

Court File No. 400/13

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

BETWEEN:

**WILDLANDS LEAGUE and
FEDERATION OF ONTARIO NATURALISTS**

APPLICANTS

- and -

**LIEUTENANT GOVERNOR IN COUNCIL and
MINISTER OF NATURAL RESOURCES**

RESPONDENTS

**NOTICE OF APPLICATION TO DIVISIONAL COURT FOR
JUDICIAL REVIEW**

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following pages.

THIS APPLICATION for Judicial Review will come on for a hearing before the Divisional Court on a date to be fixed by the Registrar at the place of hearing requested by the Applicants. The Applicants request that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicants' lawyer or, where the Applicants do not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicants'




lawyer or, where the Applicants do not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicants' application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: September 9,
2013

Issued By



Local Registrar

Address of
court office

Divisional Court
Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5

TO: LIEUTENANT GOVERNOR IN COUNCIL
Office of the Lieutenant Governor of Ontario
Whitney Block, 6th Floor
99 Wellesley Street West
Toronto, Ontario
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AND TO: MINISTER OF NATURAL RESOURCES
Ministry of Natural Resources
Minister's Office
Whitney Block, 6th Floor, Room 6630
99 Wellesley Street West
Toronto, Ontario
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AND TO: ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Civil
8th Floor, 720 Bay Street
Toronto, ON
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APPLICATION

This is an Application for judicial review challenging the validity of Ontario Regulation 176/13 (“O Reg 176/13”), which largely came into force on July 1, 2013. O Reg 176/13 (“Regulation”) was purportedly made under the *Endangered Species Act*, SO 2007, c 6 (“ESA” or “*Endangered Species Act*” or “Act”). It amends Ontario Regulation 242/08 by, among other things, exempting a large number of activities from the sections of the ESA that, among other things, prohibit the killing, harming and harassing of species at risk and the damage or destruction of their habitat.

When O Reg 176/13 was still under consideration by the Ministry of Natural Resources (“Ministry”), the Minister of Natural Resources (“Minister”) unlawfully failed to fulfill the mandatory condition precedent of forming an opinion on whether the proposed regulation, where it would apply to a threatened or endangered species that is listed under the ESA, was likely to jeopardize the survival of those threatened and endangered species in Ontario (“jeopardy”) or to have any other significant adverse effect on those species (“significant adverse effects”).

Additionally, O Reg 176/13 runs contrary to the objects and purposes of the ESA, which are “to protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.” O Reg 176/13 undermines the Act’s purpose by removing certain protections afforded to endangered and threatened species listed under the Act.

1. The Applicants make application for:
 - (a) A declaration that the Minister erred in law by failing to fulfill the mandatory condition precedent before he recommended the proposed regulation that is now O Reg 176/13 to the Lieutenant Governor in Council; namely, the Minister failed to form an opinion on whether that proposed regulation is likely to jeopardize the survival of a species or have any other significant adverse effect on a species, for each species that is listed on the Species at Risk in Ontario List (Ontario Regulation 230/08) as a threatened or endangered species and to which the proposed regulation would apply, as required by subsection 57(1) of the *Endangered Species Act*.
 - (b) In the alternative to paragraph (a), if the Minister did form the requisite opinion under subsection 57(1) before he recommended the proposed regulation to the Lieutenant Governor in Council, a declaration that the Minister's opinion was unreasonable, was based on irrelevant considerations, failed to consider relevant considerations or was based on no evidence.
 - (c) A declaration that O Reg 176/13 is inconsistent with the objects and purposes of the ESA.
 - (d) A declaration that O Reg 176/13 is *ultra vires* the authority of the Lieutenant Governor in Council and of no force or effect.
 - (e) Costs of this Application or in the alternative, an order that the Parties bear their own costs.

- (f) Such further and other relief as counsel may advise and this Honourable Court may deem just.

2. The grounds for the application are:

The parties to the litigation

- (a) The Applicants are non-profit environmental organizations with a long history of advocating for the protection and recovery of species at risk in Ontario. The Applicants are public interest litigants and have no personal, proprietary or pecuniary interest in the outcome of this litigation.
- (b) The Applicants seek judicial review of O Reg 176/13 in order to ensure that the ESA is implemented as intended and that threatened and endangered species in Ontario are afforded the protections the Legislature intended when the ESA was enacted.
- (c) The Respondent Minister is responsible for the administration of the ESA. Pursuant to section 57, the Minister has a duty to form an opinion on whether a proposed regulation under the ESA is likely to result in jeopardy or significant adverse effects before he may recommend that regulation to the Lieutenant Governor in Council.
- (d) Pursuant to section 55 and subject to the Minister first performing his mandatory duties under section 57, the Respondent Lieutenant Governor in Council (“LGIC”) may make regulations under the ESA.

Objects and purposes of the ESA

- (e) Pursuant to section 1, the purposes of the ESA are:
1. To identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge;
 2. To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk; and
 3. To promote stewardship activities to assist in the protection and recovery of species that are at risk.
- (f) It is not a purpose of the ESA to promote industrial, infrastructure or development activities. Nor is it a purpose of the ESA to balance or trade-off the interests of various economic or development sectors against the protection and recovery of species at risk. Rather, the ESA is intended to prioritize the protection and recovery of species at risk over other interests.
- (g) The ESA sets out a process whereby an independent committee, the Committee on the Status of Species at Risk in Ontario, scientifically assesses and classifies species as extinct, extirpated, endangered, threatened or of special concern, based on the best available scientific information (sections 3-6). Following this classification process, the Ministry legally lists these species as they have been classified, by prescribing them in a regulation (sections 6-8).
- (h) Once a species is listed as endangered or threatened, the ESA then prohibits, among other things, activities that kill, harm, harass, capture or take such species (section 9), and activities that damage or destroy their habitats (section 10).

- (i) The Minister may grant a permit to a person that authorizes the person to engage in an activity that would otherwise be prohibited by section 9 or 10, on an activity-specific basis, only if the activity meets strict criteria designed to ensure that any permit achieves the objects and purposes of the ESA (subsections 17(1) and (2)). Similarly, a Minister's or a prescribed instrument may authorize a person to engage in an activity that would otherwise be prohibited by section 9 or 10, on an activity-specific basis, again only if the activity meets strict criteria designed to ensure that the objects and purposes of the ESA are not undermined (section 18).

The LGIC's regulation-making authority under the ESA is limited to where the Minister has first formed opinions on jeopardy and significant adverse effects

- (j) The LGIC has the authority to make various regulations under the ESA, pursuant to section 55.
- (k) Pursuant to subsection 55(1)(b), the LGIC's regulation-making authority includes the power to make regulations prescribing exemptions from subsections 9(1) and 10(1) of the ESA. These subsections constitute prohibitions aimed at protecting species and their habitat.
- (l) Subsection 57(1) creates special requirements for certain regulations. Before the LGIC may make a regulation exempting certain activities from the application of sections 9 or 10, the Minister is required to form an opinion on whether the regulation is likely to jeopardize the survival of the species in Ontario or have any other significant adverse effect on the species to which the proposed regulation will apply (subsection 57(1)).

- (m) If the Minister forms the opinion that either jeopardy or significant adverse effects are likely to result from the proposed regulation for one or more species to which the proposed regulation would apply, then a number of additional substantive and procedural requirements must be met before the Minister may recommend the regulation to the LGIC and before the LGIC may make the regulation (subsection 57(2)).
- (n) These special additional requirements, as set out in subsection 57(2), are that:
- the Minister must be of the opinion that the regulation will not result in the species no longer living in the wild in Ontario;
 - the Minister must consult with an expert on the possible effects of the proposed regulation on the species, and the expert must submit a written report to the Minister with his or her opinion on, *inter alia*, jeopardy and significant adverse effects;
 - the Minister must consider alternatives to the proposal for a regulation;
 - the Minister must give notice of the proposal for a regulation to the public under section 16 of the *Environmental Bill of Rights, 1993*, SO 1993 c 28 (“EBR”) at least two months before the day the regulation is made, which notice must include
 - the Minister’s opinion on whether the proposed regulation will result in jeopardy or significant adverse effects on the species to which it would apply;
 - the Minister’s reasons for this opinion;
 - a copy of the expert report;
 - alternatives to the proposal for a regulation that the Minister considered;
 - the reasons for making the proposed regulation, including any significant social or economic benefit to Ontario; and
 - steps that could be taken to minimize the impact of the proposed regulation on an individual members of the species.

