Court File No. M45222

COURT OF APPEAL FOR ONTARIO

BETWEEN:

WILDLANDS LEAGUE and
FEDERATION OF ONTARIO NATURALISTS

Applicants / Moving Parties

and

LIEUTENANT GOVERNOR IN COUNCIL and
MINISTER OF NATURAL RESOURCES

Respondents / Responding Parties

FACTUM
OF THE RESPONDENTS

Date: July 29, 2015

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PART I - OVERVIEW

1. The Moving Parties seek leave to appeal the Divisional Court's unanimous decision dismissing their application for judicial review challenging the *vires* of Ontario Regulation 176/13 ("*Regulation*")[1] passed pursuant to the *Endangered Species Act, 2007*, S.O. 2007, c. 6 ("*ESA*" or "*Act*").

2. The *Regulation* creates species or activity based exemptions that permit proponents to engage in activities that would otherwise be prohibited by the *ESA*. However, the activities will only be permitted if the proponent can satisfy a number of onerous conditions meant to mitigate impacts on the species.

3. Pursuant to s. 57, before the Lieutenant Governor in Council ("LGIC") can promulgate a regulation that permits activities that are prohibited by the *ESA,* the Minister of Natural Resources and Forestry ("Minister") must form an opinion on whether the regulation is "likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species" (ss. 57(1), para. 1). If the Minister's believes that the regulation is "likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species", then the Minister is required, amongst other things, to obtain an expert opinion on the regulation's effects on species at risk before the regulation can be recommended to the LGIC. In this case, based on advice that reflected considered work by Ministry staff, the Minister did not form the opinion that the *Regulation* was likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species.

4. The Moving Parties challenged the *vires* of the *Regulation* on two grounds. First, the Moving Parties argued that the Minister did not satisfy s. 57 of the *ESA* on the basis that the

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[1] Ontario Regulation 176/13, amended Ontario Regulation 242/08

Minister did not "assess the effect of the proposed regulation on any of the endangered or threatened species to which it would apply".[2] Second, the Moving Parties claimed that the *Regulation* is inconsistent with the objects and purposes of the *ESA*, as the *Regulation* permits harms to endangered or threatened species that are inconsistent with the protection and recovery purposes of the *Act*.[3]

5. After a two day hearing on the application, the Divisional Court unanimously dismissed the application finding that the Minister formed the opinion required by section 57 and that the *Regulation* was consistent with the purposes of the *ESA*.

6. On the motion for leave to appeal, the Moving Parties argue that leave should be granted because the Divisional Court erred: (1) in finding that the Minister complied with s. 57; (2) in ruling that the Minister's opinion was not subject to review; and (3) in finding that the *Regulation* was consistent with the *ESA*.

7. The Respondents respectfully submit that leave should not be granted because the proposed appeal does not raise any issues of importance warranting this Honourable Court's review and that :

(a) The Divisional Court did not err in finding that the Minister complied with s. 57 because the record does, in fact, demonstrate that the Minister considered the impact of the *Regulation* on each species;

(b) The Moving Parties should be precluded from raising the second issue as they abandoned their request for a declaration that the Minister's opinion was unreasonable at the hearing below. The Moving Parties made a tactical decision to abandon this argument and should not be entitled to raise this argument for the first time on an appeal. In any event, the Divisional Court was correct in deciding that the

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[2] Moving Parties' Factum, para. 22
[3] Moving Parties' Factum, paras. 95-97

Minister's opinion was not subject to review; and

(c) As found by the Divisional Court, the *ESA* explicitly provides the Minister with the authority to consider social, economic, health and cultural considerations when determining whether to grant an exemption from the prohibited harms. Based on these considerations, the *Regulation* permits exemptions to the prohibitions if a proponent engages in a suite of rigorous conditions that are intended to mitigate harm to species at risk. As such, the *Regulation* is consistent with the *ESA*.

8. The proposed appeal does not engage issues of the legal interpretation of s. 57. Rather, the Moving Parties take issue with the Divisional Court's application of the law to the record before the Court, and whether the record in fact demonstrates that the Minister considered each species. This is a question of fact and limited to the record in this case. Furthermore, the Moving Parties' argument that the protection and recovery purposes of the *ESA* trump all other considerations explicitly permitted by the *ESA* runs contrary to well-established law that a legislative purpose section cannot override a specific statutory authority within the *Act*.[4] The Moving Parties have not proffered a compelling argument for abandoning this well-established principle of law. As such, there is no broad public importance to this proposed issue that requires this Honourable Court's intervention.

PART II – THE FACTS

A. *The Endangered Species Act, 2007*

9. The *ESA* is a regulatory scheme that provides statutory protection to species listed as threatened, endangered and extirpated. The *Act* contains a preamble and purposes section. The preamble of the *ESA* states that, "the People of Ontario wish to do their part in protecting species

[4] Sullivan on the Construction of Statutes, 5th ed (Markham: LexisNexis, 2008) at pp. 391-393; see also *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, para. 32

at risk, with appropriate regard to social, economic and cultural considerations".[5] Reflecting these aims, the *ESA* identifies, in general terms, four purposes of the *Act*: (a) identifying species at risk ("SAR"); (b) protecting SAR and their habitats; (c) promoting the recovery of SAR; and (d) promoting stewardship activities to assist in the protection and recovery of SAR (collectively "the protection and promotion purposes").[6]

10. The Moving Parties argue that the protection and promotion purposes are a controlling feature of the *ESA* and that the *Act* does not permit the LGIC to promulgate regulations that are motivated by any factor outside of the protection and promotion purposes. However, as reviewed below and as found by the Divisional Court, the *ESA* reflects a nuanced approach that places the protection and recovery of species at risk as a central concern to be balanced with appropriate social, economic, health and cultural considerations.

(i) Species at Risk and the prohibitions

11. Subsection 5(1) of the *ESA* sets out five species classifications defining five different levels of vulnerability or risk: (i) Extinct; (ii) Extirpated; (iii) Endangered; (iv) Threatened; and (v) Special Concern.[7] Pursuant to s. 7 of the *ESA*, a Ministry official must make and file a regulation that lists all the species that the Committee on the Status of Species at Risk in Ontario ("COSSARO") has classified as extirpated, endangered, threatened or special concern as described in s. 5(1). The Regulation is titled the Species at Risk in Ontario List ("SARO List").[8]

12. Subsection 9(1) of the *ESA* prohibits killing, harming, harassing, possessing, capturing, taking, collecting, buying, selling, trading, leasing or transporting species listed as threatened, endangered or extirpated. Subsection 10(1) of the *ESA* prohibits the damage or destruction of the

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[5] *Endangered Species Act, 2007*, S.O. 2007, c. 6 ("*ESA*"), preamble
[6] *ESA*, s. 1
[7] *ESA*, s. 5(1)
[8] The consolidated regulation is Ontario Regulation 230/08 (Species at Risk in Ontario List).

habitat of a species listed as threatened, endangered or extirpated[9] (s. 9 and s. 10 collectively, "the prohibitions").[10]

(ii) Exceptions to the prohibitions

13. As reflected in the preamble, the *ESA* does, however, create exceptions to the prohibitions which allow for a balancing of the protection and recovery of SAR with economic, social, health and cultural concerns.

