Marbeled Murrelet, the evidence demonstrates that this is not the case. This will be further discussed in the next section below. Insofar as the reference to agreements under section 11 are concerned, the basis for the Minister’s assertion regarding the interplay between paragraph 58(5.2)(a) and section 33 would not exist if there were no such agreement.

[93] The Minister also relies on *Alexander College Corp v Canada*, 2016 FCA 269, at para 32 [***Alexander College***], where it was held that the overlap between various exemptions provided to suppliers of educational services in Part III, Schedule V of the *Excise Tax Act*, RSC 1985 c E-15, did not offend the presumption against tautology. However, that case is distinguishable because there was a demonstrated legislative intent to exempt all forms of education from the requirement to charge and remit GST/HST, if there were some governmental input into the quality of the programs offered. Consequently, the Court held that there was no impermissible redundancy in the overlapping exemptions: *Alexander College*, at paras 37-38. This is consistent with the recognition that the presumption against tautology can be rebutted in circumstances

where the legislature may have wished to be redundant or to include superfluous words: Sullivan, at §8.03[2].

[94] *Alexander College* is distinguishable because an assessment of the legislative scheme, discussed below, reveals no such intent to be superfluous. Indeed, that scheme reveals an intent to provide a protective role for subsection 58(5.2) that potentially goes well beyond that which is contemplated by section 33 of the SARA, depending on the particular bird species in question.

[95] A second shortcoming associated with the Minister's "overlapping circles" approach is that subsection 61(1.1) states that subsection 61(1) does not apply in respect of (a) an aquatic species, or (b) the critical habitat of a species of bird that is a migratory bird protected by the MBCA, that is habitat referred to in subsection 58(5.1) of the SARA. Consequently, the protection afforded by subsection 61(1) does not apply to the critical habitat contemplated by subsection 58(5.2), which is the habitat at issue in this proceeding. This is not to suggest that subsection 61(1) does not have any role in protecting migratory bird critical habitat. Indeed, one such role could be to protect critical habitat that is not located in areas frequented by migratory birds – for example, areas where migratory birds have been extirpated and need to be reintroduced.

[96] Having regard to the foregoing, and the fact that section 80 may only be invoked in emergency situations, I consider that the provisions relied upon by the Minister do not provide a reasonable contextual basis for the narrow interpretation of subsection 58(5.2) that he reached.

Stated differently, they do not provide or contribute to providing a reasonable basis for concluding that the habitat contemplated by subsection 58(5.2) consists solely of "nests."

[97] In my view, the scheme of the SARA supports a more expansive interpretation of the habitat referred to in subsection 58(5.2).

[98] The SARA's status as remedial legislation entitles it to a generous interpretation, particularly having regard to its environmental conservation and habitat protection objectives, which are repeatedly mentioned in its recitals: *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 at para 9.

[99] The penultimate recital to the SARA specifically recognizes that "the *habitat* of species at risk is *key* to their conservation" (emphasis added). Another recital states that "stewardship activities contributing to the conservation of wildlife species *and their habitat* should be supported to prevent species from becoming at risk" (emphasis added).

[100] In subsection 2(1), the term "critical habitat" is defined to mean "the habitat that is *necessary for the survival or recovery* of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species" (emphasis added). Although this habitat is not necessarily the same as the habitat contemplated by subsection 58(5.2), it implicitly reflects Parliament's view that critical habitat is broader than "nests" alone, because species need more than a nest to survive or recover as a population.

[101] The stated purposes of the SARA that are set forth in section 6 also support an interpretation of subsection 58(5.2) that is broader than the one adopted by the Minister. Those purposes 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*. [Emphasis added.]

[102] In furtherance of the foregoing objectives, subsection 37(1) requires the Minister to prepare a recovery strategy for any wildlife species that is listed as extirpated, endangered or threatened.

[103] In addition, subsection 41(1) requires the recovery strategy to address the threats to the survival of the species in question, *including any loss of habitat*. Paragraph 41(1)(c) then requires the identification of the species' *critical habitat*, to the extent possible, and paragraph 41(1)(g) requires a statement of when one or more action plans in relation to the recovery strategy will be completed.

