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# Chronicles of the Canadian High Court of Environmental Justice: *Wildlands League v Ontario (Natural Resources and Forestry)*

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**Case Commented On:** *Wildlands League v Ontario (Natural Resources and Forestry*), 2016 ONCA 741 (CanLII) (leave denied, [2016] SCCA No 549)

In a decision issued May 4, 2017 the Supreme Court of Canada denied the Wildlands League and Federation of Ontario Naturalists leave to appeal a decision of the Ontario Court of Appeal dismissing their application for judicial review on the vires of regulations enacted by the Lieutenant Governor in Council under the Ontario *Endangered Species Act* 2007, SO 2007, c 6 [Ontario ESA]. The Supreme Court did not provide reasons for denying leave. The applicants seek a declaration from this Court that the regulations are ultra vires the Lieutenant Governor in Council on the ground that the regulations defeat the purpose of the Ontario ESA to facilitate the protection and recovery of endangered species in Ontario.

A preliminary matter was raised as to the jurisdiction of this Court to hear the application, as it is not an appeal from a decision by the Federal Court of Canada. See here for a statement on the mandate of this Court. After some deliberation, it was decided this Court has inherent jurisdiction to determine who it will hear from and that, as the highest court of environmental justice in this country, there is general jurisdiction in this Court to make non-binding declarations on the vires of legislation which has the potential to weaken environmental protection in Canada.

THE COURT:

We are in the midst of the Anthropocene—a geological epoch wherein human activity is the primary source of widespread environmental change. This epoch is the inevitable result of massive human population growth and technological advances brought about by the extraction of energy from the combustion of coal and oil over the past 200 years.

Species' decline leading to extinction, caused by the surge in human population growth during the course of the carbon era, is one measure by which we might assess the sort of environmental change occurring in the Anthropocene. Some even suggest the Anthropocene will be characterized as the sixth great mass extinction on the Earth. The International Union for Conservation of Nature (IUCN) has been assessing the status of species for approximately 50 years, and maintains a list (the IUCN Red List) which categories species assessed based on extinction risk. As of 2015, approximately 77,300 species had been assessed on the IUCN Red List, and the numbers are alarming. For example, 25% of mammal species and 40% of amphibian species assessed are considered to be threatened with extinction. The World Wildlife Fund reports in its 2016 Living Planet Report that available data suggests global populations of mammals, birds, fish, amphibians and reptiles declined by 58% between 1970 and 2012.

What is alarming in these studies is the global scope and magnitude of these losses. Recorded history shows that the growth of human communities correlates with the decline of other species as we consume for development. For centuries this correlation was local and limited to island geographies. The extinction of the Moa – a giant flightless bird endemic to New Zealand – within 200 years of human settlement provides a good illustration of this. However, industrial economies powered by energy from coal and oil combustion has led to global human population growth and continental species decline.

The notion of widespread species extinction is powerful – the world is literally dying around us – but is species extinction wrong? Do we have an obligation to refrain from activity that causes species extinction? Conversely, do we have an obligation to take steps to prevent species extinction? These were some of the early questions facing philosophers in the nascent field of environmental ethics back in the 1970s, and needless to say many debates ensued over these questions. When the dust settled there were no definitive answers, but at least three distinct camps of thought formed around this debate.

One camp consists of those who assert we have no obligation to other species. This position has the benefit of history on its side and is working from the status quo of anthropocentrism – the traditional view with strong and deep cultural roots across the globe that only humans should matter to us and everything else that is here should only be valued for how it contributes to our welfare. Something which provides no benefit to the human endeavour has no value, and its value rises in correlation with the amount of benefit provided. Simple and easy to understand, this position appeals to many. However, this anthropocentric view is also implicated by critics as one of the primary reasons for why we find ourselves living with so many environmental problems today.