14. Section 17 of the *ESA* authorizes the Minister to issue a permit exempting a person from the prohibitions in four scenarios: (i) when the Minister is of the opinion that the activity authorized by the permit is necessary for the protection of human health or safety (s. 17(2)(a)); (ii) when the main purpose of the activity authorized by the permit is to assist in the "protection or recovery" of the species specified in the permit (ss. 17(2)(b)); (iii) when the main purpose of the activity authorized by the permit is not to assist in the "protection or recovery" of the species in the permit, but the Minister is of the opinion that, amongst other things, an overall benefit to the species will be achieved in a reasonable time; (ss. 17(2)(c)); and (iv) where the main purpose of the activity authorized by the permit is not to assist in the "protection or recovery" of the species in the permit but the Minister is of the opinion that the activity will result in significant social or economic benefit to Ontario, and that the activity will not jeopardize the species "survival or recovery" in Ontario (ss. 17(2)(d)).

15. Clauses 17(2)(a) and (d) recognize that the Minister may issue permits to achieve policy objectives other than the protection and promotion purposes of the *ESA*.[11] In particular, clauses 17(2)(a) and (d) grant exemptions to the prohibitions without requiring the proponent seeking the

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[9] The prohibition against damaging or destroying the habitat of an extirpated species only applies if the species is prescribed by a regulation for the purpose of that prohibition.
[10] *ESA*, s. 9 and s. 10
[11] *ESA*, s. 17(2)

permit to create an overall benefit to the endangered or threatened species and for reasons unrelated to the protection and promotion purposes of the *ESA*.

16. Section 19 of the *ESA* enables the Minister to grant certain Aboriginal organizations an exemption to the prohibitions by way of agreement or permit. The Minister may grant the exemption, in the form of an agreement or permit, if the Minister forms the opinion that authorized activity would not jeopardize the survival or recovery a SAR.[12] Like ss. 17(2)(a) and (d), s. 19 does not require the Minister to form the opinion that an overall benefit would result to a SAR before entering into the agreement.

(iii) Regulation making Authority

17. The regulation making activity also foresees that a regulation can create exemptions to the prohibitions that are not meant to benefit SAR. Pursuant to clause 55(1)(b) of the *ESA*, the LGIC may make regulations, "prescribing exemptions from subsections 9(1) or 10(1), subject to any conditions or restrictions prescribed by the regulations".[13] Clause 55(1)(b) does not circumscribe the activities that can obtain an exemption, nor describe the types of "conditions or restrictions" required by the regulation. Rather, the LGIC has the discretion to determine what, if any, "conditions or restrictions" are required.

18. Section 57 sets out the steps required before the LGIC can promulgate a regulation pursuant to ss. 55(1)(b). Subsection 57(1) reads as follows:

> **Special requirements for certain regulations**
>
> 57. (1) If a proposal for a regulation under subsection 55 (1) is under consideration in the Ministry, the proposed regulation would apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, and either or both of the following criteria apply, the Minister shall consult with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation on the species:

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[12] *ESA*, s. 19(4)
[13] *ESA*, s. 55

> 1. In the case of any proposed regulation under subsection 55 (1), the Minister is of the opinion that the regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species.

Accordingly, the Minister is only required to obtain an expert report if the Minister forms the opinion that the regulation is "likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species".

19. If the Minister is required to consult with an expert, then the Minister cannot recommend the regulation to the LGIC unless: (a) the Minister forms the opinion that the regulation "will not result in the species no longer living in the wild in Ontario" (ss. 57(2)(a)); (b) the Minister obtains an expert report (ss.57(1)); and (c) the Minister complies with a number of procedural requirements (ss. 57(2)(c)-(e)). Included in the procedural requirements, the Minister must provide notice of the regulation on the Environmental Registry. The notice must include, amongst other things, the Minister's "reasons for making the proposed regulation, including any significant social or economic benefit to Ontario" (ss. 57(2)(e)(vi)). Importantly, ss. 57(2) permits the Minister to recommend the regulation to the LGIC without on overall benefit to an affected SAR and explicitly permits the Minister to consider significant social or economic benefits.

20. When reviewing the entire scheme, as found by the Divisional Court, it is clear that the *ESA* permits social, economic, health and cultural considerations to be factored along with the protection and promotions purpose of the *Act*.

B. The Minister's Explanatory Note and the *Regulation*

21. On May 15, 2013, Ontario Regulation 176/13 was promulgated by the LGIC. Ontario Regulation 176/13 amended Ontario Regulation 242/08 to include, amongst other things, 14

activity based exemptions (total 19 exemptions).[14] The *Regulation* provides exemptions to the prohibitions for activities that are narrowly defined and limited in scope. The exemption will only apply when a proponent seeking to rely on the exemption complies with several stringent conditions.

22. As required by s. 57(1) of the *ESA*, before the *Regulation* came into force, the then Minister of Natural Resources, the Honourable David Orazietti came to the opinion, based on advice from the Ministry, that the "effect of the proposed regulation was not likely to jeopardize the survival of the affected endangered or threatened species in Ontario or to have any other significant adverse effect on these species at risk" ("Opinion").[15] The Minister's Opinion was based upon a review of the proposed regulation and a 45 page Minister's Explanatory Note dated April 29, 2013, which included the SARO List ("EN").[16]

23. The 14 activity based exemptions can be divided into three general categories:

> **Administrative Efficiencies**: Possession for science and education (s. 23.15); Trapping - incidental catch (s. 23.19); Commercial cultivation of vascular plants (s. 12); and Human Health and Safety Activities (s. 23.18).
>
> **Ecosystem Protection and Activities to Benefit Species at Risk**: Ecosystem protection (s. 23.11); Species protection and recovery (s.23.17); and Safe harbour habitat (s. 23.16).
>
> **Industrial and Development Activities**: Transition for Activities that are Approved or Planned, but not Completed or Operating (s. 23.13); Early Mineral Exploration (s. 23.10); Waterpower Operations (s. 23.12); Aggregate Operations (s. 23. 14); Operation of a Wind Facility (s. 23.20); Drainage (s. 23.9); and Forestry Operations (s. 22.1).