[104] Pursuant to subsection 49(1), an action plan must include an identification of the species' critical habitat, to the extent possible, as well as an identification of *any portions of the species' critical habitat that have not been protected*.

[105] In addition, section 57 articulates a broad purpose for section 58 with respect to the critical habitat referred to in subsection 58(1) and contemplated by subsections 58(5.1) and

58(5.2) – see paragraphs 53-60 above), and *David Suzuki*, at paras 110 and 117. That broad purpose is stated as follows:

Purpose	**Objet**
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.]	[Nos italiques.]

[106] Subsection 58(1) then prohibits the destruction of *any part of* the critical habitat of listed species, in the circumstances described in paragraphs 58(1)(a), (b) and (c). For the present purposes, the relevant circumstance is the latter one, which provides that the prohibition applies if the listed species is a species of migratory birds protected by the MBCA.

[107] Pursuant to other provisions in section 58, the prohibition set forth in subsection 58(1) is subject to certain qualifications. For the present purposes, it will suffice to note two of them.

First, for any critical habitat that is not in a federally protected area described in subsection 58(2), the prohibition in subsection 58(1) applies only in respect of the critical habitat or portion thereof specified in an order by the Minister: subsection 58(4). Second, insofar as migratory birds are concerned, the latter qualification is further qualified by subsection 58(5.1). As previously noted, that provision states that if the critical habitat is not on federal land or certain other federally protected places, the prohibition in subsection 58(1) applies only to those portions of the critical habitat that are habitat to which the MBCA applies, and that the Governor in Council may, by order, specify on the recommendation of the Minister, as contemplated by subsection 58(5.2).

[108] In addition to the foregoing, paragraph 58(5)(a) requires the Minister to make a protection order "with respect to *all* of the critical habitat or *any portion of* the critical habitat" that is not in a federally protected place described in subsection 58(2), "if the critical habitat or *any portion of*" it is not legally protected by other provisions in the SARA, or in any other Act of Parliament (emphasis added). That order must be made within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry. This is subject to the provisions in subsections 58(5.1) and 58(5.2), which address critical habitat of migratory birds protected by the MBCA that is not on federal land, in the exclusive economic zone of Canada, on the continental shelf of Canada or in a migratory bird sanctuary referred to in subsection 58(2).

[109] Finally, subsection 53(1) requires the Minister to make any regulations that the Minister considers "*necessary … for the purposes of implementing the measures in an action plan*"

relating to, among other things, migratory birds protected by the MBCA (emphasis added). This is subject to the proviso that if the measures relate to the protection of critical habitat on federal lands, the regulations must be made under section 59. Pursuant to subsection 59(2), the Minister is obliged to recommend regulations to protect habitat on federal lands "if the recovery strategy or action plan identifies *a portion of the critical habitat as being unprotected* … [and if the Minister] is of the opinion that *the portion requires protection*" (emphasis added).

[110] Collectively, the italicized language in the passages and provisions of the SARA described in the eleven paragraphs immediately above reflect a scheme to protect a scope of the critical habitat of listed endangered and threatened wildlife species that extends potentially well beyond "nests," depending on the particular species in question. In certain circumstances, this is subject to consultation, sometimes with the appropriate provincial or territorial minister. However, no such consultation is contemplated by the provisions at the heart of this proceeding, namely, subsections 58(5.1) and 58(5.2).

[111] This legislative scheme constrains the range of reasonable interpretations of subsection 58(5.2) available to the Minister. An interpretation that limits the protection of critical habitat contemplated by that provision to "nests" is not within that range.

[112] The Minister emphasises that his interpretation of subsection 58(5.2) complies with the principles of subsidiary and cooperative federalism. The Minister asserts that cooperative federalism is built into the legislative scheme of the SARA, and should inform the Court's assessment of the reasonableness of his interpretation of that legislation. In support of this

position, the Minister notes that the preamble of the SARA recognizes that it is important for the federal and provincial governments to work cooperatively to pursue the establishment of complementary legislation and programs for the protection and recovery of species at risk in Canada. The Minister also refers to certain provisions that require consultation with the appropriate provincial minister, in particular circumstances.

[113] In advancing this position, the Minister agreed with the Applicant that this proceeding does not engage issues pertaining to the division of powers between the federal government and the provinces.