O Reg 176/13 exempts entire economic or development sectors from the ESA's prohibitions

- (o) O Reg 176/13 was made on May 15, 2013, filed on May 31, 2013 and largely came into force on July 1, 2013. The regulation exempts whole sectors of activity from the ESA's general prohibitions against harming species or their habitat. A broad spectrum of industrial, infrastructure or development activities – including forestry, pits and quarries, renewable energy, hydro-electric generating stations, mining exploration and production, roads, highways, waste management, drainage works, and commercial and residential development – are variously exempted from the prohibitions in sections 9 and 10. Likewise, these activities are exempted from sections 17 and 18, which set out permitting and authorizing criteria that must be satisfied on an activity-specific basis.

The Minister has declined to give the Applicants any of the opinions that he purports to have formed pursuant to subsection 57(1), or the record of those determinations

- (p) The public was notified that the Ministry was considering O Reg 176/13 by way of Regulation Proposal Notice (EBR Notice: 011-7696) posted to the Environmental Registry, as established and required pursuant to the EBR, on December 2, 2012.
- (q) The Ministry subsequently updated the Regulation Proposal Notice and provided a link to a Ministry document containing additional information about the proposed regulations (“the Ministry Explanation”) on January 24, 2013.

- (r) Neither the Regulation Proposal Notice nor the Ministry Explanation indicated whether the Minister had formed an opinion on the likelihood of jeopardy and significant adverse effects to individual species to which the proposed regulation would apply.
- (s) In addition to submitting comments to the Ministry in response to the Regulation Proposal Notice, the Applicant Federation of Ontario Naturalists (currently operating as Ontario Nature), with other environmental organizations, sent a letter through legal counsel to the Minister on February 25, 2013. The letter expressed concerns that the proposed regulatory amendments would undermine the purpose of the ESA and remove protections for species at risk, and put the Minister on notice of his duty to form opinions on whether the proposal was likely to cause jeopardy or significant adverse effects to listed species.
- (t) To this end, the letter requested that the Minister confirm whether or not he was forming opinions on jeopardy and significant adverse effects for each of the 155 species listed as either threatened or endangered to which the amendments may apply and that the Minister provide any opinions formed.
- (u) Having received no response to their February 25, 2013 letter, on April 9, 2013 the Applicant Federation of Ontario Naturalists and other environmental organizations, through legal counsel, wrote to the Minister again, reiterating the same concerns and requesting confirmation of whether the Minister had formed opinions on the likelihood of jeopardy and significant adverse effects to individual species.

- (v) The Minister declined to respond to either letter prior to the LGIC making O Reg 176/13 on May 15, 2013.
- (w) On July 18, 2013, two months after the LGIC made O Reg 176/13 and after the Regulation had largely come into force on July 1, 2013, the Minister responded in writing to these letters.
- (x) In his letter, the Minister conceded that subsection 57(1) obliged him to form opinions on whether the regulation is likely to result in jeopardy or significant adverse effects on a species that is listed as threatened or endangered. However, the Minister did not provide the opinions that he had formed for any of the species to which O Reg 176/13 applies nor the record of material on which he had purportedly reached his opinions, as the Applicants had sought. Instead, he simply asserted that he had been able to form the opinion that the regulatory changes will neither jeopardize the survival of the species in Ontario, nor have any other significant adverse effect on the species.

The Minister failed to fulfill a mandatory condition precedent before the LGIC made O Reg 176/13

- (y) The Minister failed to form the requisite opinion on whether O Reg 176/13 is likely to jeopardize the survival of the individual species or have any other significant adverse effect on a species, for each species that is listed a threatened or endangered species under the ESA and to which the proposed regulation would apply, as he was required to do by section 57 of the ESA.
- (z) If the Minister did form an opinion on whether O Reg 176/13 is likely to result in jeopardy or significant adverse effects on individual species to which O Reg 176/13 applies, the Minister's opinion was unreasonable, was based on

irrelevant considerations, failed to consider relevant considerations or was based on no evidence.

- (aa) In proposing O Reg 176/13, the Minister unreasonably and impermissibly elevated administrative and economic efficiencies, and customer service for those subject to permitting requirements, above the statutory purposes of protecting species that are at risk and their habitats and promoting the recovery of species that are at risk. At the same time, the Minister failed to assess the likelihood of jeopardy and significant adverse effects to the individual species affected by the Regulation.
- (bb) Where the Minister considered social, economic and political factors in determining the likelihood of jeopardy and significant adverse effects, he erred in law. These factors are irrelevant considerations to the Minister's threshold determination on jeopardy and significant adverse effects.
- (cc) For these reasons, O Reg 176/13 is *ultra vires* the authority of the LGIC under the ESA and is of no force or effect.

O Reg 176/13 undermines the objects and purposes of the ESA

- (dd) O Reg 176/13 runs contrary to the objects and purposes of the ESA. The Regulation's purpose and effect is to undermine core protections for species at risk and prevent their protection and recovery.
- (ee) A regulation made by the LGIC under the ESA may provide for a streamlined and efficient implementation of the Act, but it cannot do so at the expense of the Act's objects and purposes. O Reg 176/13 undermines the ESA's objects and

purposes as it exempts a large number of industrial, infrastructure or development activities that have led historically to species' declines from the very protections under the ESA that were intended to constrain industry's ability to impact species or their habitat.

- (ff) For these additional reasons, O Reg 176/13 is *ultra vires* the authority of the LGIC under the ESA and is of no force or effect.

Statutory instruments relied upon

- (gg) *Endangered Species Act*, SO 2007, c 6.
- (hh) *Judicial Review Procedure Act*, RSO 1990, c J.1 (“JRPA”).
- (ii) *Legislation Act, 2006*, SO 2006, c 21, Sch F, Part VI.
- (jj) *Courts of Justice Act*, RSO 1990, c C.43.
- (kk) *Rules of Civil Procedure*, RRO 1990, Reg 194.
- (ll) Ontario Regulation 176/13.
- (mm) Ontario Regulation 242/08.
- (nn) Ontario Regulation 230/08.
- (oo) Such further and other grounds as counsel may advise and this Honourable Court may deem just.

3. The following documentary evidence will be used at the hearing of the application:

- (a) An affidavit on behalf of Wildlands League, to be sworn.

- (b) An affidavit on behalf of Federation of Ontario Naturalists, to be sworn.
- (c) The record before the Minister in reaching his statutory determinations, under subsection 57(1) of the ESA, that the regulatory changes in O Reg 176/13 will not jeopardize the survival of any listed species in Ontario to which the Regulation applies nor have any other significant adverse effect on those species, which record is required to be filed in the Court pursuant to section 10 of the JRPA.
- (d) Such other affidavit material and evidence as counsel may advise and this Honourable Court may deem proper.

September 9, 2013

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Counsel for the Applicants

Wildlands League and
Federation of Ontario Naturalists
Applicants
and
Lieutenant Governor in Council and
Minister of Natural Resources
Respondents

Court File No: 400/13

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

Proceeding Commenced at Toronto

**NOTICE OF APPLICATION TO DIVISIONAL
COURT FOR JUDICIAL REVIEW**

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