(i) Purposes of the Regulation

24. The EN is the key document reviewed by the Divisional Court as it relates to the basis for the Minister's Opinion. The EN begins with an explanation of the relevant sections of the *ESA*

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[14] Ontario Regulation 176/13 ("*Regulation*"), **Applicants' Motion Record ("AMR"), Vol. 1, Tab 5, pp. 88-114**
[15] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 52**
[16] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4**

that must be considered, including s. 55 and s. 57 of the *ESA*.[17] The EN explains that the *Regulation* would exempt a number of activities from the prohibition if certain conditions are satisfied by the proponent.[18] The EN describes the purpose of the *Regulation* stating that it will "increase efficiency and reduce burdens on individuals and businesses engaged in activities that affect species at risk and their habitat while providing for the protection of species at risk".[19]

(ii) Suite of Conditions

25. The EN states that SAR will remain protected by the proposed regulation because of the suite of conditions that attach to each exempted activity. It is the suite of conditions applicable to each regulatory exemption that "ensure the regulation provisions are not likely to result in jeopardizing the survival of, or have any other significant adverse effect on, species at risk".[20] As described by the EN, the suite of conditions are intended to result in one of three outcomes: "(1) a beneficial action to a specific species; (2) a mitigation of adverse effects to species or habitat created by existing activities or newly proposed activities; and (3) an increased ability for individuals/organizations to undertake actions which will benefit the species."[21]

26. The suite of conditions are described in the EN as follows:

> 1. Registration with the Ministry prior to undertaking an activity that would contravene Section 9(1) or 10(1) of the ESA and result in an adverse effect on a species or its habitat;
> 2. Minimizing adverse effects on the species;
> 3. Development, implementation and maintenance of a plan that describes how the adverse effects of the activity on the species will be avoided, minimized and mitigated over time, and/or how beneficial actions have been undertaken for the species; and
> 4. Monitoring, including monitoring the effectiveness of the steps taken to minimize adverse effects, and reporting on the completion of the mitigation

[17] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 37**
[18] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 38**
[19] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 39**
[20] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 40**; A summary chart of the exempted activities and the suite of conditions required for each activity was included in the EN and is attached to this factum as Schedule "C".
[21] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 38**

plan and beneficial actions;

5. Reporting of information related to the species to the Natural Heritage Information Centre (NHIC) thereby contributing to knowledge and understanding of the species.[22]

27. The Divisional Court relied on the suite of conditions in determining that the Minister complied with s. 57. In particular, the Divisional Court held that the Minister was entitled to rely on the suite of conditions in determining that the *Regulation* was not likely to jeopardize the survival of any of the affected SAR.[23] In coming to this conclusion, the Divisional Court's reasons place an emphasis on three aspects of the *Regulation*: (1) the requirement to prepare a species specific mitigation plan;[24] (2) the requirement to take reasonable steps to mitigate adverse harms to SAR; [25] and (3) the "scoping" of each activity eligible for an exemption.[26] As such, a more detailed review of these aspects of the *Regulation* is warranted.

28. With the exception of the Forest Operations exemption,[27] all exemptions within the Industrial and Development Activities category require a proponent seeking to rely on the exemption to prepare a species specific mitigation plan and to take steps to minimize the adverse effects of the activity on SAR. Where applicable, the *Regulation* requires mitigation plans to, amongst other things: (a) be prepared by a species specific expert using the best available information on the steps that may help minimize or avoid adverse effects on the species; (b) identify the endangered or threatened species that could be adversely affected by the activity; (c)

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[22] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 38**
[23] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, paras. 35 and 36**
[24] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, paras. 11 and 14**
[25] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, paras. 15 and 22**
[26] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, para. 20**
[27] Neither mitigation plans nor reasonable steps to minimize adverse effects are required for Forest Operations, Incidental Trapping of SAR; and Possession of SAR Specimens for Scientific or Educational Purposes. The Forest Operations exemption does not include these conditions because the FMP includes a SAR assessment. The provisions related to Incidental Trapping of SAR and possession for Scientific or Educational Purposes are excluded from these conditions because of the limited risk involved in both activities – see Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, pp. 69-70**.

provide detailed plans on the reasonable steps the proponent will take to minimize adverse effects on the species; and (d) describe the monitoring steps that will be taken.[28] Mitigation plans must be produced to the Ministry within 14 days of a request.[29]

29. In addition to a mitigation plan, most of the exemptions require proponents to take reasonable steps to minimize the adverse effects of the activity on SAR. Where applicable, the *Regulation* includes a number of activities, species or geographical area specific steps that must be included in the reasonable steps taken to minimize adverse effects.[30] In all but a few cases, the exemption conditions require the proponent to monitor the effectiveness of the steps taken to minimize the adverse effects on SAR and, in some cases, prepare an annual report or similar record detailing the monitoring results.[31] Reports must be produced to the Ministry within 14 days of a request.

30. The EN also provides a comprehensive review of how each of the activity based exemptions were scoped to "[Exclude] high-risk activities" or "clearly [define]...the intent and application of the exemption".[32] The following provides a non-exhaustive list of how each exempted Industrial and Development Activity is limited in scope and application:

> **Forestry Operations** (ss. 22.1) – (i) Time limited to forest operations conducted before July 1, 2018 on behalf of the Crown or under the authority of a licence under the *Crown Forest Sustainability Act*, 1994, S.O. 1994, c. 25 ("*CFSA*"); and (ii) only applies to forest operations undertaken in accordance with approved forest management plans ("FMP") under the *CFSA* that includes consideration of SAR and their habitat.[33]
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> **Drainage** (ss. 23.9) – (i) only applies to activities undertaken under the *Drainage Act*, R.S.O. 1990, c. D.17 for the purpose of maintenance, repair or improvement of

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[28] For example, see *Regulation*, s. 23.12(1), paras. 1, 4, 5, and 23.13(4) "Hydro-electric generating station", **AMR, Vol. 1, Tab 5, pp. 131 and 142**; see also Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, pp. 39-41**
[29] For example, see *Regulation* 23.9(6), para. 5(ii)– "Drainage Works", **AMR, Vol. 1, Tab 5, p. 116**
[30] For example, see *Regulation*, s. 23.12(5), para. 5, "Hydro-electric generating stations", **AMR, Vol. 1, Tab 5, p. 134**
[31] Fox example, see *Regulation*, 23.12(1), para. 7 "Hydro-electric generating station", **AMR, Vol. 1, Tab 5, p. 132**
[32] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 41**
[33] *Regulation* , ss. 22.1(1) and (2) , **AMR, Vol. 1, Tab 5, p. 85**; EN, **AMR, Vol. 1, Tab 4, pp. 46-47**

a drainage work; and (ii) 10 species have been excluded from the exemption.[34]

Early Mineral Exploration (ss. 23.10) – (i) activity cannot occur in an area that is being used or has been used by a SAR at any time in the previous 3 years for hibernation or reproduction; and (ii) one species excluded from the exemption[35]

Waterpower Operations (ss. 23.12) – (i) exemption only applies to the operation of a hydro-electric station; and (ii) two species excluded from the exemption.[36]

Aggregate Operations (ss. 23.14) – (i) activity is scoped to pits or quarries that began operations before a species was first listed or before the SAR first appeared on the site; or, in the case of species listed on January 24, 2013, that met certain approval requirements and begin operations within specified dates (ii) otherwise, new pits that begin to operate after a species is listed or first appears on site will require an approval under the ESA; and (iii) 7 species excluded from the exemption. [37]

Operation of a Wind Facility (s. 23.20) – (i) the exemption does not apply to the construction of a wind facility; (ii) the wind facility must be operated in a manner that is unlikely to damage or destroy habitat; and (iii) one species excluded from the exemption.[38]