[114] Given that the protection of the environment is a matter of shared jurisdiction between the federal government and the provinces, the Minister asserts that it was reasonable for him to adopt an interpretation of subsection 58(5.2) that avoids the risk of frustrating concurrent provincial interests.

[115] I disagree.

[116] The principle of cooperative federalism was developed "to provide flexibility in separation of powers doctrines, such as federal paramountcy and interjurisdictional immunity": *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, at para 17 [***Quebec AG***]. However, that principle has limits. It cannot be invoked to read down the otherwise valid exercise of legislative competence, or to impose a positive obligation to facilitate cooperation

where the constitutional division of powers authorizes unilateral action: *Quebec AG*, at paras 18-20.

[117] It is reasonable to infer from this that the principle of cooperative federalism cannot be invoked to read down a statutory provision to the point that it is without utility, or is of such limited utility as to frustrate the valid exercise of Parliament's authority. Similarly, that principle cannot be invoked to render reasonable an interpretation of a statute that is inconsistent with a plain reading of the relevant provision(s), and the statutory scheme. This is particularly so where the relevant province has failed to avail itself of opportunities to take protective action in an area of joint responsibility, as alleged by the Applicants: see paragraph 10 above.

[118] To the extent that subsection 58(5.1) may be said to contemplate a potential role for the principle of cooperative federalism at the time the Governor in Council considers the exercise of its discretion to act on a recommendation of the Minister, the Minister's interpretation of subsection 58(5.2) would frustrate that potential role. This is because the Minister would seldom, if ever, make a recommendation, given his view that legal protections for nests are already in place pursuant to the MBCA, the MBR and the SARA: Protection Statement, at p. 1.

[119] In summary, the legislative scheme of the SARA supports a broader interpretation of subsection 58(5.2) than the interpretation adopted by the Minister. That scheme contemplates the protection of critical habit extending potentially well beyond the "nests" of migratory birds protected by the MBCA, depending on the particular species in question. The Minister's interpretation is not aligned with the remedial purpose of section 58 and contravenes the

presumption against tautology. The Minister has not overcome that presumption by demonstrating that Parliament intended any redundancy as between subsection 58(5.2) and section 33, or any other provision of the SARA. For greater certainty, none of the provisions relied upon by the Minister (sections 33, 61 and 80) reasonably support his narrow interpretation. The same is true with respect to the principle of cooperative federalism.

(e) *Conclusion*

[120] For the reasons set forth above, the Minister's interpretation of subsection 58(5.2) is inconsistent with the text and internal logic of that provision. It is also inconsistent with the scheme of the MBCA, the purposes of the Convention and the scheme of the SARA.

[121] Collectively, the text of subsection 58(5.2), the scheme of the MBCA, the purposes of the Convention and the scheme of the SARA constrain the range of reasonable interpretations of subsection 58(5.2). The Minister's interpretation falls outside of that range of reasonable interpretations.

B. *Is the Protection Statement insufficiently justified and intelligible in relation to (i) certain submissions that were made to the Minister, or (ii) the relevant factual constraints?*

(1) Submissions made to the Minister

[122] The Applicants maintain that the Protection Statement and the memoranda to the Minister that form part of the "decision" under review in this proceeding failed to grapple with the important issues they had previously raised concerning the proper interpretation of subsection

58(5.2) of the SARA. The Applicants submit that this constitutes a second, and independent, reason why the Minister's decision was unreasonable.

[123] I agree.

[124] As noted in paragraph 8 above, the Applicants requested certain information from the Commissioner for Environment and Sustainable Development in January 2021. That information included the Minister's interpretation of the phrase "habitat to which the [MBCA] applies", in subsections 58(5.1) and 58(5.2).

[125] In a letter dated July 29, 2021, the Minister of the day responded directly to the Applicants' request. That response consisted of the following two sentences:

> The MBCA 1994 and the *Migratory Birds Regulations* provide protection for migratory birds, nests and eggs. In particular, paragraph 6(a) of the Regulations prohibits the disturbance, destruction and taking of nests and eggs.

[126] The Minister proceeded to note that section 33 of the SARA "provides protection against the damage or destruction of the residence of one or more individuals of a species listed as threatened or endangered, and the definition of residence in SARA includes 'nest.'"

