Federal Court Invalidates Government Policy for Failing to Protect Migratory Birds

February 1 was a good day for the Marbled Murrelet and at least 24 other at-risk species of migratory birds that are legally protected but only on federal lands across the country. A day before Groundhog Day, the Federal Court of Canada handed down a landmark ruling finding that the federal government has taken an unreasonably narrow view of its obligation to protect the habitat of endangered and threatened species of migratory birds and ordered it to change its protection policies accordingly. Here's an executive briefing on the *Western Canada Wilderness Committee v Canada (Environment and Climate Change),* 2024 FC 167 (CanLII) case (which we'll refer to as the" WCWC case") and its potential significance.

Background: The SARA Law & Federal Wildlife Conservation

One of the key laws in Canadian wildlife conservation is the *Species At Risk Act* (SARA) which authorizes the federal Minister of Environment and Climate Change Canada (Minister) to take measures to protect species it lists as being at risk of becoming endangered or threatened. Section 58 of the SARA bans the destruction of any part of the "critical habitat" of a listed species, including migratory birds protected by another federal law called the *Migratory Birds Convention Act, 1994* (MBCA). Section 58 incorporates the MBCA definition of "critical habitat" as 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."

The problem with Section 58 protections is that they apply only to federal and not provincial and territorial lands. The SARA gives the Minister authority to recommend additional new protections for the critical habitat of migratory birds on non-federally protected lands; the Minister may also decline to recommend new protections when it believes that current protections are adequate. In either case, Section 58(5.2) of the SARA requires the Minister to post a statement explaining its reasons for recommending or not recommending protective actions for listed species on non-federal lands.

The WCWC Case

The controversy began in 2022 when the Minister issued a Protection Statement under Section 58(5.2) explaining why it wasn't recommending new protections for migratory birds. The ignition point was the Statement's suggestion that the term "habitat" for which SARA protection is required refers only to the **nest** of migratory birds. And since (Section 33 of) the SARA already provides protection for nests on non-federal lands, the Minister concluded that there was no need to recommend further protections.

Outraged environmentalists filed a lawsuit claiming that the Protection Statement's determination that critical habitat protection was limited to the nest was unreasonably narrow. They also accused the Minister of not considering evidence suggesting that habitat loss and degradation were also significant threats to the survival and recovery of most at-risk migratory birds.

The Federal Court agreed. In addition to flying in the face of the ecological evidence, the Court found that the Minister's failure to provide wider protection to the critical habitat of migratory birds undermined the broad conservation objectives of the MBCA and SARA. "In my view, the scheme of the SARA supports a more expansive interpretation of the habitat" of migratory birds, the Court reasoned.

As a result, the Court struck down the Protection Statement and instructed the Minister to go back to the drawing board and make a new Section 58(5.2) determination on recommending new migratory bird critical habitat protections on non-federal lands in accordance with the ruling. As icing on the cake, it also ordered the Minister to pay the environmental groups' legal costs ($8,900) in bringing the suit.

Takeaway & Wider Significance

While the Court's analysis focused on a small seabird called the Marbled Murrelet, the WCWC ruling affects approximately 25 different migratory birds that have habitats in Canada, including the Bank Swallow, Black Swallow, Bobolink, Canada Warbler, Chestnut-collared Longspur, Eskimo Curlew, Lark Bunting, Loggerhead Shrike, Thick-billed Longspur, Mountain Plover, Piping Plover, Sage Thrasher, Sprague's Pipit and Whooping Crane. It also serves as a wider mandate by the federal courts to the Minister to take a broader and more active approach to protecting the critical habitat or not only migratory bird but other threatened and endangered wildlife.

The bad news about the WCWC case is that it doesn't address, let alone resolve what many environmental activists perceive to be the fundamental weakness in the current Canadian wildlife conservation regulatory regime, namely, the sharing of responsibility between the federal and provincial/territorial governments. Regrettably, this division of powers has often led to cooperative efforts to avoid conservation regulations and initiatives by giving the federal government cover for not stepping up to take action in a province that has declined to protect species in need.

Meanwhile, there's also the possibility that the federal government will appeal the ruling to the Canadian Supreme Court.