

SNAKES & LADDERS

Ontario's Endangered Species Act

Ecological consultants are often asked to comment on development projects where the developer presumes the *Endangered Species Act, 2007* (ESA, 2007) does not apply. The purpose of this article is to demystify the grandfathering principles available to developers under the ESA, 2007 when developing on private land. The former *Endangered Species Act* was replaced with the new ESA, 2007 on May 17, 2007. Many developers assume they are exempted from the ESA, 2007 prohibitions because they had development rights that predated the new legislation.

Protection of Species and Habitat

While the ESA, 2007 prohibits developers from destroying a species or a species habitat (under sections 9 and 10), the Minister of Natural Resources (MNR) may allow certain development activities to occur, provided the developer meets certain exemptions specified in the ESA, 2007, O. Reg. 242/08. If a development project does not fit within the O. Reg. 242/08 exemptions, then the ESA, 2007 only provides relief from the prohibitions if the de-

veloper obtains a permit or instrument authorizing the development activity.

The closest thing to a grandfathering provision available to developers exempting them from ESA, 2007 prohibitions under sections 9 and 10 is the O. Reg. 242/08, section 23 exemption.

If the developer has an approval or permit issued prior to June 30, 2008 and the developer entered into an agreement with the MNR by June 30, 2010, then these prohibitions do not apply. This provision provided a transition period to enable developers to enter into an agreement with the MNR. The exemption only applies if the developer had an approval or permit issued by June 30, 2008 and entered into agreement with the MNR by June 30, 2010. The developer must also be in compliance with all of the terms of its agreement.

Once the June 30, 2008 or June 30, 2010 dates passed, there are only two other ways around the ESA, 2007 prohibitions.

The developer may seek permit approval from the MNR under ESA, 2007, section 17 or the developer may obtain an "instrument" authorizing the

development activity under ESA, 2007, section 18. An instrument has the same effect as a permit issued under the Act. "Instrument" is defined as an "agreement, permit, licence, order, approved plan or other similar document."

Neither the permit nor the instrument will issue unless certain requirements are met. The MNR may only issue the permit or instrument, if:

- ▶ the activity will result in a significant social or economic benefit to Ontario;
- ▶ the activity will not jeopardize the survival or recovery of the species in Ontario;
- ▶ reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted; and
- ▶ reasonable steps to minimize adverse affects on the species are conditions of the permit or instrument.

Note that these criteria are conjunctive. Each must be established to the MNR's satisfaction as a prerequisite to the issuance of a permit or instrument.

The MNR has been criticized for being too lenient when issuing permits to developers, particularly when mitigation plans do not guarantee the survival or recovery of the species.

Windsor-Essex Parkway

In *Sierra Club Canada v. Her Majesty the Queen in Right of Ontario* (2010 ONSC 5130), the MNR issued

Donna Shier is an Environmental Law Specialist with Willms & Shier Environmental Lawyers LLP. She is one of Ontario's best known experts in contaminated land issues and rated Repeatedly Recommended in the Canadian Legal Expert Directory. She can be reached at (416) 862-4822 or <dshier@willmsshier.com>.

Katherine Koostachin is an associate with Willms & Shier Environmental Lawyers LLP. Her practice is in Aboriginal and Environmental Law. Her focus is developing consultation protocols for industry, municipalities, and Aboriginal communities. She can be reached at (416) 862-4823 or <kkoostachin@willmsshier.com>.

a section 17 permit to the Ministry of Transportation (MTO) on February 9, 2010 to allow the construction of the Windsor-Essex Parkway. The parkway is part of the proposed Detroit River International Crossing that the Province of Ontario plans to construct to service cross-border traffic.

