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Misunderstanding Cooperative Federalism: Environment and Climate Change Canada Unreasonably Failed to Protect Migratory Bird Habitat

By: Drew Yewchuk

Case Commented on: *Western Canada Wilderness Committee v Canada (Environment and Climate Change)*, 2024 FC 167 (CanLII)

Western Canada Wilderness Committee v Canada (Environment and Climate Change), 2024 FC 167 (CanLII) is a recent decision of the Federal Court rejecting the federal Minister of Environment and Climate Change's restrictive interpretation of migratory bird habitat under the *Species at Risk Act*, SC 2002, c 29 (*SARA*). The decision also offers some interesting notes about co-operative federalism in the environmental context.

First, as a quick summary for non-lawyers interested in what this means for the environment, the Court found that the federal executive branch (the Minister of Environment and Climate Change Canada) had taken an unreasonably narrow view of its obligation to protect the habitat of endangered and threatened species of migratory birds, and ordered the Minister to develop an approach that would be more protective of migratory bird habitat as required by *SARA*. The new approach will impact around 25 species of birds across the country. Many of these have habitat in Alberta, including the Bank Swallow, Barn Swallow, Black Swift, Bobolink, Canada Warbler, Chestnut-collared Longspur, Eskimo Curlew (although it may be extinct), Lark Bunting, Loggerhead Shrike, Thick-billed Longspur (also called McCown's Longspur), Mountain Plover, Piping Plover, Sage Thrasher, Sprague's Pipit, and Whooping Crane.

As a final introductory note, readers should note that this post is about the 2024 decision *Western Canada Wilderness Committee v Canada (Environment and Climate Change)*, 2024 FC 167 and *not* the 2014 decision *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 (CanLII). In addition to the similar names, both are important decisions on critical habitat under the *SARA*, and both relate to the Marbled Murrelet, so the chance of confusion is high.

Empire Treaties, Federal Jurisdiction, and Implementing Legislation

I set out the statutory background to the decision in advance because it is convoluted, covering an old international treaty, an obscure source of federal jurisdiction, and two interrelated federal statutes.

The migratory birds convention was initially agreed to in 1916 as an agreement between the United States and the British Empire (the 1916 convention text refers to "His Britannic Majesty" and notes he was also "Emperor of India"). This protection of migratory birds in 1916 can is a bit odd because

it is 50 years before environmental protection developed into a major political issue in late 1960's and early 1970's. The convention reflected the earlier understanding of species protection, aimed at preventing either country from overconsuming or destroying migratory game bird populations while the birds were on their side of the border as a kind of resource sharing agreement.

This imperial history means that migratory birds are the subject of federal government jurisdiction as an "empire" treaty under section 132 of *The Constitution Act, 1867*, 30 & 31 Vict, c 3, which reads:

> **Treaty Obligations**
> **132** The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Section 132 has been interpreted to apply only to treaties made *before* Canada acquired self-government in treaty making – *new treaties* do not create new federal jurisdiction over their subject matter (see Armand Claude de Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53:4 McGill L J 573 at 595-596). In 1994, the migratory birds convention was amended by agreement between the United States and Canada to better account for Aboriginal and treaty rights and sustainability concerns but the federal jurisdiction is locked in place by the initial treaty (the issue was recently mentioned, in passing in *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII), see para 201).

The *Migratory Birds Convention Act, 1994*, SC 1994, c 22 is the federal statute that implements some parts of the amended migratory birds convention in Canadian law, but it primarily creates prohibitions and penalties, along with allowing the establishment of migratory bird sanctuaries through the *Migratory Bird Sanctuary Regulations*, CRC, c 1036 . But the protection for migratory birds at risk outside of those sanctuaries is done through *SARA*, particularly the critical habitat protections in sections 32 (prohibition on killing, harming, harassing, etc. of species), 33 (prohibition on damaging or destroying residences of wildlife species), and 58 (prohibition on destruction of critical habitat).

