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OVERVIEW

1. This Application is public interest litigation challenging the validity of Ontario Regulation 176/13, made under s. 55(1)(b) of the *Endangered Species Act, 2007,* SO 2007, c 6 ("ESA").[1] The Regulation achieves, by Executive fiat, what the Government failed to achieve in proposed statutory amendments rejected by the Legislature a year earlier.

2. In recommending this Regulation to Cabinet, the Respondent Minister of Natural Resources failed to me a mandatory condition precedent under s. 57(1) of the ESA. The Minister failed to determine if the Regulation was likely to jeopardize the survival of, or have any other significant adverse effect on, ***each*** endangered and threatened species to which the Regulation would apply. In purporting to make this determination, the Minister failed to even *identify* each species to which the Regulation applies, let alone assess its effects on each species.

3. The Regulation creates wide-ranging exemptions for most industrial activities in Ontario and removes the ESA's core protections for almost all of Ontario's 155 endangered and threatened species. Its purpose is to simplify permit approvals, so as to achieve administrative efficiencies and cost savings for government and industry. In aim and effect, the Regulation is contrary to the ESA's purposes – to protect and recover Ontario's most imperilled species.

PART I – THE PARTIES AND THE DECISION

4. The Applicants CPAWS-Wildlands League ("Wildlands League") and the Federation of Ontario Naturalists ("Ontario Nature") are non-profit environmental organizations with long histories of advocating for the protection and recovery of species at risk in Ontario.[2]

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[1] *Endangered Species Act, 2007*, SO 2007, c 6 [ESA].

[2] Schultz Affidavit, paras 6-18 [Applicants Record [AR], Vol 2, Tab 4, pp 555-59]; Affidavit of Anna Baggio, paras 4-11 [AR, Vol 1, Tab 3, pp 156-60].

Neither has a pecuniary or proprietary interest in these proceedings; they come to the Court as public interest litigants. The Respondents have not contested their standing.

5. The Respondent Minister of Natural Resources ("Minister") is responsible for administering the ESA. If mandatory conditions precedent are satisfied under s. 57(1), and, where necessary, also under s. 57(2), then the Minister may lawfully recommend a regulation to the Respondent Lieutenant Governor in Council ("Cabinet"), and Cabinet may lawfully make the regulation under s. 55 of the ESA.

6. The Applicants challenge the validity of Ontario Regulation 176/13 ("the Regulation"). Cabinet made the Regulation on May 15, 2013; it amended Ontario Regulation 242/08.

7. Before Cabinet made the Regulation, Minister Orazietti signed his concurrence to a document entitled *Minister's Explanatory Note – Change to Ontario Regulation 242/08 under the ESA related to the Modernization of Approvals* ("the Minister's Determination").[3] The Applicants submit that the Minister's Determination fails to satisfy s. 57(1) of the ESA.

PART II – CONCISE SUMMARY OF THE FACTS

A. The ESA was enacted to ensure meaningful legal protections for species at risk and their habitats

8. In 2007, Ontario Legislature enacted a new modernized and species-focused ESA. The ESA was enacted to "provide significantly broader and more effective provisions for protecting species at risk and their habitats" and "includes a stronger commitment to species recovery".[4]

[3] Schultz Affidavit, paras 64-68 and Ex GG (the "Minister's Determination") [AR Vol 2, Tab 4, pp 576-78 and Tab 4.GG, pp 820-65]. Of note, the Regulation appears to have been proposed to Cabinet earlier, on April 24, 2013—*before* Minister Orazietti actually signed the Minister's Determination on May 1, 2013.
[4] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 143, (20 March 2007) at 1401 (Hon David Ramsay, Minister of Natural Resources).

9. The ESA was enacted to remedy the major shortcomings in the then-extant *Endangered Species Act*,[5] which was recognized to be ineffective legislation.