MTO said that the parkway project will affect eight species classified as threatened or endangered under the ESA, 2007. MTO applied for a section 17 permit to “kill, harm, harass, capture, take, collect, possess, and transport all eight species at risk, and to damage and destroy the habitat of the Eastern Foxsnake.”¹

On February 9, 2010, the MNR issued the permit to the MTO, but required the MTO to undertake a number of measures to both mitigate and avoid impacts to species at risk. The MNR had circulated the permit application to independent experts to comment on the possible effects of the development activity on the species. After reviewing the experts’ opinions, the MNR required additional measures to provide increased protection for species at risk as a condition to granting the permit to the MTO. The MNR said that “it will ... work closely with the MTO to ensure that the adaptive management re-

quired by the conditions of the permit is effective.”²

Sierra Club Canada challenged the permit and sought an injunction to prevent the construction because it “would result in the permanent degradation of a sensitive ecosystem and the destruction of a threatened species.”³

The Divisional Court’s Justice Swinton found that the permit contained provisions for the protection of species at risk, including training those involved in the project on habitat protection and remediation. Justice Swinton dismissed Sierra Club’s injunction application for failure to demonstrate “irreparable harm” on the basis that there was no evidence that the mitigation proposed by the MTO was inadequate. This is notwithstanding that the “Minister’s own expert reports, which were before the court, specifically indicate that the measures were untested and unproven.”⁴

This case highlights the competing criteria the MNR is obliged to consider prior to issuing a permit or instrument. The ESA, 2007’s purpose is to protect and promote species at risk. The purpose of the Act is not to thwart development activities that will provide significant social and economic benefits to the people of Ontario. One

might conclude that there were bigger issues at stake in the parkway project than protecting snakes. The City of Windsor and the Province of Ontario now both support the parkway project. The city and the province struck a deal in April 2010 after a two-year dispute over the plans for construction of the new Windsor-Detroit bridge crossing.⁵ Their dispute was never about snakes. With so much support and the promise of 12,000 construction-related jobs, perhaps the parkway project case was not the best to showcase the ESA, 2007.

Limited Grandfathering Provisions

When a municipality reviews a development project neither the municipality nor the developer should presume the development project is exempt from the application of the ESA, 2007. The legislation’s grandfathering provisions are very limited. The only way a development project is exempted from the ESA, 2007 prohibitions is if the developer has an approval or permit issued prior to June 30, 2008 and the developer entered into an agreement with the MNR by June 30, 2010. Otherwise, the developer has to satisfy the MNR that all the conditions prerequisite to the issuance of a permit or instrument are met. MW

THERE IS NO SUBSTITUTE FOR EXPERIENCE



LOOPSTRA NIXON LLP
BARRISTERS AND SOLICITORS



THE STRAIGHT ANSWER

Everything Municipal

135 Queens Plate Drive, Suite 600, Toronto, Ontario M9W 6V7
Tel: 416-746-4710 Fax: 416-746-8319
gannibale@loonix.com
www.loopstranixon.com

- 1 Ministry of Natural Resources, “Information Notice: Permit under clause 17 (2)(d) of the *Endangered Species Act, 2007* to allow impact to one endangered species (Eastern Foxsnake) and seven threatened species (Butler’s Gartersnake, Dense Blazing Star, Willowleaf Aster, Colicroot, Dwarf Hackberry, Common Hoptree, Kentucky Coffee-tree) during construction of Windsor-Essex Parkway portion of Detroit River International Crossing (DRIC) Project,” Environment Registry (EBR Registry Number: 010-7651), <www.ebr.gov.on.ca>.
- 2 Ibid.
- 3 “Sierra Club launches legal action to stop DRIC bridge” (19 August, 2010), <www.sierraclub.ca/en/media/release/sierra-club-launches-legal-action-stop-dric-bridge>.
- 4 “Ontario Court Denies Government Motion” (20 October, 2010), <www.windsorsquare.ca/2010/09/21/ontario-court-denies-government-motion>.
- 5 “New Canada-U.S. border route dispute ends” (9 April, 2010), <www.cbc.ca/canada/windsor/story/2010/04/09/wdr-border-access-route-100409.html>.