ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

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From:	**Nina Dixon** **Divisional Court**	**Date:**	**September 20, 2010**	
Re:	**File # DC 412/10**	**No. Pages:**	**6**	
Urgent	**For Review**	**Please Comment**	**Please Reply**	**Please Recycle**

Enclosed, please find attached a copy of the endorsement of The Honorable Justice Swinton, dated September 16, 2010.

If you require further assistance please contact Nina Dixon at 416- 327- 5100.

Thank you kindly,

N.Dixon

COPY

CITATION: Sierra Club Canada v. Her Majesty the Queen in Right of Ontario, 2010 ONSC 5130
COURT FILE NO.: 412/10
DATE: 20100920

SUPERIOR COURT OF JUSTICE - ONTARIO
(DIVISIONAL COURT)

RE: SIERRA CLUB CANADA

- and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTATIVE OF THE MINISTRY OF NATURAL RESOURCES AND THE MINISTRY OF TRANSPORTATION

BEFORE: Justice Swinton

COUNSEL: Paula Boutis for the Applicant
William Manuel and Lise Favreau for the Respondent

HEARD AT TORONTO: September 16, 2010

ENDORSEMENT

Background

[1] Sierra Club Canada ("SCC") has brought an application for judicial review to challenge a permit under the *Endangered Species Act, 2007*, S.O. 2007, c. 6 (the "ESA") issued by the Minister of Natural Resources to the Crown in Right of Ontario as represented by the Ontario Ministry of Transportation ("MTO"). In the present motion, SCC seeks an interlocutory injunction to prevent certain construction activity being taken in accordance with the permit, particularly the demolition of houses in a certain zone. The respondent Crown, in turn, has brought a motion to dismiss the application for judicial review on the grounds of delay.

[2] The permit was obtained in order to allow the construction of the Windsor-Essex Parkway ("WEP"), which will connect Highway 401 in the Town of Tecumseh to a new customs plaza site in the City of Windsor and a new bridge crossing the Detroit River. The WEP is part of the project to build a new international crossing through a partnership of the governments of Ontario, Canada, Michigan and the United States.

[3] The MTO has acquired a large number of properties, including residential properties, which will be demolished for the construction of the WEP.

[4] The Minister of Transportation applied for a permit under the ESA because the construction project would affect eight species classified as threatened or endangered under the ESA. Subsection 9(1) of the ESA prohibits any person from killing, harassing, capturing or taking a living member of a species listed as at risk in Ontario as an extirpated, threatened or endangered species. Section 10 prohibits damage or destruction of habitat for certain species. Of the eight species affected by the WEP, habitat protection under the ESA applies only to one species, the Eastern Foxsnake.

[5] Section 17 permits the Minister of Natural Resources to issue a permit authorizing activity otherwise prohibited by ss. 9 or 10. In the present case, the permit was obtained under s. 17(2)(d), which allows the Minister to issue a permit where the main purpose of an activity is not to assist in the protection or recovery of the species, but a number of criteria have been met:

> (i) the Minister is of the opinion that the activity will result in a significant social or economic benefit to Ontario,
>
> (ii) the Minister has consulted with a person who is considered by the Minister to be an expert on the possible effects of the activity on the species and to be independent of the person who would be authorized by the permit to engage in the activity,
>
> (iii) the person consulted under subclause (ii) has submitted a written report to the Minister on the possible effects of the activity on the species, including the person's opinion on whether the activity will jeopardize the survival or recovery of the species in Ontario,
>
> (iv) the Minister is of the opinion that the activity will not jeopardize the survival or recovery of the species in Ontario,
>
> (v) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted,
>
> (vi) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit, and
>
> (vii) the Lieutenant Governor in Council has approved the issuance of the permit.

The Minister can impose conditions in a permit, including requirements that must be taken before the activity commences, and monitoring of compliance.

[6] The permit was issued on February 9, 2010 identifying the eight species at risk ("SARs") and specifying detailed conditions for the project. A redacted version was posted on MTO's website on April 7, 2010. SCC had knowledge of its content at the latest around April 25, 2010.

[7] The schedule for the WEP construction contemplates extensive preliminary work, including activities for the protection of SARs, demolition activities and utility relocation (including gas lines and two pipelines). MTO has commenced that preparatory work, including some of the mitigation work required under the permit. In July, an announcement was made that demolition would commence in August. That demolition activity has started, and it is contemplated that over 220 buildings will be demolished before the end of the year.

[8] The design, construction, financing and maintenance of the WEP are currently in the procurement process with the intention that construction will begin in 2011.

[9] SCC is particularly concerned about three of the affected SARs: colicroot, a plant; Butler's Gartersnake; and the Eastern Foxsnake. The first two are threatened species, while the Eastern Foxsnake is endangered. SCC made two submissions to the Minister of Natural Resources prior to the issuance of the permit on the protection of these and the other species.

