ABlawg.ca

2012 Award Winner Clawbies Canadian Law Blog Awards

September 24, 2013

Update on the Sage-grouse, the Separation of Powers and the Rule of (Ineffective Environmental) Law(s)

Written by: Martin Olszynski

Cases Considered: *Alberta Wilderness Association v Canada (Attorney General)*, 2013 FCA 190, *Wildlands League and Federation of Ontario Naturalists v Ministry of Natural Resources (Ontario) et al*., Court file no. 400/13, *Sandy Pond Alliance to Protect Canadian Waters Inc. v Canada*, Court file no. T-888-10

As most readers are probably already aware, last week the federal government announced that it will be issuing an emergency protection order (EPO) under the federal *Species at Risk Act* SC 2002, c 2 for the Greater Sage-grouse (for the background to this announcement, see my previous post here). Ostensibly, this is a 'good news' story about the separation of powers at work: The federal government delayed in taking the measures ecologically necessary and (ultimately) required by law to protect the Sage-grouse; the matter was brought before the courts, which concluded that the government's actions were illegal; the government is now taking steps to bring itself into compliance.

Only I am not so sure. While Ecojustice appears optimistic, the government's press release states that although the details have yet to be sorted out the EPO will contain "no restrictions on activities on private land, nor on grazing on provincial or federal crown lands." On this front, the situation is similar to that which is occurring on a greater scale in Ontario right now with respect to its endangered species legislation, where the Liberal government recently introduced regulations that effectively exempt numerous sectors from the Act's application. There, as was the case for the Sage-grouse here, Ecojustice has initiated a legal challenge alleging various legal defects in the decision-making leading up to the regulations, which they also allege are *ultra vires* by virtue of the fact that they "undermine the *ESA*'s very purposes".

In her post on this situation, which she describes as "a tremendous blow to species protection" in Ontario, environmental lawyer and expert Dianne Saxe asks several questions that speak to the separation of powers and some of the fundamental dynamics of environmental law and policy. Dianne frames the legal challenge this way:

> To win this legal challenge, Ecojustice will have to persuade the courts that governments cannot make policy decisions, for political and economic reasons, that increase the danger to endangered species that they said they would protect. Is this the type of decision that courts will prevent politicians from making? And if so, should they?

In other words, who as between the executive and the judiciary should have the ultimate word on matters of public policy? The obvious response, of course, is the executive. An alternative

response, however, is to frame the matter not as one of current public policy but of legislative intent and statutory interpretation, the broad policy decisions having *already been made* by previous legislatures as manifested through the *Endangered Species Act, 2007*, SO 2007, Ch. 6. A very similar argument was recently made in *Sandy Pond Alliance to Protect Canadian Waters Inc. v Canada*, T-888-10 (decision pending, but see 2011 FC 158 (CanLII) for some background on the case in the context of an application for intervener status). In that case, the applicants have alleged that the *Metal Mining Effluent Regulations (MMER)*, SOR 2002/222, and more specifically those sections that authorize the use of natural water bodies as mine tailings impoundment areas (TIAs), are *ultra vires* the federal *Fisheries Act*, RSC 1985 c F-14, otherwise regarded as one of Canada's strongest environmental laws. On this theory, a court striking down such regulations is not engaging in policy-making but rather ensuring that the will of previous legislatures is respected and given effect. Such an outcome could be considered analogous to the "*Charter* dialogue" described by Professor Hogg and Allison Bushell in their classic article on the subject: "Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue" ("The Charter Dialogue Between Courts And Legislatures (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)" (1997) 35(1) Osgoode Hall LJ 75 at 79).

Indeed, it is the spectre of negative "legislative reversal" in the case of the *ESA* that Dianne raises towards the end of her post:

> The Ontario government presumably decided to weaken the *Endangered Species Act* in order to increase its chances of surviving the next election. It is already facing substantial anger in many rural areas over the *Green Energy Act*. If Tim Hudak's Conservatives were to win the next election, they are certainly no friends of the *Endangered Species Act*; what would happen to the Act and its regulations then?

To be sure, such 'pyrrhic victories' are not uncommon in environmental law; many of the changes to federal environmental and natural resource legislation over the past few years can be explained by this dynamic, the most obvious example being the amendments to the scoping provisions of the previous *Canadian Environmental Assessment Act*, SC 1992, c 37, following the Supreme Court of Canada's decision in *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2. While *SARA* has to date largely been spared, on my last count the federal government is batting 0-7 in terms of litigation related thereto and there is every reason to believe that more litigation is likely should the EPO for the Sage-grouse be deemed inadequate. The fundamental question, then, is which is better: to preserve a law by allowing it to be covertly rendered ineffective, or to insist on its strict implementation and risk having it modified or scrapped altogether?

From an environmental outcome perspective, it is tempting to point to last year's federal omnibus legislation and vote for the former, perhaps with the hope of a policy reversal down the road. Without staking out a position conclusively, however, I am inclined to go with the latter on both democratic and environmental grounds. Although opposition (in the broadest sense of the word) efforts ultimately failed to have that legislation modified, its introduction in Parliament was a catalyst for a reinvigorated national debate on the importance of not just environmental protection but also on the role of science and evidence in Canadian environmental law and policy (likely a reflection of the incredible chasm between the two as reflected in the omnibus bills, as discussed here and here), debate that is ongoing and that has reached international dimensions

(for the most recent example, see this editorial in the *New York Times*). Such debate seems much less likely where a government bypasses the legislature and effectively re-writes legislation through executive regulation. The 2002 promulgation of the *MMER* provides a useful illustration, Schedule II of which now boasts an impressive list of nineteen lakes and rivers authorized for use as TIAs with many more waiting in the queue. Arguably, that regulation has done more to undermine the conservation of fish and fish habitat than the byzantine amendments to the *Fisheries Act* introduced last year, though to little fanfare. And while I am not suggesting that it always leads to better environmental outcomes (at least not in the short term and not without other factors), anyone doubting the value of public debate in this context need only consider the great and awkward lengths to which the current federal government went to in order to avoid it throughout so much of last year.

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**
Follow us on Twitter **@ABlawg**