10. On June 30, 2008, the ESA came into force. In contrast to the old Act, which offered limited protection for only 42 of 176 species designated at risk, the ESA extended some immediate protection to all species listed in Ontario.[6] In the words of then-Minister of Natural Resources David Ramsay, the ESA created a "presumption of protection" for all listed species.[7]

11. Important to the events following is the fact that when the ESA came into force, the government deferred general protection for habitat of "transition" species for the maximum five year period. This deferral would expire by law on June 30, 2013.[8]

B. In spring of 2012, the Government tried—and failed—to weaken the ESA by legislative amendment under Bill 55

12. On March 27, 2012—with the legal expiration of the five-year deferral of habitat protection only a year away—the government introduced an "omnibus" bill entitled *Bill 55, Strong Action for Ontario Act (Budget Measures)*, 2012 ("the Bill") in the Legislature.[9] In addition to the budget, the Bill proposed many substantive amendments to various statutes.

13. Specifically, controversial amendments were proposed to the ESA, found in Schedule 19 to the Bill. Schedule 19 proposed, among other things, to exempt certain activities from the Act's prohibitions against harming species and their habitat. Activities proposed for exemption included maintaining, repairing or replacing infrastructure like electric power

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[5] *Endangered Species Act*, RSO 1990 c E.15 (repealed 30 June 2008).
[6] Environmental Commissioner of Ontario, *Reconciling our Priorities: Annual Report 2006-2007*, submitted to Legislative Assembly of Ontario November 2007 (Toronto: ECO, 2007) at p 96.
[7] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 148, (28 March 2007) at 1530 (Hon David Ramsay, Minister of Natural Resources).
[8] ESA, s 10(3).
[9] Baggio Affidavit, para 13 and Ex D [AR Vol 1, Tab 3, pp 160 and Tab 3.D, pp 218-20].

systems, oil or gas pipelines, energy systems, transportation corridors and drainage works. Schedule 19 also sought to alter the statutory requirement that an overall benefit to a species be shown before authorizations may issue for activities otherwise prohibited by the Act.[10]

14. The government's proposed amendments to weaken the ESA sparked intense, widespread criticism, including from opposition members of the Legislature and stakeholder groups. The Applicants and others advocated against the amendments, including by appearing before the Standing Committee tasked with reviewing Schedule 19 to voice concern over the adverse impact the changes would have on Ontario's species at risk.[11]

15. As a result of the democratic process, on June 18, 2012, the Standing Committee voted against Schedule 19, with the support of its government members.[12] The Legislature subsequently enacted Bill 55, without any changes to the ESA.

16. Instead, then-Premier Dalton McGuinty indicated that the Schedule 19 amendments would be reintroduced in another legislative bill, in the fall of 2012.[13] Government members of the Standing Committee stressed that these amendments to the ESA were still needed in order to "bring about much-needed cost savings that will contribute to eliminating the deficit."[14]

17. However, the government never did reintroduce Schedule 19 or other amendments to the ESA in the fall 2012 session of the Legislature, and the ESA remained intact.

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[10] Bill 55, *Strong Action for Ontario Act (Budget Measures)*, 1st Sess, 40th Parl, Ontario, 2012, Schedule 19 (see Schultz Affidavit, Ex C [AR Vol 2, Tab 2.C, pp 587-92]); Baggio Affidavit, para 14 [AR Vol 1, Tab 3, pp 160-61]. See also Baggio Affidavit, Ex G [AR Vol 1, Tab 3.G, pp 229-40]; Schultz Affidavit, para 20 and Ex I at pp 5-6 [AR Vol 2, Tab 4, p 560 and Tab 4.I, pp 626-27].

[11] Baggio Affidavit, paras 12-29, 68 and Exs E-K [AR Vol 1, Tab 3, pp 160-66, 176-77 and Tabs 3.E-3.K, pp 221-91]; Schultz Affidavit, paras 19-31 and Exs C-I [AR Vol 1, Tab 4, pp 559-63 and Tabs 4.C-4.I, pp 587-641].