[10] On August 18, 2010, SCC commenced its application for judicial review. It now seeks an interlocutory injunction to prevent demolition of 68 properties and construction activity in the area west of Huron Church Road where it meets E.C. Row Parkway in order to protect species habitat.

Motion for an interlocutory injunction

Is there a serious issue to be tried?

[11] The respondent argues that SCC has not met the low threshold of a serious issue to be tried. SCC raises a number of arguments concerning the permit. It argues that the requirement for an independent expert has not been met with respect to one species, Butler's Gartersnake, and that the mitigation efforts approved are not sufficient, particularly in light of the precautionary principle, and therefore, the permit cannot stand.

[12] SCC also speaks in its motion materials of putting forth evidence relating to a challenge to the criterion of social and economic benefit. It is not appropriate for me, in this motion, to enter into the debate about the evidence that can properly be placed before the court in the judicial review application.

[13] I cannot say that the arguments are frivolous or vexatious, and therefore, I will consider the other elements for interlocutory relief.

Will the applicant suffer irreparable harm if the injunction is not granted?

[14] SCC argues that the three species will suffer irreparable harm if the demolition and construction work continues. They believe the mitigation efforts may not succeed, and the species will be irreparably harmed. For example, they take issue with the planned method to protect the propagation of the colicroot, given the untested methodoly, and the movement of the snakes from their habitat.

[15] In my view, they have failed to put forth evidence to support their argument of irreparable harm and for this reason, the motion must fail.

[16] Fausto Natarelli of MTO gave affidavit evidence on behalf of the respondent. He stated that pre-screening of all buildings to be demolished has occurred, and no SARs were found to be present. On the date a building is to be demolished, there is a further screening for SARs in all

structures on the site. If any are found, the mitigation steps required by the permit must be followed. If a protected species not covered by the permit is found, a new permit must be sought.

[17] Moreover, he gave evidence that the injunctive relief sought by SCC could harm SARs. There is a concern that the snakes will be attracted to the vacant buildings over the fall and winter. This would result in disruption through the need to capture and release them.

[18] The evidence from the respondent is not contradicted. Thus, the case for preventing demolition of the buildings to prevent irreparable harm to any of the SARs has not been made out.

[19] SCC, in oral argument, stated that it sought to prevent demolition only if SARs were actually to be found in a building. SCC does not agree with the mitigation requirements of the permit. However, it has not provided evidence that shows irreparable harm to any of the species will result because the mitigation requirements are insufficient. At most, it speculates that the measures are inadequate.

Where does the balance of convenience lie?

[20] Even if there were evidence of some potential harm to the survival or recovery of one of the SARs, such as the colicroot plant, the balance of convenience does not favour the granting of an injunction.

[21] Leaving the buildings intact creates concerns for the safety and comfort of neighbouring residents, as there have been problems with vandalism, squatters and theft. Neighbouring owners have also complained about loss of enjoyment of their properties due to the vacant buildings and lots.

[22] The respondent has also led evidence that delay in completing the demolition of the buildings will affect the construction schedule by impeding preparatory work and the relocation of utilities. Inevitably, that will create costs. The respondent has led evidence of adverse economic impacts if the project is affected by constraints on demolition and construction.

[23] The permit contains detailed provisions for the protection of the SARs, including training for those involved in the project, habitat protection and remediation. There is a real risk that if the demolition is stopped, there will be disruption to the snakes that could have been avoided. While SCC may take issue with the efficacy of the mitigation measures in the permit, they have not shown that there is a threat to the three species with which they are particularly concerned that overrides the public interest in continuing the project, including the demolition, in compliance with the safeguards in the permit.

[24] Therefore, the motion for an interlocutory injunction is dismissed. Given my conclusion, I need not address the question whether injunctive relief is even available against the Crown in the circumstances of this case.

Motion to dismiss for delay

[25] On an application for judicial review, a court may refuse to grant relief because of the delay in bringing the application. The court considers the length of the delay, the reasons for the delay, and the prejudice caused (*Gigliotti v. Conseil d'Administration du Collège des Grands Lacs*, [2005] O.J. No. 2762 at para. 28).

[26] Generally, such relief is sought from the panel hearing the application, since the relief is discretionary. However, in some cases, a motion judge has given this relief.

[27] In the circumstances of this case, I do not think it appropriate to dismiss the application for delay in my capacity as a single judge of the Divisional Court. The applicant was able to obtain a copy of the permit near the end of April 2010 and commenced the application for judicial review on August 18. This is not a case like *Zaki v. Ottawa Hospital (General Campus)*, [2003] O.J. No. 894 (Div. Ct.), where C. McKinnon J. dismissed an application because it had been brought a number of years after the impugned decisions were made.

[28] Therefore, in accordance with s. 21(4) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the motion to dismiss the application for delay is adjourned to be determined by the panel hearing the application for judicial review.

[29] If the parties cannot agree on costs, they may make brief written submissions within 30 days of the release of this decision.

Swinton J.

Released: September 20, 2010