COURT OF APPEAL FOR ONTARIO

CITATION: Wildlands League v. Ontario (Natural Resources and Forestry), 2016 ONCA 741
DATE: 20161011
DOCKET: C61016

Sharpe, LaForme and van Rensburg JJ.A.

BETWEEN

Wildlands League and Federation of Ontario Naturalists

Applicants
(Appellants)

and

Lieutenant Governor in Council and Minister of Natural Resources

Respondents
(Respondents in appeal)

Lara Tessaro and Anastasia M. Lintner, for the appellants

William Manuel and Sunil Mathai, for the respondents

Heard: April 19, 2016

On appeal from the order of the Divisional Court (Justices J. Robert MacKinnon, David L. Corbett and Thomas R. Lederer), dated May 28, 2015, with reasons reported at 2015 ONSC 2942, 338 O.A.C. 309.

van Rensburg J.A.:

A. OVERVIEW

[1] The appellants are not-for-profit environmental groups. They appeal, with leave of this court, a decision of the Divisional Court dismissing their challenge

by judicial review to a regulation under the *Endangered Species Act, 2007*, S.O. 2007, c. 6 (the "ESA" or the "Act"). The ESA, which came into force June 30, 2008, is administered by the Ministry of Natural Resources and Forestry (referred to here as the "MNR" or the "Ministry").

[2] The focus of the judicial review application in the court below and on this appeal is on the *vires* of O. Reg. 176/13, a regulation that amended the General Regulation under the ESA, O. Reg. 242/08. The impugned regulation was made on May 15, 2013 and came into effect on July 1, 2013. The appellants seek an order setting aside the order of the Divisional Court and declaring the regulation *ultra vires* and of no force and effect.

[3] 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 ESA sets out various prohibitions for activities affecting SAR and their habitats. The Act allows for exceptions to these prohibitions, including through the issuance of permits, through stewardship agreements with the Ministry and by regulation. The challenged regulation provides for 19 exemptions from the Act's prohibitions (including 14 activity-based exemptions), subject to compliance with prescribed conditions.

[4] The appellants have a number of concerns with the regulation. In essence, they believe that the MNR is trying to get out of the business of issuing permits,

and that the protection of SAR, through the effective enforcement of the Act, will suffer as a result. The appellants, however, acknowledge that they are unable to challenge the wisdom or likely effectiveness of the regulation: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 28. *Katz Group*, which is the governing authority on the permissible scope of review of regulations, confirms that the court's review is limited to whether the regulation is *ultra vires*, or beyond the scope of the regulation-making authority under the enabling or parent statute: at para. 24.

[5] In the Divisional Court the appellants challenged the *vires* of the regulation on two grounds. First, they argued that a mandatory condition precedent under s. 57(1) of the Act was not met before the regulation was promulgated. Section 57(1) requires that, where (as here) a proposed regulation would apply to an endangered or threatened species listed on the Species at Risk in Ontario List, and "the Minister is of the opinion that the regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species", the Minister is required to consult with an expert on the possible effects of the proposed regulation, and not to enact the regulation unless certain criteria are met. In this case, the MNR issued a Minister's Explanatory Note (the "Explanatory Note"), at the conclusion of which the Minister signified his opinion that the regulation was 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 SAR (the "Minister's Determination"). The appellants argued that, in arriving at the Minister's Determination, the Minister did not consider the effect of the proposed regulation on each individual endangered or threatened species, and therefore the statutory condition precedent was not met.

[6] As a second ground, the appellants asserted that the purpose of the regulation was to save government and industry time and money, and that such purpose is inconsistent with the overarching purpose of the ESA, which is the protection and recovery of SAR. The appellants maintained that the regulation was *ultra vires* because it was not directed to the same purpose as its enabling statute.

[7] The Divisional Court dismissed the judicial review application. Lederer J., for the court, held that the requirements of s. 57(1) were met. He stated that there was nothing to require the Minister to examine the impact of the proposed regulation on each species to which the regulation would apply, separately or independently, and that it was sufficient if there was a program, approach or other condition that, in the opinion of the Minister, demonstrated there will be no such jeopardy or risk of other significant adverse effects (at para. 35).

[8] The Divisional Court held that the ESA sets out to protect biological diversity, while not forgetting society's concern for social, economic and cultural considerations (at para. 48). As such, "this suggests something more balanced

than the reliance on protection and restoration of species at risk as the singular purpose behind the *ESA*" (at para. 49). The impugned regulation is "directed to balancing the protection and restoration of Species at Risk with the economics of the industries required to operate under the auspices of the *ESA*" and "[t]he economic considerations brought to bear on the making of [the regulation] are not a peripheral purpose. They are a consideration which, pursuant to the *ESA*, is to be part of the efforts undertaken in acting to protect and restore species at risk" (at paras. 51 and 53). The Divisional Court therefore concluded that the regulation was authorized by the provisions of the ESA (at para. 51).

[9] The appellants raise two main arguments on appeal. First, they say that the Divisional Court erred in holding that the statutory condition precedent in s. 57(1) of the Act was met by the Minister's Determination. The appellants contend that the Minister's Determination under s. 57(1) is subject to review for correctness, or in the alternative, for reasonableness. They say that the Divisional Court simply accepted that the Minister had given his opinion, without reviewing whether it was justified. In this regard, the appellants renew in this court their argument that the Minister failed to consider the potential impact of the regulation on each individual species, and state that the Divisional Court erred in accepting that the Minister could examine the impact of the regulation on all affected SAR collectively.

[10] Second, the appellants contend that the Divisional Court erred in its conclusion that the regulation is consistent with the purpose of the Act. They say the purpose of the Act is to protect and enhance the recovery of SAR and not, as the court concluded, to balance such interests with economic interests. The appellants argue that the regulation is *ultra vires* because its purpose is to save government and industry time and money, and not to protect and recover SAR.