[127] In their letter to the Minister dated September 2, 2021, discussed at paragraph 10 above, the Applicants took issue with the Minister's interpretation and advanced a broader interpretation of the phrase "habitat to which the [MBCA] applies", in subsections 58(5.1) and 58(5.2). Among other things, they explained why, in their view, subsection 5.1(1) of the MBCA and the purpose

set forth in section 4 of that legislation support the view that the MBCA applies broadly to migratory bird critical habitat. They also noted that a broader purpose of the MBCA was to implement the Convention, and that the purpose of the original Convention was to save migratory birds from indiscriminate slaughter and ensure the preservation of migratory birds.

[128] As previously noted, subsection 5.1(1) of the MBCA prohibits depositing, and permitting the deposit of, a substance harmful to migratory birds, "*in waters or an area frequented by migratory birds* or in a place from which the substance may enter such waters or such an area" (emphasis added): see paragraphs 66-70 above. In addition, section 4 provides that the purpose of that legislation is to implement the Convention (as defined), "*by protecting and conserving* migratory birds – *as populations* and individual birds – and their nests" (emphasis added): see paragraph 72 above.

[129] Neither of the two versions of the Protection Statement, nor the memoranda to the Minister that form part of the "decision" under review, addressed the above-mentioned submissions of Applicants with respect to the proper interpretation of the phrase "habitat to which the [MBCA] applies", in subsections 58(5.1) and 58(5.2).

[130] In a letter dated March 25, 2022, a ministerial delegate wrote to the Applicants to provide further information on behalf of the Minister, in response to their letters dated September 2, 2021 and November 29, 2021.[5] However, once again, that letter did not address the Applicants' submissions described above.

[5] Among other things, the latter letter attached a copy of the September 2, 2021 letter and noted that a response was still outstanding.

[131] The Respondent maintains that the memorandum to the Minister that accompanied the initial version of the Protection Statement specifically mentioned the Applicants' letter dated September 2, 2021 and their disagreement with the interpretation that the critical habitat contemplated by subsections 58(5.1) and 58(5.1) is limited to "nests." The Respondent adds that the Applicants' letter was attached to the memorandum to the Minister, and that this constituted sufficient recognition of their submissions, for the purposes of this Court's assessment of the reasonableness of the Minister's decision.

[132] I disagree. To withstand the Court's review of the reasonableness of that decision, the Minister was required to meaningfully account for, and be responsive to, the central issues and concerns raised by the Applicants regarding the proper interpretation of the phrase "habitat to which the [MBCA] applies", in subsections 58(5.1) and 58(5.2): *Vavilov*, at para 127; *Mason*, at paras 74 and 118. The Minister's failure to address the Applicants' key points regarding the proper interpretation of those provisions renders the Protection Statement and the accompanying memoranda insufficiently justified. That failure also renders the Minister's decision unintelligible. Consequently, I find that this is a separate reason why the Minister's decision is unreasonable.

(2) Relevant factual constraints

[133] The Applicants submit that the Minister also failed to take into account and address important facts in reaching his interpretation of subsection 58(5.2) of the SARA.

[134] In particular, the Applicants state that the Minister did not consider evidence indicating that habitat loss and degradation is a key threat to the survival and recovery of most at-risk migratory birds affected by the Protection Statement.

[135] I agree. Among other things, the recovery strategies for almost all of the migratory bird species covered by the Protection Statement list the loss, degradation or disruption of habitat as a primary or significant threat for those species. The evidence also indicates that the assessment of critical habitat varies for each species. Yet, there is nothing to suggest that the Minister conducted an assessment of the critical habitat of any of the particular migratory bird species covered by the Protection Statement. This is despite the fact that subsections 58(5.1) and 58(5.2) appear to contemplate an assessment at the individual species level. This is reflected by the wording "the critical habitat of a species of bird", in the former provision, and the words "within 180 days after *the* recovery strategy … is included in the public registry", in the latter provision (emphasis added).

[136] The Minister's failure to address the critical habitat of Marbeled Murrelet and the other species covered by the Protection Statement, before concluding that the habitat contemplated by subsection 58(5.2) is confined to "nests", rendered that conclusion insufficiently justified: *Vavilov*, at paras 105,126; *Mason*, at para 73. This is particularly so given the impact on, and "potentially harsh consequences" for, those species: *Mason*, at paras 66 and 69.

