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Migratory Birds and the City

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Decision considered:

Podolsky v Cadillac Fairview Corp. [2013] O.J. No. 581 (QL) [Note as of date of writing this decision is not available online at Canlii or the Ontario Court of Justice]

In this recent decision of the Ontario Court of Justice, Justice Melvyn Green finds the corporate defendant property developers and managers not guilty of charges laid against them by Ecojustice as a private prosecutor under the federal *Species at Risk Act*, SC 2002, c 29 as well as the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36 and the *Environmental Protection Act*, RSO 1990, c E.19. The substance of these charges is the physical harm or death suffered by migratory birds when they collide with urban buildings. Justice Green rules the prosecution established beyond a reasonable doubt that the defendants committed the *actus reus* of the offences, and he also finds the defendants established on the balance of probabilities that they took reasonable steps to avoid the bird collisions. Accordingly, Justice Green acquits the defendants on all charges.

This decision is of relevance to ABlawg for a number of reasons, and my comments will be restricted to these two points: (1) migratory bird collisions with urban buildings is also a problem in Calgary, and the City of Calgary has Bird Friendly Urban Design Guidelines (the “Calgary Guidelines”) that identify and discuss the problem (see [here](#)) and (2) this is the first reported judicial decision interpreting section 32(1) of *Species at Risk Act* and Justice Green gives us some insight into how that provision will be interpreted going forward.

The charges in question flow from statutory provisions which establish so-called regulatory offences. I am not going to canvass the applicable legal principles that apply in a prosecution of these type of offences, and I direct readers to my earlier ABlawg posts discussing the 2010 prosecution of Syncrude concerning migratory birds (see [here](#)) and my comment on *R v Syncrude Canada Ltd*, 2010 ABPC 229 published in volume 49(1) of the 2011 *Alberta Law Review* at pages 237 to 244.

To begin with, I would say that I thoroughly enjoyed reading Justice Green’s decision. The judgement provides an excellent summary of the bird collision problem – its causes and implications – and the judgement is also well-organized, succinct where it needs to be, and provides clear analysis. No doubt this is the result of well-prepared counsel and a judge who grapples with the arguments and issues placed before him.

The prosecution led evidence as to the extent of the bird collision problem. According to their experts, at least one billion birds meet their death in the United States every year due to collisions with buildings. It is apparent that local groups study the problem in various municipalities. The Toronto group known as FLAP – the Fatal Light Awareness Problem –

recorded close to 5000 collisions in the Greater Toronto Area during 2010 – and according to the evidence at trial at least 826 of these collisions occurred at property owned and managed by the defendants.

The cause of these collisions is, as one would expect, the result of a combination of factors. Buildings located in municipalities that are within the fly way for migratory birds will be more susceptible to this issue. Buildings located in or close to wooded areas or wetlands will be more susceptible than others. The reflective glass used in modern skyscrapers exacerbates the problem by creating an illusion of a clear path for the birds.

The Calgary Guidelines note the city is located within 2 continental migratory bird flyways that involve somewhere between 5 and 10 billion birds and over 150 species. The Guidelines refer to a somewhat dated study (1995-1997) that counted 411 bird deaths resulting from building collisions in downtown Calgary. The Guidelines also note that the Bow River valley attracts migratory birds which, in turn, attracts birds to the downtown core. The Guidelines note that 78% of recorded collisions during the 1990s study were associated with buildings that have reflective glass. As well, the Guidelines state that one of the birds collected in the 1990s study was an Olive-sided Flycatcher which is a species listed as threatened under the *Species at Risk Act*. Thus the Calgary Guidelines would suggest that the facts supporting the prosecution in this Ontario case are likely found in Calgary too. The Guidelines include a number of design measures which are thought to reduce the number of bird-building collisions, some of which are also canvassed by Justice Green including the application of window film.

Section 32(1) of the *Species at Risk Act* states “no person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.” Section 97(1) makes it an offence to contravene section 32(1) and provides for fines against corporate defendants for up to \$300,000 in a summary conviction and \$1,000,000 for an indictable offence. Section 100 states the defence of due diligence is available to a person charged under section 32(1). And section 102 sets out factors which may be considered in sentencing, including in clause (b) whether the offender committed the act inadvertently.

Justice Green considers these *Species at Risk Act* provisions collectively in paragraphs 72 and 73 of his judgement. His interpretation includes the following key points:

1. Parliament intended to include the accidental or involuntary killing of a member of a listed species within the section 32(1) no take prohibition; and,
2. even a single death can amount to a contravention of section 32(1).

Justice Green finds the prosecution met its onus of proving beyond a reasonable doubt that the defendants committed the physical elements of the section 32(1) offence (at para 85). Several of the birds killed during the time period set out in the Information laid by Ecojustice were members of a species listed as threatened under the *Species at Risk Act*. The evidence established these deaths occurred as a result of the birds impacting with the defendants’ buildings. The fact that these deaths were unintended by the defendants was not relevant to establishing the *actus reus*. Justice Green was satisfied that the reflective glass caused the birds to mistakenly view the reflection as an extension of a nearby wooded area. The evidence also established that the defendants had been aware of the bird collision problem caused by reflective glass on their buildings for some time.

Justice Green then goes on to find the defendants avoid culpability under the *Species at Risk Act* for the death of the listed birds because they had taken reasonable steps to avoid the problem. The defendants led evidence to establish a significant commitment to address the bird collision problem. In particular, Justice Green noted the defendants:

1. met applicable municipal and industry standards for addressing the issue;
2. met or exceeded the efforts of other building owners and managers in the Toronto area;
3. cooperated with FLAP in terms of bird retrieval, rescue and documentation for more than a decade prior to this prosecution;
4. had tested and experimented with several different means to reduce bird collisions over the years.

The message here with respect to endangered species is much the same message that was delivered by the successful prosecution in *R v Syncrude*. There are adverse impacts on other species that flow from the built human environment and the law does not expect us to completely eliminate these adverse impacts. However we have evolved to the point where some of these adverse impacts are recognized by our legal system – particularly in the case of a species legally recognized as endangered or threatened with extinction - and the law does require that we take reasonable measures to prevent harm to individuals of these species. Like oil sands operators in Alberta, building owners must pay special attention to bird deterrence. Empty promises will not suffice to avoid legal liability.

As I was writing, a link to the trailer for an upcoming film by Chris Jordan landed in my inbox. Jordan's film documents the impacts of modern life on birds. The trailer for the film depicts the problem in a much more powerful way than I could ever hope to in words. It provided some inspiration for this blog – so I thought I'd share it here: <http://www.midwayfilm.com/>

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