[11] For the reasons that follow, I would dismiss the appeal. I agree with the result reached by the Divisional Court, and its conclusion that the impugned regulation is not *ultra vires* because of the failure to meet a prescribed statutory condition precedent. I also agree with the Divisional Court that the impugned regulation does not conflict with the purposes and objects of the Act. As I will explain, my analysis of the issues differs in certain respects from that of the court below.

[12] It is unnecessary to repeat here the Divisional Court's comprehensive and detailed review of the relevant legislation and history of the regulation. For the purpose of these reasons, I will simply provide a general outline of the ESA, the regulation and the Explanatory Note, which contains the Minister's Determination in satisfaction of s. 57(1). I will review the parties' positions on appeal, and then set out the applicable legal principles. I will then analyze the issues, referring, as necessary, to the reasons for decision of the Divisional Court, and explain why I would dismiss the appeal.

B. LEGISLATIVE BACKGROUND

(1) The *Endangered Species Act*

[13] The ESA replaced the former *Endangered Species Act*, R.S.O. 1990, c. E.15, a statute that had been in place since 1971. The new Act constituted a departure from the former legislation. Under the 1971 Act, SAR were protected only through regulations made by the Lieutenant Governor in Council and to the extent prescribed by regulation. The former legislation, as of 2007, offered only limited protection for 43 of 176 species designated at risk.

[14] The ESA, by contrast, required that a regulation be promulgated to list all species classified as extirpated (meaning still living but no longer in the wild in Ontario), endangered, threatened and of special concern (that may become threatened or endangered because of a combination of biological characteristics and identified threats): ss. 5(1) and 7(1). The Minister is required to add to the list any species so identified by the Committee on the Status of Species at Risk in Ontario, a body of independent scientists: ss. 7(3), (4). Regulation 242/08 was first enacted in 2008 and has been amended from time to time, such that by 2013, 151 species were listed on the Species at Risk in Ontario List ("SARO List") as endangered or threatened.

[15] The new Act extended immediate protection to all species in Ontario on the SARO List. It also provided for habitat protection for certain species

immediately and by certain fixed deadlines, and for general habitat protection for all endangered and threatened species, to commence on or before July 1, 2013.

[16] The stated purposes of the ESA, set out in s. 1, 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.
>
> 3. To promote stewardship activities to assist in the protection and recovery of species that are at risk.

[17] The preamble to the Act states that the protection of SAR is to be done "with appropriate regard to social, economic and cultural considerations", and stresses the importance of biological diversity and the need for global action to address the loss of species due to human activities. The preamble speaks of the need to protect SAR for future generations.

[18] The Act prohibits the killing, harming, harassment, capture or taking of any member of any species listed as extirpated, endangered or threatened, and prohibits any trade or other commercial activity in such species, living or dead, including any part or thing derived from such species: s. 9(1). It prohibits the damage and destruction of the habitat of any species listed as threatened or endangered, and damage and destruction of the habitat of listed extirpated species which have been prescribed by regulation for habitat protection: s. 10(1). Violation of these prohibitions is an offence that can result in a fine, imprisonment

or a compliance order: ss. 36, 40 and 41. The Act contains substantial enforcement powers, including the ability to inspect and search and to issue stop orders and habitat protection orders: ss. 21-35.

[19] While the Act improves the protection of SAR, it also provides for greater flexibility than the previous legislation which prohibited, without exception, the wilful interference with and the killing of any species included in a regulation, or the destruction of its habitat: former Act, s. 5. The Act allows for exceptions to the prohibitions in ss. 9(1) and 10(1) through stewardship agreements (s. 16), permits (s. 17), other instruments (s. 18) and agreements and permits with aboriginal persons (s. 19). The ESA also authorizes the Lieutenant Governor in Council to make regulations, including regulations "prescribing exemptions from subsection 9(1) or 10(1), subject to any conditions or restrictions prescribed by the regulations": s. 55(1)(b). The challenged regulation was made under this section.

[20] Section 57 provides for certain conditions precedent before a regulation can be made under s. 55(1)(b). First, s. 57(1) provides that where a regulation is proposed to be made under s. 55(1) that would apply to a listed endangered or threatened species and the Minister is of the opinion that the regulation is likely to: jeopardize the survival of the species in Ontario; have any other significant adverse effect on the species; or result in a significant reduction in the number of members of the species that live in the wild in Ontario, then the Minister shall

consult with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation on the species.

[21] Where an expert is to be consulted in respect of a proposed regulation under s. 55(1)(b), s. 57(2) provides that the Minister is not to recommend the regulation nor is the regulation to be made 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 submitted a written report on the possible effects of the proposed regulation on the species; and (3) the Minister has considered alternatives to the proposal for a regulation. The expert report must include the expert's opinion as to whether the regulation will jeopardize the survival of the species in Ontario or have any other significant adverse effect on the species and, if so, whether the regulation will result in the species no longer living in the wild in Ontario. The Minister is also required to give notice of a proposed regulation on the Environmental Registry, which attaches a copy of the expert's report and includes details of the opinion reached and alternatives considered by the Minister, the reasons for making the proposed regulation and steps that could be taken to minimize any adverse effects of the proposed regulation on individual members of the species.

[22] In this case, the Minister did not consult with an expert on the possible effects of the proposed regulation. Despite the regulation affecting endangered and threatened species on the SARO List, the Minister concluded that the

regulation was not likely to jeopardize the survival of any such species in Ontario or to have any other significant adverse effect on the species. By expressing this opinion, the Minister purported to fulfill the statutory condition precedent set out in s. 57(1).

(2) The Challenged Regulation: O. Reg. 176/13

[23] O. Reg. 176/13 was made May 15, 2013, amending Reg. 242/08, and came into effect July 1, 2013. The impetus for the regulation was to modernize the permitting and approvals process for the various statutes the MNR administers. The approach that was proposed and ultimately adopted classifies the proposed amendments into two categories: "Rules in Regulation" and "Registration with Rules in Regulation". When the government was preparing to promulgate O. Reg. 176/13, it posted notices explaining what was being considered to the Environmental Registry under the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28 (described in detail in the Divisional Court's reasons, at paras. 9-12).