[137] Considering those potential consequences, together with the schemes and purposes of the SARA and the MBCA, it is difficult to understand the justification for the decision: *Vavilov*, at

paras 85-86, 99, 103 and 105; *Mason*, at para 66. Consequently, the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Vavilov*, at para 86, quoting *Dunsmuir*.

[138] The Applicants further assert that the Minister failed to take into account evidence that identifying nests is difficult, and therefore is not an effective way to protect and recover migratory birds. In brief, nests cannot be protected if they cannot be found.

[139] Once again, I agree. At page 6 of the 2014 *Recovery Strategy for the Marbled Murrelet (Brachyramphus Marmoratus) in Canada*, it is reported that "[n]est[ing] sites are widespread across the landscape and are both cryptic, and high up in trees, making them very difficult to locate." The difficulty of locating nests is also noted in the recovery strategies of several of the other species covered by the Protection Statement. Indeed, this difficulty is also recognized in the Government of Canada's *Guidelines to reduce risk to migratory birds*, which state: "In most cases, active nest search techniques are not recommended, because … the ability to detect nests is very low while the risk of disturbing or damaging active nests is high …"

[140] The evidence mentioned in the four immediately preceding paragraphs above constitute important factual constraints the Minister ought to have addressed in assessing the extent of critical habitat contemplated by subsection 58(5.2). Given those factual constraints, it was not reasonable or tenable for the Minister to limit that critical habitat to "nests" alone: *Vavilov*, at para 101. In any event, it was unreasonable for the Minister to fail to address those constraints in the course of his assessment.

IX. Conclusion

[141] Collectively, the text of subsection 58(5.2), the scheme of the MBCA, the purposes of the Convention and the scheme of the SARA constrain the range of reasonable interpretations of subsection 58(5.2). The Minister's interpretation falls outside of that range of reasonable interpretations. That is to say, the Minister's determination that words "habitat to which [the MBCA] applies" is confined to "nests" was unreasonable.

[142] The Minister's decision was also unreasonable for two additional reasons. Specifically, the Minister failed to meaningfully account for, and be responsive to, the central issues and concerns raised by the Applicants regarding the proper interpretation of the phrase "habitat to which the [MBCA] applies." In addition, the Minister's decision was not justified by reference to important factual constraints. Those constraints included evidence indicating that habitat loss and degradation is a key threat to the survival and recovery of most at-risk migratory birds covered by the Protection Statement. They also included evidence that identifying nests is difficult, and therefore is not an effective way to protect and recover migratory birds. Given those factual constraints, it was not reasonable or tenable for the Minister to limit that critical habitat to "nests" alone.

[143] Having regard to the foregoing, the Minister's decision will be set aside and remitted for reconsideration in accordance with these reasons.

[144] In addition to requesting the setting aside of the Minister's decision, the Applicants sought two declarations. Specifically, they sought "an order declaring unlawful the Minister's decision to issue the Protection Statement." They also sought a further "order declaring unlawful the Minister's failure to recommend protection pursuant to s. 58(5.2)(a) of SARA of any Marbled Murrelet critical habitat on non-federal land."

[145] However, declaratory relief should normally be declined where there exists an adequate alternate remedy: *Ewert v Canada*, 2018 SCC 30, at para 83.

[146] In my view, setting aside the Protection Statement and remitting the matter to the Minister for redetermination in accordance with these reasons is an adequate alternative remedy given the particular issues and facts in this proceeding.

X. Costs

[147] At the end of the hearing of this Application, I encouraged the parties to endeavour to reach an agreement as to the costs to be paid to the successful party. They were able to do so. In a letter dated November 17, 2023, they advised that they had agreed on an amount of $8,900 to be paid to the successful party, should I decide to make a cost award.

[148] Having regard to the factors set forth in Rule 400(3) of the *Federal Courts Rules*, particularly the Applicants' success on the issues raised in this proceeding, I consider it appropriate and just to award the Applicants costs in the amount of $8,900.

