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Of Killer Whales, Sage-grouse and the Battle Against (Madisonian) Tyranny

Written by: Martin Olszynski

Cases commented on:

Alberta Wilderness Association v Canada (Attorney General), 2013 FCA 190, *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40.

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."
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> James Madison, *Federalist Papers No. 47*

It is commonly understood that Canada's Parliamentary system of democratic governance is an example of a "weak" separation of powers. In contrast to the United States, where generally speaking the Legislature (i.e. Congress) is responsible for passing laws, the Executive (i.e. the President) for implementing them and the Judiciary for interpreting them, in Canada — at least in "majority" situations — the Legislature (i.e. Parliament) is effectively (if not theoretically) controlled by the Executive (i.e. the Prime Minister and his Cabinet). The fairly predictable result is that laws passed by Parliament tend to give statutory delegates considerable discretion, which in turn allows them to implement government policy on a case-by-case basis without much restraint. In the environmental and natural resources context, most commentators regard this as a bad thing because it tends to favor short term economic and/or political gain over long term economic and environmental sustainability. But there is an emerging threat to the already weak separation of powers in Canada that should be of concern to all lawyers and academics, if not all Canadians. I refer to the Supreme Court of Canada's (SCC) current approach to judicial review, and the standard of review in particular.

More specifically, I am referring to the SCC's willingness to abdicate its constitutional responsibility to interpret legislation to the Executive branch not just within but also outside of the well-established exception of the administrative tribunal context, notwithstanding its apparent understanding in other contexts that "our constitutional framework prescribes different roles for the executive, legislative and judicial branches": *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 27 – 29. Fortunately for Canada (and perhaps also the Killer Whale and the Greater Sage-grouse), at least the Federal Court of Appeal (FCA) has recognized the relationship between the separation of powers and the standard of review and has begun to incorporate its implications into Canadian judicial review theory.

The issue was addressed most directly in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40 [*Killer Whale*] (see previous post by Nigel Bankes here). The

substantive issue in *Killer Whale* was whether the Minister for Fisheries and Oceans (MFO) could rely on the discretionary prohibition against the harmful alteration, disruption and destruction of fish habitat found in section 35 of the *Fisheries Act*, RSC 1985, c F-14, as "legally protect[ing]" the critical habitat of killer whales pursuant to s. 58(5) of the *Species at Risk Act,* SC 2002, c 29 [SARA]. More relevant to this post, however, was the MFO's argument that his interpretations of the *Fisheries Act* and the SARA — which is to say questions of law — were entitled to deference because these were his "home" statutes (at paras 66 – 69).

Writing for a unanimous bench and invoking the *Bill of Rights 1689* (described briefly here), Mainville JA rejected this position outright for what Nigel described in his post as "high constitutional reasons":

> [97] The Minister is inviting this Court to expand the above-described *Dunsmuir* [*Dunsmuir v New Brunswick*, 2008 SCC 9] analytical framework and presumption [of deference on questions of law to adjudicative bodies] to all administrative decision makers who are responsible for the administration of a federal statute. I do not believe that *Dunsmuir* and the decisions of the Supreme Court of Canada which followed *Dunsmuir* stand for this proposition.
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> [98] What the Minister is basically arguing is that the interpretation of the SARA and of the *Fisheries Act* favoured by his Department and by the government's central agencies, such as the Department of Justice, should prevail. The Minister thus seeks to establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable. This harks back to the time before the *Bill of Rights of 1689* where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives. It would take a very explicit grant of authority from Parliament in order for this Court to reach such a far-reaching conclusion.
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> [99] The issues in this appeal concern the interpretation of a statute by a minister who is not acting as an adjudicator and who thus has no implicit power to decide questions of law. Of course, the Minister must take a view on what the statute means in order to act. But this is not the same as having a power delegated by Parliament to decide questions of law. The presumption of deference resulting from *Dunsmuir*, which was reiterated in [*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61] at paras 34 and 41, does not extend to these circumstances. The standard of review analysis set out at paragraphs 63 and 64 of *Dunsmuir* must thus be carried out in the circumstances of this case in order to ascertain Parliament's intent.
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> (Emphasis added)

