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First Nation treaty obligations should inform the interpretation of discretionary powers under the Species at Risk Act

By Nigel Bankes

Cases Considered:

Adam v Canada (Environment), 2011 FC 962

Woodland caribou are listed as threatened under the *Species at Risk Act*, SC 2002, c 29 (*SARA*). The species (and particular herds of the species) are threatened by the fragmentation of their habitat principally due to resource developments including coal mining (see *West Moberly First Nation v British Columbia (Chief Inspector of Mines*), 2011 BCCA 247), oil and gas exploration, oil sands projects (mining and in situ) and forestry projects, and by the linear land use disturbances often associated with these projects including seismic lines, roads, transmission lines and pipelines. The species is also negatively impacted by increased predation.

But what should we do about this? The answer of governments in Alberta, British Columbia and the federal government seems to be as little as possible and as slowly as possible – for fear that any real action to recover the various herds will be too disruptive of the governments' shared resource development agendas.

This decision of Justice Crampton goes a long way towards concluding that "as little as possible and as slowly as possible" is simply not adequate. Unfortunately, and for reasons that are not well articulated, he cannot quite bring himself to issue a declaration to the effect that the Minister's delay in issuing a recovery strategy is unlawful, but judgement does add to the existing *SARA* jurisprudence on recovery strategies and it also breaks new and important ground with respect to the interpretation of section80 on emergency orders. In the course of doing so the judgement also addresses the interaction between the government's *SARA* obligations and the government's obligations with respect to aboriginal and treaty harvesting rights as those rights pertain to listed species.

For previous Ablawg postings on *SARA* see:

"Is SARA growing teeth?"
"SARA has a spine as well as teeth"
"The full implications of demonstrable integration: a roundtable discussion on West Moberly"

The prior administrative proceedings

COSEWIC (the Committee on the Status of Endangered Wildlife in Canada) assessed the general population of boreal woodland caribou as threatened in 2000 and confirmed that assessment in 2002. That assessment is available on the SARA Registry here.

Since the boreal population was already listed by COSEWIC as threatened before *SARA* came into force it was automatically listed as threatened under *SARA*. The Environment Minister's response to the reassessment (available here) confirmed that a recovery strategy was to be developed by June 2007. However, the development of a recovery strategy as required by subsection 42(2) of *SARA* has been repeatedly delayed.

Frustrated and concerned by this delay, the Applicants in this judicial review proceeding - a number of First Nations (specifically the Athabasca Chipewyan First Nation - Treaty 8), the Beaver Lake Cree First Nation and the Enoch Cree First Nation – both Treaty 6) and two environmental non-governmental organizations (ENGOs) (Alberta Wilderness Association and the Pembina Institute) - filed a series of four petitions with the Minister in the summer of 2010 asking him to recommend that the federal cabinet make emergency orders for the protection of seven distinct herds of boreal caribou within Alberta. A fifth petition covered all herds of caribou in Alberta (i.e. the southern mountain woodland caribou as well as the boreal herds). Not having received a timely response to their petitions the applicants commenced these proceedings in September 2010 seeking: (1) a declaration that the Minister was in breach of his duty to prepare a recovery strategy, (2) an order in the nature of mandamus to require the responsible Minister to take action under section 80 of *SARA* and recommend to cabinet that it make an emergency order "to provide for the protection" of the boreal population of woodland caribou as a listed species (*SARA*, s 80(1)), or (3) an Order declaring that the Minister's failure to recommend that the cabinet make an emergency Order is unlawful or unreasonable.

Section 80 of *SARA* provides that:

> (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.
> (2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

The section recognizes two actors: the Minister and the Governor in Council (cabinet). It is the Governor in Council that makes the emergency order but only on the basis of a recommendation from the Minister. The Minister has a discretion to make or not make such a recommendation unless he or she is of the opinion that the species faces imminent threats to its survival *or* recovery in which case the Minister *must* make the recommendation. It was common ground in the case that (at para 4) "even if the Minister had made a recommendation to the Governor in Council pursuant to subsection 80(2), the Governor in Council may have declined to issue the requested emergency Order, after weighing and balancing relevant public-interest considerations."

Minister Kent, acting on the Department's advice, ultimately rejected the petitions in a decision of March 10, 2011. The Minister's decision (not available on the SARA website but available here), premised on the assessment that the overall population of woodland caribou was

comprised of some 57 distinct herds of caribou (local populations), and further premised on the conclusion that "the current range and conditions are sufficient for 27 of the 57 herds" (at para 16) concluded that "there are no imminent threats to the survival of boreal caribou" or to its recovery and thus declined to make the section 80 Order. In the course of making his decision Minister Kent took the position that "[f]actors such as the potential impact of the decline of the boreal caribou on the applicants' Treaty Rights and the Crown's obligation to act honourably in all of its dealings with Aboriginal peoples are not relevant in considering whether or not the species' survival or recovery is imminently threatened under section 80."