JUDGMENT in T-849-22

THIS COURT'S JUDGMENT is that:

1. This application is granted. The Minister's amended *Protection Statement for the habitat to which the* Migratory Birds Convention Act*, 1994 applies for migratory birds listed under the* Species at Risk Act, is set aside and remitted to the Minister for redetermination in accordance with these reasons.

2. The Respondent shall pay costs in the amount of $8,900 to the Applicants.

"Paul S. Crampton"
Judge

Appendix 1 – Relevant Provisions of the SARA

Purposes

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.

[…]

Measures to Protect Listed Wildlife Species

General Prohibitions

[…]

Damage or destruction of residence

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.

Objet

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.

[…]

Mesures de protection des espèces sauvages inscrites

Interdictions générales

[…]

Endommagement ou destruction de la résidence

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.

Application — certain species in provinces

34 (1) With respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*, sections 32 and 33 do not apply in lands in a province that are not federal lands unless an order is made under subsection (2) to provide that they apply.

Application : certaines espèces dans une province

34 (1) S'agissant des individus d'une espèce sauvage inscrite, autre qu'une espèce aquatique ou une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, les articles 32 et 33 ne s'appliquent dans une province, ailleurs que sur le territoire domanial, que si un décret prévu au paragraphe (2) prévoit une telle application.

Order

(2) The Governor in Council may, on the recommendation of the Minister, by order, provide that sections 32 and 33, or either of them, apply in lands in a province that are not federal lands with respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*.

Décret

(2) Sur recommandation du ministre, le gouverneur en conseil peut prévoir, par décret, l'application des articles 32 et 33, ou de l'un de ceux-ci, dans une province, ailleurs que sur le territoire domanial, à l'égard des individus d'une espèce sauvage inscrite, autre qu'une espèce aquatique ou une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*.

[…]

[…]

Recovery of Endangered, Threatened and Extirpated Species

Rétablissement des espèces en voie de disparition, menacées et disparues du pays

Recovery Strategy

Programme de rétablissement

Preparation — endangered or threatened species

Élaboration

37 (1) If a wildlife species is listed as an extirpated species, an endangered species or a threatened species, the competent minister must prepare a strategy for its recovery.

[…]

Protection of Critical Habitat

Destruction of critical habitat

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

(a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;

(b) the listed species is an aquatic species; or

(c) the listed species is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994*.

37 (1) Si une espèce sauvage est inscrite comme espèce disparue du pays, en voie de disparition ou menacée, le ministre compétent est tenu d'élaborer un programme de rétablissement à son égard.

[…]

Protection de l'habitat essentiel

Destruction de l'habitat essential

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) 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) si l'espèce inscrite est une espèce aquatique;

c) si l'espèce inscrite est une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention*

concernant les oiseaux migrateurs.

[…]

[…]

Habitat of migratory birds

(5.1) Despite subsection (4), with respect to the critical habitat of a species of bird that is a migratory bird protected by the *Migratory Birds Convention Act, 1994* that is not on federal land, in the exclusive economic zone of Canada, on the continental shelf of Canada or in a migratory bird sanctuary referred to in subsection (2), subsection (1) applies only to those portions of the critical habitat that are habitat to which that Act applies and that the Governor in Council may, by order, specify on the recommendation of the competent minister.

Habitat d'oiseaux migrateurs

(5.1) Par dérogation au paragraphe (4), en ce qui concerne l'habitat essentiel d'une espèce d'oiseaux migrateurs protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs* situé hors du territoire domanial, de la zone économique exclusive ou du plateau continental du Canada ou d'un refuge d'oiseaux migrateurs visé au paragraphe (2), le paragraphe (1) ne s'applique qu'aux parties de cet habitat essentiel — constituées de tout ou partie de l'habitat auquel cette loi s'applique — précisées par le gouverneur en conseil par décret pris sur recommandation du ministre compétent.

Obligation to make recommendation

(5.2) The competent minister must, within 180 days after the recovery strategy or action plan that identified the critical habitat that includes habitat to which the *Migratory Birds Convention Act, 1994* applies is included in the public registry, and after consultation

Obligation : recommandation ou declaration

(5.2) 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 qui comporte tout ou partie de l'habitat auquel la *Loi de 1994 sur la convention concernant les oiseaux*

with every other competent minister,

(a) make the recommendation if he or she is of the opinion there are no provisions in, or other measures under, this or any other Act of Parliament, including agreements under section 11, that legally protect any portion or portions of the habitat to which that Act applies; or

(b) if the competent minister does not make the recommendation, he or she must include in the public registry a statement setting out how the critical habitat that is habitat to which that Act applies, or portions of it, as the case may be, are legally protected.