[24] The Minister's Explanatory Note provides the following summary and context for the regulation:

> The Ministry of Natural Resources is modernizing its approval processes as part of a three-year Transformation Plan including these amendments to Ontario Regulation 242/08 under the [ESA]. The amendments would exempt a number of activities from a number of the prohibitions set out [in] subsections 9(1)

> and 10(1) of the ESA provided that conditions are met. Implementation of the proposed changes will increase administrative efficiency and reduce burdens on individuals and businesses engaged in activities that affect species at risk and their habitat while providing for the protection of species at risk. [Footnotes omitted.]

[25] The regulation exempts certain activities from the prohibitions under ss. 9(1) and 10(1) of the Act. Rather than having to obtain a permit or enter into an agreement with the Ministry regarding prohibited activities, proponents who follow the requirements of the regulation are exempt from the prohibitions, provided they comply with all prescribed conditions.

[26] The various exemptions are described under three headings in the Explanatory Note as follows:

> Streamlined Approaches for New Activities that Include Actions that Assist in Protecting and Recovering a Species at Risk: Bobolink and Eastern Meadowlark (s. 23.6); Barn Swallow (s. 23.5); Chimney Swift – Built Structures (s. 23.8); Butternut (s. 23.7); Aquatic Species (s. 23.4); Ecosystem Activities (s. 23.11); Species Protection and Recovery (s. 23.17); Safe Harbour Habitat (s. 23.16); and Human Health and Safety Activities (s. 23.18).
>
> Administrative Efficiencies that Will have Low to No Risk to Species at Risk: Possession for Science and Education (s. 23.15); Trapping Incidental Catch (s. 23.19); and Commercial Cultivation of Vascular Plants (s. 23.13).
>
> Activities Already Approved or Planned: Transition for Activities that are Approved or Planned, but not Completed or Operating (s. 23.13); Early Mineral Exploration (s. 23.10); Waterpower Operations

(s. 23.12); Aggregate Operations (s. 23.14); Operation of a Wind Facility (s. 23.20); Drainage (s. 23.9); and Forest Operations (s. 23.1).

[27] Each exemption in the regulation contains its own specific provisions, including conditions which must be complied with in order to meet the terms of the exemption. The exemptions contain the following common features:

1. The identification or "scoping" of the activities to which the exemption applies;
2. The exclusion of certain species from the exemption;
3. The requirement for the person engaging in the exempted activity to register the activity on the MNR on-line Registry before engaging in anything that would be prohibited by the ESA;[1]
4. The requirement to prepare species-specific mitigation plans for each endangered or threatened species to be affected by the activities.[2] The plan is required to be prepared and updated by one or more persons with expertise in relation to the affected species;

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[1] No registration is required for two exemptions: Forest Operations and Commercial Cultivation of Vascular Plants. As the Explanatory Note indicates, the Forest Operations exemption pertains only to forest operations previously approved under forest management plans under the *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25. Such activities are exempt from the registration requirement as these plans have previously been approved. The Commercial Cultivation of Vascular Plants exemption does not require registration as it has been determined the new regulatory scheme will not significantly alter the risks to these species.

[2] No species-specific mitigation plan is required for certain exemptions. For example, the Explanatory Note explains that: under the Forest Operations exemption, the consideration of SAR is currently a component of the forest management planning scheme under the *Crown Forest Sustainability Act*; under the Incidental Trapping exemption, no mitigation plan is required due to licensing requirements under the *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41 and the rarity of incidental trapping; Possession for Scientific or Educational Purposes is also excluded from the mitigation plan requirement due to the limited risk involved in this activity.

5. Prescribed mandatory conditions to minimize adverse effects on the SAR;
6. The requirement to monitor and record the effectiveness of steps taken.

(3) Compliance with s. 57

[28] The Explanatory Note was prepared by staff at the MNR to demonstrate compliance with s. 57 of the ESA. It provides an overview and explanation of the various conditions, including those intended to minimize adverse effects on individual species or habitats, the exclusion of specific SAR from various exemptions and the scoping of activities covered by the exemptions. The Explanatory Note addresses each exemption in detail, identifying the particular risks to SAR that arise from the activity, and provides the rationale for the scope of activities covered by the exemption and the mandatory conditions imposed.

[29] The Explanatory Note concludes with the following opinion of the MNR Species at Risk Branch:

> 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.
>
> Therefore subsections 57(2) and (3) do not apply to this proposal, and the Minister may recommend the proposed regulation to the Lieutenant Governor for approval.

[30] Directly following this recommendation, under the heading "Minister's Opinion and Decision", the Minister states "[h]aving considered section 57 of the *Endangered Species Act, 2007* and the information above, I approve the recommended course of action." Accordingly, the Minister determined that there was no need to consult with an expert pursuant to s. 57(1), and he recommended the regulation to the Lieutenant Governor in Council. This is the "Minister's Determination".

C. ISSUES ON APPEAL

[31] There are two main issues on appeal: whether the Divisional Court erred in concluding that the statutory condition precedent for the regulation was met, and whether the court erred in concluding that the regulation is not inconsistent with the purposes and objects of the parent statute.

[32] With respect to the first issue, the appellants assert that the Divisional Court erred in concluding that, in arriving at a decision under s. 57(1), and thus purporting to fulfill the statutory condition precedent to the regulation, the Minister was not required to consider the effect of the regulation on each individual SAR. The appellants contend that the Minister's Determination is reviewable on a correctness or reasonableness standard, and that the Divisional Court erred in refusing to look behind the Minister's statement of his opinion.

