CITATION: D.A.C.E.S. v. Ontario (M.N.R.F.), 2015 ONSC 1933
COURT FILE NO.: DC-14-92
DATE: 20150325

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

H. SACHS, HAMBLY and D.L. CORBETT JJ.

B E T W E E N:	
DURHAM AREA CITIZENS FOR ENDANGERED SPECIES (D.A.C.E.S.)	*Eric K. Gillespie and Priya Vittal* for the Applicant
Applicant	
- and -	
ONTARIO (MINISTRY OF NATURAL RESOURCES AND FORESTRY)	*Sunil Mathai and Judith Parker* for the Respondent
Respondent	
	John A. Terry and Alex Smith for the Intervenor East Durham Wind, LP
	HEARD at Brampton: March 19, 2015

JUDGMENT

D.L. Corbett J.:

[1] The applicant ("DACES") seeks the aid of this court to compel compliance with the *Endangered Species Act*[1] by the Ministry of Natural Resources and Forestry ("MNRF") in connection with a wind farm project (the "Project") to be built by the intervenor East Durham Wind, LP ("Wind") near the Saugeen River in Grey County. DACES asserts that MNRF wrongly exempted Wind from compliance with the *Act* and its Regulation in respect to the Redside Dace (a fish) and its habitat.

---

[1] S.O. 2007, c.6.

[2] Construction on the Project is scheduled to start in April 2015.

[3] A full day of argument was scheduled for this application on March 19, 2015.

[4] Preliminary issues raised at the start of argument occupied the first two hours of the hearing. First, DACES sought to file supplementary evidence. Second, DACES sought to file a supplementary factum. MNRF and Wind objected to the late-filed evidence and to portions of the supplementary factum. After hearing argument on these points, the court decided to hear full argument on one of the issues on this application – whether there is a "decision" by MNRF which is subject to judicial review by this court. MNRF and Wind consented to the supplementary evidence being before the court solely in respect to this issue. The court reserved on whether the supplementary evidence could be used for any other purposes on this application, and on whether impugned portions of the supplementary factum would be permitted, and if so, whether an adjournment would be granted to permit MNRF to file further evidence and argument.

This Application

[5] In its notice of application, DACES seeks:

> A declaration that the decision of... [MNRF] exempting the [Project] from compliance with Ontario Regulation 242/08... regarding habitat protection for Redside Dace is null and void.

[6] The *Endangered Species Act* prohibits certain conduct harmful to species at risk ("SAR"). Section 9 prohibits certain harms to SAR, and s.10 prohibits certain harms to the habitat of SAR. Section 17 provides that the Minister may issue a permit that allows a proponent to do specified acts that would otherwise breach ss. 9 and 10. The *Act* does not provide for any "exemptions" other than a permit issued under s.17.

[7] MNRF has not exempted the Project from the Regulation. Rather, MNRF has concluded that the Project will not impact on Redside Dace, and so Wind need not apply for a permit in respect to Redside Dace. MNRF's conclusion also has the effect that Wind need not undertake further steps to satisfy MNRF in respect to Redside Dace, because MNRF is already satisfied.

[8] MNRF's conclusions are set out in two emails described below (the "impugned communications").

[9] Since there is no "decision... exempting the Project" from the *ESA* or its Regulation, this application, as framed, is doomed to failure. However, reading the notice of application generously, in substance it is a request to the court:

(i) to find that MNRF made a "decision" respecting the impact of the Project on Redside Dace and its habitat;

(ii) to find that this "decision" is wrong or unreasonable; and

(iii) to set aside this "decision".

Thus this application, framed properly, is a request for judicial review of MNRF's "decision" that Redside Dace will not be affected by the Project.

Judicial Review

[10] The jurisdiction of the Divisional Court on an application for judicial review arises from the *Judicial Review Procedure Act*.[2] Section 2(1) of that *Act* provides:

> On an application... the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:
>
> ...
>
> 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

[11] Section 1 of the *JRPA* defines "statutory power" as

> A power or right conferred by or under a statute,
>
> (a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,
>
> (b) to exercise a statutory power of decision,
>
> (c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
>
> (d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party.

---

[2] R.S.O. 1990, c. J.1.

Paragraphs (a), (c) and (d) have no application to this case. The phrase "statutory power of decision" in (b) is defined as:

> a power or right conferred by or under a statute to make a decision deciding or prescribing
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party; or
>
> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or license, whether the person or party is legally entitled thereto or not.

