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Sentencing Lake Louise Ski Resort Under the Species at Risk Act and A Comment on the Federal Environmental Damages Fund

By: Shaun Fluker

Case Commented On: *R v The Lake Louise Ski Area Ltd*, 2018 ABPC 280 (CanLII)

In December 2017, the Lake Louise Ski Resort pled guilty to unlawfully cutting down and damaging 148 trees without a permit during the summer of 2013 in the Ptarmigan Chutes area of the resort. Some of the trees cut were whitebark pines, a species listed as endangered under the federal *Species at Risk Act*, SC 2002, c 29 (*SARA*). Section 32 of *SARA* prohibits any conduct that harms the endangered whitebark pines and section 97 makes it an offence to contravene this prohibition. Most of the trees cut at the resort were not from an endangered species, but were nonetheless cut down without authorization from Parks Canada, and thus Lake Louise also contravened section 10 of the *National Parks General Regulations*, SOR/78-213, which is an offence under section 24(2) of the *Canada National Parks Act*, SC 2000, c 32 (*Parks Act*). On November 30, 2018 Judge Heather Lamoureux of the Provincial Court of Alberta sentenced Lake Louise to a $1.6 million penalty under *SARA* for cutting the whitebark pines, and a $500,000 penalty under the *Parks Act* for unlawful cutting of the other trees, for a total penalty of $2.1 million which will be directed into the federal Environmental Damages Fund. Lake Louise has since filed an appeal with the Court of Queen's Bench seeking to have this total penalty reduced to $200,000.

The Crown and Lake Louise entered an agreed statement of facts as an exhibit to the sentencing hearing, and Judge Lamoureux also received testimony from several expert and lay witnesses. A summary of this evidence and opinion is set out in paragraphs 3 to 29 of the decision. Notable points in this summary include the following:

- Lake Louise Ski Resort operates a commercial ski operation in Banff National Park on leased lands located near the village of Lake Louise.

- Lake Louise is subject to the operating rules in its lease and the *National Parks General Regulations*, and these rules prohibit destruction of flora without the authorization of Parks Canada. As well, harm to the endangered whitebark pine is prohibited without a section 73 permit under *SARA*.

- Parks Canada is precluded under the *Canada Environmental Assessment Act 2012*, SC 2012, c 19, s 52 from authorizing any activity (e.g. destruction of flora) that is likely to cause significant adverse environmental effects, and Parks Canada testified that, if the ski resort had applied for authorization or a permit for the cutting, the agency would not have issued a permit for the destruction of whitebark pine under the *Parks Act* or *SARA*.

- Whitebark pine is a tree species located in the high elevations of the subalpine of the Rocky Mountains. Individual trees are known to survive for up to 1000 years. It is considered a keystone species for the subalpine ecosystem, and its seeds are a food source for numerous other species. The depletion of whitebark pine is thought to have significant impacts for the subalpine ecosystem generally. Approximately 56% of the entire global population of whitebark pine is located in the western Canadian mountain ranges. The number of mature trees in Canada is estimated at 200 million. Whitebark pine matures slowly, and only begins to produce cones after approximately 30 to 50 years of age. Each cone contains about 75 seeds. The Clark's Nutcracker is thought to be the only disperser of whitebark pine seeds, and thus the bird species has co-evolved with the tree. Threats to the whitebark pine include disease, mountain pine beetle, wildfire suppression, and climate change. More information on the species can be found in the 2010 COSEWIC Status Report.

- Whitebark pine was listed as endangered under *SARA* in 2012. In June 2013, Parks Canada held information sessions with Lake Louise officials about legal protection for the endangered trees and the need for extra precautions at the resort. Parks Canada testified that it had identified the whitebark pine as a species of special concern even prior to its listing under *SARA* and has been working to prevent the decline of the trees in the mountain parks since 1995.

- In August 2013 maintenance crews at the resort cut down the trees during a 'brushing' operation in the Ptarmigan Chutes area. 'Brushing' is a term used to describe the removal of brush along a ski run to minimize hazard to skiers in the winter. The maintenance supervisor with the resort who oversaw this brushing operation testified that he did not receive any education or training from the resort about the significance of the whitebark pine or its endangered status.

