Appeal court upholds exemptions under ESA

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The Ontario Court of Appeal has upheld exemptions for industrial activities under the *Endangered Species Act, 2007*.

The validity of a regulation made under the *Endangered Species Act, 2007* (the "ESA") — which regulation grants certain blanket exemptions to the strict prohibitions in the ESA — was recently challenged. This challenge afforded the Court of Appeal for Ontario the opportunity to consider the purpose and scope of the ESA.

Facts

In *Wildlands League v. Ontario (Lieutenant Governor in Council)*, two not-for-profit environmental groups — the Wildlands League and the Federation of Ontario Naturalists — argued that the Ministry of Natural Resources and Forestry (the "Ministry"), which administers the ESA, was attempting to "get out of the business of issuing permits" by introducing a regulation which would provide exemptions for industrial activities, subject only to compliance with certain conditions.

The *ESA*

The stated purposes of the ESA are: to identify species at risk ("SAR"), to protect them and their habitats, and to promote their recovery and stewardship. The preamble to the ESA states that the protection of SAR is to be done "with appropriate regard to social, economic and cultural considerations," and speaks of the need to protect SAR for future generations.

While the ESA contains general prohibitions against (among other things) the killing and capture of SAR and damage and destruction of their habitats, it also allows for certain exceptions to these prohibitions through: permits (s. 17); stewardship agreements with the Ministry (s. 16); and by regulation (s. 55(1)(b)).

The Regulation

The regulation at issue in this matter – O.Reg. 176/13 (the "Regulation") – was made by the Lieutenant Governor in Council under this section of the ESA.

Prior to the introduction of the Regulation, the ESA's prohibitions could, generally, only be avoided through permits applied for through the Ministry.

The Regulation provides for 19 exemptions from the ESA's prohibitions, including 14 activity-based exemptions, subject to compliance with prescribed conditions.

Generally, the conditions that must be met to satisfy the exemption include: the precise scoping of intended industrial activities, the preparation of mitigation plans, and the monitoring and recording of the effectiveness of the steps taken to minimize adverse effects on the SAR.

Explanatory Note

In the context of promulgating the Regulation, the Minister had issued an Explanatory Note to provide summary and context for the Regulation, and to demonstrate compliance with the condition precedent requirement.

The Explanatory Note provided an explanation for the various conditions underlying the exemptions and the rationale for the scope of activities covered by the exemption.

The Explanatory Note concluded with the following opinion:

> Having considered the detailed provisions of the proposed regulation with respect to the requirements of section 57(1) of the ESA, MNR Species at Risk Branch advises the Minister that it is our opinion that the effect of the proposed regulation is not likely to jeopardize the survival of the affected endangered or threatened species in Ontario or to have any other significant adverse effect on these species at risk.

The challenge

The Appellants challenged the *vires* of the Regulation on two grounds. First, they argued that a mandatory condition precedent under the ESA requiring the Minister to determine whether the Regulation was likely to jeopardize the survival of each affected SAR was not met.

Second, they contended that the purpose of the Regulation, which was to save government and industry time and money, was inconsistent with the protection of SAR under the ESA.

Court of Appeal

The Court of Appeal agreed with the Divisional Court ruling that the Regulation was not *ultra vires* because of the failure to meet the condition precedent. The Court of Appeal held that the Regulation did not conflict with the objectives of the ESA, although it arrived at this conclusion through a slightly different analysis.

With regard to the statutory condition precedent issue, the Appellants argued that the Minister was required to consider the effect of the proposed Regulation on *each* SAR and failed to do so. As such, the Minister's determination was based on an incorrect principle or was unreasonable.

Good faith determination

Recognizing that the case was unique (in that it involved the judicial review of a Regulation where a statutory condition precedent required an opinion to be formed as to the existence of certain facts), the Court found that it was beyond the scope of judicial review to assess whether the Minister's determination was objectively correct or reasonable.

As long as the determination was made in good faith and based on the factors specified in the enabling statute

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— in this case, the ESA — the determination will have satisfied the condition precedent. The Minister's Explanatory Note was evidence that the Minister had considered the appropriate factors in making his determination.

Qualified protection

The Court also disagreed with the Appellants' argument that the Regulation was inconsistent with the *ESA*'s purpose of protecting SAR. The Court found that the ESA is concerned with balancing the rights of SAR in the context of social and economic realities and that the protection to SAR was effectively qualified:

> While the *ESA* is directed toward the protection of SAR, the protection afforded by the Act to individual species members and their habitats is not absolute. The scheme or system is to provide a presumption of protection with tools to address, among other things, social and economic conditions. The tools ... have specific criteria and conditions for their operation. The statute recognizes that the protection of SAR takes place in the context of human activities. The Act therefore promotes its objects of protecting SAR and their habitats through a scheme that necessarily has regard to these activities.

Significance

The Regulation simplifies the approval processes necessary for landowners, municipalities and industries (especially in forestry, oil and gas and mining) to engage in activities that would otherwise have required formal permits from the Ministry.

On the other hand, and in the same vein as the Appellants' arguments, the decision is viewed by many environmental groups as eroding the protections afforded by the ESA. The Appellants have applied for leave to appeal to the Supreme Court of Canada but at the time that this case comment was written, the Supreme Court had not taken a decision on the application.

This case has piqued the interest of industries and environmentalists alike. A novel case, it raises the rare issue of judicial review of a regulation where a statutory condition precedent requires an opinion to be formed as to the existence of certain facts.

Balancing act

The Regulation also involves an important balancing of rights with far-reaching consequences. Industries and environmentalists alike will undoubtedly pay close attention to whether the Supreme Court of Canada grants leave to appeal this decision.

In the meantime, the purpose of the *ESA* has been expressly qualified: while it protects SAR, it must balance the rights of SAR in the context of social and economic realities.

REFERENCES: *Endangered Species Act, 2007*, S.O. 2007, c.6; *Wildlands League v. Ontario (Lieutenant Governor in Council)*, 2016 ONCA 741, 2016 CarswellOnt 15948, 2 C.E.L.R. (4th) 217, 402 D.L.R. (4th) 738 (Ont. C.A.).

TECHNOLOGY LAW

Implied consent under privacy law reconsidered

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The Supreme Court of Canada found implied consent under PIPEDA to the disclosure of a mortgage discharge statement in the context of a writ of seizure and sale.

The federal private sector privacy regime operates on a consent basis. Unless an exception is applicable, consent is needed to collect, use or disclose the personal information of another. That consent can be express or implied.

In *Royal Bank of Canada v. Trang*, the Supreme Court of Canada took a practical and pragmatic approach to implied consent under the federal private sector privacy law, *Personal Information Protection and Electronic Documents Act* ("PIPEDA").

Facts

The plaintiff, Royal Bank of Canada ("RBC"), loaned the Trangs about $35,000. The Trangs defaulted on the loan and RBC obtained a judgment against them. The Trangs own property in Toronto and Scotiabank holds the first mortgage on the property.

To collect on its judgment, RBC filed a writ of seizure and sale with the sheriff in Toronto. That writ permits the sheriff to sell the Trangs' property.

The sheriff refused to sell the property without first obtaining a mortgage discharge statement from Scotiabank. While RBC requested the mortgage discharge statement, Scotiabank refused to provide it on the basis that PIPEDA precluded it from doing so without the Trangs' consent.

Prior decisions

RBC sought an order compelling Scotiabank to produce the mortgage

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