[12] Baggio Affidavit, para 24 and Ex M [AR Vol 1, Tab 3, p 164 and Tab 3.M, p 294].

[13] Baggio Affidavit, paras 23-25 and Ex L [AR Vol 1, Tab 3, pp 163-65 and Tab 3.L, pp 292-93].

[14] Baggio Affidavit, para 25 and Ex M [AR Vol 1, Tab 3, pp 164 and Tab 3.M, p 304].

C. In December 2012, the MNR proposed to achieve through regulatory exemptions what it had failed to achieve through legislative amendment

18. By late 2012, it became clear that the government had not given up on its desire to change the ESA. However, the MNR would no longer try to persuade the Legislature to do this.

19. Rather, on December 5, 2012, the MNR first made public its intention to change the ESA outside of the legislative process. In a formal posting to the Environmental Bill of Rights ("EBR") Registry, the MNR proposed to make changes to the administration of the ESA so as to be "consistent" with the MNR's ongoing "Modernization of Approvals" process.[15] Modernization of Approvals (or "MAP") is an MNR policy framework aimed, in essence, at simplifying permit approvals so as to introduce cost savings and administrative efficiencies.[16]

20. A subsequent posting to the EBR Registry, on January 24, 2013, made clear that the MNR was in fact contemplating significant regulatory exemptions. The regulatory proposals that the MNR posted for public comment focused not on specific species, but rather on exempting entire industrial sectors and activities from various ESA prohibitions.[17]

21. These proposals provoked major public concern. The MNR received over 10,000 public comments on its December 2012 EBR Registry posting.[18] The Applicants' exhaustive efforts to share their concerns included meeting with MNR officials, writing to Minister David Orazietti and Premier Kathleen Wynne, and commenting on EBR Registry notices.[19]

22. In addition, through counsel and with other environmental groups, the Applicant Ontario Nature wrote twice to Minister Orazietti, in February and April 2013. These letters noted

[15] Schultz Affidavit, para 40 and Ex O [AR Vol 2, Tab 4, p 567-68 and Tab 4.O, pp 717-20].
[16] See MNR EBR Registry posting of 27 Sept 2012, Schultz Affidavit, Ex J [AR, Vol 2, Tab 4.J, pp 645-68].
[17] Schultz Affidavit, para 41 and Ex P [AR Vol 2, Tab 4, p 568 and Tab 4.P, pp 722-31].
[18] Schultz Affidavit, para 55 [AR Vol 2, Tab 4, pp 573].
[19] Baggio Affidavit, paras 47-53 and Ex T [AR Vol 1, Tab 3, pp 170-72 and Tab 3.T, pp 350-52]; Schultz Affidavit at paras 43, 48-54 and Exs Q, X, Y, Z, AA, & BB [AR Vol. 2, Tab 4, pp 569-73 and Tabs 4.Q, 4.X-4.BB, pp 732-40, 777-98].

concern that the Minister may not have met his duties under s. 57(1) of the ESA. Ontario Nature explained its view that s. 57(1) obliged the Minister to determine whether the MNR's regulatory proposal was likely to jeopardize the survival of, or have any other significant adverse effect on, *each* of the listed endangered and threatened species to which the regulation would apply.[20] Ontario Nature's correspondence also requested that, if the Minister *had* made a determination, that he provide the record before him when he made it.[21]

23. The Minister did not respond to Ontario Nature until July 18, 2013, after the Regulation had been made. His response asserted that he had formed an opinion under s. 57(1). He declined to provide the opinion and the record before him in reaching it, as had been requested.[22]

D. In May 2013, the Minister purported to make a statutory determination under s. 57(1) of the ESA, and Cabinet purported to make the Regulation

24. As the Applicants learned after initiating this litigation, on May 1, 2013, Minister Orazietti signed the Minister's Determination, purportedly meeting his obligations under s. 57(1).[23]

25. Uncontroverted evidence suggests that Minister Orazietti signed his Determination *after* the regulation had been proposed to Cabinet, which appears to have occurred on April 24, 2013.[24]

