June 30, 2009

Lame duck constitutional arguments: a new twist on Syncrude's Tailings Pond Debacle

By Jocelyn Stacey

The dead duck saga continues. In a previous post on ABlawg (R. v. Syncrude Canada: The Case of The 500 Dead Ducks), Shaun Fluker left off with the words "stay tuned". Stay tuned, indeed. As it turns out, Syncrude Canada is contemplating making this relatively mundane regulatory (albeit environmentally significant) offence a little more interesting.

Here's the recap: Back in February 2009, Syncrude Canada was charged with an offence under the federal *Migratory Birds Convention Act*, 1994, S.C. 1994, c. 22 (*MBCA*) and an offence under the Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 after what was originally thought to be approximately 500 ducks landed in Syncrude's tailings ponds near Fort McMurray in April 2008. Syncrude later conceded that more than 1600 ducks died in this tailings ponds incident.

Here's where it gets interesting: At a court appearance on Wednesday, June 10, 2009 Syncrude gave notice of a possible of constitutional challenge to the charge under the *MBCA*. Syncrude was charged with violating Section 5.1 of the *MBCA* which reads:

> 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.

Section 13 of the *MBCA* makes it an offence to contravene this prohibition.

Syncrude did not release any details of the legal argument it is contemplating. However, it seems the question most likely to be before the court is whether the federal government has the authority to implement amendments to Empire treaties under section 132 of the *Constitution Act, 1867*.

Under the Canadian constitution, there is no broad federal power to implement treaties (*Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326, hereinafter *Labour Conventions Case*). That is, the provinces or the federal government may be responsible for the domestic implementation of treaties depending on which constitutional head of power the subject matter of the treaty falls under. However, under section 132 of the *Constitution Act, 1867* the federal government has the authority to implement treaties entered into by Britain on Canada's behalf - Empire treaties. Whether section 132 includes the power to make amendments to Empire treaties (amendments concluded by Canada on its own behalf) has not been judicially determined.

The *Migratory Birds Convention* is a bi-lateral treaty between Canada and the United States originating in 1916. It is, without question, an Empire treaty. Therefore, the power to perform Canada's obligations under this treaty is constitutionally allocated to the federal government by section 132 of the *Constitution Act, 1867*. Indeed, the constitutionality of the federal implementation of the original *Migratory Birds Convention* was confirmed by the Manitoba Court of Appeal in *R. v. Stuart* (1924), 34 Man. R. 509; 43 C.C.C. 108. However, the original convention underwent a significant makeover in 1995. The original convention was quite narrow; it dealt primarily with the timing of hunting seasons for migratory game birds. It also was substantially flawed in that it did not account for the rights of aboriginal peoples (see, for example, *Sikyea v. R.*, [1964] S.C.R. 642). The adoption of the 1995 Protocol accommodated the aboriginal issues, fortified the Convention's principles and expanded its scope to include habitat protection for migratory birds (See Nigel Bankes, *International Wildlife Law* (Calgary: Canadian Institute of Resources Law, 2006) for a review of the *Migratory Birds Convention* and its domestic implementation).

Syncrude was not charged with an offence that stems from the original *Migratory Birds Convention*. Syncrude was charged with an offence that stems from the 1995 Protocol to the *Convention*, a charge relating to habitat protection.

For Syncrude to successfully mount a constitutional defence to the charges under the *MBCA*, it must show that section 5.1 is ultra vires the federal government. It will have to overcome several hurdles to succeed.

First, Syncrude will have to show that the federal government does not have the authority under section 132 to implement amendments to Empire treaties. This is an intriguing legal argument. The 1995 Protocol was not a mere, technical amendment to the *Convention*. Rather, it was a comprehensive revision that broadened the underlying principles of the *Convention*. There is a fairly compelling legal argument that substantial amendments to Empire treaties are not within the scope of section 132. If the Protocol does not enjoy Empire Treaty status, the question then turns to the status of the original convention. Does the original treaty maintain this status, or does the adoption of the Protocol somehow cause the original treaty to lose its Empire treaty status as well? This determination could be quite messy. What would be the implications of a divided authority on migratory birds? Would the federal government implement the original *Convention* under section 132 and the provinces implement the amendments under section 92(13) (the provincial power over property and civil rights)? Or, if the entire *Convention* loses its status as an Empire treaty, then the federal government would need to justify the *MBCA* on the basis of some other head of power or the provinces would be responsible for meeting Canada's obligations under the *Convention*.

