

SMART *Remediation*

Snakes and Turtles and Bats, oh my! What environmental consultants need to know about species at risk



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Snakes and Turtles and Bats, Oh My! What Environmental Consultants need to know about Species at Risk

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This presentation provides general information and is not intended to provide legal advice.
Audience members should seek legal advice for specific situations.

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Overview

- **Applicable Law**
 - *Federal Species at Risk Act*
 - *Ontario Endangered Species Act, 2007*
- **Species at Risk and Development**
 - Exemptions
 - Case Law

FEDERAL SPECIES AT RISK ACT

Federal *Species at Risk Act* (SARA)

- **SARA applies on federal lands**
 - land that belongs to His Majesty in right of Canada, or that His Majesty in right of Canada has the power to dispose of, and all waters on and airspace above that land;
 - the internal waters of Canada and the territorial sea of Canada; and
 - reserves and any other lands that are set apart for the use and benefit of a band under the *Indian Act*, and all waters on and airspace above those reserves and lands
- **Schedule 1 – Official List of Wildlife Species at Risk**
- **Prevent Canadian indigenous species, subspecies, and distinct populations from becoming extirpated or extinct**
- **Provide for the recovery of endangered or threatened species**
- **Encourage the management of other species to prevent them from becoming at risk**

Federal *Species at Risk Act* (SARA)

- **General prohibitions**
 - no person shall kill, harm, harass, capture or take a listed species
 - no person shall possess, collect, buy, sell or trade a listed species
 - no person shall damage or destroy the residence of a listed species
- **Protection of critical habitat**
- **Recovery strategies and action plans**
- **Enforcement**
- **Offences**

***ONTARIO
ENDANGERED SPECIES
ACT, 2007***

Ontario *Endangered Species Act*, 2007

Objectives of the Act

- identify species at risk based on the best available scientific information obtained from
 - community knowledge, and
 - aboriginal traditional knowledge
- protect species that are at risk and their habitats, and to promote the recovery of species that are at risk
- promote stewardship activities to assist in the protection and recovery of species that are at risk

O. Reg 230/08: Species At Risk in Ontario

List – Categories

- **Committee on the Status of Species at Risk in Ontario (COSSARO)**
- **Extirpated** – no longer lives in the wild in Ontario
- **Endangered** – lives in the wild in Ontario, but facing imminent extinction or extirpation
- **Threatened** – lives in the wild in Ontario, likely to become endangered if action not taken
- **Special Concern** – lives in the wild in Ontario, may become threatened if action not taken
- **Not at Risk**

Endangered Species Act, 2007 –

Prohibition on Killing

Section 9 (1) No person shall,

- a) kill, harm, harass, capture or take a living member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;
- b) possess, transport, collect, buy, sell, lease, trade or offer to buy, sell, lease or trade,
 - i. a living or dead member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species,
 - ii. any part of a living or dead member of a species referred to in subclause (i),
 - iii. anything derived from a living or dead member of a species referred to in subclause (i); or
- c) sell, lease, trade or offer to sell, lease or trade anything that the person represents to be a thing described in subclause (b) (i), (ii) or (iii)

Endangered Species Act, 2007 – **Prohibition on Damage to Habitat**

Section 10(1) No person shall damage or destroy the habitat of,

- a) a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species; or
- b) a species that is listed on the Species at Risk in Ontario List as an extirpated species, if the species is prescribed by the regulations for the purpose of this clause.

Section 10(2) If the Species at Risk in Ontario List specifies a geographic area that a classification of a species applies to, subsection (1) only applies to that species in that area

Endangered Species Act, 2007 – Prohibition on Damage to Habitat

- **Habitat” means**
 - a) habitat that is prescribed by regulation for a species (regulated habitat); or
 - b) an area on which the species depends, directly or indirectly, to carry on its life processes (general habitat)
- **Regulated habitat may include specific requirements or exemptions relevant to development activities**

Endangered Species Act, 2007 – Habitat

- **General**
 - area on which a species depends directly or indirectly to carry out its life processes
 - Section 2(1)(b)
- **Regulated**
 - area prescribed for species in habitat regulation per section 2(1)(a)
 - may include areas currently unoccupied by the species
 - may be smaller or larger than general habitat
- **Both include places that the species uses as dens, nests, areas for hibernation or other residences**

Endangered Species Act, 2007 –

Enforcement

- **Stop Orders (s. 27)** – issued by an enforcement officer having reasonable grounds to believe an activity is contravening, has contravened or is about to contravene certain provisions of the Act (e.g. sections 9, 10, 16.1, 17)
- **Species Protection Orders (s. 27.1)** – issued by the Minister having reasonable grounds to believe an activity has, or is about to have a significant adverse effect on a species, subject to criteria
- **Habitat Protection Orders (s. 28)** – issued by the Minister having reasonable grounds to believe an activity is destroying or seriously damaging or is about to destroy or serious damage on important feature described in clause (b) of the general habitat definition, subject to criteria
- **Prosecution (s. 26 – s. 45)**

Endangered Species Act, 2007 –

Recent Amendments

Amendments came into force on May 31, 2022; these include

- updates to reflect the addition of newly listed species
- expansion to activities eligible for conditional exemptions from prohibitions
- notice of activity form must be submitted before carrying on activities that are eligible for conditional exemptions
- clarification on when prohibitions come into effect
- exemptions for activities necessary to avoid non-imminent threats to human health do not apply to certain species

DEVELOPMENT AND CASE LAW REVIEW

Exemptions to Prohibitions

- **May exist in your jurisdiction**
- **Manitoba – Minister can exempt existing or proposed development if the minister is satisfied that**
 - protection and preservation of the species and its habitat is assured; or
 - appropriate measures are established, or will be established, to reduce to a minimum the impact of the development upon the species and its habitat.

