CITATION: Animal Alliance of Canada v. Ontario (Minister of Natural Resources), 2014 ONSC 2826
DIVISIONAL COURT FILE NO.: 179/14
DATE: 2014/05/08

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN, DAMBROT and MACKINNON JJ.

B E T W E E N :	
ANIMAL ALLIANCE OF CANADA and ZOOCHECK CANADA INC.	*Michael S. F. Watson* and *Brent J. Arnold* for the Applicants
Applicant	
– and –	
MINISTER OF NATURAL RESOURCES	*William Manuel* and *Judie Im* for the Ministry of the Attorney General
Respondent	*Michael Dunn* for the Constitutional Law Branch
	HEARD: April 29, 2014

MACKINNON J.:

NATURE OF THE PROCEEDING

[1] This is an application for judicial review of two regulations[1] authorizing the Minister of Natural Resources to reinstitute a spring bear hunt in eight Wildlife Management Units ("WMU") in northern Ontario and of the Minister's decision implementing the hunt in the form of a two-year "pilot program." The applicants challenge the regulations as *ultra vires*; they challenge the Minister's decision as unreasonable.

[1] O. Reg. 107/14 and O. Reg. 108/14

[2] The application was heard on April 29, 2014. Given that the spring bear hunt was scheduled to begin on May 1, 2014 the Panel provided its decision orally, dismissing the application with reasons to follow. These are the Reasons.

BACKGROUND

[3] Prior to 1999 a black bear hunt season used to occur every spring in Ontario. Killing bear cubs was prohibited during this spring hunt. It was also prohibited to kill female bears with cubs because those cubs, born during the mother bear's hibernation over the winter, are completely dependent on their mother for their first 5.5 months of life after hibernation. If their mother is killed, the cubs will almost certainly die of starvation or predation.

[4] Despite the ban, mother bears were killed during the spring bear hunt because of the difficulty in distinguishing between female and male black bears under field conditions, especially in the spring. The then Minister eventually canceled the spring bear hunt in 1999, explicitly citing the killing of mother bears as the main reason for doing so.

[5] In the years after the spring bear hunt was canceled the Ministry instituted a number of programs to manage human-bear interactions, including the "Bear Wise" program in 2004. Bear Wise aimed to reduce human-bear conflict through education, awareness, reporting and response, including animal relocation. In August 2013, CBC News reported that the Minister was not considering reinstating the spring bear hunt. The CBC News report noted that local politicians and residents had called on the Ministry of Natural Resources ("MNR") to step back in with bear management and relocation following a rise in "nuisance bear" complaints in communities throughout northeastern Ontario. The Minister was quoted as stating:

> The numbers [of bears] are relatively stable. Every year we have a different level of food sources and varying weather conditions affect and do affect the number of nuisance bears we have in various communities. … I'm working with our ministry staff to look at options and deal with specific issues and areas and communities where nuisance bears are more prevalent. You may hear more about that in the next short while.

[6] In November 2014, the MNR issued a press release proposing a two year bear management pilot program in specified areas in northern Ontario, all of which had reported high levels of nuisance bear activity. The proposal included a limited bear hunt open to Ontario residents from May 1 to June 15, 2014 and 2015, prohibited hunting bear cubs or females with cubs, was optional to the specified communities and would include monitoring and evaluation on an ongoing basis.

[7] On February 5, 2014 the Minister posted a proposal notice on the Environmental Registry under the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28 ("*EBR*") for a regulation re-instituting a spring bear hunt on a two year Pilot Project basis. The proposal notice noted that the purpose of the regulation was to provide for a hunting season as part of a program to "more effectively respond to human-bear conflict situations in northern Ontario." The proposal notice

was available for 30 days of public viewing and comment until March 7, 2014 and during that time 13,479 comments were received.

[8] The Minister's delegate produced a statement of how the Ministry's Statement of Environmental Values ("SEV") was considered (the "SEV consideration statement") in the development of the proposed regulation. Section 11 of the *EBR* requires the Minister or his/her delegate to take all reasonable steps to ensure the SEV is considered when decisions that might significantly affect the environment are made.