Transition for Activities that are Approved or Planned, but not Completed or Operating (s. 23.13):

(i) activities exempted are limited to those that have been previously reviewed and approved pursuant to other legislatives schemes, the majority of which that include consideration of impacts on SAR;[39]

(ii) the exemption only applies to "transition species"[40]and "newly listed species";[41]

(iii) the exemption to the s. 9 prohibition only applies to "newly listed species" (i.e. in July, 2013 - five species). The exemption provided for "transition species" is limited to an exemption from the section 10 prohibitions on damage or

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[34] *Regulation*, ss. 23.9 (1) and (2), **AMR, Vol. 1, Tab 5, pp. 114-115**; Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 52**

[35] *Regulation*, ss. 23.10 (10) paragraph 1 and ; and 23.10(13); **AMR, Vol. 1, Tab 5, p. 119**; Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 45**

[36] *Regulation*, ss. 23.12(1) and (9), **AMR, Vol. 1, Tab 5, pp. 131-132 and 134**; Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 50**

[37] *Regulation*, ss. 23.14(1), (2) and (3), **AMR, Vol. 1, Tab 5, pp. 147-148**; Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 51**

[38] *Regulation*, ss. 23.20(1), (8)(b)(iii) and (16), **AMR, Vol. 1, Tab 5, pp. 171, 173 and 175**; Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, pp. 54-55**

[39] EN, **AMR, Vol. 1, Tab 4, p. 45**

[40] Transition species are species that are listed in Schedule 3 or 4 to the *ESA* and to which clause 10 (1) (a) does not apply until June 30, 2013 by the operation of ss. 10 (1) and 10(3) of the *ESA* - see *Regulation*, ss. 23.13 (1), **AMR, Vol. 1, Tab 5, p. 135**

[41] Newly Listed Species are species that were added for the first time to the SARO list as endangered or threatened species on January 24, 2013 - this is limited to the 5 identified species that received species and habitat protection as of that date) – see *Regulation*, ss. 23.13(1), **AMR, Vol. 1, Tab 5, p. 135**

destruction of habitat;[42]

(iv) the exemption only applies to projects that meet timing eligibility;[43] and

(v) the activity cannot occur in an area while it is being used by SAR for hibernation or reproduction.[44]

(iii) Assessment of impacts on each SAR

31. In arguing that the "[EN] does not assess the effect of the proposed regulation on any of the endangered or threatened species to which it would apply"[45], the Moving Parties fail to draw this Honourable Court's attention to two sections of the EN wherein the note explicitly states that the effect of each regulatory proposal on each SAR was considered.

32. First, in describing how the suite of conditions were developed, the EN states that a team of taxa specialists within the Ministry provided advice on the needs of each individual species and the likely effects of the proposal on those species:

> To develop these proposals and conditions, there were teams of staff that worked on each of the 18 proposals in this regulation. To ensure the proposals were based on the best available scientific information, these teams were comprised of Species at Risk Branch staff and a mix of other relevant staff from Policy Division, biologists from Regional Operations Division and biologists from Science and Information Division. **A team of taxa specialists within the Species at Risk Branch (specialists for birds and mammals, herpetofauna, plants, and aquatic species) also provided taxa-based advice on the needs of each individual species and the likely effects of the proposals.**[46]
>
> As a result of an assessment of risk for each proposal, several high risk activities have been excluded to further reduce the risk of significant adverse effects on affected species. **In addition, some proposals also exclude specific species at risk or highly sensitive ecological communities due to an identified higher risk to the species at risk as a result of potential activity impacts, or where impacts are too complex to manage using standardized rules**. (emphasis added)[47]

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[42] *Regulation*, ss. 23.13(5) and (6), **AMR, Vol. 1, Tab 5, p. 142**

[43] For transition species, the activity exempted must have reached a specified stage of approval and have commenced before June 30, 2015 or have been issued a section 17 permit before June 30, 2013. For the "newly listed species", the activities must reach a specified stage of approval by January 24, 2015, and must be commenced, in most cases, prior to January 24, 2020, or earlier in some cases, depending on when the approval was granted.

[44] *Regulation*, ss. 23.13(8), para. 2, **AMR, Vol. 1, Tab 5, p. 144**

[45] Moving Parties' Factum, para. 22

[46] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 40**

[47] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 40**

33. Second, the EN goes on to describe the factors considered by the Ministry when determining whether to exclude certain SAR that were at greater risk of being negatively affected by an activity eligible for exemption:

> **B. Excluding specific species**: Specific species were excluded from provisions in the regulation so that the activities eligible for those provisions could not affect species at risk that are at greater risk of being negatively affected from the proposed regulation. The criteria used to identify these species generally include circumstances where:
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> - There are fewer than 20 occurrences (i.e. areas in which the species is/was present) in Ontario;
> - The species has been ranked as Possibly Extirpated, Critically Imperiled or Imperiled in Ontario, following the Nature Serve methodology;
>   - "Possibly Extirpated" species are only known from historical records in Ontario; however their rediscovery in the province remains a possibility.
>   - "Critically Imperiled" species are at very high risk of extirpation in Ontario due to extreme rarity, very sharp declines, severe threats, or other factors.
>   - "Imperiled" species are at high risk of extirpation in Ontario due to rarity, sharp declines, severe threats, or other factors.
> - There is a plausible intersection/overlay between species occurrences and the types of impacts and possible locations of the activity; and
> - Existing or previously issued authorizations containing well established conditions for a species have not been issued making it difficult to standardize rules in regulation.
>
> Several species were excluded from the regulations based on the above assessment. **All endangered and threatened species on the Species at Risk were considered in this assessment; these species are listed in Schedule 1.**[48] (emphasis added)

34. Finally, it is important to note that, contrary to the Moving Parties' position, the EN does provide a general description of the potential adverse impacts that each of the exempted activities may have on endangered or threatened species.[49]

35. The EN clearly demonstrates that the Ministry considered the effect of each eligible activity

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[48] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 41**. Of the 19 exemptions, six include exceptions for particular species (29 threatened or endangered species have been excluded from the six exemptions). Attached as Schedule "C" to this affidavit is a chart detailing the species excluded from various exemptions.

[49] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 49**; see also Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 48**

on each SAR. The Moving Parties do not appear to contest this fact and have led no evidence to suggest that the assessments described in the EN did not, in fact, occur.

(iv) Regulatory Compliance

36. Despite the Moving Parties argument to the contrary[50], SAR continue to be subject to the full protections provided by the *ESA*. If any of the conditions necessary to obtain an exemption are not satisfied, then the proponent is not in compliance with the *Regulation* and is not exempt from the prohibitions.