Exemptions to Prohibitions

- **Ontario – permits, agreements, conditional exemptions**
 - taking measures to minimize adverse effects of activity on species
 - completing beneficial (helpful) actions for the species
 - creating and following a mitigation plan
 - monitoring and reporting on effectiveness of mitigation measures
 - 5 types of permits - health or safety, protection or recovery, overall benefit, social or economic benefit to Ontario, and Aboriginal Community permits
 - 3 types of agreements – Stewardship, Landscape and Aboriginal Community Agreements

R v Lake Louise Ski Area Ltd.



- **Summer Trail Crew employed by Lake Louise Ski Area cut down Whitebark Pine and other trees while undertaking trail maintenance – 58 Whitebark Pines felled**
- **Lake Louise Ski Area Ltd. was charged and pled guilty to two counts**
 - Count 1: offence under 97(1) of SARA, kill an individual wildlife species that is listed as an endangered species contrary to section 32(1) of SARA – Whitebark Pine
 - Count 2: remove, deface, damage or destroy flora in a park without a permit issued under section 11(1) of the National Parks General Regulations, thereby committing an offence under section 24(2) of the *Canada National Parks Act*
- **\$2.1 million fine (Count 1: \$1.6 million; Count 2: \$500,000)**

Ontario (Natural Resources and Forestry) *v South Bruce Peninsula*

- **Town worked with MNR to protect the habitat of the Piping Plover**
- **Town passed a bylaw prohibiting the raking of Sauble Beach before the birds arrived in the spring or within 30 feet of the sand dunes at anytime**
- **In February & April 2017, Town used heavy machinery to mechanically rake width & length of the beach**
- **In August & September 2017, Town used a bulldozer and agricultural cultivator to work length of a beach**

Ontario (Natural Resources and Forestry) *v South Bruce Peninsula*

- **Crown experts testified the Town's actions damaged the habitat of the Piping Plover in multiple ways**
- **The Town was convicted of two counts of damaging the habitat of the Piping Plover contrary to section 10(1)(a) of the *Endangered Species Act, 2007***
- **The Court held that 'damage' should be given a generous interpretation in light of objective of environmental protection**



R v Haddad et al.



- **Plan to construct eight multi-unit residential buildings**
- **Property identified as species at risk habitat under the ESA and a permit would be required**
- **No ESA approvals were applied for or obtained**
- **Conservation Officer attended the site and noticed that the defendants had commenced work**
- **The work damaged or destroyed habitats listed for ESA species, specifically the Butler Gartersnake, Eastern Foxsnake, and Willowleaf Aster**



R v Haddad et al.



- **Defendants were charged with**
 - one count against each defendant under section 9(1)(a) *Endangered Species Act, 2007* for killing or harming living threatened or endangered species plant
 - three counts against each defendant under section 10(1)(a) *Endangered Species Act, 2007* for unlawfully damaging or destroying habitat of threatened or endangered species
- **Mr. Haddad pled guilty to two counts of destruction of habitat and received a fine of \$25,000 per count**
- **Maple Grove Homes pled guilty to one count of destruction of habitat and received a fine of \$25,000**

R v M&A Rentals Inc.



- **M&A Rentals owns a 130 acre property**
- **City of Ottawa advised M&A Rentals that some of the property was Blanding's Turtle habitat**
- **M&A Rentals cleared the property with heavy equipment**
- **Court determined work damaged Blanding's Turtle habitat contrary to section 10(1) of the ESA**
- **Ordered to complete ~\$400,000 in habitat rehabilitation on a stream running through the property**
- **Ordered to pay \$90,000 to the Nature Conservancy of Canada for the benefit of Blanding's Turtles**

R v Les Entreprise Antoine Stabille & fils Inc.



- **Emergency Order for the Protection of the Western Chorus Frog pursuant to *Species at Risk Act* prohibits the use of any on- or off-road vehicle anywhere other than on a road or paved path**
- ***Les Entreprise* operated heavy machinery in La Prairie (an area covered by the Emergency Order which is a 2 km² area of partially developed land)**
- **Pled guilty for violating the Emergency Order and were fined \$25,000**

Final Thoughts

- **Where there are prosecutions, fines tend to be high and there is a risk of imprisonment**
- **Prosecutions in the development context do occur in Ontario**
- **Ontario trend indicative of potential future prosecutions for developers/consultants responding to species at risk**
- **Increasing use of stewardship agreements and overall benefit permits**

Willms & Shier Environmental Lawyers

- **Established nearly 50 years ago**
- **Environmental, Indigenous, and Energy law**
- **17 lawyers**
 - seven lawyers are certified by the Law Society of Ontario as Environmental Law Specialists and one in Indigenous Legal Issues
 - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
 - offices in Toronto, Ottawa, Calgary, and Yellowknife

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