Another camp consists of those who believe that only human welfare should matter to us as a species, however this group advocates for an indirect obligation to other species based upon their usefulness to us. This position typically employs metaphors in advocating for the protection of other species. For some, species extinction is the canary in the coal mine or the tip of the iceberg. The widespread decline of species across the globe today is a warning that something is amiss on planet Earth, and what is happening to other species is merely an indication or brief glimpse towards what will also happen to us if we don't take corrective measures. So taking steps to prevent species extinction serves to prevent us from suffering a similar fate. An alternative metaphor in this group is that species are the rivets holding spaceship Earth together. As the rivets pop away from the hull, we not only inch towards a spectacular crash but we also lose access to their usefulness in keeping the ship running smoothly. Species loss in this sense may also be understood as an impoverishment in biodiversity—see Holmes Rolston III, "Duties to Endangered Species" (1985) 35 Bioscience 718.

The third camp consists of those who disagree fiercely with the others. This group asserts it is wrong to view human welfare as the only source of moral obligation, and that there is intrinsic value in all forms and processes of life on Earth. Thus we owe a direct obligation towards the welfare of all species, not just the human species. This position argues the other camps are guilty of speciesism (drawing moral lines based solely on what species something belongs to) and that their positions adhere to a flawed worldview that conceptually separates humans from the rest of nature. The philosophy of this camp is commonly known by names such as ecocentrism,

biocentrism, or deep ecology. For those interested in some current discussion on this position, the Ecological Citizen is a new journal dedicated to this scholarship.

Parliament along with the provincial and territorial legislatures in Canada have enacted statutory provisions in one form or another to address the species extinction problem. These provisions were enacted in response to Canada's ratification of the 1992 *UN Convention on Biological Diversity* which called on signatories to enact legislation to protect species at risk and facilitate their recovery to viable populations. The home for the assessment of endangered wildlife in Canada is the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). As of April 2017, COSEWIC lists 735 wildlife species as at risk of extinction in Canada.

The strongest Canadian legislation from a species protection and recovery perspective is generally considered to be the federal *Species at Risk Act*, SC 2002, c 29 [SARA]. On the face of its provisions, SARA provides legal protection for hundreds of species in Canada and is the legal basis for planning and action to facilitate the recovery of endangered species. Over the past decade when disputes have arisen between federal officials and species advocates, the Federal Court has repeatedly interpreted SARA as legislation with teeth to ensure species protection prevails over other interests. However the effectiveness of SARA has been significantly impaired from within, as federal officials have used their extensive discretionary powers granted by SARA to seemingly defeat the implementation of the legislation on the ground. This is a theme to which these reasons will return later.

The legislation before this Court in these proceedings is the Ontario *Endangered Species Act* 2007, SO 2007, c 6 [Ontario ESA]. The Ontario ESA shares many similarities with SARA, and is accordingly on its face also strong legislation with provisions designed to halt the decline of a species and facilitate its recovery. Endangered species are listed by operation of law under section 7 based upon a scientific assessment. Sections 9 and 10 protect listed wildlife by prohibiting the take or sale of endangered species, and by prohibiting any damage to their habitat. Section 11 requires the Minister to produce a strategy to facilitate and guide the recovery of an endangered population.

Section 55 of the Ontario ESA provides the Lieutenant Governor in Council with regulation-making powers. The list of powers includes prescribing habitat for a listed species under the Ontario ESA, governing the development of recovery strategies for listed species, and enacting exemptions from the prohibitions set out in sections 9 and 10. Importantly for these proceedings, the Ontario ESA sets out pre-requisites that must be met before a regulation is enacted to create exemptions from the prohibitions in the statute. Section 57 provides that where such a regulation is proposed and the Minister is of the opinion that the regulation is likely to jeopardize the survival of a listed species, or have any other significant adverse effect on the species, the Minister is obligated to consult with an expert on the possible effects of the proposed regulation on the species. Where an expert is to be consulted, the regulation is not to be enacted unless: (1) the Minister is of the opinion that the regulation will not result in the species no longer living in the wild in Ontario; (2) the expert consulted by the Minister has prepared a report which includes his or her opinion as to whether the regulation will jeopardize the survival of the species in Ontario; and (3) the Minister has considered alternatives to the proposed regulation.