37. Pursuant to s. 36 of the *ESA*, a person in contravention of the prohibitions is guilty of an offence and can be subject to prosecution under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P.33.[51] In addition, an *ESA* enforcement officer that has reasonable grounds to believe that the *Regulation* is not being complied with can issue a stop work order pursuant to s. 27 of the *ESA*.[52]

D. The Application for Judicial Review

38. In the Notice of Application, the Moving Parties sought, amongst other things, the following relief:

> (b) .... if the Minister did form the requisite opinion under subsection 57(1) before he recommended the proposed regulation to the Lieutenant Governor in Council, a declaration that the Minister's opinion was unreasonable, was based on irrelevant considerations, failed to consider relevant considerations or was based on no evidence.[53]

39. In support of the request for a declaration that the Minister's Opinion was unreasonable, the Moving Parties filed two reports purporting to give expert evidence on the effects of the *Regulation* on the American eel and the Blanding's turtle. The Respondents cross-examined both

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[50] Moving Parties' Factum, para. 28
[51] *ESA*, s. 36(1)
[52] *ESA*, s. 36(1)
[53] Notice of Application, para. 1, **Respondents' Responding Motion Record ("RMR"), Tab 1**

affiants. At the Divisional Court, the Moving Parties abandoned their request for a declaration that the Minister's decision was unreasonable and did not rely on the reports. The Moving Parties took the position that requesting a declaration on the reasonableness of the Minister's opinion was premature:

> To be clear, in this case, the Moving Parties do not challenge the scientific, technical or factual merits of the Minister's opinion under s. 57(l). Any such challenge here would be premature. The [EN] failed to identify or assess each species to which proposed regulatory exemptions would apply. Had the Minister applied the right legal test, and done the requisite assessment, then he would be entitled to review on a reasonableness standard.[54]

E. Divisional Court Decision

40. The Divisional Court unanimously dismissed the application finding that the Minister had satisfied the statutory pre-condition and that the *Regulation* was consistent with the *ESA*. In determining that the Minister satisfied the requirement of ss. 57(1), the Divisional Court correctly noted that ss. 57(1) requires the Minister to engage in a two-step process. The Court also noted that the Minister was not precluded from relying on the suite of conditions in forming the opinion that the *Regulation* would not jeopardize the survival of applicable SAR or cause any significant adverse effects on those SAR:

> Compliance with the direction found in s. 57(1) consists of two questions. These questions are not to be asked together or as one. The answer for the second, if it is necessary at all, follows from the first. The first question asks whether or not "the proposed regulation would apply to a species that is listed on the "Species at Risk in Ontario List" as an endangered or threatened species". If the proposed regulation would not apply to any of the species on the list, there is no need to go further. Of course, a proposed regulation could apply to one, two or more of the species listed. In this case, the Explanatory Note states that "[a]ll endangered species and threatened species on the Species at Risk [List] were considered in this assessment". As a result, some species were excluded from particular activity exemptions. (It may be obvious, but an American Eel, like other fish, will not affected by the operation of a wind facility or other terrestrial activities.) ....
>
> Where there are Species at Risk to which the proposed regulation would apply, the Minister is obliged to answer the second question. **He or she must come to an opinion as to whether the proposed regulation is likely to jeopardize the**

[54] Applicant's Factum at the Divisional Court, **RMR, Tab 2, para. 75**

> **survival of those species or whether it will have any other significant adverse effect on them.** If, in the opinion of the Minister the answer to the second question is affirmative, he or she has to consult with an expert. **There is nothing that says that the Minister has to examine the impact on each species to which the regulation would apply separately or independently of the others. There could be a program, approach or other condition that, in the opinion of the Minister, demonstrates there will be no jeopardy to the survival of any of them and no risk of other significant adverse effects. While it may not be independent and separate, this could be said to be a means by which each of the species at risk, to which the regulation would apply, was considered.** Whether it is or is not, it is enough to satisfy the condition precedent imposed by s. 57(1) of the *ESA*. It is what happened in this case. **The Explanatory Note reviewed "the detailed provisions of the proposed regulation", which included the suggested conditions and offered the opinion that the regulation was not likely to jeopardize the survival of any of the affected endangered or threatened species or to have any other significant adverse effect on these species at risk.**
>
> It is from this that the Minister came to arrive at his opinion that there was no jeopardy or risk to any threatened species. There was no need to consult. The regulation could be and was recommended to the Lieutenant Governor in Council. The requirement of the condition precedent was met. (emphasis added)[55]

41. Having found that the Minister complied with section 57(1), the Divisional Court went on to address an argument abandoned by the Moving Parties – whether the ultimate conclusion of the Opinion was reasonable. The Divisional Court found that the Opinion was not subject to review:

> In its factum, Wildlands proposed that, in the circumstances, "it is premature to review the reasonableness of any opinion of whether the regulation is likely to 'jeopardize the survival' or have 'any other significant adverse effect'" on any Species at Risk. Such an examination is not only premature, it would be beyond what can properly be asked. It is not for this court to examine and determine whether the opinion is correct or reasonable (that, in fact, O. Reg. 176/13 is not likely to threaten the survival of any Species at Risk). To do so would conflict with the injunction of the Supreme Court of Canada that a review is not concerned with assessing whether the regulation will prove to be "...necessary, wise, or effective in practice".[56]

42. In determining that the *Regulation* was consistent with the purposes of the *ESA*, the Divisional Court rejected the Moving Parties' argument that considerations of any factors outside of the protection and promotion purposes is prohibited by the *ESA*. This conclusion was reached upon reviewing the following provisions:

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[55] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, paras. 34 and 35**
[56] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, para. 36**

(a) that the preamble of the *ESA* demonstrates that social, economic and cultural considerations are all appropriately considered when determining how to protect SAR; [57]

(b) that s.17 and s. 57(2) provide exemptions to the prohibitions in circumstances where none of the four identified purposes of section 1 are satisfied; and [58]

(c) that section 48(h) permits the Minister to establish a committee to make recommendations "...on any matter specified by the Minister that relates to approaches that may be used under [the *ESA*] to promote sustainable social and economic activities that assist in the protection or recovery of species".[59]

43. In reviewing the legislative scheme as a whole, the Divisional Court held that the *ESA* explicitly permits the consideration of social, cultural, and economic factors to be considered when determining how to assist the protection or recovery of SAR. As such, the Court found that the purposes of the *Regulation* were consistent with the overall scheme of the *ESA*:

> ....The preamble and these statutory provisions run contrary to the position advanced by Wildlands that every other consideration falls in the face of concern for a Species at Risk in Ontario. Balancing these competing concerns is part of the rationale for O. Reg. 176/13. This is consistent with what was said in the "Regulation Proposal Notice" that initiated its preparation and promulgation. [60]
>
> ***
>
> The economic considerations brought to bear on the making of O. Reg. 176/13 are not a peripheral purpose. They are a consideration which, pursuant to the *ESA*, is to be part of the efforts undertaken in acting to protect and restore species at risk. [61]

PART III – THE ISSUES

44. The sole issue to be determined is whether the Moving Parties should be granted leave to appeal the unanimous decision of the Divisional Court. In addressing this issue, the Respondents submit as follows:

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[57] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, para. 47**
[58] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, para. 49**
[59] *Ibid.*
[60] *Ibid.*
[61] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, para. 54**

(a) the Divisional Court was correct in deciding that the Minister satisfied the mandatory condition precedent required in s. 57(1);

(b) that the Moving Parties should not be entitled to raise on appeal an argument they abandoned in the proceedings below (i.e. that the Minister's opinion is subject to review on a reasonableness standard) and, in any event, the Divisional Court's *obiter* comments are correct;

(c) the Divisional Court correctly held that the *Regulation* was consistent with the purposes of the *ESA*; and

(d) that the proposed appeal does not raise issues of public importance.

