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Species at risk and an adjustment clause

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Case Considered:
Matichuk v Quattro Holdings Ltd., 2013 ABQB 164

The case of *Matichuk v Quattro Holdings Ltd* involves a contractual dispute over the sale of a parcel of agricultural land in St. Albert. The parties entered into a purchase and sale agreement in June 2012. The facts set out by Mr. Justice G.A. Verville suggest the Vendor was keen to sell and the Purchaser was keen to purchase in order to develop the land (I presume residential). Time was of the essence. The closing date was set for early October 2012. But the deal began to go sideways just a couple weeks before closing. The Purchaser sought an adjustment (reduction) on the purchase price to account for the facts that there are five wetlands on the property, some which may be Crown owned under section 3 of the *Public Lands Act*, RSA 2000, c P-30, and that a bird species listed as "special concern" under the *Species at Risk Act*, SC 2002, c 29 – was known to nest on the lands. The Vendor was not agreeable, and insisted on closing for the full purchase price. The parties filed counter claims and Mr. Justice G.A. Verville heard arguments in late February at the Court of Queen's Bench. Justice Verville decided in favour of the Vendor, ruling the environment adjustments provision in the contract being relied upon by the Purchaser was so vague as to be meaningless and thus the Purchaser could not rely on it. Accordingly, Justice Verville found that the Purchaser had repudiated the contract by refusing to close the deal.

It has been many years since I thought much about contract law, and readers hoping for some insight into legal principles governing the construction of commercial contracts, meeting of the minds, or the severability of provisions will be disappointed. But there is a lesson to be learned here on drafting contracts. My primary interest here concerns investigating the role of listed species at risk in this dispute.

The contractual provision in question was the adjustments clause: "The parties acknowledge and agree that the amount set herein for the Purchase Price is based on the assumption that the Lands are 144.51 acres. Prior to and in conjunction with the Closing Date, the Vendor shall advise the Purchaser of the precise acreage. If the acreage, including **deduction of environment, if any**, varies from the 144.51 acres, the Purchase Price shall be adjusted on the basis of $90,000 per acre" [emphasis is mine].

The Purchaser sought an extension of the closing date to allow its environmental consultants to calculate appropriate reductions to the purchase price, in part, for undevelopable lands resulting from the application of the *Species at Risk Act*. We don't get any more details from Justice Verville on this issue, and he makes no reference to the species at risk in his reasoning. Justice

Verville rejects the position of the Purchaser on the basis that the adjustments clause is too vague to be of any meaning (at paras 60-61).

Nonetheless, it is interesting to consider how a listing under the *Species at Risk Act* might implicate private legal relations such as those in this case. The bird species in question (which isn't named in the decision) is apparently listed as a species of special concern under the *Species at Risk Act*. Had this issue gained some traction in the courtroom, it would have become apparent that a "special concern" listing does not result in any prohibitions or restrictions under the *Species at Risk Act*. The no take and protection of critical habitat provisions, for example, generally only apply to species listed as endangered or threatened. Thus even if the adjustments clause had been drafted with more precision and specifically referenced species at risk issues as grounds for an environmental adjustment (so as to not be meaningless or vague), I question whether a species of special concern can trigger an adjustment in the purchase price since there are no *Species at Risk Act* impediments to developing lands frequented by these species.

An environmental adjustment is a real possibility in cases where species listed as endangered or threatened under the *Species at Risk Act* are present on lands subject to a commercial transaction. In light of this decision, the solicitor for a purchaser seeking to acquire such lands would be unwise to rely on the standard precedent language in drafting the adjustments clause.

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