Applying the standard of review analysis, Mainville JA concluded that the appropriate standard was correctness. Neither SARA nor the *Fisheries Act* contained a privative clause (at para 101). The Minister was acting in an administrative capacity rather than an adjudicative one and the provisions in questions contained restrictive language ("the Minister must"), neither of which supported deference (at para 102 – 103). Finally, although the Minister could claim subject matter expertise (over fish and fish habitat in this instance), this was not the same as legal expertise (at para 104).

Since its release in February of 2012, *Killer Whale* has been cited at least fourteen times by the Federal Court and Federal Court of Appeal, and it is now commonly credited for having created its own presumption: "the interpretation of a statute by a minister responsible for its implementation is to be reviewed on a standard of correctness unless Parliament has provided otherwise": see *e.g. Bartlett v Canada (Attorney General)*, 2012 FCA 230 at para 46. *Killer Whale* has also been the subject of some, albeit surprisingly limited, academic commentary. Most recently, in a published speech, Evans JA described the decision as follows:

> The applicability of the *Dunsmuir* analysis to statutory interpretation by decision-makers outside the traditional administrative tribunal context has not been tackled head-on by the Supreme Court. It has, however, been fairly fully considered in the Federal Court of Appeal…
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> *David Suzuki* contains the most extensive analysis of the issue. In essence, it says that it would be contrary to the separation of powers between Parliament and the Executive to conclude that Parliament intended the Minister to interpret legislation, subject only to reasonableness review. …Unlike an adjudicative tribunal…the Minister had no similar power to interpret the *Fisheries Act*. Of course, the Minister may have to form a view…but that is not the same thing as having the legal authority to render binding determinations on questions of law.
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> (John M Evans, "Standards of Review in Administrative Law" (2013) 26 Can J Admin L & Prac 67)

In light of these developments it is disappointing that, in its most recent decision requiring a standard of review analysis, the SCC failed to address the issue entirely. *Agraira v Canada (Public Safety and Emergency Preparedness)* involved an appeal of the Minister of Public Safety and Emergency Preparedness' decision that Mr. Agraira's admission into Canada was not in the "national interest" as a result of his sustained contact with the Libyan National Salvation Front — a terrorist organization according to Citizenship and Immigration Canada. Strictly speaking, the SCC's standard of review analysis ended at the first stage of the *Dunsmuir* analysis (i.e., whether the standard has been appropriately identified in previous jurisprudence, at paras 48 and 49) and the case can be distinguished on this basis. Unfortunately, the SCC felt compelled to buttress its conclusion with its blanket statement about administrative decision-makers and their "closely connected" statutes:

> [50] …Also, because such a decision involves the interpretation of the term "national interest" in s. 34(2), it may be said that it involves a decision maker "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para 54). This factor, too, confirms that the applicable standard is reasonableness.

The problem with this statement, from a separation of powers perspective at least, is that there is *always* some Minister responsible for a given statute. In the environmental and natural resources context, the MFO is responsible for several statutes, including the *Fisheries Act* and the *Oceans Act* SC 1996, c 31. The Minister of Environment (MoE) is responsible for well over a dozen statutes, including the *Canadian Environmental Protection Act,* SC 1999, c 33 and the new *Canadian Environmental Assessment Act,* SC 2012, c 19. The Minister of Transport (MoT) is responsible for the *Navigable Waters Protection Act*, RSC 1985, c N-22 and the recently passed but not yet in force *Navigation Protection Act* (part of last year's omnibus budget legislation).

Most of these statutes are accompanied by numerous regulations. Simply put, if the judiciary is to presume deference to the interpretations proposed by the Ministers responsible for these statutes in all but "exceptional" circumstances (*Alberta Teachers' Association, supra* at para 34), there would seem very little left of its role in maintaining the rule of law through statutory interpretation.