[…]

Destruction of critical habitat

61 (1) No person shall destroy any part of the critical habitat of a listed endangered species or a listed threatened species that is in a province or territory and that is not part of federal lands.

migrateurs s'applique, le ministre compétent est tenu, après consultation de tout autre ministre compétent :

a) de faire la recommandation si, à son avis, aucune disposition de la présente loi ou de toute autre loi fédérale, ni aucune mesure prise sous leur régime, notamment les accords conclus au titre de l'article 11, ne protège légalement toute partie de l'habitat auquel cette loi s'applique;

b) s'il ne fait pas la recommandation, de mettre dans le registre une déclaration énonçant comment est protégé légalement tout ou partie de l'habitat essentiel constitué de tout ou partie de l'habitat auquel cette loi s'applique.

[…]

Destruction de l'habitat essentiel

61 (1) Il est interdit de détruire un élément de l'habitat essentiel d'une espèce en voie de disparition inscrite ou d'une espèce menacée inscrite se trouvant dans une province ou un

territoire, ailleurs que sur le territoire domanial.

Exception

(1.1) Subsection (1) does not apply in respect of

(a) an aquatic species; or

(b) the critical habitat of a species of bird that is a migratory bird protected by the *Migratory Birds Convention Act, 1994* that is habitat referred to in subsection 58(5.1).

Non-application

(1.1) Le paragraphe (1) ne s'applique pas :

a) aux espèces aquatiques;

b) aux parties de l'habitat essentiel d'une espèce d'oiseaux migrateurs protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, étant l'habitat visé au paragraphe 58(5.1).

Appendix 2 – Relevant Provisions of the MBCA

Purpose	**Objet**
4 The purpose of this Act is to implement the Convention by protecting and conserving migratory birds — as populations and individual birds — and their nests.	**4** La présente loi a pour objet la mise en œuvre de la convention par la protection et la conservation des oiseaux migrateurs — individus et populations — et de leurs nids.
[…]	[…]
Prohibition	**Interdiction**
5.1 (1) No person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area.	**5.1 (1)** Il est interdit à toute personne et à tout bâtiment d'immerger ou de rejeter ou de permettre que soit immergée ou rejetée une substance nocive pour les oiseaux migrateurs dans des eaux ou une région fréquentées par ces oiseaux ou en tout autre lieu à partir duquel la substance pourrait pénétrer dans ces eaux ou cette région.
[…]	[…]
Regulations	**Règlements**
12 (1) The Governor in Council may make any regulations that the Governor in Council considers necessary to carry out the purposes and provisions of this Act and the Convention, including regulations	**12 (1)** Le gouverneur en conseil peut prendre les règlements qu'il juge nécessaires à la réalisation de l'objet de la présente loi et de la convention; les règlements peuvent notamment :
[…]	[…]

(j) for charging fees for permits, leases, stamps or other authorizing documents required to carry on any activity under this Act or the regulations, and for determining the amount of the fees and the terms and conditions under which they are to be paid	**j)** prévoir l'imposition de redevances pour les baux ainsi que pour les permis, timbres et autres autorisations préalables à l'exercice d'activités dans le cadre de la présente loi et de ses règlements, de même que la fixation de leur montant et des conditions de leur paiement

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-849-22
STYLE OF CAUSE:	WESTERN CANADA WILDERNESS COMMITTEE AND SIERRA CLUB OF BRITISH COLUMBIA FOUNDATION v MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 1-2, 2023
JUDGMENT AND REASONS:	CRAMPTON CJ.
DATED:	FEBRUARY 1, 2024

APPEARANCES:

Sean Nixon Andhra Azevedo	FOR THE APPLICANTS
Andrea Gatti Arnav Patel Sophie Bahen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sean Nixon Andhra Azevedo Vancouver, British Columbia	FOR THE APPLICANTS
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT