

STEPHEN AND KATHLEEN: BIRDS OF A FEATHER?

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Question:

- Which level of government been more effective in dismantling laws that conserve and protect nature?
- Stephen Harper's Conservatives or Kathleen Wynn's Liberals?

It's a Toss-Up

- Federal government dismantled:
 - *Canadian Environmental Assessment*
 - *Navigable Waters Protection Act*
 - *Fisheries Act* habitat protection
 - But not the *Species at Risk Act*
- Ontario government:
 - Virtually abandoned *Environmental Assessment Act*
 - Gutted *Endangered Species Act*

Introduction

- Summary of Ontario *Endangered Species Act 2007*
- Summary of Ontario Regulation 176/13
- Is O Reg 176/13 lawful?
- Analysis of Wildlands League/Ontario Nature application for judicial review

Endangered Species Act

Purposes (S. 1)

- Identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge
- Protect species that are at risk and their habitats, and promote recovery of species that are at risk
- Promote stewardship activities to assist in the protection and recovery of species at risk

Endangered Species Act

Purposes

Purposes do not include:

- Promoting industrial, infrastructure or development activities
- Balancing interests of economic sectors against species at risk

Listing (SS. 3 – 8) and Prohibitions (SS. 9- 10)

- Committee on the Status of Species at Risk (COSSARO) established to assess and classify species as extinct, endangered, threatened etc. based on best available scientific information
- Ministry of Natural Resources then legally lists these species as classified by regulation
- Once listed as endangered or threatened, ESA prohibits killing, harming, harassing and activities that damage or destroy habitats

Permitting (SS. 17–18)

- Minister may authorize otherwise prohibited activity through permit or instrument only if activity meets criteria to ensure permit/instrument achieves ESA's objects and purposes
- If Minister is of opinion that main purpose of activity authorized by permit not to assist in protection or recovery of species but of significant social or economic benefit to Ontario
 - Consultation with independent person of effects of activity
 - Written report on jeopardy to survival/recovery of species
 - Minister of opinion that no jeopardy
 - Minister of opinion that reasonable alternatives considered, best alternative adopted
 - Minister of opinion reasonable steps to minimize adverse effects required by permit

Regulation-making Authority (SS. 55, 57)

- LGIC has authority to make regulations exempting certain activities from prohibitions
- Before making exemption regulation, Minister required to form opinion on likely jeopardy to survival or recovery of species or other significant adverse effect on species
- If jeopardy or significant adverse effects opinion, other requirements such as notice for proposal for regulation under EBR

Ontario Regulation 176/13

- O Reg 176/13 (July 2013) creates broad exemptions from ESA's requirements to obtain government permission prior to harming species at risk or habitat
- Regulation exempts from prohibitions whole sectors of activity (forestry, pits and quarries, renewable energy, hydro-electric generating stations, mining exploration and production, roads, highways, waste management, drainage works, commercial and residential development)

Is O Reg 176/13 Lawful?

- Is On September 9, 2013, Ecojustice filed notice of application to Divisional Court for judicial review seeking declarations on behalf of Wildlands League and Ontario Nature that:
 - Minister erred in law by failing to fulfill mandatory condition precedent in recommending regulation before forming “no jeopardy” opinion
 - If such opinion formed, it was unreasonable, based on irrelevant considerations or no evidence
 - O Reg 176/13 inconsistent with purposes of ESA
 - O Reg 176/13 is ultra vires authority of LGIC

Issues

- Minister asserted that he formed “no jeopardy” opinion with respect to O Reg 176/13; is it necessary that the record or material be released?
- Does O Reg 176/13 fundamentally undermine the ESA? Can streamlining and efficient implementation regulation lawfully exempt entire sectors that historically caused species’ declines?

Final Thought

- What's left of Ontario's *Endangered Species Act* after O Reg 176/13? Prohibitions seem now to apply only to ordinary citizens and interests that don't have a strong lobby at Queen's Park
- But is it much different from *Environmental Assessment Act* (aka Environmental Exemptions Act)?
- Isn't this too often the Ontario way?
- Aren't Kathleen and Stephen really birds of a feather?