[33] As I will explain, it is unnecessary for the purpose of this appeal to attempt to define the outer limits of the reviewability of the Minister's Determination. Although the appellants, in support of their application for judicial review, had filed affidavits of experts on the Blanding's turtle and American eel to the effect that the regulation would in fact have a significant adverse effect on these species, and that therefore the Minister's Determination was not correct or reasonable, by the time the matter came to court the appellants had narrowed the focus of their challenge. They specifically disclaimed that they were challenging the "scientific, technical or factual merits of the Minister's opinion" and stated instead that the Minister's Determination "failed to identify or assess each species to which proposed regulatory exemptions would apply." They said that "it is premature to review the reasonableness of any opinion of whether the regulation is likely to 'jeopardize the survival' or have 'any other significant adverse effect on' the species that it impacts" (Applicants' Factum in Divisional Court, at paras. 75 and 89).

[34] Accordingly, the scope of the application for judicial review that was ultimately pursued by the appellants in this court and the court below was quite narrow. The appellants' argument regarding the statutory condition precedent issue was restricted to a single point: that the Minister was required to consider the effect of the proposed regulation on *each* SAR and failed to do so. It is in this

limited sense that they argue that the Minister's Determination was based on an incorrect principle or test or was unreasonable.

[35] The respondents (at least in this court) agree that the Minister was required to consider each individual SAR. What falls to be determined therefore is whether the evidence demonstrates that the Minister asked himself, and answered, the right question: that is, whether he was satisfied that the test under s. 57(1) would be met for each affected SAR.

[36] On the second issue, the appellants argue that the Divisional Court erred in characterizing the purpose of the ESA as including economic and social factors. The appellants say that the regulation is *ultra vires* because the purpose of the Act is to preserve and protect SAR and the regulation's purpose (which they say is to promote administrative efficiency and save money) is inconsistent with that purpose.

[37] The respondents disagree, arguing that the Divisional Court did not err in assessing the purpose of the ESA and in concluding that the regulation is not *ultra vires* as inconsistent with such purpose. They say that the regulation is not "irrelevant", "extraneous" or "completely unrelated" to the purpose of the Act.

[38] I turn now to briefly review the legal framework for judicial review of the regulation.

D. LEGAL PRINCIPLES

[39] The focus of judicial review of a regulation or other subordinate legislation is on its *vires* – that is to determine whether the regulation is authorized by the statute under which it is made. This involves an examination of any grant of authority that is explicit in the statute, as well as restrictions to that grant that are implicit from the purpose of the statute. In Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (July 2016) (Toronto: Thomson Reuters Canada Limited, 2013, 2014, 2016) vol. 3, after noting that subordinate legislation can be either expressly or implicitly authorized (at para. 15.3210), the authors say (at para. 15:3261):

> In other words, the grant of authority, in the context of determining the *vires* of delegated legislation, is examined pursuant to the doctrine of "improper purposes"...Once having ascertained [the purposes and objects of the enabling statute] the second step is to determine whether the grant of authority permits the particular delegated legislation. [Footnotes omitted.]

[40] In *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.), this court explained, at para. 41: "the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed."

[41] An important recent authority on the scope of judicial review of regulations is the decision of the Supreme Court of Canada in *Katz Group*, which adopted the above statement from this court in *Ontario Federation of Anglers*. *Katz Group* made it clear that a challenge to the *vires* of subordinate legislation is limited to two grounds: that the legislation is inconsistent with the purpose of the parent statute or that a decision maker failed to comply with a statutory condition precedent: at para. 27. Generally speaking, Abella J. set out a number of principles applicable in a *vires* challenge that can be summarized as follows.

[42] First, "[a] successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate". The court is to look at the terminology of the enabling provision, qualified by the overriding requirement that the regulation accord with the purposes and objects of the parent enactment read as a whole: at para. 24.

[43] Second, regulations benefit from a presumption of validity. This means that the burden is on the challenger to demonstrate invalidity, and the court favours an interpretive approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*: at para. 25.

[44] Third, in interpreting both the challenged regulation and the enabling statute the courts should use a "broad and purposive approach": at para. 26.

[45] Fourth, neither the policy merits of the regulation nor the question of whether it will actually succeed at achieving the statutory objectives are relevant considerations: at paras. 27 and 28. In *Katz Group*, the court considered arguments that the impugned regulations would not in fact achieve their objective (at para. 39) and were under-inclusive (at para. 40) to be irrelevant.

[46] And, finally, striking down regulations as being inconsistent with a statutory purpose requires that they be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose. "[I]t would take an egregious case to warrant such action": at para. 28.

[47] In *Katz Group*, at para. 24, the court adopted Lysyk J.'s explanation in *Waddell v. Canada (Governor in Council)* (1983), 5 D.L.R. (4th) 254 (B.C.S.C.) at p. 272: "The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole." At p. 275 of that case, Lysyk J. further explained that:

> [T]he delegate may not frustrate or evade the Act of Parliament or exercise his discretionary power arbitrarily or otherwise than in accordance with the purposes or objects of the enactment. The delegate must not only stay within the literal terms of the delegating provision but must respect, as well, restrictions upon his mandate

> that are implicit in the legislative scheme considered in
> its entirety.

[48] The second ground of challenge to the *vires* of subordinate legislation is that the decision maker failed to comply with a statutory condition precedent. The court in *Katz Group* did not address the principles governing judicial review on this basis as no condition precedent was at issue in that case.