26. In any event, Cabinet made the Regulation on May 15, 2013. It came to public attention on May 31, 2013, when it was published. It largely came into effect on July 1, 2013—one day after the expiration of the five-year period during which habitat protection was postponed.[25]

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[20] Schultz Affidavit, para 50 [AR Vol 2, Tab 4, p 571]. In addition, Ontario Nature alerted the Premier and Cabinet members to its concerns that the Minister may not have performed his s 57(1) duty. See Schultz Affidavit, para 53 and Exs AA, W, X and Y [AR Vol 2, Tab 4, p 572 and Tab 4.AA, 4.W-4.Y, pp 797-98, 772-91].
[21] Schultz Affidavit, para 50 [AR Vol 2, Tab 4, p 571].
[22] Schultz Affidavit, para 60 [AR Vol 2, Tab 4, p 575].
[23] Schultz Affidavit, paras 64-68 [AR Vol 2, Tab 4, pp 576-78].
[24] Schultz Affidavit, paras 71-73 [AR Vol 2, Tab 4, pp 578-79].
[25] O Reg 176/13, s 16 ["the Regulation"] [AR Vol 1, Tab 2.B, pp 62-154]. See also Schultz Affidavit at para 56 [AR Vol 2, Tab 3, p 573].

27. The Regulation amends Ontario Regulation 242/08 by purporting to introduce a broad suite of exemptions, for identified industrial activities, from the ESA's prohibitions. It does this primarily through the "Exemptions Requiring Notice to be Given on Registry" provisions. As with Bill 55, the Regulation exempts infrastructure-related activities, but also extends exemptions to industrial sectors including forestry and mining. The Regulation also echoes Bill 55 by exempting activities from criteria that must be met under ss. 17 and 18 to obtain authorization for those activities, including by significantly narrowing or eliminating the requirement that the activities ensure an "overall benefit" to the affected species.[26]

28. In his 2012/2013 Annual Report, the Environmental Commissioner of Ontario concluded that the Regulation accomplished, in part, what government had tried to do through Bill 55.[27]

E. The Minister's Determination fails to assess 150 of the 155 endangered and threatened species to which the proposed regulation would apply

29. After initiating this litigation, the Applicants obtained the Minister's Determination from the Respondents.[28] At page 36, Minister Orazietti concurred with the recommended decision.

30. At the time of the Minister's Determination, 155 species were listed on the Species at Risk in Ontario List[29] as endangered or threatened.[30] These species–lichens, mosses, vascular plants, molluscs, insects, fishes, reptiles, birds and mammals–are noted in Schedule A to this factum.

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[26] See e.g., the Regulation, *ibid*, s 14, adding by amendment ss 23.4(4), 23.9(4), 23.10(2), 23.11(4), 23.12(1), 23.13(5)-(6), 23.14(3), 23.17(4), 23.20(2) to O Reg 242/08, each of which exempts the application of ss 9(1)(a) and 10(1) to certain activities, subject to conditions being met. See also the Regulation, s 10(1), adding by amendment s 22.1 to O Reg 242/08, which exempts forest operations approved under the *Crown Forest Sustainability Act, 1994* from the application of ss 9(1)(a) and 10(1).
[27] Baggio Affidavit, paras 68-69 and Ex DD, p 48 [AR Vol 1, Tab 3, pp 176-77 and Tab 3.DD, p 471].
[28] Schultz Affidavit, paras 64-68 [AR Vol 2, Tab 4, pp 576-78].
[29] ESA, s 7 compels a designated MNR official to create the Species at Risk in Ontario List through regulation. The List is prescribed in O Reg 230/08, which lists extirpated, endangered, threatened and special concern species in Schedules 1, 2, 3 and 4 respectively. As of the Minister's Determination on May 1, 2013, the List had last been amended on January 24, 2013 by O Reg 25/13.