[12] Thus, the question is not whether the impugned communications are "decisions" of the MNRF. Rather, the question is whether MNRF exercised a "statutory power of decision" in the impugned communications.

The Impugned Communications

[13] The impugned communications are two emails sent by Jodi Benvenuti, a Species at Risk Biologist with MNRF, to Lynette Renzetti, a consultant planning ecologist retained by Wind. In the first email, on August 5, 2011, Ms Benvenuti wrote:

> Currently we have no occupied reaches for Redside Dace in the East Durham study area.

In the second email, on August 30, 2013, Ms Benvenuti wrote:

> [t]here are no Redside Dace (RSD) issues in this area. Within Midhurst District, there are only two occupied reaches for RSD, neither of which are in the area of Priceville (sic). Because of the highly localized nature of our occupied reaches, if I had felt there was potential concern with this species and the East Durham wind project I would have flagged it much earlier in the process.

[14] Wind did not apply for a permit under s.17 of the *ESA* in respect to Redside Dace.

[15] DACES argues that Ms Benvenuti was wrong in her conclusion that "there are no Redside Dace issues in this area". It is this "decision" that DACES challenges.

The Sierra Club Case

[16] *Sierra Club* v. *Ontario (MNRF)*[3] concerned a new bridge to be built between Windsor and Detroit. MNRF issued a permit under s.17 of the *ESA* to disturb eight species at risk believed to be present in the project area. MNRF concluded that a permit was needed only for those eight species because, while "other species at risk [may] occur in the area, MNRF has concluded that the activities authorized by the permit will not result in violations of the *Act* with respect to species that are not mentioned in the permit."[4]

[17] The applicant in *Sierra Club* argued that MNRF's conclusion, that the "other species at risk" would not be affected by the activities authorized by the permit, was a statutory power of decision susceptible to judicial review. This court disagreed:

> The species that may be "implicated" by the Parkway have been accounted for pursuant to s.17(2)(d) of the *ESA*. If more are found, the *ESA* will apply either in terms of protection or the requirement for an additional permit. To put it differently, it will remain an offence under the *ESA* for the MTO or anyone else to harm or kill SAR not covered by the Permit. In any event, as matters presently stand, this issue is not reviewable by way of judicial review. No statutory power of decision has been exercised. MTO did not apply for a permit in respect of other SAR. Accordingly, the Minister did not make any decision in respect of such an application.[5]

[18] DACES argues that *Sierra Club* is distinguishable because more due diligence was done in respect to Redside Dace in the case at bar than was done in respect to the unnamed SAR in the *Sierra Club* case. We do not accept this distinction. The extent of due diligence undertaken prior to MNRF reaching a conclusion does not affect the legal characterization of that conclusion: a conclusion does not become a statutory power of decision solely by being better informed.

[19] In our view this case cannot be distinguished from *Sierra Club*. The impugned communications are not "exercises of a statutory power of decision" which this court can review judicially.

---

[3] *Sierra Club Canada* v. *Ontario (M.N.R.F.)*, 2011 ONSC 4655, 285 O.A.C. 1, 63 C.E.L.R. (3d) 273, 344 D.L.R. (4th) 148 (Div. Ct.), per Lederer J. ("*Sierra Club*").
[4] *Sierra Club*, para. 95.
[5] *Sierra Club*, para. 96.

Conclusion

[20] The application is dismissed. As a result, it is not necessary to decide the outstanding preliminary issues.

[21] There was discussion during oral argument about alternative means by which members of the public might challenge MNRF's administration of the *Act* in a particular case. We decline to comment upon that general issue, which is not properly before us.

[22] If the parties cannot agree on costs then the respondent and the intervenor shall deliver costs submissions within fourteen days, and DACES shall deliver responding submissions within seven days thereafter.

[23] We are obliged to all counsel for their capable and thorough arguments.

D.L. Corbett J.

H. Sachs J.

Hambly J. per D.L. Corbett J.
I have authority to sign on behalf of Hambly J. D.L. Corbett J.

Released: March 25, 2015

CITATION: DACES v. Ontario (M.N.R.F.), 2015 ONSC 1933
COURT FILE NO.: DC-14-92
DATE: 20150325

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DURHAM AREA CITIZENS FOR ENDANGERED SPECIES (D.A.C.E.S.)

- and –

ONTARIO (MINISTRY OF NATURAL RESOURCES AND FORESTRY)

JUDGMENT

H. Sachs , Hambly and D.L. Corbett JJ.

Released: March 25, 2015