[49] Some principles are clear: The failure to comply with a statutory condition precedent is a fatal jurisdictional flaw: *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at p. 111. The power to enact a regulation is legislative and not adjudicative. As such, while this is a "statutory power" under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, it is not a "statutory power of decision" under that Act: *Apotex Inc. v. Ontario (Office of the Lieutenant Governor in Council)*, 2007 ONCA 570, 229 O.A.C. 11, at para. 31. Where a regulation can only be made where a Minister "believes" or "is satisfied" the regulation is "necessary", the statutory condition precedent requires only that the belief be present, and not that it be correct or reasonable: *McEldowney v. Forde*, [1969] 2 All E.R. 1039 (H.L. (Eng.)), at p. 1070; *Teal Cedar Products (1977) Ltd. v. R.*, [1989] 2 F.C. 158 (C.A.), at p. 170. Finally, the court may consider whether the required process was followed before a regulation is made, but not whether the decision to make the regulation was wise or reasonable: *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609, 105 O.R. (3d) 111 (Div. Ct.), at para. 31.

[50] What is less clear is the scope of permissible judicial review when the condition precedent involves, as here, an opinion as to the existence of certain facts to be reached by the Minister.

[51] The appellants referred to a decision of the Federal Court of Appeal and two decisions of the Federal Court involving the federal *Species at Risk Act*, S.C. 2002, c. 29 ("SARA"): *Alberta Wilderness Association v. Canada (Attorney General)*, 2013 FCA 190, 362 D.L.R. (4th) 145; *Centre québécois du droit de l'environnement c. Canada (Ministre de l'Environnement)*, 2015 FC 773, 98 Admin. L.R. (5th) 233; and *Athabasca Chipewyan First Nation v. Canada (Minister of the Environment)*, 2011 FC 962, 395 F.T.R. 48. In each case, the court concluded that the Minister of the Environment's decision under s. 80(2) of SARA, whether to recommend that the Governor in Council issue an "emergency order" for the protection of a species, was reviewable for reasonableness, applying a *Dunsmuir* analysis (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). It is beyond the scope of these reasons to address the differences between the legislative schemes under the ESA and SARA (which requires Ministerial decisions to be made, among other things, before SAR are listed for protection, and in the preparation of recovery strategies). It is sufficient to say that these cases involved judicial review of decisions made within the framework of SARA, which the courts treated as reviewable administrative decisions. These

cases did not involve the review of a regulation, as no emergency order had been made, and the decisions were not attacked on *vires* grounds.

[52] The parties were unable to refer this court to any reported case involving the judicial review of a regulation where a statutory condition precedent, as here, requires an opinion to be formed as to the existence of certain facts.

[53] The decision of the Federal Court of Appeal in *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136, leave to appeal refused, [2008] S.C.C.A. No. 422, may provide some guidance. The case involved a regulation providing that Canada would send back to the United States ("U.S.") any refugee entering the country from the U.S. at a land border point of entry. A condition precedent under the enabling statute was that the Governor in Council had designated the U.S. as a "safe third country" based on its compliance with certain international conventions. The applicants argued that the regulation was *ultra vires* because the U.S. did not actually meet the criteria for designation as a "safe third country".

[54] The Federal Court of Appeal overturned the decision of the Federal Court that had concluded, after assessing the evidence of the parties, that the regulation was *ultra vires* because the U.S. did not in fact meet the criteria to be designated as a "safe third country". The Court of Appeal stated, at para. 56: "An attack on the legality of subordinate legislation, on the ground that the conditions

precedent prescribed by Parliament were not met at the time of the promulgation [is] … an attack on the impugned regulation *per se* and not on the 'decision' to promulgate it."

[55] The court noted that Parliament had specified four factors to be considered in determining whether a country could be designated as "safe" and that "[o]nce it is accepted, as it must be in this case, that the [Governor in Council] has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant [international conventions], there is nothing left to be reviewed judicially": at para. 78. As such, it was irrelevant whether the U.S. in fact complied with the international conventions, or was "safe". What was relevant was that the Governor in Council considered the specified factors and, acting in good faith, designated the U.S. as "safe": at para. 80.

[56] This case suggests that, where a statutory condition precedent itself requires an opinion to be reached or a determination to be made, it is beyond the scope of judicial review to assess whether the determination was objectively correct or reasonable. At the same time, it is not sufficient that the decision-maker purported to make the determination. The determination must have been made in good faith and based on the factors specified in the enabling statute.

[57] Whether this is characterized as a question of process (as argued by the respondents) or something else, the approach in *Canadian Council of Refugees* is consistent with the scope of review that was advocated by the appellants in this court. Although they characterized their challenge as one based on the correctness or reasonableness of the Minister's opinion, the appellants ultimately argued in substance that the Minister did not apply the factors specified in the legislation, and in particular that he did not consider the effect of the regulation on each affected SAR. The respondents, while asserting that the Minister's Determination was not reviewable for correctness or reasonableness, nevertheless agreed that it could be reviewed on this basis.

[58] Where the parties differ is on whether the Explanatory Note (which is the evidence relied on by the respondents as to the fulfillment of the statutory condition precedent) supports the conclusion that the Minister did in fact consider the effect of the regulation on each SAR. The respondents acknowledged, and this court agrees, that the court is entitled to examine the Explanatory Note to determine whether the Minister asked and answered the right question.

E. ANALYSIS

[59] The appellants submit that: (1) the Divisional Court erred in failing to find the Minister did not consider the factor specified in the legislation as a condition precedent for the regulation; and (2) the Divisional Court erred in failing to

conclude the regulation was inconsistent with the purposes and objects of the ESA.

[60] On the first issue, I agree with the Divisional Court that the Minister properly considered the effect of the regulation on each affected SAR. The Divisional Court therefore did not err in concluding the Minister complied with the necessary statutory condition precedent to consider the impact of the regulation on each affected SAR in forming his opinion that the regulation was not likely to jeopardize the survival of, or to have any other significant adverse effect on, each species.

[61] On the second issue, the Divisional Court did not err in concluding the regulation was not *ultra vires* as inconsistent with the purpose of the ESA.

[62] I address each of the above issues in turn.

(1) Issue One: Did the Divisional Court err in failing to find that there was non-compliance with a statutory condition precedent?

