October 4, 2017

A Proposal for Effective Legal Protection for Endangered Species in Alberta: Introducing the *Wildlife Species Protection and Recovery Act* (Alberta)

By: Shaun Fluker

Case Commented On: *Wildlife Species Protection and Recovery Act*, SA 2017, c W-?

I have followed law and policy on endangered species protection for nearly a decade, focusing primarily on Canada's federal *Species at Risk Act*, SC 2002 c 29 [SARA] and Alberta's *Wildlife Act*, RSA 2000 c W-10 and the policies enacted thereunder. From time to time, I have glanced into the Ontario *Endangered Species Act, 2007*, SO 2007, c 6 [Ontario ESA] and observed a selection of decisions by the Ontario Environmental Review Tribunal – for example its decisions concerning the threatened blanding's turtle. There are many who are working hard on the endangered species file, and some have enjoyed success in Federal Court obtaining rulings under SARA which are favourable towards protecting endangered species in Alberta and elsewhere. There is also an impressive amount of empirical research being conducted by scientists that sheds important light on the application of SARA. All of this is encouraging, but nevertheless I keep returning to an ABlawg post I wrote 7 years ago entitled Endangered species under Alberta's Wildlife Act: Effective legal protection? In that piece I noted meaningful and effective legal protection for endangered species is largely a provincial matter in Canada and Alberta's *Wildlife Act* does not provide effective legal protection for endangered species in this province. Nothing here has really changed since then. Enter the proposed *Wildlife Species Protection and Recovery Act* (Alberta).

Endangered species protection in Alberta still persists almost entirely as a matter of policy discretion administered behind closed doors in the form of terms and conditions placed on resource development permits and approvals issued by forestry officials, parks officials, and various administrative agencies such as the Alberta Energy Regulator and the Alberta Utilities Commission. While it is possible for this approach to result in effective legal protection for endangered species, it isn't very likely. Accordingly, during the Winter term of the 2016/2017 academic year I assigned a term project in my Law 634 Species and Spaces law class here at the University of Calgary to draft provincial legislation and fill this void. What was developed by the students in Law 634 formed the basis for the proposed *Wildlife Species Protection and Recovery Act* (Alberta) which is the subject of this post.

There are a number of general considerations which informed our draft of this proposed new legislation. The first one to mention is ***Transparency***. This Act goes above and beyond to force disclosure on officials responsible for endangered species protection, but perhaps most importantly on those decisions where officials choose not to follow a scientific assessment pertaining to a species at risk. The second one to mention is ***Accountability***. This Act purports to restore the accountability of officials to the public they serve by creating numerous opportunities for public participation in decision-making and providing for citizen suits. The third one to

mention is ***Predictability***. This Act imposes timelines for making decisions and is prescriptive in what those decisions must address, all in an effort to minimize surprises and give some measure of certainty to species advocates and industry.

As a final general consideration to note here, this Act attempts to carve politics out of the science on the endangered species file. The mixing of politics into science is arguably the most significant problem in what is Canada's most effective endangered species regime—the federal framework under SARA. Lots of good work is conducted federally on species assessment and recovery planning – sometimes in collaboration with provincial scientists, only to collect dust on the shelves as federal officials drag their feet on the listing process or fail to engage in meaningful action to implement recovery strategies or protect critical habitat. Indeed there is currently a private member's bill before Parliament that addresses some of this in SARA. The problem of good science collecting dust is magnified in Alberta where endangered species protection as a whole is governed by discretionary power in provincial officials. The crux of the matter is that effective protection and recovery of endangered species entails real limits on economic development, and when push comes to shove we favour economic development over saving an endangered species. The *Wildlife Species Protection and Recovery Act* (Alberta) allows economic development to trump species protection, but the legislation does so in a unique manner as is explained below.

Part 3 sets out the species assessment and designation process, which is conducted by a committee of scientists and based entirely on their research. The process begins with the establishment of a priority list for assessments in section 13. The priority list informs the development of species status reports in section 14 which produce a designation for a species as extinct, extirpated, endangered, threatened, healthy, or data deficient. The designation provided by the species status report becomes the legal designation for the species under section 16. The Act provides for no policy discretion in the designation decision. However, the Minister can direct the committee to review a designation under section 15, and similarly any interested person can petition the committee to review a designation. While the committee must act on the Minister's direction, the committee does have discretion on whether or not to act on a petition from an interested member of the public.

A species designated as endangered or threatened by the science committee is deemed to be on the Protected List and thus by operation of law comes within the protective measures of the Act unless the species is moved to the Non-Protected List under Part 5. This work is conducted by a policy committee whose members are appointed by the Minister. Part 5 allows for politics and economic development to trump science on species at risk and is reminiscent of the god squad under the US *Endangered Species Act*, but there are several procedural checks along the way. The policy committee acts on direction from the Minister or by petition from the public, and produces an assessment under sections 25 and 26 on whether an endangered or threatened species should be protected under the Act. This assessment is conducted by way of a public hearing, and the committee must consult with key stakeholders including the science committee and recovery team for the species. Another notable component is the provision of hearing rights to a wildlife guardian appointed for the impugned species under Part 4. In cases where the policy committee determines an endangered or threatened species should not be protected by the Act, the Minister may only move the species to the Non-Protected List on address before the

Legislature. So while the Act does allow for economic development to further the demise of a species known to be endangered or threatened, it does require us to be open and transparent about it.

Species on the Protected List are subject to recovery planning under Part 6 and receive the protections under Part 7. In particular, section 39 prohibits government officials from authorizing activity which may jeopardize an endangered or threatened species. This sort of provision is notably absent from endangered species legislation in Canada. In the absence of this prohibition, species advocates are left to prosecute individuals and companies whose activity contravenes no-take provisions but have few legal avenues to pursue officials who authorize such activity. The prospect of a regulatory prosecution by the Attorney General is slim, and thus prohibitions set out in endangered species legislation go largely under-utilized in Canada.

Part 8 establishes an administrative enforcement regime whose primary purpose is to facilitate species recovery and protection work by generating funding through enforcement orders issued against those persons who contravene the Act. The regime also places an emphasis on encouraging compliance rather than the traditional model of deterrence backed with sanctions. Sections 54 to 56 add important backstops to enforcement and compliance with provisions that allow for an interested person to petition for an investigation into non-compliance with the Act and providing a guardian with a right of action for civil damages or injunctive relief.

The *Wildlife Species Protection and Recovery Act* (Alberta) was drafted with an eye on learning from experiences which have plagued the implementation of SARA and the Ontario ESA—the Canadian High Court of Environmental Justice recently remarked on some of these problems in *Wildlands League v Ontario (Natural Resources and Forestry)*. Much of the legislation is focused on procedure to avoid these problems rather than substantive rules. This is largely an acknowledgement that it will take more than legislation to get us to the point where we value the protection and recovery of endangered species over economic development. In the meantime, we can at least insert some transparency, accountability, and predictability into the endangered species file.

This post may be cited as: Shaun Fluker "A Proposal for Effective Legal Protection for Endangered Species in Alberta: Introducing the *Wildlife Species Protection and Recovery Act* (Alberta)" (4 October, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/10/Blog_SF_Wildlife_Species_Protection_and_Recovery_Act.pdf