[9] No environmental assessment ("EA") was done under the *Environmental Assessment Act*, R.R.O. 1990, c. E.18 ("*EAA*"), as the Minister relied on an order exempting MNR wildlife management programs from that requirement.

ISSUES AND POSITIONS OF THE PARTIES

[10] The issues on this judicial review are:

(i) Whether the regulations are *ultra vires*?

a. For failure to satisfy a condition precedent – proper consideration of the Ministry's SEV

b. For failure to satisfy a condition precedent – no environmental assessment

c. For conflicting with s. 445.1 of the *Criminal Code*

(ii) Whether the Minister's decision was unreasonable?

[11] Recently the Supreme Court of Canada has confirmed in *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, that a regulation is only subject to narrow judicial review for *vires*. A regulation may be *ultra vires* for: (1) failure to satisfy a statutory condition precedent or (2) inconsistency with the objects and purposes of its enabling statute. The court held, at para. 27, that the inquiry "does not involve assessing the policy merits of the regulations to determine whether they are 'necessary, wise, or effective in practice.'"

[12] In this case, the applicants argue that the Minister failed to comply with statutory conditions precedent before the regulations were issued, namely proper consideration of the SEV and the requirement to conduct an EA.

[13] The applicants also argue that the regulations are *ultra vires* for conflicting with the *Criminal Code*, thereby engaging the constitutional doctrine of federal paramountcy.

[14] Finally, the applicants submit that the Minister's decision to implement the hunt was unreasonable and made in bad faith.

[15] The respondent counters that the Pilot Project Regulations are authorized by the *Fish and Wildlife Conservation Act 1997*, S.O. 1997, c. 41 ("*FWCA*"), that the Minister's delegate explicitly considered the Ministry's SEV in relation to the Pilot Project and that, in any event, any failure to do so cannot ground a challenge to the validity of the Pilot Project Regulations. Moreover, the respondent submits that an EA was not required for the proposal because wildlife population control through establishment and enforcement of hunting seasons for black bears is specifically exempt from the requirements under the *EAA*. The respondent disagrees that the *Criminal Code* prohibition of cruelty to animals has any application and, therefore, the doctrine of federal paramountcy cannot be engaged.

[16] Respecting the *vires* of the regulations, the respondent relies on *Katz*, *supra*, at paras. 27 and 28:

> [27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at p. 604. As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.):
>
> > ... 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. The motives for their promulgation are irrelevant. [para. 41]
>
> [28] It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corporation v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p. 111).

[17] Finally, the respondent submits the Minister's decision to implement the spring bear hunt via valid regulations is not subject to judicial review.

COURT'S JURISDICTION AND STANDARD OF REVIEW

[18] Pursuant to subsection 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, the Divisional Court has jurisdiction to grant any relief that an applicant would be entitled to in: (1) proceedings by way of an application for an order in the nature of *mandamus*, prohibition or *certiorari*, or (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.

[19] The standard of review as to whether the regulations are *ultra vires* is correctness. The standard of review applicable to the Minister's decision, if reviewable, is reasonableness because the decision was made pursuant to one of the Minister's home statutes or a statute closely connected to his function.

STATUTORY PROVISIONS

[20] For ease of reference the pertinent statutory provisions are set out here.

Environmental Bill of Rights, 1993

1. (1) In this Act,

…

"instrument", except as otherwise provided under clause 121 (1) (c), means any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation; ("acte")

…

7. Within three months after the date on which this section begins to apply to a ministry, the minister shall prepare a draft ministry statement of environmental values that,

(a) explains how the purposes of this Act are to be applied when decisions that might significantly affect the environment are made in the ministry; and

(b) explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry.