- In August 2014, Parks Canada officials were on site to assess a new hiking trail along Ptarmigan Ridge and noted that whitebark pine had been cut. Parks Canada testified that a single whitebark pine tree can have multiple stems capable of producing cones. The evidence here was that a total of 58 stems were lost in this incident. Moreover, none of the stems were diseased or otherwise unhealthy.

- Subsequent to this incident, the ski resort has developed and implemented a program on education and training for species at risk, including whitebark pines.

The imposition of a sentence for an offence rests in the discretion of the trial judge, who is charged with determining a sanction which is proportionate to the gravity of the offence and the culpability of the offender. Sections 718.2 and 718.21 of the *Criminal Code*, RSC 1985, c C-46 set out factors which must be considered by a sentencing court for a criminal offence. These factors in the *Criminal Code* are sometimes also referenced by other legislation in the context of sentencing for regulatory offences, and this is the case for offences under the *Parks Act* (see section 27.7). In addition to these factors, section 102 of *SARA* sets out considerations which must be taken into account in the sentencing for an offence under that legislation:

> 102 A court that imposes a sentence shall take into account, in addition to any other principles that it is required to consider, the following factors:
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> (a) the harm or risk of harm caused by the commission of the offence;
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> (b) whether the offender was found to have committed the offence intentionally, recklessly or inadvertently;
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> (c) whether the offender was found by the court to have been negligent or incompetent or to have shown a lack of concern with respect to the commission of the offence;
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> (d) any property, benefit or advantage received or receivable by the offender to which, but for the commission of the offence, the offender would not have been entitled;
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> (e) any evidence from which the court may reasonably conclude that the offender has a history of non-compliance with legislation designed to protect wildlife species; and
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> (f) all available sanctions that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.

Canadian courts also consider environmental sentencing to be unique from sentencing for other offences. A leading authority for this principle is *R v Terroco Industries Limited*, 2005 ABCA 141 (CanLII). The reasons for this unique treatment include the following: (1) prosecuting an environmental offence can involve an inordinate amount of expert evidence and public resources; (2) measuring or quantifying the amount of environmental harm caused by an offence can be difficult; (3) where the offender is a corporation, there is risk that a monetary penalty may be internalized as merely a cost of doing business for wealthy corporations. As well, most environmental offences are strict liability offences in which a conviction may follow from varying degrees of negligent conduct. Because of these unique characteristics, relevant considerations in an environmental sentencing include: (1) degree of culpability of the offender; (2) prior record of the offender; (3) acceptance of responsibility and remorse by the offender; (4) the type and degree of environmental harm as well as the cost to remediate the damage; (5) specific and general deterrence (for a discussion of these five considerations, see *Terroco* at paras 34 – 64).

Judge Lamoureux notes here (at paras 35 and 42) that both *SARA* and the *Parks Act* allow for cumulative penalties for offences that involve harm to more than one individual animal or plant. Given the number of individual trees unlawfully cut in this case, she notes the maximum cumulative sentence for the *SARA* offence would be $17.4 million (at para 36) and $25 million for the *Parks Act* offence (at para 44). This discussion is relevant because Judge Lamoureux rejects the submission by Lake Louise that the brushing incident should be considered as one event (at para 52).

Judge Lamoureux agrees with the Crown's submission that a penalty of $27,500 for each destroyed whitebark pine stem is appropriate, for a cumulative penalty of $1.6 million on the *SARA* offence (at paras 57 and 64). For comparative purposes, Judge Lamoureux observes that the Crown

provided an unreported New Brunswick decision that imposed a sentence of $25,000 under *SARA* for an offence involving the death of individual threatened birds. She also accepts the Crown's submission that a $500,000 penalty is a fit and proper sentence for the *Parks Act* offence (at paras 58 and 64). Judge Lamoureux cites several aggravating factors in support of this rather large total sentence of $2.1 million, including the following (at para 60):

- The offence involved the killing of an endangered species listed under SARA in a national park which is also a part of a designated UNESCO World Heritage Site.

- The ski resort and its employees were reckless in their disregard for the need to protect whitebark pines and their failure to adhere to warnings and precautions given by Parks Canada. The cutting of whitebark pine was the result of systematic deficiencies in the corporate operations of a commercial ski resort operating in a national park.

- The ski resort failed to seek a permit to cut the whitebark pine or consider alternative measures to address the safety concerns associated with the brushing.