[63] In the Divisional Court the appellants asserted that there was non-compliance with the statutory condition precedent under s. 57(1). They alleged that the Minister failed to consider the impact of the regulation on each individual affected SAR when he formed his opinion that the regulation was not likely to jeopardize the survival of the species to which the regulation would apply in Ontario and would have no other significant adverse effect on the species.

[64] The Divisional Court concluded, at paras. 35-36, that the Minister need not examine the impact of the regulation on individual SAR separately or independently of the others, and that it was sufficient that the Minister was satisfied that there was a program, approach or other condition that, in the opinion of the Minister, demonstrated there would be no jeopardy to the survival of or other significant adverse effects on any of the SAR.

[65] The Divisional Court went on to state that the question was whether the record demonstrated that the required steps were taken, and, referring to how the appellants had stepped back from challenging the reasonableness or correctness of the Minister's opinion, stated that "it is not for this court to examine and determine whether the opinion is correct or reasonable" (at para. 37). This comment may simply reflect the narrowed position taken by the appellants and, as I have already stated, it is unnecessary in this appeal to attempt to define the outer limits of the reviewability of a Minister's opinion under s. 57(1).

[66] The appellants say that, under s. 57(1), the Minister must assess whether a proposed regulation will likely jeopardize the survival of, or have another significant adverse effect on, *each* individual SAR to which it applies. They say that the Divisional Court erred in accepting the Minister's Determination that was based on the effect of the regulation on only "a few" SAR or all SAR collectively.

[67] The appellants say that they asked for, and were refused, proof from the Minister that the effect of the regulation on each individual species was considered and analyzed with expert scientific input. Without such proof, they say there is no way for the court to evaluate whether the Minister asked and answered the right question.

[68] The respondents say that the Explanatory Note demonstrates that the effect on each individual species was considered. The respondents agree that s. 57(1) requires the Minister to assess each species affected by the regulation (in this case all SAR). They say that they were justified in refusing to produce any further evidence of the how the MNR and the Minister satisfied the condition, and they rely on the Explanatory Note. In fact, in argument counsel asserted that the determination of whether the statutory condition was met "stands or falls on" the Explanatory Note.

[69] I agree with the respondents that whether the Minister asked and answered the right question – whether he considered the effect of the proposed regulation on each SAR and not just on "some" species or SAR as a group – can be evaluated by looking at the Explanatory Note. The Explanatory Note provides the basis for the 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 effects on these species at risk." I conclude as such for the following reasons.

[70] First, the fact that specific SAR were excluded from several exemptions indicates that the risk to individual species was considered. For example, seven specific species (four reptiles, two birds and one plant species) are excluded from the Aggregate Operations exemption as "high risk species". According to the Explanatory Note, the exclusion of specific SAR was "due to an identified higher risk to the species at risk as a result of potential activity impacts, or where impacts are too complex to manage using standardized rules." The appellants say that the exclusion of certain species from the exemption is unexplained and arbitrary. To the contrary, the Explanatory Note identifies the specific criteria applied to the decision to exclude particular SAR from the different exemptions. The Explanatory Note states that "[s]pecific species were excluded from provisions in the regulation so that the activities eligible for those provisions could not affect species at risk that are at greater risk of being negatively affected from the proposed regulation" and that "[a]ll endangered and threatened species on the Species at Risk [list] were considered in this assessment".

[71] In some cases, the Explanatory Note provides a more detailed explanation for the exclusion of particular species in the discussion of the specific exemption. For example, with respect to the Drainage exemption, the Explanatory Note outlines the risks from such works to aquatic species, reptiles and amphibians and identifies ten specific SAR that are excluded from the exemption as "higher

risk species". The exclusion of particular SAR from specific exemptions is consistent with a consideration of each affected species.

[72] Second, the Explanatory Note describes how the exemptions and mitigation conditions were developed with teams of staff, including Species at Risk Branch staff, biologists and taxa specialists, "[t]o ensure the proposals were based on the best available scientific information" and to provide "taxa-based advice on species and the likely effects of the proposals." This is inconsistent with the appellants' contention that the regulation was made without an understanding of the different threats to individual species and their specific needs.

[73] Third, the limits on the activities that are covered by each exemption, referred to in the Explanatory Note as "scoping", reflect the consideration of risks to individual SAR arising from the various activities. The Explanatory Note says that, as a result of an assessment of risk for each proposal, "several high risk activities have been excluded to further reduce the risk of significant adverse effects on affected species" and explains how each of the activity-based exemptions was scoped to exclude such high-risk activities.

[74] I note here that the regulation does not, as the appellants argue, provide for "[m]ost major industrial activities...[to be] presumptively exempt." Typically, the exemptions applicable to industrial activities apply to the operation of

approved facilities, and not the construction of a new facility, which will continue to require a permit under the ESA. As the Explanatory Note states, an exemption "may only apply to certain defined activities or eligible groups or may be time-limited narrowing the potential impacts on species at risk to levels that can be managed through standardized regulatory conditions."

[75] Fourth, each exemption contains conditions that require measures to be taken to minimize the effects on individual affected SAR. The Explanatory Note says:

> MNR has developed a standard suite of conditions intended to ensure the regulation provisions are not likely to result in jeopardizing the survival of, or have any other significant adverse effect on a species at risk in Ontario by imposing requirements that will avoid or reduce the adverse effects of the activity on species at risk and their habitats. These conditions will be applied as appropriate to individual proposals in accordance with the level of risk to the species.

[76] The appellants assert that the Minister relied on "standardized conditions rather than species-specific conditions" and therefore conducted a blanket assessment of the regulation's impacts on "species overall" without assessing each individual species affected. This ignores the fact that the conditions themselves require species-specific identification, mitigation measures, monitoring, modifications and reporting.

[77] The Explanatory Note explains the conditions in relation to each exemption. Typically, when the activity is registered, all SAR likely to be affected

must be identified. Further, the Explanatory Note explains that, where a mitigation plan is required, it must contain details on how the proponent will mitigate the impacts on each SAR identified as well as describe each area to be affected that is used by or is the habitat of a SAR that has been identified. The regulation provides that a mitigation plan must be prepared and updated:

> by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available.