Case Summary

Western Canada Wilderness Committee v Canada (Environment and Climate Change), 2024 FC 167 is the result of cause lawyering, specifically public interest environmental litigation filed in April 2022 by two groups (the Western Canada Wilderness Committee and the Sierra Club of British Columbia Foundation) with Ecojustice as counsel. The litigation therefore considered both a specific issue and a question with a broader policy impact. The litigation challenged the legality of the 2022 *Protection Statement for the habitat to which the Migratory Birds Convention Act, 1994 applies for migratory birds listed under the Species at Risk Act* (the Protection Statement), issued by the Minister of Environment and Climate Change Canada under section 58(5.2) of *SARA*, as not being consistent with the requirements of *SARA* or justifiable in the factual context (at paras 1-6).

The litigation focused on the example of the Marbled Murrelet, a species of small seabird found on the west coast of North America and concentrated on the coasts of B.C. and Alaska. The Marbled Murrelet, unusually for a seabird, nests in the upper canopy of old growth trees. However, the Protection Statement applies to all species protected by the *Migratory Birds Convention Act, 1994* and listed as endangered, threatened, or extirpated under *SARA*.

I will summarize section 58(5.2) instead of reproducing it because the byzantine federal jurisdiction at play in *SARA* makes section 58(5.2) nearly unintelligible without the full context of sections 56 through 61. In short, these sections set out protections for critical habitat, then exceptions, and then exceptions to exceptions, to match the federal government's understanding of their jurisdiction: protection on federal lands, but not provincial lands, except for aquatic species and migratory birds and only where ordered. Section 58(5.2) requires the Minister to post a statement explaining how newly identified critical habitat of migratory birds is already legally protected where the Minister does not recommend new protections for "critical habitat" as identified under *SARA*.

The court determined the single over-arching issue was whether the Protection Statement and the internal memoranda explaining it was reasonable (at para 26). This is true, but it is a cryptic phrasing because the word "reasonable" in administrative law is legal jargon with a highly specialized meaning in administrative law (see paras 44-47, see also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) at paras 73-142). Within the issue, the applicant raised two questions:

1. Was the Minister's interpretation of subsection 58(5.2) unreasonably narrow?
2. Is the Protection Statement insufficiently justified and intelligible in relation to (i) certain submissions that were made to the Minister, or (ii) the relevant factual constraints?

(at para 27)

On the first question, Chief Justice Crampton concluded the Protection Statement took an unreasonably narrow interpretation of *SARA* subsection 58(5.2), because the Minister interpreted the section as permitting the Minister to protect only portions of critical habitat rather than the entire critical habitat (at paras 59-61) and interpreted "habitat" in the context of the *Migratory Birds Convention Act, 1994* to mean only "nests" (at para 63-65). Justice Crampton found interpreting the term "habitat" to mean only "nests" was inconsistent with the overall statutory scheme, as it would make *SARA* subsection 58(5.2) redundant because section 33 of *SARA* provides protections for "residences", (at paras 85-99), resulting in a violation of the presumption against tautology (at para 119). Justice Crampton found the term "habitat" in *SARA* was a separate and broader concept (at paras 100-111), concluding that *SARA*'s "legislative scheme constrains the range of reasonable interpretations of subsection 58(5.2) available to the Minister. An interpretation that limits the protection of critical habitat contemplated by that provision to 'nests' is not within that range" (at para 111).

On the second question, Justice Crampton found that the Minister's decision could not be justified on the record, as the evidence placed before the Minister by both the Applicants and the federal department showed that locating individual nests was so difficult that it was not a recommended

approach (at paras 138-140). Protecting only nests was not a tenable approach to protecting "habitat" in light of the factual constraint that nests could not be practically found.

The Protection Statement was "set aside and remitted for reconsideration in accordance with these reasons" (at para 143). The Applicants also sought declaratory relief, but Justice Crampton declined to grant declaratory relief on the basis that setting aside the Protection Statement was an adequate alternate remedy (at paras 144-146). Costs (always a concern for those engaging in public interest litigation) of $8,900 were ordered for the successful party, reflecting an agreement between the parties made after the hearing but prior to the decision. (at paras 147-148).