…

> 11. The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry.
>
> ...
>
> 37. Failure to comply with a provision of this Part does not affect the validity of any policy, Act, regulation or instrument, except as provided in section 118.
>
> …
>
> 118. (1) Except as provided in section 84 and subsection (2) of this section, no action, decision, failure to take action or failure to make a decision by a minister or his or her delegate under this Act shall be reviewed in any court.
>
> (2) Any person resident in Ontario may make an application for judicial review under the Judicial Review Procedure Act on the grounds that a minister or his or her delegate failed in a fundamental way to comply with the requirements of Part II respecting a proposal for an instrument.

ARE THE REGULATIONS *ULTRA VIRES*?

DID THE MINISTER COMPLY WITH *EBR* s.11?

[21] The Minister's Delegate completed the consideration of the Ministry's SEV. The SEV sets out a number of statements to guide the Minister's decision making. The applicants argue that the consideration of the SEV was a "cynical, *pro forma* and bad faith attempt to provide the mere appearance of compliance with the *EBR*." They say the Delegate only considered four of the SEV's eleven principles. They say that, effectively, the only issue addressed was public safety, which is not mentioned in the SEV. The SEV consideration statement was signed before the 30 day public consultation period expired. It contains placeholder notations such as "a total of XXXX comments were provided" and "I have taken into consideration the aforementioned in my decision to approve [proposal title]." The applicants maintain that the Minister did not even consider the established science and other data readily available to him on the consequences of the spring bear hunt in the form of the information relied upon by his predecessor to cancel the spring bear hunt in 1999. They say there is nothing to indicate that the Minister weighed the potential enhancement of public safety expected from a spring bear hunt against the number of cubs that would die as a result of it.

[22] These submissions are not persuasive. Section 11 of the *EBR* does not require complete consideration of public comments before the SEV is considered. Public safety is a proper consideration under the *FWCA*, the general purpose of which is conservation of fish and wildlife and public safety. The public safety purpose of the Pilot Project is consistent with the *FWCA*. It is also consistent with the Ministry's SEV which does provide the Minister will "take into

account special, economic and other considerations; these will be integrated with the purposes of the *EBR* when decisions that might significantly affect the environment need to be made." The Delegate checked four of eleven boxes in the consideration statement, indicating they were relevant to the proposal. This does not mean he did not consider the other factors.

[23] In *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609, 105 O.R. (3d) 111 (Div. Ct.), this Court stated at paragraph 31:

> It is not the court's function to question the wisdom of the minister's decision, or even whether it was reasonable. If the minister followed the process mandated by s. 11 of the EBR, his decision is unassailable on a judicial review application. If he did not comply with the mandated process, the court would have to decide if the failure to do so means he acted without lawful authority.

[24] The Minister did comply with the mandated process. His delegate did consider the Ministry's SEV. Public notice was given as required by s. 27 of the *EBR*. All reasonable steps were taken to ensure that comments relevant to the proposal were considered. The completion of the SEV consideration statement prior to the close of the 30 day period for public consultation does not preclude this finding because consideration of the SEV and the 30 day public consultation period are separate processes.

[25] Under s. 37 of the *EBR* (subject to s. 118), failure on the part of the Minister to consider the SEV, to give public notice, or to consider public comments received when decisions about a proposal are made does not affect the validity of any policy, Act, regulation or instrument. Under s. 118(1), "no action, decision, failure to take action or failure to make decision by a minister or his or her delegate under this Act shall be reviewable by any court." The scope of this latter privative clause is subject only to s. 118(2) which provides the right to judicially review only an instrument (which does not include a Regulation) and even then the instrument may only be challenged for fundamental failure to comply.