It is unclear what the court would decide when faced with this question. There is little jurisprudence on section 132 (See Andrew Thompson and Nancy A. Morgan, "Migratory Birds" in *Report of the Canadian Bar Association Committee on Sustainable Development in Canada: Options for Reform* (Ottawa: Canadian Bar Association, 1990)).

If, however, Syncrude fails on this argument then its only option is to mount the *Stuart* argument: that section 5.1 of the *MBCA* is beyond the scope of the *Convention*. However, this is a very weak argument, especially in light of its poor reception in Stuart itself. First, *Stuart* articulated a liberal interpretation of section 132, that the federal government should be afforded wide latitude in implementing treaty obligations. Second, the *Convention* itself is worded broadly. Article IV of the amended *Migratory Birds Convention* reads:

> Each High Contracting Power shall use its authority to take appropriate measures to preserve and enhance the environment of migratory birds. In particular, it shall, within its constitutional authority:
>
> (a) seek means to prevent damage to such birds and their environments, including damage resulting from pollution; …

It is fairly clear that section 5.1 of the *MBCA* falls within the scope of this provision. Thus, if Syncrude fails on its section 132 argument, it's out of luck.

If, however, Syncrude succeeds in arguing that the implementation of the 1995 Protocol is ultra vires section 132, its work is not complete. There are at least two other federal heads of power that the implementation of the 1995 Protocol could fall under: section 91(27) (criminal law) or the residual power of Peace, Order and Good Government.

The test for whether a provision is intra vires the federal criminal power under 91(27) is whether there is a prohibition "enacted with a view to a public purpose which can support it as being in relation to criminal law" (*Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] S.C.R. 1 at 50 (hereinafter, *Margarine Reference*). Public peace, order, security, health, morality are the examples of public purposes listed in the *Margarine Reference*. Section 5.1 of the *MBCA* is a prohibition and is backed by a penalty (both a fine and imprisonment), thus the only real question is whether it is enacted with a public purpose. The Supreme Court of Canada has previously considered environmental issues under the criminal power and set a strong foundation for environmental protection as a valid public purpose under 91(27). For example, in *R v. Hydro-Quebec*, [1997] 3 S.C.R. 213 the Supreme Court concluded that pollution prevention was a legitimate public purpose for criminal regulation. Species protection is different than pollution prevention, so there is some uncertainty as to whether a court would find the same link to a public purpose. However, the majority in *Hydro-Quebec* went to great lengths to establish the fundamental nature of environmental protection in our society. The majority could have easily linked pollution to human health (PCBs in that case) as a valid objective of criminal legislation and avoided the murky waters of environmental protection. There may be some ambiguity as to whether a court would conclude that migratory bird protection falls under 91(27), but for Syncrude the door is not open very wide.

Further, Syncrude would also have to show that the implementation of the 1995 Protocol cannot be justified under the federal government's residual power of Peace, Order and Good Government (POGG) under the national concern doctrine. To be a matter of national concern the implementation of the 1995 Protocol must be single, distinctive and indivisible, and distinguishable from provincial jurisdiction (*R. v. Crown Zellerbach Ltd. et al.*, [1988] 1 S.C.R. 401). This matter is fairly analogous to *Crown Zellerbach*. Species protection generally, like water pollution, is not single or indivisible. However, migratory bird protection, like marine pollution, very likely is. The provincial indivisibility test informs this conclusion because the failure of any one province to protect migratory birds would undermine the entire scheme and have extra-provincial and international implications. This would be an especially difficult hurdle for Syncrude to overcome.

The federal government has many arrows in its quiver if it needs to defend the constitutionality of the *MBCA*: it can justify it on the basis of section 132, section 91(27), or POGG. The only question remaining is whether Syncrude will follow through with this constitutional lame duck. Its next court appearance is September 14, 2009.

Stay tuned.