PART IV – THE LAW

A. Leave to Appeal – Legal Principles

45. Rule 61.03.1 provides that a motion for leave to appeal to the Court of Appeal is to be brought in writing. As set out in the case law, matters to be considered in granting leave include: (a) whether the appeal involves the interpretation of a statute or regulation including its constitutionality; (b) the interpretation, clarification or propounding of some general rule or principle of law; and (c) whether the interpretation of the law or agreement in issue is of significance only to the parties or whether a question of general interest to the public or a broad segment of the public would be settled for the future.[62]

Issue 1: The Condition Precedent was satisfied

46. The Moving Parties argue that the Divisional Court erred in finding that s. 57 was complied with because the Minister failed to "assess the effect of the proposed regulation on any of the endangered or threatened species to which it would apply".[63] With respect, the Moving Parties' argument ignores (i) that the EN demonstrates that each SAR was considered against each

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[62] *Sault Dock Co. Ltd. And City of Sault Ste. Marie*, [1973] 2 O.R. 479 (CA) at pp. 2-3 of QL cite
[63] Moving Parties' Factum, para. 22

regulatory exemption; (ii) that the Divisional Court found as fact that the Minister did assess each SAR against each exemption when determining which species to exclude from the exemptions;[64] and (iii) that the species specific conditions required by the *Regulation* must be considered when determining whether the proposal will jeopardize the survival of a SAR or subject a SAR to a significant adverse harm.

47. On the record before the Divisional Court, it is clear that the effects of each regulatory exemption on each SAR were considered at two stages. First, when the suite of conditions were being crafted for each regulatory exemptions (as described in para. 29 above)[65] and second, when determining to exclude certain species from each regulatory exemption.[66] Based on the record before it, the Divisional Court found, as a fact, that the Ministry reviewed the effects of each regulatory exemption on each SAR (i.e. when engaged in the first question required by s. 57).[67] The Moving Parties have made no argument to suggest that the Divisional Court made a palpable and overriding error in making this finding.

48. With respect to the second question mandated by ss. 57(1), the Divisional Court correctly held that the Minister could rely on the suite of conditions identified in the note (e.g. mitigation plans and reasonable steps to minimize harms) to form the opinion that the *Regulation* would not likely jeopardize the survival of or have any significant adverse effects on relevant SAR. The Divisional Court correctly noted that section 57 does not stipulate the method by which the Minister must form the requisite opinion.[68] As such, the Minister was entitled to rely on the conditions as the "means by which" he was able to form the opinion that the *Regulation* would not likely jeopardize the survival of each SAR or have a significant adverse effect on each SAR.

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[64] Divisional Court Reasons for Decision **AMR, Vol. 1, Tab 2, paras. 34 and 35**
[65] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, p. 40**
[66] Minister's Explanatory Note, **AMR, Vol. 1, Tab 4, pp. 40-41**
[67] Divisional Court Reasons for Decision **AMR, Vol. 1, Tab 2, para. 34**
[68] Divisional Court Reasons for Decision **AMR, Vol. 1, Tab 2, para. 35**

49. There can be no question that the Minister formed the requisite Opinion. The exhaustive nature of the EN demonstrates the considered analysis provided by the Ministry and reviewed by the Minister before forming the Opinion. The record reflects that the Minister took his obligation seriously and relying on information from the Ministry, he came to a well-informed opinion. As such, the condition precedent for enacting the *Regulation* was satisfied.

Issue 2: The Moving Parties abandoned their argument that the Ministers' opinion was unreasonable.

50. As detailed above, the Moving Parties abandoned their request for a declaration that the Minister's Opinion was unreasonable. Having abandoned the argument, the Moving Parties should not be permitted to raise this argument on a proposed appeal.[69] The issue was not fully argued before the Divisional Court and the Moving Parties now appear to seek leave based on *obiter* comments by the Divisional Court. This Honourable Court has held that it would be "manifestly unfair" to allow an argument on appeal that was abandoned at the court of first instance.[70]

51. The only evidence the Moving Parties would have relied upon in support of a finding that Minister's Opinion was unreasonable were the purported expert reports. As detailed above, the Moving Parties did not rely upon the reports in their main factum on the application, and no oral arguments were made on how the reports demonstrate that the Minister's Opinion was unreasonable. Arguably, the reports were not properly before the Divisional Court on an application for judicial review because the reports were not before the Minister when forming his

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[69] Moving Parties' Factum, para. 77 – the Moving Parties appear to revive their abandoned argument that the Minister's opinion was unreasonable.

[70] *Shaver Hospital for Chest Diseases v. Slesar et al.,* [1979] O.J. No. 4504 (C.A.), para.19; see also *Pedwell v. The Corp. of the town of Pelham*, [2003] O.J. No. 1774 (C.A.), para. 50

opinion.[71]

52. Without any findings on the relevance or credibility of the reports, the Moving Parties would be relying on the reports, for the first time on the proposed appeal, in the hope of turning this Honourable Court into a court of first instance. This Honourable Court has held that it is "ill-equipped to make factual findings without the benefit of a full record and findings from the tribunal".[72]

(i) In any event, the Minister's Opinion is a statutory precondition not subject to review

53. In any event, the Respondents respectfully submit that the Divisional Court was correct in finding that reviewing the *vires* of the *Regulation* did not permit the Court to determine whether the Opinion was correct or reasonable (i.e. that, in fact, the *Regulation* will not likely jeopardize the survival or have any other significant adverse effect on a SAR). Respectfully, the *obiter* comments are consistent with established case law that does not warrant review by this Honourable Court.