- 58 healthy reproductive whitebark pine stems were destroyed, 19 of which were more than 40 years old and could be expected to produce an additional 95 trees. The significance of this loss is magnified for an endangered and keystone species, potentially undermining its survival along with other components of the ecosystem.

- While the ski resort entered a guilty plea, it was not until the first day of the trial.

These are the sort of aggravating factors listed by the Court of Appeal in *Terroco*, noted above. In particular, the findings of reckless disregard speak to a high degree of culpability which *Terroco* notes as being the primary consideration in an environmental sentence (*Terroco* at para 35). As well, the fact that the harm occurred to an endangered species in a national park where environmental protection is supposed to be paramount supports a penalty which strongly deters such acts from occurring in the future.

Will Lake Louise be successful in its appeal of this sentence? Judge Lamoureux's sentence is entitled to deference, as noted in *Terroco* (at para 20):

> The general rule is that absent an error in principle, a failure to consider a relevant factor, or overemphasis of a relevant factor, a court of appeal should only intervene to vary a sentence imposed by a trial judge if the sentence is demonstrably unfit: *R. v. M.(C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500. The approach taken is one of deference. The sentence should not be modified simply because the appellate court feels that a different order should have been made. The sentencing order must be demonstrably unfit in the sense that it is clearly excessive or inadequate by falling outside the acceptable range of orders for the crime and the offender.

The issue on appeal will be whether this $2.1 million sentence is disproportionate or otherwise demonstrably unfit for the offence of cutting down 148 trees in a national park, 38 of which were protected as an endangered species under *SARA*. Considerations will include whether the

cumulative approach of calculating fines for each individual tree (or stem) led to an excessive sentence, and also whether the loss of 38 endangered trees (58 stems) is sufficiently significant to warrant such a high penalty in light of the fact that there are approximately 200 million whitebark pines in Canada.

The culpability of Lake Louise found by Judge Lamoureux appears seems to have some relation to the finding of disregard for the precautionary advice given by Parks Canada regarding the protection of whitebark pines. But it is possible that these meetings were received and interpreted by Lake Louise officials in a context much different from what is suggested in this decision. While Parks Canada makes out as a champion of environmental protection here, there are several reasons to question this view. Those who have read my work on ecological integrity will know that on many occasions Parks Canada has approved development in the parks at the expense of ecological integrity and habitat for endangered species (see e.g. Chronicles of the Canadian High Court of Environmental Justice: *Canadian Parks and Wilderness Society v Maligne Tours*). While it is true that Parks Canada is precluded under the *Canada Environmental Assessment Act, 2012* from authorizing any activity that is likely to cause significant adverse environmental effects, the agency generally avoids this problem by not characterizing development in the parks as being likely to cause significant adverse environmental effects – see here where we reported on ABlawg that Parks Canada determined a total of 1533 projects were unlikely to cause significant adverse environmental effects under section 67 between January 1, 2013 and October 30, 2016. And lastly, it is somewhat surprising to learn that Parks Canada had identified the whitebark pine as a species of special concern since 1995 because I could not find even one reference to the tree in the 2010 Banff National Park Management Plan. Moreover, the Lake Louise Ski Resort Site Guidelines approved by Parks Canada in 2015 contemplate future expansion of ski and summer operations at the resort into new areas inhabited by whitebark pines. So perhaps the failure by Lake Louise to heed the warnings from Parks Canada should be less of an aggravating factor in determining the overall sentence because the agency does have a history of favouring its 'visitor experience' mandate over that of environmental protection in the mountain parks.

My final word on this decision pertains to the direction by Judge Lamoureux that 95% of the fine imposed for the *SARA* offence be paid into the federal Environmental Damages Fund for the purpose of the protection of endangered species in Canada, with priority given to mountain forest ecosystems (at para 64). One of the key omnibus amendments to federal environmental legislation implemented in 2009 by the *Environmental Enforcement Act*, SC 2009, c 14 was to add provisions that direct fines levied under federal environmental statutes to the Environmental Damages Fund (see e.g. section 294.1 of the *Canadian Environmental Protection Act*, SC 1999, c 33 (*CEPA*)). Not all federal environmental legislation has these provisions, but even in statutes without express provisions there is typically discretionary power for a sentencing court to make the direction. *SARA* is one of the statutes which does not have the explicit direction. In this case, Judge Lamoureux relies on section 105(k) of *SARA* to direct the fine on the *SARA* offence into the Fund. Section 105(k) simply states that the court may issue an order requiring the offender to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences. Section 29.1 of the *Parks Act* directs the fine for that offence into the Fund.