Justice Crampton's Decision

Justice Crampton held that the standard of review for the Minister's interpretation of the aboriginal constitutional issues associated with subsection 80(2) should be correctness (at para 27), while a reasonableness standard should apply to the non-constitutional interpretive aspects of that subsection and to the Minister's assessment of whether or not he was required to make an emergency order recommendation to the cabinet (at paras 27, 28 and 40).

Based on this, Justice Crampton's went on to rule that it was a clear error of law for the Minister to have concluded that the Treaty-based hunting rights of the First Nation petitioners were irrelevant to his section 80 decision. Accordingly, he sent the matter back to the Minister to have him re-consider his decision and in doing so instructed that (at para 36, references omitted):

> …. the Minister should not confine his consideration of the honour of the Crown to an assessment of whether any active course of conduct may negatively affect treaty rights of the First Nations. I agree with the Applicants that such an approach would present an impoverished view of the honour of the Crown. A broader view is required to be taken. This includes assessing the extent to which the ongoing violation of the SARA (by failing to post a Recovery Strategy) and continued inaction with respect to the boreal caribou would, in all of the circumstances discussed in this decision and in the more detailed Certified Record pertaining to the Decision, would be consistent with the honour of the Crown.

Justice Crampton had more difficulty with the argument that it was unreasonable for the Minister to have reached the conclusion that there was no imminent threat to the national recovery of boreal caribou. While Justice Crampton had some sympathy for the claims of the Applicants (see para 49: "it is not immediately apparent how, given the foregoing facts, the Minister reasonably could have concluded that there are no imminent threats to the national recovery of boreal caribou") he preferred to conclude that the Minister's decision was flawed because the Minister had failed to meet the tests of "justification, transparency and intelligibility" in articulating the reasons for his conclusion that the loss of the seven Alberta herds did not constitute an imminent threat to national recovery.

In the Court's view, the Minister's short reasons were inadequate (at para 68):

> [they] do not enable me to conduct a meaningful review of the Decision … This is because the basis for the overall conclusion reached by the Minister, particularly the evidentiary basis, was not meaningfully discussed …. and the record does not otherwise explain the Minister's decision in a satisfactory manner … In the context of the Decision as a whole, this conclusion essentially came "out of the blue". The Applicants, the public and the Court are left to speculate as to:

> i. the scientific basis for the conclusion that it is possible to maintain a self sustaining population of boreal caribou in eastern Canada;
> ii. the content of "the national recovery objectives and approaches that would be constrained by the extirpation of" the Seven Herds;
> iii. the basis upon which it was concluded that the eastern local populations could provide the basis for achieving a national recovery objective;
> iv. the likelihood of achieving such national recovery objective if the Seven Herds become extirpated; and
> v. the basis upon which this conclusion was considered to be consistent with the language of subsection 80(2), the purposes of the SARA, as set forth in section 6, and the SARA as a whole …

That provided an additional ground for setting aside the Minister's decision.

But what about the other two issues before the court: (1) the request for mandamus in relation to the emergency order, and (2) the request for a declaration that the Minister was in breach of his obligation to publish a recovery strategy?

The court refused to grant mandamus. There is some logic to this given Justice Crampton's decision to ground himself on the absence of reasons to support a conclusion of no imminent threat to survival or recovery, rather than a conclusion that such a finding was unreasonable. However, if that finding is unreasonable then the "*must* make the recommendation" provision of subsection 80(2) is, in principle, capable of supporting an order of mandamus (see paras 55 – 57) because it is, at that point, a mandatory duty.

This raises a nice question (and perhaps a point of law for an appeal) as to whether it was really open to Justice Crampton to give the Minister the opportunity to supplement his reasons. My colleague Shaun Fluker in commenting on a draft of this blog, noted that Justice Crampton relies on *Khosa* (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339) for the "justification, transparency and intelligibility" test for assessing the adequacy of minister's reasons. However, *Khosa* was not really a case about the adequacy of reasons (*Khosa* at para 64: "In this case, both the majority and dissenting reasons of the IAD disclose with clarity the considerations in support of both points of view, and the reasons for the disagreement as to outcome.") and the original source of these words is in fact *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 where Justices Bastarache and Lebel JJ, commenting on the reasonableness standard have this to say:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.* (emphasis supplied)

And see also Justice Binnie in *Dunsmuir* at paras 149 and 151 on the nexus between reasons and reasonableness.

Thus it was perhaps open to Justice Crampton in this case to find that the quality of the minister's reasons made the ultimate decision unreasonable - but if Justice Crampton had taken that course, arguably his own logic would have forced him to order mandamus.