54. A review of the correctness or reasonableness of the Opinion would amount to an analysis of whether the *Regulation* is "necessary, wise, or effective in practice" – an area of review that the Supreme Court has deemed inappropriate.[73]

55. When engaging in a review of the *vires* of the *Regulation*, a court must be guided by the following limiting principles outlined by the Supreme Court of Canada in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*:

(a) Regulations benefit from a presumption of validity;

(b) This presumption has two aspects: it places the burden on challengers to demonstrate

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[71] *Sierra Club Canada v. Ontario* (Ministry of Natural Resources), [2011] O.J. No. 3071, para. 13; see also: *Mianowski v. Ontario (Human Rights Commission)*, [2003] O.J. No. 3790 (Div. Ct.), para.2; and *Ontario Hydro v. Ontario (Assistant Information & Privacy Commissioner)* (1996), 97 O.A.C. 324 (Div. Ct.), para. 4

[72] *Schaeffer v. Wood*, 2011 ONCA 716 (CanLII), para. 51

[73] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, paras. 25-26 [*Katz Group*]

the invalidity of regulations, rather than on regulatory bodies to justify them and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*;[74]

(c) Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach…consistent with this Court's approach to statutory interpretation generally";

(d) A review of a regulation does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice";

(e) A review of a regulation is not an inquiry into the underlying "political, economic, social or partisan considerations" nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives;

(f) The motives for the regulations' promulgation are irrelevant;

(g) In order for a regulation to be found *ultra vires* the purpose of the Act, the regulation must be shown to be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose; [75]and

(h) A regulation will only be struck down as *ultra vires* in the most egregious cases.[76]

56. A review of the *vires* of the *Regulation* requires a court to determine whether the s. 57 condition precedent has been satisfied and whether the *Regulation* is "irrelevant", "extraneous" or "completely unrelated" to the statutory purposes of the *ESA*. Based on the *Katz* limiting principles, a court cannot engage in a review of the merits of the *Regulation*. The Respondents respectfully submit that subjecting the conclusion of the Opinion to judicial review will, in effect, require the *Regulation* to be reviewed on a broader basis than what is permitted in *Katz*. Because

[74] *Ibid.*
[75] *Alaska Trainship Corporation v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261 at pp. 11-12 of QL cite; and *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 23 at paras. 97-101
[76] *Katz Group, supra*, paras. 24-28; see also: *Animal Alliance of Canada v. Ontario (Minister of Natural Resources)*, [2014] O.J. No. 2216 (Div. Ct.), para. 11 [*Animal Alliance*]; *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 (CA), paras. 39-40; *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 4 of QL cite

the Opinion is directly tied to the *Regulation*, any attack on the conclusion of the Opinion is an indirect attack on the merits of the *Regulation*.

57. Despite the Moving Parties' argument to the contrary,[77] Ontario law has definitively answered whether a statutory precondition is subject to review. While not referenced in the Moving Parties' factum, the Divisional Court has held that where a Minister is required to take certain actions prior to the promulgation of a regulation, a review of the merits of a Minister's action in satisfying any conditions precedent "is unassailable on a judicial review application".[78]

58. In *Hanna v. Ontario (Attorney General)*, the applicant challenged the promulgation of a regulation on the basis that the Minister had not satisfied a statutory precondition in that he failed to consider the Ministry's statement of environmental values (the "SEV") before recommending the regulation. The Minister had, in fact, considered the SEV in recommending the regulation. In addressing the permissible scope of the review, the Divisional Court held as follows:

> Furthermore, government policy, expressed through a regulation, is not subject to judicial review unless it can be demonstrated that the regulation was made without authority or is unconstitutional. A regulation may be said to have been made without authority only if the Cabinet has failed to observe a condition precedent set forth in its enabling statute or if the power is not exercised in accordance with the purpose of the legislation.
>
> 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.[79] (emphasis added)

59. Similarly, the Divisional Court in *Huron-Perth Children's Aid Society v. Ontario (Ministry of Children and Youth Services)*, held that where a Minister is engaging in "policy-making"

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[77] Moving Parties' Factum, para. 62

[78] *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609, 105 O.R. (3d) 111 (Div. Ct.), para. 31 [*Hanna*]; see also: *Animal Alliance, supra*, para. 23; *Association for the Protection of Amherst Island v. Director of Environmental Approvals, Ministry of the Environment (MOE), et al*, 2014 ONSC 4574, paras. 21-22, and 28

[79] *Hanna, supra*, paras. 11 and 32; see also *Animal Alliance, supra*, para. 23

functions, the actions taken by the Minister are not subject to judicial review absent bad faith or an improper purpose. The Court held as follows:

> We accept that the exercise of the Minister's statutory discretion under section 19(4) of the *CFSA* and section 14 of the Regulation is not totally unconstrained, insofar as it may be subject to judicial review on the grounds of an abuse of the discretion, i.e., because of bad faith or an improper purpose. **However, where the Minister is exercising an essentially legislative rather than a judicial function, the case law does not support the existence of a more expansive judicial supervisory function**. (emphasis added)[80]

60. In support of the position that the Opinion is subject to review on a reasonableness standard, the Moving Parties rely on the Federal Court of Appeal's decision in *Alberta Wilderness Assn. v. Canada*.[81] In *Alberta Wilderness* (decided before *Katz*), the issue was whether to require the Minister of Environment to produce documents relating to whether the Minister recommended to Cabinet that an emergency order be issued to protect the Sage-grouse pursuant to s. 80 of the *Species at Risk Act*.[82] Section 80 permitted the Minister to make a recommendation to Cabinet that emergency orders for a species be issued if the Minister formed the opinion "that the species faces imminent threats to its survival or recovery".[83] In that case, the Minister refused to advise whether a recommendation to Cabinet was made. The Minister claimed Cabinet immunity over the documents requested.

61. The Federal Court of Appeal overturned the motion court's decision on the basis that the Minister could not claim a Cabinet immunity unless the Minister had, in fact, made a recommendation to Cabinet. Without knowing that, there could be no legal basis for claiming

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[80] *Huron-Perth Children's Aid Society v. Ontario (Ministry of Children and Youth Services)*, [2012] O.J. No. 4982 (Div. Ct.), para. 55; see also: *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)*, [1991] O.J. No. 439 (Div. Ct.) (leave to appeal dismissed), para. 48; and *Re Metropolitan General Hospital and Ontario (Minister of Health)* (1979), 25 O.R. (2d) 699 (H.C.J.), at pp. 5-6 of QL cite

[81] *Alberta Wilderness Assn. v. Canada*, 2013 FCA 190 [*Alberta Wilderness Assn.*]

[82] *Species at Risk Act*, SC 2002, c. 29

[83] *Species at Risk Act*, SC 2002, c. 29, s. 80

Cabinet immunity.[84] As such, the Court required the Minister to reveal whether a recommendation was made and then argue the merits of a Cabinet immunity argument. In *obiter*, the Federal Court of Appeal relied upon the Supreme Court of Canada's decision in *Roncarelli v. Duplessis* in holding that the Minister's refusal to make a recommendation could be subject to judicial review on a reasonableness standard. [85]

62. Respectfully, the Federal Court of Appeal's reliance on *Roncarelli v. Duplessis* in its *obiter* comments is misplaced. The *Roncarelli* decision stands for the proposition that a court has jurisdiction to review administrative decisions on the basis of bad faith or an improper purpose. It does not stand for the proposition that legislative action, such as the Minister's Opinion would be subject to judicial review on a correctness or reasonableness standard.