Commentary: Cooperative Federalism and Alternative Remedies

First, the decision did "not engage issues pertaining to the division of powers between the federal government and the provinces" (at para 113). But the division of powers was discussed because the Minister's unlawfully minimal interpretation of *SARA* was based on a misguided view of cooperative federalism (at para 50, 112). Justice Crampton wrote that:

> …the principle of cooperative federalism cannot be invoked to read down a statutory provision to the point that it is without utility, or is of such limited utility as to frustrate the valid exercise of Parliament's authority. Similarly, that principle cannot be invoked to render reasonable an interpretation of a statute that is inconsistent with a plain reading of the relevant provision(s), and the statutory scheme. This is particularly so where the relevant province has failed to avail itself of opportunities to take protective action in an area of joint responsibility… (at para 117)

The scheme of *SARA*, and species at risk in Canada, have long been the victim of the approach to cooperative federalism exemplified by the Minister's impugned decision, where instead of cooperating to protect species at risk, the federal and provincial governments have cooperated on plans to *not* protect species at risk. The Marbled Murrelet is only one example of the federal government declining to protect a species at risk even after the province has also declined to do so (at para 10).

However, because the decision was not specifically on division of powers, federal action (which the executive branch is required to take by *SARA*) may lead to challenges to the federal jurisdiction over migratory bird habitat under 'empire' treaties from impacted provinces. But readers should note that migratory bird habitat protection was placed into *SARA* partially on the basis of a legal opinion of the-then recently retired Justice Gerard La Forest that migratory birds habitat was within core federal jurisdiction (an opinion noted by Justice Crampton at para 84).

The confusing division of jurisdiction over the environment in Canada has been an obstacle to effective environmental protection in Canada for almost a century now, and in my view, it appears to be only getting more complex. Courts are obliged to respect the constitution and to carry out the interpretive repair work to keep it running, but legal academics are free to draw attention to the 1867 Constitution's failure to assign environmental protection to either provincial or federal governments as a major obstacle to Canadian environmental protection not intended or even contemplated by any of the drafters. The environment is far more important than the out of date

and ramshackle distribution of legislative powers set up in 1867, which are not a "carefully calibrated division of powers between the federal and provincial governments" (*Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 (CanLII) at para 5), but a weird historical compromise designed for a different century.

Second, the decision contains an error relating to the remedy. The court declined to grant declaratory relief on the basis of the adequate alternative remedy principle, citing *Ewert v Canada*, 2018 SCC 30 (CanLII), at para 83. But this is a misreading of *Ewert*, where the court was discussing the availability of an alternative grievance mechanism to challenge the decision, not a different 'remedy'. I previously wrote about this misunderstanding of the adequate alternative remedy principle back in 2020. The purpose of the 'adequate alternative remedy principle' is to prevent parties from skipping administrative review bodies and proceeding directly to judicial review. The court's overly literal reading of the name of the adequate alternative remedy principle means that declaratory relief was rejected on an error of law.

The remedy has another significant problem: it does not specify *when* the Minister must issue a new protection statement (or protection statements, as *SARA* subsection 58(5.2) intended one for each impacted species, not a single statement for all impacted species). In the absence of a timeline, or keeping the litigation in case management for further consideration, my prediction is that the Minister will continue with the *SARA* tradition of excessive jurisdictional caution, and engage in lengthy negotiations with the provinces that delays the protection urgently needed by species at risk.

To conclude, the new protection statement (or statements) for migratory birds the Minister must produce will be an issue worth its own post. So expect to hear more on this issue.

This post may be cited as: Drew Yewchuk, "Misunderstanding Cooperative Federalism: Environment and Climate Change Canada Unreasonably Failed to Protect Migratory Bird Habitat" (19 February 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/02/Blog_DY_Migratory_Bird_Habitat.pdf