Justice Crampton also declined to grant a declaration that the Minister was in breach of his obligation to publish a recovery strategy. The Minister acknowledged that he had missed the statutory deadline of June 4, 2007: i.e. by over four years by the time of judgement. The respondents (as reported in the judgement at para. 70) gave this reason for the delay: "[the strategy] was delayed to allow for further scientific studies and to work with aboriginal organizations and stakeholders affected by the recovery strategy, because it was found that there was not enough information to identify critical habitat for the boreal caribou". Note that while the reason refers to the work to be done with aboriginal organizations and others as part of the procedure to be followed, the actual object of the sentence is the need to identify critical habitat. It is not clear to me that this is a good reason for the delay. While it is true that *SARA* requires that the recovery strategy identify critical habitat, the duty to identify critical habitat is a duty to identify it on the basis of available information. The Act does not expect that the initial identification should be definitive, but, as the *Sage Grouse* decision makes clear (see "Is *SARA* growing teeth?" above and *Alberta Wilderness Association v Canada (Minister of the Environment,* 2009 FC 710), if there is information that allows the minister to identify some habitat as critical then that habitat should be so designated even if work is continuing to identify additional habitat as critical (or not). This reading of the statute is consistent with the precautionary principle incorporated in both the preamble to the statute and s.38, and referred to in this case at para. 71.

Justice Crampton does not expressly address whether the proffered reason is good or bad. Instead he fastens on the sub-clause of the sentence suggesting that (at para 66 that) "the Applicants have not alleged any bad faith on the part of the Minister with respect to his desire to further consult with aboriginal organizations and stakeholders." With respect this is hardly to the point. And in any event, since when does an applicant seeking a declaration of unlawful behaviour on the part of government have to show bad faith on the part of the government as a condition precedent to the grant of the declaration?

One of the more interesting issues in the case relates to the use of the term "species" or "listed species" in section 80, and the question of whether or not the Minister had to make his decision on the basis of each herd or population or whether it was to be made on the basis of the threat to or recovery of the species as a national species distributed across the country from British Columbia to Quebec and Newfoundland. *SARA* itself defines "wildlife species" as a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism". This definition therefore admits of the possibility of listing not just the species but also a subspecies or "a geographically or genetically distinct population". In the United States the equivalent term is "distinct population segment" (DPS).

The actual listing for woodland caribou in Schedule 1 of the Act reads as follows:

> Caribou, Woodland (*Rangifer tarandus caribou*) Boreal population
> Caribou, Woodland (*Rangifer tarandus caribou*) Southern Mountain population

In other words the *Act* lists only two geographically or genetically distinct populations rather than a more closely grained assessment of the 57 herds, some of which may qualify as being geographically or genetically distinct. The point for present purposes is that the coarseness or fineness (eg a specific run of salmon) of the listing will also - on Justice Crampton's reading of the *Act* - affect the coarseness or fineness of the government's obligations. This follows from paras 45 – 47 of the judgement:

> [45] To the extent that the Applicants are suggesting that any time the survival or recovery of any herd or particular group of any listed species, or a sub-species or individual population thereof, is threatened in any area of its range or habitat, the Minister is required to make a recommendation for an emergency protective order under subsection 80(2), I respectfully disagree. In my view, this interpretation of subsection 80(2) is not supported by the plain language of that provision.
> [46] The operative words in that provision are "is of the opinion that the species faces imminent threats to its survival or recovery" (emphasis added [by Justice Crampton]). *The species in question is the "listed wildlife species" referred to in subsection 80(1)* [emphasis, Bankes]. There is no mention of herds or other local populations of species or subspecies in subsection 80(2). The logical extension of the Applicants' position on this point would require the Minister to make a recommendation for an emergency Order under subsection 80(2) even where only a small herd, group or local population of a species or a subspecies is facing a threat to its ability to be self-sustaining in a small area of a particular province. A plain reading of the above quoted words in subsection 80(2) does not support such an interpretation of that provision. Such an interpretation would also be inconsistent with Parliament's decision to grant some scope for the exercise of subjective discretion by the Minister, as evidenced by the words "if he or she is of the opinion that …".
> [47] In short, the Minister is not required to make a recommendation for an emergency Order under subsection 80(2) in the circumstances described immediately above, unless he or she comes to the opinion that the listed species in question (in this case, woodland caribou, boreal population) faces imminent threats to its survival or recovery.

The reasoning is contingent on the actual listing in the statute. Had the listing proceeded on the basis of further distinct populations then it is clear that the section 80 duties would have been interpreted in light of that unit rather than the national picture. The decision to identify a unit at a level lower than the species involves difficult questions of science and judgement. The issue has proven to be contentious (legally and politically) in the United States and this decision suggests that it will prove contentious here. We can expect to see parties argue in the future about the level of the listing with governments pushing for listing at the species level and ENGOs and others in appropriate cases seeking more discrete listings. COSEWIC's current "Guidelines for Recognizing Designatable Units", approved in November 2009 is available here. A particularly useful treatment of the DPS issue in the United States is Holly Doremus, "Listing Decisions under the Endangered Species Act: Why Better Science Isn't Always Better Policy" (1997), 75 Washington University Law Quarterly 1029.