In 2013 the Ontario government enacted general regulations under the Ontario ESA to allow certain commercial activities and industrial sectors to proceed with development that may kill individual members of a listed species and/or damage their habitat; these regulations provide

such activities and sectors with an exemption from the prohibitions in sections 9 and 10 of the Ontario ESA, so long as conditions set out in the regulation are complied with. The conditions which apply vary by activity, but generally may include the need to provide notice of the activity, having an existing license or permit issued under sector-specific legislation, the preparation of a mitigation plan to minimize adverse harm to a listed species, and subsequent monitoring and reporting on the effects of the activity. Notably, the regulations do not require project proponents to file or publish mitigation plans or monitoring results. Commercial activities which are exempt under the regulations are numerous and include operations that are commonly known to adversely affect endangered species and their habitat, including forestry operations, hydro-electric generation, quarrying, and wind power generation.

The Applicants challenged the validity of the regulations in the Ontario Supreme Court and the Ontario Court of Appeal on two grounds, namely: (1) non-compliance with the statutory prerequisites set out in section 57 of the Ontario ESA; and (2) the regulations are ultra vires the Ontario ESA. Both grounds were dismissed by the Ontario courts. The essence of argument (1) is that the Minister of Natural Resources failed to consider the impact of the regulation on each species in forming the opinion that the regulation is not likely to jeopardize the survival of, or have any other significant adverse effect on, a listed species. The Ontario Court of Appeal ruled that the terms of the regulation and the accompanying explanatory notes demonstrated the Minister did consider the effect of the regulation on the survival of each species (ONCA at paras 63-81). This ground was not raised in these proceedings as a basis for a declaration on the vires of the regulations, and will not be addressed further.

The issue before this Court is the vires of the regulations on the ground they are inconsistent with the purpose of the Ontario ESA. The applicants contend the purpose of the regulations is to allow for industrial activity that will damage or destroy endangered species and their habitat, and the blanket exemption on conditions which are fundamentally different from those contained in the Ontario ESA explicitly frustrates the objective of the statute to protect and facilitate the recovery of endangered species. While section 55 provides for regulations that create exemptions, these regulations essentially amend the Ontario ESA and thus do not fall within the regulation-making powers of the Lieutenant Governor in Council. For the reasons which follow this Court agrees with the Applicants, and not only declares the regulations to be inconsistent with the purpose of the Ontario ESA but also that the regulations effectively amend the Ontario ESA. Accordingly, this Court declares the regulations to be ultra vires the Lieutenant Governor in Council.

It is trite law that an important function for Canadian courts is to ensure delegates of a legislature do not exceed their authority and that they otherwise exercise their powers in accordance with the principle of legality. Outside of constitutional challenges, the majority of judicial review cases involve the review of discretionary authority by an official or adjudicative authority by a tribunal that affects the rights or interests of others. The judicial review of these sort of decisions by officials or tribunals is, for the most part, a focus on whether the exercise of authority was reasonable or in accordance with principles of natural justice. The judicial review of legislative authority – as opposed to administrative authority - is a far less common type of judicial review. As is the case in these proceedings, this sort of judicial review is focused on the vires of subordinate legislation enacted under a parent statute. Examples of subordinate legislation that may be subject to a vires review include municipal bylaws, rules of an administrative agency, and regulations. Generally speaking, Canadian courts are reluctant to strike subordinate legislation as ultra vires out of respect for the separation of powers between the legislature and

the judiciary, and thus courts will read subordinate legislation generously to fit it within the ambit of its parent legislation.

The leading authority in Canada on a vires review of subordinate legislation is *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII). *Katz Group* (at paras 24-28) establishes the following 4 principles applicable to vires challenge against subordinate legislation: (1) procedurally, a failure to comply with a statutory pre-requisite to the enactment of subordinate legislation renders the subordinate legislation ultra vires; (2) subordinate legislation which is inconsistent with the purpose of its parent legislation is ultra vires; (3) subordinate legislation enjoys a presumption of validity and should be read wherever possible to be consistent with its parent legislation – the onus is on the challenger to demonstrate invalidity; (4) a substantive review for vires is generally not an inquiry into the policy considerations or motives underlying the enactment of subordinate legislation, and such considerations or motives must be completely unrelated to the parent legislation in order for a challenge on vires to be successful.