31. However, but for five species, the Minister's Determination did not assess the effect of the proposed regulation on any of these 155 species. For example, at no point does the Minister conclude that the Regulation would not likely jeopardize the survival of Blanding's Turtle in Ontario and not likely have any other significant effects on it. To the contrary, Blanding's Turtle is not even mentioned. Likewise, the Minister's Determination does not at any point assess or determine the effects of the Regulation on the American Eel.[31]

32. Of these 155 species, only five are specifically assessed in the Minister's Determination: Butternut,[32] Bobolink, Eastern Meadowlark,[33] Barn Swallow and Chimney Swift.[34]

33. Rather than assessing each of the 155 individual species to which the regulation would apply, the Minister's Determination focuses on 18 proposals. Fifteen proposals focus on individual sectors or activities to be exempted—including forestry, mining exploration, aggregate operations, hydro operations, operation of wind facilities, drainage works, and an exemption for all activities not completed or operating, but that have been approved or planned.

34. The Minister's Determination states that the 18 proposals are to "increase administrative efficiency and reduce burdens on individuals and businesses engaged in activities that affect

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[30] Pursuant to s 5(1), a species is an "endangered species" if it lives in the wild in the Ontario but is facing imminent extinction or extirpation. A species is a threatened species if it lives in the wild in Ontario, is not endangered, but is likely to become endangered if steps are not taken to address factors threatening to lead to its extinction or extirpation. A species is an extirpated species if it lives somewhere in the world, lived at one time in the wild in Ontario, but no longer lives in the wild in Ontario.

[31] Minister's Determination, p 14 [AR, Vol 1, Tab 2.A, p 30]. American Eel is exempted from the Exemptions Regime for only one hydro-electric generating station (R. H. Saunders Station), but is otherwise exempted by the Regulation from s. 9(1) and 10(1) of the ESA. This exemption from the Exemptions Regime continues the prior exemption that applied to all hydro-electric generating stations. The prior exemption (see O Reg 242/08 as originally made at s 11) imposed stricter conditions than the Exemptions Regime, including an agreement with the Minister that required ministerial determinations in relation to "reasonable steps to minimize adverse effects" and that "if the agreement is complied with, the operation will not jeopardize survival or recovery."

[32] Minister's Determination, p 25, noting that "It is unlikely that the section will result in any significant adverse effect on Butternut or jeopardize the survival of the species" [AR, Vol 1, Tab 2.A, p 41].

[33] Minister's Determination, pp 27-28 [AR, Vol 1, Tab 2.A, pp 43-44].

[34] Minister's Determination, pp 28-29 [AR, Vol 1, Tab 2.A, pp 44-45].

species at risk and their habitat while providing for the protection of species at risk."[35] This is consistent with later statements, such as a fundraising invitation for Minister Orazietti boasting of success in achieving "substantive revisions" to the ESA, to the benefit of industries.[36]

PART III – THE ISSUES AND CONCISE STATEMENT OF THE LAW

A. The Points in Issue

35. This Application places one overarching question before the Court: is the Regulation *ultra vires* the ESA? This overarching question breaks down into two sub-issues, stated as follows:

    1. Did the Minister err in law by failing to meet a mandatory condition precedent in s. 57(1), namely by failing to determine whether the proposed regulation is likely to jeopardize the survival of, or have any other significant adverse effect on, each listed species to which the regulation would apply?

    2. Is the Regulation inconsistent with the objects and purposes of the ESA?

36. Both issues are questions of *vires*. The first issue raises the Minister's failure to comply with a mandatory condition precedent, which deprives Cabinet of jurisdiction; this first issue attracts a correctness standard of review.[37] The second issue engages the approach to the validity of regulations recently addressed in *Katz Group Canada Inc v Ontario*.[38]

37. Consideration of the Regulation's validity does not require the Court to adjudicate the merits of the MNR's "Modernization of Approvals" policy, the cost-cutting policy that is the context for the Regulation. The only issue is whether the Regulation is *ultra vires* the ESA.