[26] This is confirmed in *Hanna*, at paras. 7-10:

> [7] Section 37 of the *EBR*, found in Part II of the Act, states "failure to comply with a provision of this Part does not affect the validity of any policy, Act, regulation or instrument except as provided in s. 118". This section applies to the minister's duty to consider the statement of environmental values because s. 11 of the *EBR* is also in Part II.
>
> [8] Section 118(1) reads "no action, decision, failure to take action, or failure to make a decision by a minister or his or her delegate under this Act shall be reviewed in any court".
>
> [9] Section 118(2) provides that any person resident in Ontario may make an application for judicial review on the grounds that a minister or his or her delegate

> "failed in a fundamental way to comply with the requirements of Part II respecting a proposal for an instrument" (emphasis added). Under the definitions in the *EBR*, an "instrument" includes a permit, licence, approval, authorization, direction, or order issued under the Act but does not include a regulation. It is worth noting that during the debates on s. 118, a proposed amendment to s. 118(2) that would have removed the words "respecting a proposal for an instrument", so that a regulation could be challenged through judicial review, was specifically rejected.
>
> [10] In short, s. 118(2) does not apply in this case and the decision of the minister is protected from judicial scrutiny by two privative clauses, both s. 37 and s. 118(1) of the *EBR*. The court's jurisdiction is therefore quite circumscribed.

[27] The applicants also offered the submission that the Minister's decision to implement the Pilot Project should not be protected by s. 118, even if the ensuing Regulations were, because the word "decision" is not contained in s. 37. Since s. 37 and s. 11 are both found in Part II of the *EBR*, the applicants say that s. 37 should be regarded as specifically applying to a minister's decision under s. 11. In contrast s. 118, which does include "decisions" is a provision of only general application and should not so apply. This argument has no merit. It is an attempt to challenge the Regulations by another route.

COMPLIANCE WITH THE *ENVIRONMENTAL ASSESSMENT ACT*

[28] Section 5(3) of the *EAA* prohibits any person from proceeding with an undertaking unless the proponent carries out an EA in accordance with the requirements of the *EAA*. The EA must then be approved by the Minister of the Environment or the Environmental Review Tribunal, after taking into account public consultation and the adequacy of the EA. It is common ground that no EA was done for the proposal. The respondent says that an EA was not required because in 1985 the Minister requested and obtained an *EAA* exemption for the following undertakings:

> wildlife population and habitat management activities conducted by MNR including population control through the establishment and enforcement of bag limits and hunting seasons for game species.[2]

[29] The exemption order, MNR-42, is subject to conditions, including that a Regulation Proposal Notice be publicly posted, that 30 days be given for public response, and that the Minister of Environment be given an opportunity to order the proposal undergo an EA. These conditions were met. In particular, the Proposal Notice posted on the *EBR* Registry constituted notice to the Minister of the Environment; there is no suggestion or evidence that the Minister of Environment required an EA to be prepared.

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[2] Black bears are defined as game species pursuant to the *FWCA*.

[30] However, the applicants submit that the exemption order does not apply and that the Pilot Project is subject to the *Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects* (the "Class EA"). The validity of this submission depends upon whether the Pilot Project is about "nuisance species control." The applicants point to the description of the Pilot Project in the notice posted by MNR on the Environmental Registry which notes the Minister's intention to "respond to human-bear conflict situations" in areas that have reported high levels of "nuisance bear activity" in support of their submission that the program is at its core about "nuisance species control" and therefore within the Class EA.

[31] The Class EA describes nuisance species control programs as "relatively minor in terms of frequency and significance," "not expected to result in significant adverse effect," and "reserved for urgent situations, when if not action is taken, human health and safety could be threated." The two year Pilot Project and Pilot Project Regulations are readily distinguishable from a program designed for nuisance species control. Their purpose is to consult on the proposed bear management project and to enable a limited spring bear hunting season in specific areas to respond to human-bear conflict situations in northern Ontario.

[32] The Class EA document expressly provides that "long term application of EA Act coverage for wildlife management activities and the rabies control program is provided by Order MNR-42 and 62 respectively." Wildlife population management activity is defined in Procedure No. EA 4.02.20 WM as, "deliberate and planned actions, generally taken to sustain healthy wildlife populations. … [and includes] establishing or adjusting season length and harvest limits to achieve population targets within a specified time in a specific area."

[33] Accordingly the Class EA does not apply to the Pilot Project.

IS THE PILOT PROJECT CONTRARY TO THE *CRIMINAL CODE*?