That governments — of all political stripes — cannot not be entrusted with this role has also been demonstrated numerous times throughout Canada's history, including most recently in another decision from the FCA: *Alberta Wilderness Association v Canada (Attorney General)* [*Sage-grouse*]. (Interested readers can find a clip of the Sage-grouse's famous mating ritual in a recent comment by the *National Post*'s Kelly McParland here. Ontario environmental lawyer Diane Saxe also recently blogged about the decision and its implications here).

This decision, which is primarily procedural in nature and part of a larger, multi-year legal saga over the fate of the Greater Sage-grouse in Western Canada, is worth noting for at least two reasons. The first is its substantive finding that, under what are known as the emergency protection provisions of SARA (section 80, which authorizes Cabinet to make an emergency order for the protection of a listed species upon the recommendation of a competent Minister), the MoE's decision to refuse to make a recommendation is reviewable (at paras 43 – 50). The second reason is the route by which the court arrived at this result. Pointing out the untenable consequences of the interpretation advanced by the MoE, Pelletier J.A. invoked what is perhaps still the most important Canadian decision on the role of the judiciary in maintaining the rule of law:

> [48] If the position asserted by the respondents is correct, it would have the effect of sheltering from review every refusal to make a recommendation for an emergency order. This cannot be so. The Minister's discretion to decline to make a recommendation to Cabinet must be exercised within the legal framework provided by the legislation. The authority for that proposition is at least as old as the seminal case of *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), at page 140:
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> > In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.
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> [Emphasis added]

That the Executive branch would try, as it did in *Killer Whale* and other cases, to claim the authority to render binding interpretations of the laws it has the responsibility to implement is hardly surprising; after all, "power is of an encroaching nature" (James Madison, *Federalist*

Papers No. 48). The positions advanced by the respondent Ministers in *Roncarelli*, *Killer Whale, Sage-grouse* and countless others are proof that such encroachment must be resisted.

At the same time, a re-affirmation of the judiciary's supervisory role in statutory interpretation should not be expected to dramatically alter outcomes in judicial review applications. For example, when *Agraira* was before the FCA, Pelletier JA applied the correctness standard to the interpretation of "national interest" but nevertheless upheld — as did the SCC subsequently — the Minister's decision as a reasonable exercise of his discretion (see 2011 FCA 103 at paras 32 – 33). This is not to suggest that insistence on correctness review is to insist on a distinction without a difference — both lawyers and judges have spilled too much ink arguing over the standard of review for there to be nothing at stake here — but that concerns about judicial interference in government decision-making need not be exaggerated.

Nor am I suggesting that the FCA's approach is without flaws. In *Takeda Canada Inc v Canada (Health)*, 2013 FCA 13, Stratas JA (dissenting) raised some legitimate questions about the basis upon which *Alberta's Teachers Union* has been distinguished (at paras 31 – 33), while in *Qin v Canada (Citizenship and Immigration)*, 2013 FC 147, Gleason J admitted to some difficulty in determining whether a visa officer fits within the parameters of *Killer Whale*, the *ratio* of which she described in much narrower terms: "a Minister cannot shield from curial review his or her interpretation of a law that binds the Minister to a certain course of action" (at footnote 1). Mainville JA's approach also seems to leave open the possibility that Parliament might, through express language, shelter the Executive's interpretations of law from rigorous review, which could still be contrary to the separation of powers.

Clearly, more analysis and judicial consideration is required. One possible solution may be to do away with overly broad presumptions in either direction — the problems with which were foreseen by the dissenting justices in *Alberta Teachers Union* (at paras 89 and 99 in particular) — and let the standard of review analysis do its job. Both the second and third factors (the nature of the tribunal and the nature of the question of law, respectively) seem particularly amenable to separation of powers considerations. Nevertheless, the FCA is to be credited for beginning to address what is presently a *lacuna* in Canadian judicial review theory. Notwithstanding its stated appreciation of the fundamental importance to the working of government "that all…parts play their proper role" and that "no one of them overstep its bounds" (*New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 389), the SCC's current approach to the standard of review allows just that.