[78] Reasonable steps to minimize adverse effects must be taken for each specific SAR that will be affected and its habitat. Further, the exemptions contain certain mandatory requirements, which in some cases single out specific species or their habitats. For example, a number of exemptions limit or prohibit activities: by setting requirements to minimize adverse effects during hibernation and reproduction, as in the Drainage exemption which also deals specifically with water levels to protect turtle species during hibernation; by excluding SAR from areas of activity, as in the Aggregate Operations exemption; and by mandating measures to deal with specific species, as in the Early Mineral Exploration exemption, which contains mandatory conditions addressing woodland caribou.

[79] I disagree therefore with the appellants' contention that a standard suite of conditions suggests a blanket assessment of risk to all species and that the

Minister simply relied on the "existence of conditions" in forming his opinion. As the conditions for each exemption are responsive to individual species' needs, this informed the Minister's opinion that the regulation would not jeopardize the survival of or have any other significant adverse effect on *each* affected species.

[80] Finally, the plain wording of the Explanatory Note is consistent with the consideration of the effect of the regulation on each SAR and not, as the appellants assert, just "some" or "a few" SAR, or SAR collectively. The Explanatory Note recites that s. 57 "requires the Minister to consider the effect of a proposed regulation under consideration in the Ministry on endangered or threatened species *that would be affected*" and speaks of the consultation and other steps required "[i]f the Minister does form the opinion that the proposed regulation is likely to jeopardize the survival of *the species* in Ontario or to have a significant adverse effect on *a species*" (emphasis added). The Explanatory Note concludes that the effect of the proposed regulation is not likely to jeopardize the survival or have any other significant adverse effects on "the affected endangered or threatened species in Ontario".

[81] I therefore conclude that the Explanatory Note provides the evidence that the Minister considered the effect of the regulation on the survival of each SAR and that therefore the statutory condition precedent was met. The opinion on which the Minister based his decision reflects that risk assessments were undertaken for the various activities to be exempted, taking into consideration the

effects of those activities on individual SAR. I agree with the conclusion of the Divisional Court that the statutory condition precedent was fulfilled and I would reject the narrow challenge advanced by the appellants on this issue.

(2) Issue Two: Did the Divisional Court err in failing to find that the regulation was *ultra vires* as inconsistent with the purpose of the ESA?

[82] The appellants' second challenge to the *vires* of the regulation is that it does not accord with the purpose of the parent legislation, the ESA.

[83] The Divisional Court dealt with the question of consistency with legislative purpose at paras. 47-49, 51 and 53. The court held that the ESA sets out to protect biological diversity, while not forgetting society's concern for social, economic and cultural considerations. The Divisional Court found that "[t]his suggests something more balanced than the reliance on protection and restoration of species at risk as the singular purpose behind the *ESA*." The impugned regulation is "directed to balancing the protection and restoration of Species at Risk with the economics of the industries required to operate under the auspices of the *ESA*" and "[t]he economic considerations brought to bear on the making of [the regulation] are not a peripheral purpose. They are a consideration which, pursuant to the *ESA*, is to be part of the efforts undertaken in acting to protect and restore species at risk."

[84] Here, the appellants say that the Divisional Court did not apply a proper *Katz Group* analysis. First, the appellants argue that the Divisional Court erred in concluding economic interests are at the core of the ESA, and that the Act's purpose includes the protection of social and economic interests. Second, the appellants say that, to the extent that the ESA's overarching purpose is the protection and preservation of SAR, the regulation is *ultra vires* because it does not advance this purpose. The regulation seeks to balance the protection and recovery of SAR with a host of social and economic interests. The appellants also submit that any regulation that is not for the net or overall benefit of SAR is *ultra vires.*

[85] The respondents contend that the Divisional Court did not err in assessing the purpose of the ESA, which they say "reflects a nuanced approach that places the protection and recovery of SAR as a central concern to be balanced with appropriate social, economic, health and cultural considerations." The respondents say that the court must examine the scheme of the Act, as well as the specific regulation-conferring power. As *Katz Group* instructs, striking down regulations as being inconsistent with a statutory purpose requires that they be "irrelevant", "extraneous" or "completely unrelated to" the statutory purpose (at para. 28).

[86] I would not give effect to this ground of appeal. I agree with the conclusion of the Divisional Court that the regulation is not *ultra vires* as inconsistent with the purpose of the ESA.

[87] As articulated in *Katz Group*, the court favours an interpretive approach that reconciles an impugned regulation with its enabling statute: at para. 25. As I will explain, the Divisional Court was right to look at the legislation as a whole in determining the purpose of the ESA. The court was entitled to go beyond the purpose statement in s. 1 of the Act to examine the approach of the legislation and the extent to which the legislature had regard for social, economic and cultural factors. The court was correct to point to the specific statutory provision of s. 57 as the regulation-making authority. Finally, the court did not err in concluding that the impugned regulation, based in part on social and economic concerns, is not inconsistent with the purposes and objects of the ESA.

[88] The foundational question is whether the regulation is *ultra vires* such that it is inconsistent with the purpose of the Act. This inquiry necessitates an understanding of the express regulation-making authority in the context of the enabling statute as a whole and the statutory scheme the legislature adopted to achieve that purpose. As *Katz Group* instructs, the court is to look at the terminology of the enabling provision, qualified by the overriding requirement that the regulation accord with the purposes and objects of the parent enactment read as a whole. The question is whether the regulation's purpose is "irrelevant",

"extraneous" or "completely unrelated" to that of the parent statute: at paras. 24 and 28.