The applicants contend the regulations undermine the purpose of the Ontario ESA and significantly reduce the scope of its application. The provisions in the Ontario ESA which prohibit the killing of individual members of a listed endangered species and/or damaging their habitat form the core of the legislation, and the regulations provide blanket exemptions from these prohibitions for a wide range of activities known to adversely affect endangered species. The effect of the regulations is such that the prohibitions in the Ontario ESA will no longer apply to a wide range of commercial and industrial activities in Ontario. Instead, these activities are subject to conditions such as the requirement to minimize adverse impacts on species at risk and, in some instances, to prepare a species mitigation plan. The regulations provide for very little monitoring or oversight of these mitigation measures. These conditions are foreign to the Ontario ESA. Moreover, the Applicants note section 17 of the Ontario ESA already provides for case-by-case permits to be issued for such activities with more robust safeguards and allow for more nuanced and context-specific conditions to protect an endangered or threatened species in the face of proposed industrial or commercial activity. The Applicants assert the overall purpose of the regulations is not simply to provide limited exemptions to species protection, but rather the purpose of the regulations is to facilitate economic development at the expense of protecting species at risk, and thus the regulations are inconsistent with the Ontario ESA.

The Ontario Superior Court and the Court of Appeal both disagreed with the Applicants on this point. The Ontario courts acknowledged the protection of species at risk is the purpose of the Ontario ESA. However, both courts ruled the Ontario ESA seeks to protect species in the context of economic development. Thus the protection afforded by the legislation must be interpreted with regard to the socio-economic context in which such protection occurs (ONCA at paras 91-93). In other words, the Ontario courts ruled the Ontario ESA establishes a set of rules that attempt to balance or reconcile the protection and recovery of species at risk with economic development. Both courts ruled this is precisely what the regulations attempt to do, and thus it is possible to read the regulations in manner that is consistent with the Ontario ESA.

The notion of a balance or reconciliation between economic development and endangered species protection may be attainable at a macro-scale, but on the ground at a site-specific level this notion is a fallacy because it's either bulldozers or preserving what remains of habitat for endangered species. A species becomes endangered precisely because of habitat loss, and thus any further loss of habitat necessarily impedes its recovery. The primary purpose of effective

endangered species legislation must be to stop the bulldozers. On the face of its provisions, that is exactly what the Ontario ESA attempts to accomplish. There is no balance to be struck here.

The impugned regulations green light the bulldozers. The regulations effectively do away with the need for project proponents to obtain activity-specific permits from the Lieutenant Governor in Council under section 17 of the Ontario ESA, and the conditions to be met by project proponents under the regulations are fundamentally distinct from those which would be required for a section 17 permit. Notably, there is no need to ensure there will be a net benefit to the species and there is no requirement for an expert opinion to inform the Minister on whether the activity will jeopardize the recovery or survival of the species. Given the widespread scope of the regulations, one could persuasively argue the regulations essentially repeal the Ontario ESA by replacing absolute protection for endangered species and their habitat with management and mitigation strategies used in resource development legislation.

The proper course of action here would have been for the legislature to amend the Ontario ESA to incorporate the management and mitigation framework implemented in the regulations for endangered species. However, law-making by regulation can be done in relative secrecy by the executive as compared to that which occurs in the elected assembly. There is a disturbing trend of executive action or inaction both provincially and federally which seems directed at frustrating the objectives of endangered species legislation in Canada. And this seems to arise precisely when the goals of economic development and endangered species protection conflict, which is also the moment when the legislation needs to perform if we are serious about halting species decline in this country. The conflict between economic development and halting species decline will not be resolved with magic beans. But then maybe we are not committed to halting species decline, and anthropocentrism remains the dominant worldview. In which case, we are only fooling ourselves by enacting endangered species legislation that we have no real intention of implementing.

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