38. Courts will invalidate regulations where the Executive has failed to comply with a condition precedent required under the enabling statute, or where the regulation is not

[35] Minister's Determination, p 2 [AR, Vol 1, Tab 2.A, p 18].
[36] Baggio Affidavit, Ex AA [AR, Vol 1, Tab 3.AA, pp 385-86]. See also Baggio Affidavit, Ex X [AR Vol 1, Tab 3.X, p 371]; and Schultz Affidavit, Exs O, P [AR, Vol 2, Tab 3.O-3.P, pp 717-31] (EBR Registry notices).
[37] *Dunsmuir v New Brunswick (Board of Management)*, 2008 SCC 9 [*Dunsmuir*].
[38] *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*].

consistent with the statute's purpose.[39] For the reasons outlined below, the Applicants submit that the Regulation suffers both of these defects and thus is *ultra vires*.

B. The ESA's protective purposes are carried out by the scheme as a whole

39. Before turning to the specific questions at issue, the purposes and scheme of the ESA should first be considered, along with the basic scheme and function of the Regulation.

40. As context, it should be noted that the ESA was enacted in 2007 to replace outdated, ineffective legislation. Ontario's former *Endangered Species Act* was highly discretionary. It conferred discretion on Cabinet to list species and created a prohibition on "wilful" harming of listed species and their habitat. A preamble stated the Act was "considered expedient to provide for the conservation, protection, restoration and propagation" of Ontario's species.[40]

41. In contrast, the ESA is a sophisticated, modern regime, designed to advance much stronger purposes. The ESA reflects a purposeful evolution in the Legislature's approach to governing the relationship between human activity and Ontario's endangered and threatened species. It creates a species-centric regime that, while flexible, is intended to make protection and recovery of endangered and threatened species paramount to other interests under the Act.

B1. The purposes of the ESA are solely to protect and recover species—and not to promote industry or development

42. Section 1 sets out the three complementary, species-centric purposes of the ESA, stating:

> 1. To identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge.
> 2. To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.
> 3. To promote stewardship activities to assist in the protection and recovery of species that are at risk.

[39] *Ibid* at paras 27-28.
[40] *Endangered Species Act*, RSO 1990 c E.15 (repealed 30 June 2008), ss 1-6, Preamble.

43. In contrast to Ontario's resource management statutes,[41] the ESA's legislated purposes do not contemplate any "balancing" between protecting species and promoting industrial or economic development. There are no competing purposes legislated in the ESA, because the Act is not about balancing species' needs against competing interests. Rather, the overarching purpose of the ESA is to protect and recover species at risk.

44. Notably, in a few select ESA provisions, the Legislature has expressly imposed duties on the Minister to consider competing interests *other* than species protection. The clearest example is s. 17. Paragraph 17(2)(d) precludes the Minister from issuing a permit authorizing a harmful activity (where the activity's purpose is *not* to assist in the protection or recovery of an affected species) *unless* a number of conditions are met. While the Minister must conclude that the activity will not jeopardize survival or recovery of a species [s. 17(2)(d)(iv)], the Minister must also conclude, *inter alia*, that "the activity will result in a significant social or economic benefit to Ontario" [s. 17(2)(d)(i)]. As held by this Court in *Sierra Club Canada v Ontario*, in s. 17(2)(d), those conclusions are in obvious tension with one another, making the Minister's decision under s. 17(2)(d) one of balancing and weighing competing interests.[42]

45. By contrast, the Legislature has not expressly included any such "balancing" considerations in most provisions of the ESA, including in s. 57(1)—and none should be judicially read in.

46. That the ESA is aimed exclusively at protecting species is bolstered by its Preamble. The Preamble indicates that legislators were motivated by concern about loss of biological diversity and desire to protect species at risk for future generations. As held in *Guelph (City)*

[41] See e.g. *Ontario Water Resources Act*, RSO 1990, c O.40, s 0.1; *Lakes and Rivers Improvement Act*, RSO 1990, c L.3, s 2; *Aggregate Resources Act*, RSO 1990, c A.8, s 2; *Mining Act,* RSO 1990, c M.14, s 2; *Crown Forest Sustainability Act, 1994*, SO 1994, c 25, s 1.