[89] The appellants assert that the purpose of the ESA is to protect SAR and their habitat. This purpose is clearly set out in s. 1 of the Act and, unlike certain other statutes administered by the MNR,[3] the ESA is not a resource-management statute. I agree with the appellants that the fundamental purpose of the ESA, its legislative goal or aim, is to protect SAR, and is not the promotion of economic and social interests.

[90] The "statutory purpose" branch of the *vires* analysis, however, does not focus only on the legislative aim, goal or objective of the statute, but requires an examination of the scheme the legislature adopted to achieve that goal. "Purpose" here means the "perspective within which a statute is intended to operate" and "the policy and objects of the Act...determined by construing the Act as a whole": *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.) at p. 175, citing *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 140 and *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L. (Eng.)) at p. 1030. Determining the purposes and objects of an Act in the

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[3] It is fair, as asserted by the appellants, to characterize the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, the *Lakes and Rivers Improvement Act*, R.S.O. 1990, c. L.3, the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, the *Mining Act*, R.S.O. 1990, c. M.14 and the *Crown Forest Sustainability Act* as "aimed at balancing the economic use of natural resources...with their conservation."

context of a *vires* review therefore entails an examination of the scheme or approach that is adopted in order to achieve the legislative goal.

[91] 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 of the Act is to provide a presumption of protection with tools to address, among other things, social and economic conditions. The tools (in the form of the permitting, agreement and regulation-making provisions) 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.

[92] The preamble to the Act speaks of the contributions of biological diversity as "an important part of sustainable social and economic development." It refers to the people of Ontario doing "their part in protecting species that are at risk, with appropriate regard to social, economic and cultural considerations." The legislation proceeds on the presumption of the protection of SAR, which includes the broad prohibitions contained in ss. 9(1) and 10(1). The Act provides for exceptions however to these prohibitions through permits, stewardship agreements and other instruments. Importantly, s. 55(1)(b) explicitly provides for regulated exceptions to the general prohibitions under ss. 9(1) and 10(1). While the overall objective or motivation of the Act is to protect and preserve SAR, the

statutory scheme has regard for the social and economic context in which this protection and preservation operate.

[93] The appellants contend that the regulation is *ultra vires* because many of the industrial activity exemptions do not require a net benefit to SAR. The appellants assert that, since the purpose of the ESA is the protection of SAR, only regulations exempting activities that are for the purposes of recovery and protection of SAR or that would achieve an overall benefit to SAR (such as the exemptions for protection and recovery activities (s. 23.17), butternut (s. 23.7), aquatic species (s. 23.4) and bobolink, eastern meadowlark (s. 23.6)) can be made. In this regard, they say that the exemptions for species protection, recovery and overall benefit may be consistent with the ESA, but the other exemptions are not.

[94] As I have explained, legislative "purpose" for a *vires* analysis entails consideration of both the objective and the scheme of the Act. In other words, the purpose is the protection of SAR, but using the scheme as set out in the Act. The protection of SAR and their habitat in ss. 9(1) and 10(1) is subject to exceptions. The ESA provides for a number of different types of permits: some involve the protection or recovery of SAR (s. 17(2)(b)), others can be issued when there is an "overall benefit" to SAR (s. 17(2)(c)), while still others can be issued (with Ministerial approval) where there is a significant social or economic benefit to Ontario (s. 17(2)(d)).

[95] There is nothing in the statute, or for that matter the specific regulation-making authority, to say that exemption regulations must be made exclusively for activities that are for the preservation and protection of SAR. Section 55(1)(b) provides for regulations "prescribing exemptions from subsection 9(1) or 10(1), subject to any conditions or restrictions prescribed by the regulations". When such a regulation is made, the statutory condition precedent in s. 57 directs the focus to whether the regulation will jeopardize the survival of a species or have any other significant adverse effect on the species. In fact, the regulation-making authority contemplates exemptions for activities whose main purposes are not protection of SAR. There is merit to the respondents' submission that the statutory condition precedent in s. 57 ensures that any regulation made will in fact be consistent with the Act. The scope of the regulation-making power is informed by the Act as a whole, but defined with precision by that section.

[96] The appellants say that the regulation's purpose is to save the government and industry time and money. While "modernization of approvals" precipitated the regulation, and this may well result in or be prompted by a desire to save the government and proponents money, the "motive" behind the regulation is not relevant and is beyond the scope of a *vires* review: *Thorne's Hardware*, at p. 112. The question is whether the regulation is consistent with the ESA in terms of approach and scheme.

[97] In this regard, I note that the regulation operates under a similar approach as the ESA. It imposes limitations and conditions on proponents seeking to rely on exemptions. The limitations and conditions serve to avoid or minimize adverse effects on SAR, and in some cases, provide benefits to SAR.

[98] The issue is not whether the Act and regulation have identical purposes or objectives, but as *Katz Group* directs, whether the regulation is "irrelevant", "extraneous" or "completely unrelated to" the legislative purpose. O. Reg. 176/13 was promulgated under the specific statutory authority to make regulations prescribing exemptions from ss. 9(1) and 10(1) of the Act. The statutory condition precedent requires an assessment by the Minister of whether the regulation would jeopardize the survival of or have any other significant adverse effect on any SAR. While the motive for the regulation may well have been a concern for administrative efficiency and cost savings, the limitations, conditions, exceptions and scoping of the exemptions contained in the regulation are directed toward the protection of SAR. The regulation is therefore not "irrelevant", "extraneous" or "completely unrelated to" the purpose of the ESA and its scheme.

[99] I conclude that the Divisional Court did not err in finding that the regulation is both expressly authorized by s. 57 of the ESA, and consistent with the purposes and objects of the Act. I would therefore dismiss this ground of appeal.

F. DISPOSITION

[100] For these reasons I conclude that O. Reg. 176/13 is *intra vires* and I would dismiss the appeal. As agreed between the parties, I would award no costs of the appeal.

Released: OCT 11 2016

"K. van Rensburg J.A."

"I agree Paul Rouleau J.A."

"I agree H.S. LaForme J.A."