63. *Halifax (Municipality) v. Canada*, also relied upon in support of subjecting the Opinion to a reasonableness review, is distinguishable. In that case, the municipality challenged the manner in which the Minister calculated the "property value" for payments made in lieu of taxes ("PILT") to be paid by the federal government for federal property situated in Halifax. PILT payments are made pursuant to the *Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13 (*"PILT Act"*). Pursuant to the *PILT Act*, the Minister has discretion to make PILT payments and determine the amount to be paid. The *PILT Act* prohibits the Minister from making any payment that exceeds what, in the Minister's opinion, would be payable if the applicable local rate of tax were applied to the property value as determined by the local assessment authority.[86]

64. In *Halifax*, the Minister exercised his discretion to make PILTs to Halifax for federal property. The dispute between the Minister and Halifax was the value of the property. The Court

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[84] *Alberta Wilderness Assn, supra*, para. 50
[85] *Alberta Wilderness Assn, supra*, para. 52
[86] *Halifax (Municipality) v. Canada (Public Works and Government Services),* 2012 SCC 29, [2012] 2 SCR 108, para. 4 [*Halifax*]

explained the issue on the appeal as follows:

> It follows, therefore, that only one, quite narrow aspect of the Minister's discretion is in issue here. This appeal does not concern the Minister's exercise of discretion to decide whether to make PILTs. It does not concern his discretion to decide whether those PILTs should be for an amount less than the maximum permitted by the Act or his discretion to determine the rate that would be applied by an assessment authority. The appeal concerns *only* the Minister's determination of "property value".[87]

65. In the context of making an administrative decision on the appropriate "property value" to be used, the Supreme Court determined that the Minister's decision was subject to a reasonableness standard. Importantly, this case did not involve the promulgation of a regulation and, as such, was not subject to the limiting review principles described in *Katz*. Unlike the case at hand, the Minister in *Halifax* was required to make a completely administrative decision – i.e. how the local assessment authority would value the property. The Minister was not engaging in his legislative function.[88] In the case at hand, the Minister was acting solely within his legislative function when satisfying the condition precedent for the enactment of the *Regulation.* As such, the *Halifax* decision is distinguishable from the case at hand.

66. The Respondents respectfully submit that the Moving Parties are precluded from appealing an argument they abandoned in the court below and, in any event, the Divisional Court's *obiter* comments on this issue are consistent with established case law.

Issue 3: The Regulation is consistent with the *ESA*

67. In challenging the *vires* of the *Regulation,* the Moving Parties take the position that the protection and promotion purposes of the *ESA* are a trump card that renders all other considerations meaningless. As detailed above, the *ESA* does not support the Moving Parties' position.

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[87] *Halifax, supra*, para. 5
[88] *Halifax, supra*, para. 43

68. The Moving Parties argue that the Divisional Court failed to articulate the purpose of the *ESA*. With respect, this is inaccurate. At paragraph 5 of its decision, the Divisional Court pointed to the four general purposes identified in s. 1. The Divisional Court's decision did not stop at s.1. Rather, the Court analyzed the legislative scheme to determine whether the Moving Parties' position, as articulated in paragraph 45 of the decision, was correct:

> Wildlands goes on to point out that the Explanatory Note states that the conditions to be imposed were to "*minimize the impact* on species at risk, *increase administrative efficiencies* and provide clear direction when applied to a specific set of circumstances that are intended to result in one of three desired outcomes." It is said that, for the proposals "... to exempt forestry, mining, hydro, aggregate, wind energy and other industrial activities, the only applicable outcome is 'mitigation of adverse effects' to species or habitat". **To Wildlands, mitigation of impacts is inconsistent with protection and recovery which it understands to be the only purpose of the *ESA*.** (emphasis added)[89]

69. As detailed above, after reviewing the full legislative scheme, the Divisional Court correctly concluded that the *ESA* explicitly permits mitigation of adverse effects on SAR based on social, economic, health and cultural considerations.[90] As a result, the Divisional Court held that the *Regulations* were not "irrelevant", "extraneous" or "completely unrelated" to the *ESA*.[91]

70. The Moving Parties' contention that the Divisional Court relied solely on the preamble of the *ESA* to find that "the harm to the species may be accepted in light of the social or economic benefits that will accrue" is a mischaracterization of the Court's decision.[92] At paragraph 49, the Divisional Court details the numerous provisions that demonstrate that the *ESA* permits the Minister to consider appropriate social, economic, health and cultural considerations when determining how to achieve the protection and promotion purposes of the *Act*. The Divisional Court's decision reflects the fact that the whole *Act*, including the preamble, was considered when determining whether the *Regulation* was consistent with the *ESA*.

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[89] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, para. 45**
[90] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, para. 49**
[91] Divisional Court Reasons for Decision, **AMR, Vol. 1, Tab 2, para. 50**
[92] Moving Parties' Factum, para. 100

Issue 4: The Moving Parties' proposed issues on appeal do not raise issues of public importance

71. The Minister respectfully submits that none of the proposed issues on appeal are of public importance. With respect to s. 57, the Divisional Court's decision confirms that the Minister must form the requisite opinion for each SAR that is impacted by the regulatory exemption. Neither party takes issue with that interpretation. Instead, the alleged error is limited to the "means by which" the Minister formed the Opinion (i.e. reliance on species specific mitigation conditions). The Moving Parties take issue solely with the application of uncontested legal issues to the uncontested facts of this case. As such, the proposed issue regarding s. 57 is not of wider importance outside of this case.

72. The Moving Parties' argument that the protection and promotion purposes trump all other considerations runs contrary to the explicit provisions of the *ESA*. Given this reality, the Moving Parties' argument amounts to a suggestion that the protection and promotion purposes of the *Act* should override: (a) the specific statutory provisions that allow for consideration of economic, social, cultural and health factors when determining how to satisfy the purposes of the *ESA*; and (b) the specific statutory authority (i.e. section 57) that permits the creation of the regulations as long as the Minister forms the requisite opinion. It is trite law that a purposes section of an Act cannot override a specific statutory authority within the Act.[93] The Moving Parties' argument attempts to challenge this settled legal principle. Absent any compelling reasons to challenge this principle, of which there are none, it is respectfully submitted that this proposed issue is not of public importance.

73. The one issue that could have wider importance than the herein application is the standard

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[93] Sullivan on the Construction of Statutes, 5th ed (Markham: LexisNexis, 2008) at 391-393; see also *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, para. 32

of review applicable to a statutory precondition. This issue, however, has already been decided by the Divisional Court (see *Hanna* and *Animal Alliance*). Respectfully, this area of law does not require clarification from this Honourable Court. The Divisional Court's decision in *Hanna* and *Animal Alliance*, in conjunction with the Supreme Court of Canada's decision in *Katz*, definitively supports the Divisional Court's finding that the Minister's Opinion is "unassailable on a judicial review". As such, the proposed appeal does not raise any issues of public importance. Moreover, as detailed above, the Moving Parties should not be granted leave to appeal on the basis of an argument they abandoned before the Divisional Court.

74. In light of the above, the Respondents respectfully submit that the proposed appeal does not raise any issue of public importance.

PART V – ORDER SOUGHT

75. The Respondents respectfully request an order dismissing the Moving Parties' motion for leave to appeal with costs in favour of the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: July 29, 2015

LISE FAVREAU / SUNIL MATHAI
ATTORNEY GENERAL FOR ONTARIO