[34] The applicants submit the Pilot Project Regulations are inconsistent with s. 445.1 of the *Criminal Code* which prohibits cruelty to animals. Thus, the *Criminal Code* provision should prevail by virtue of the constitutional doctrine of federal paramountcy. Section 445.1 (a) and (3) state:

> 445.1 (1) Every one commits an offence who
> (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;
>
> …
>
> (3) For the purposes of proceedings under paragraph (1)(a), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering or injury was caused or was permitted to be caused wilfully, as the case may be.

[35] The applicants' argument is as follows. The regulations will result in the hunting of black bears during the spring and this will result in lactating female bears being killed due to the difficulty in distinguishing between male and female black bears. Bear cubs will lose their mothers and will die by predation or starvation. The prohibition on hunting cubs or females accompanied by cubs is ineffective because cubs are not always with their mother when she is foraging. This is well known to the MNR by virtue of its own studies relied on in the 1999 decision to ban the spring bear hunt. Accordingly by reinstating the spring hunt, the regulations are causing or permitting the cubs to suffer.

[36] Claims of paramountcy can arise either because compliance with both laws is impossible or because compliance with the provincial law would frustrate the purpose of the federal law: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 64. This is not a case where it is impossible to comply with both laws. The substance of the applicants' claim is that the Pilot Project frustrates the purpose of the *Criminal Code* prohibition of cruelty to animals by permitting the spring hunt with the inevitable outcome that mistakes will be made, mother bears will be killed and cubs will die.

[37] The legislative history is available to assist in determining the federal purpose of the *Criminal Code* provisions relating to cruelty to animals. In 1998 the Department of Justice was considering revisions to the provisions and noted:

> It is therefore essential to note that the offence of cruelty to animals is not intended to forbid conduct that is socially acceptable or authorized by law. The current provisions do not restrict or otherwise interfere with normal and regulated activities involving animals, such as hunting, fishing and slaughter for food, and the same would be true of a reformed law. Criminal prohibitions are directed at conduct that falls outside of normally accepted behavior.[3]

[38] Additionally, to secure a conviction under s. 445.1 the Crown is required to prove beyond a reasonable doubt that the accused individual "wilfully" caused unnecessary pain or suffering to an animal. This could be done by proving that the accused hunter knew that his or her act or omission will probably cause the animal unnecessary pain or suffering and is reckless as to whether this occurs or not. The mental element of the s. 445.1 offence is not met by a hunter who kills a female bear not knowing whether the bear has a cub. The fact that the provincial MNR and perhaps an individual hunter may be taken to have the general knowledge that mistakes will happen and some cubs will die does not produce the result that the provincial legislation frustrates the purpose of the federal *Criminal Code* provision.

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[3] Canada, Department of Justice, *Crimes against Animals: A Consultation Paper* (Ottawa: Justice Canada, 1998) at 5.

[39] Moreover, the Attorney General of Canada has not intervened in this case and does not assert that the provincial law conflicts with the *Criminal Code* provision.

[40] All these reasons support the conclusion that the doctrine of federal paramountcy has no application to this case. The regulations are not *ultra vires*.

WHETHER THE MINISTER'S DECISION IS UNREASONABLE

[41] As explained above, the Minister's "decision" to implement the Pilot Project pursuant to the validly authorized regulations is not subject to judicial review under the *EBR*. In their written materials the applicants framed their argument about the unreasonableness of the Minister's decision for failure to consider relevant considerations (the established science on the consequences of the spring bear hunt) and for bad faith (the cynical approach to consideration of the SEV) as a standalone argument. We do not view this as a standalone argument. Rather, we view it as inextricably linked to the applicants' arguments regarding the Minister's consideration of the SEV under *EBR* which we have rejected for the reasons given above.

DECISION

[42] The application for judicial review is dismissed.

J. MACKINNON J.

THEN J.

DAMBROT J.

RELEASED: May 8, 2014

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REASONS FOR JUDGMENT

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