Somewhat surprisingly, the Environmental Damages Fund has no legislated basis. The Fund appears to be essentially an internal account administered by Environmental Canada. The Fund webpage does, however, provide some information on its purpose and on how the money is spent. The overall purpose of the Fund is reported as supporting projects related to environmental restoration and conservation. Environment Canada solicits applications from "eligible" applicants for projects that meet prescribed criteria. "Eligible" applicants are listed as including non-governmental organizations, universities and academic institutions, Indigenous organizations, and non-federal governments. "Ineligible" applicants are listed as including individuals, businesses, and federal agencies. The exclusion of federal agencies is presumably to avoid the perception that the federal Crown seeks to profit from regulatory prosecutions. Likewise, the webpage states that an offender which has paid into the Fund is not eligible to apply to receive those funds as a project recipient. The webpage provides a short list of criteria for eligible projects, and these criteria appear to favour projects focused on habitat restoration, research in natural sciences related to environmental restoration or protection, and education (except for curriculum development). Projects explicitly deemed ineligible include those involving environmental advocacy or those which are proposed for outside of Canada. The webpage states that applications for funding are solicited at least twice per year, and that these applications are assessed by Environmental Canada officials.

A database of information on funded projects since 2015 is available here, and the information is sortable by various units including recipient, type of project, funding amount, and location. There is currently a total of 71 funded projects listed on the page. The largest amount of funding directed to a single project is reported at $1.6 million. The total amount of funds distributed on the list is just under $15 million. The median funding amount for a single project is $82,640. The distribution of funds and projects does appear to be uneven across the provinces and territories. Quebec, for example, is home to 19 projects for a total commitment of funds at approximately $7.3 million. The next closest province is British Columbia which has received a total of approximately $3.2 million for 13 projects. Ontario is third in total funding with just under $1 million for 14 projects.

The webpage notes that funding priority is given to projects that propose to engage in restoration or conservation work in the same geographic area where the offence occurred. Related to this, some legislation which references the Fund also provides for the ability of a sentencing court to recommend that the money be specifically targeted at a particular type of project or beneficiary (as Judge Lamoureux has done with this sentence; see above). Again, for example, see section 294.1 of *CEPA* for an illustration of this power.

It is noteworthy, however, that while there have been many federal prosecutions in Alberta resulting in large fines directed into the Fund, relatively few projects have been awarded money by the Fund in this province. For example, in 2017 alone, there were successful Alberta-based federal prosecutions resulting in a $600,000 fine against an Edmonton-based detergent manufacturer, a $1 million fine against Sherritt International, and a $2.5 million fine against CN Rail (I commented on the provincial sentence against CN Rail here). More than $4 million in fines were directed into the Fund just for these three convictions, but the project database lists only 5 projects conducted in Alberta since 2015 with total funding of just under $400,000. The discrepancy between the amount of fines directed into the Fund from Alberta prosecutions compared with the relatively low number of projects and funding approved for distribution in Alberta numbers places some doubt on the extent to which monies from the Fund are spent in the same geographic area where the offence occurred.

Restoration or enhancement of aquatic environments or fish habitat make up the majority of funded projects in the list. By my count, 48 of the 71 projects currently listed involve this type of work, which suggests that Environment Canada gives priority to funding these sorts of projects. This, of course, could also be one reason why the provinces with an abundance of freshwater like Quebec, Ontario and BC are the most common location for successful Fund applications. That being said, it is not the case that the water-challenged prairie provinces only receive funding for terrestrial projects. Interestingly, the eight listed projects located in Alberta and Saskatchewan also involve aquatics or fisheries work. Quebec and Ontario also dominate the number of funded projects focused on terrestrial, migratory bird, or pollution work. I'm not trying to stoke any silly talk of western alienation with these observations, and maybe it is simply the case that fewer applications for funding come from Alberta (we don't know this information, or at least it isn't readily available on the Fund webpage), but nonetheless it does appear like the Fund generates a lot more money from Alberta than it distributes back into this province.

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