[42] *Sierra Club v Ontario (Natural Resources & Transportation)*, 2011 ONSC 4655 (Div Ct) [*Sierra Club*] at para 110.

v *Soltys*, the preamble and s. 1 suggest the Legislature considered the ESA purposes to be important. They animate and are reflected throughout the scheme. The Act's operative provisions are "necessary to carry the important principles of the Act into effect."[43]

47. The operative provisions that are the lynchpin of the ESA scheme are ss. 9 and 10. Subsections 9(1) and 10(1) create prohibitions against harming species and their habitat. These prohibitions comprise the "general rule" for all endangered and threatened species under the ESA, and are central to the fulfillment of its purposes.

B2. The ESA's protective, species-centric scheme is designed to ensure the protection and recovery of species

48. To achieve the purposes in s. 1, the Legislature created a restrictive, protective scheme. In essence, after a species is listed as endangered or threatened,[44] then activity that would harm the species or its habitat is prohibited, except in very limited circumstances.

49. Specifically, s. 9(1) prohibits killing, harming or harassment of individuals of the species, and s. 10(1) prohibits damage to the species' habitat. Contravention of ss. 9(1) or 10(1) is an offence attracting fines, imprisonment, or judicial compliance orders. [45]

50. If an activity is likely to result in harm to a species or its habitat such that it would be prohibited by ss. 9(1) or 10(1), only persons that obtain a permit under s. 17 or an instrument under s. 18 may undertake it. Contravention of a permit provision is likewise an offence.[46]

51. Importantly, the ESA forbids the Minister from issuing these permits or instruments unless a strict set of criteria are met. In particular, if an activity is neither necessary for human health or safety, nor has as its main purpose assisting protection or recovery of a species, s. 17(2)

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[43] *Guelph (City) v Soltys,* 45 CELR (3d) 26 (Ont Sup Ct) at para 34.
[44] ESA, ss 3–8.
[45] *Ibid*, ss 36, 40-41.
[46] *Ibid*.

only authorizes the Minister to issue a permit where, *inter alia*, the permit will effect an overall benefit to the affected species. Likewise, if an activity is not primarily aimed at the protection or recovery of the species but will result in significant social or economic benefit for Ontario, s. 17(2)(d) only allows the Minister to issue a permit when, among other criteria, he or she is satisfied that the activity will not jeopardize survival or recovery of a species.

52. Similarly, where the Minister authorizes, under other statutes that he or she administers, activities that will affect species and the main purpose of the instrument is not assisting with protection or recovery of the species, s. 18(1) only allows permit issuance where, *inter alia*, the permit will effect an overall benefit to the species within a reasonable amount of time.[47]

B3. The Regulation overrides the ESA with wide-ranging exemptions

53. The Regulation creates broadly applicable exemptions from the ESA's protective, species-centric scheme for most listed species. The Regulation purports to establish a permissive approach centered not on species, but rather one centered around certain sectors.

54. Regulation's centerpiece is the part entitled "Exemptions Requiring Notice to be Given on Registry" ("the Exemptions Regime").[48] The Exemptions Regime overrides the general scheme of the ESA. It is basically comprised of two elements: (1) broad exemptions to the ESA's core prohibitions and associated permitting requirements;[49] and (2) conditions to be met to qualify for the general exemption.[50]

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[47] *Ibid*, s 18(1)(e)(iii)(A).
[48] See Regulation, s 14, adding by amendment ss 23.3-23.20 to O Reg 242/08.
[49] See e.g. Regulation, s 14, adding by amendment ss. 23.4(4), 23.9(4), 23.10(2), 23.12(1), 23.13(5)-(6), 23.13(3), 23.20(2).
[50] See e.g. Regulation, s 14, adding by amendment ss. 23.4(6), 23.9(6), 23.10(4), 23.12(1), 23.13(7), 23.13(5), 23.20(4).

55. In terms of the first element, the Exemptions Regime purports to exempt entire sectors of industrial and development activity from the ESA's core prohibitions in ss. 9(1) and 10(1).[51] The exempted sectors and activities covered by the Exemptions Regime are works in a watercourse [s. 23.4], drainage works [s. 23.9], early exploratory mining [s. 23.10], hydro generating stations [s. 23.12], development (newly-listed and transition species) [s.23.13], pits and quarries [s. 23.14], and wind facilities [s. 23.20]. Forestry operations are also exempted.[52] As noted by the Environmental Commissioner of Ontario in his 2013 special report to the Legislature reviewing the Regulation, "[c]ollectively, these exemptions encompass many of the major activities that are known to adversely affect species at risk and their habitats."[53]

56. In terms of the second element, the Exemptions Regime sets conditions that proponents must meet to qualify for the general exemptions. In contrast to the permitting criteria in the ESA, which require that most activities must achieve an *overall benefit* for a species, the majority of these conditions aim only to *minimize* the adverse impact of an activity.

57. "Development" activity [s. 23.13] serves as one example.[54] Proponents pursuing a development activity qualifying for exemption under s. 23.13 of the Exemptions Regime are required to "take reasonable steps to minimize the adverse effects" of the activity upon affected species.[55] This requires them, under some circumstances, to cease

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[51] See provisions cited at *supra* note 26.

[52] *Ibid.*

[53] Baggio Affidavit, Ex EE at p 22 [AR Vol 1, Tab 3.EE, p 509]. The Environmental Commissioner's November 2013 report also provides a schematic of the Regulation that illustrates which exemption conditions apply to the exempted activities [AR Vol 1, Tab 3.EE, p 510].

[54] In the context of s 14 of the Regulation, adding by amendment s 23.13 to O Reg 242/08, "development" refers to the following activities: construction of drainage works (23.13(2) 1-2); construction of highways (23.13(2) 3); certain land development (23.13(2) 4-6); condominium development (23.13(2) 7); undertakings approved under the *Environmental Assessment Act*, (23.13(2) 8-12); pipeline construction (23.13(2) 13); construction of renewable energy generation facilities (23.13(2) 14-15); mining exploration, production, or mine rehabilitation (23.13(2) 16-19).

[55] The Regulation, s 14, adding by amendment s 23.13(7)5 to O Reg 242/08.

activities,[56] take steps to "minimize or avoid killing, harming or harassing" an identified species,[57] and "take measures to relocate" a species.[58] They must also make a mitigation plan.[59] Similarly permissive conditions allow other sectors a hands-off approach.

58. Unlike the violation of s. 17 permit conditions, violation of regulation conditions is not an offence.

59. The Exemptions Regime goes far beyond minor adjustments to the application of the ESA's key operational provisions to certain species. Under the ESA as intended by the Legislature, the MNR does species-specific review and permitting of harmful activities otherwise constituting offences. Under the ESA as re-written by the Executive, harmful and illegal activities are now presumptively allowed without any review, approval or oversight by the MNR—so long as proponents adopt their own preferred mitigation plans and perform other steps in the Regulation in a manner that they feel is reasonable to minimize the killing of species and destruction of their habitat.

C. The Regulation is *ultra vires* the ESA

60. The Applicants submit that the Regulation is *ultra vires*. The Minister recommended the Regulation to Cabinet absent compliance with a mandatory precondition in s. 57(1); Cabinet made the Regulation absent that precondition being satisfied. Moreover, the Regulation is contrary to the ESA's purposes and undermines its scheme–it is an attempt by the Executive to do through regulation what it had, a year earlier, failed to achieve through the Legislature.

[56] The Regulation, s 14, adding by amendment ss 23.13(8)2-4 to O Reg 242/08.
[57] The Regulation, s 14, adding by amendment s 23.13(8)1 to O Reg 242/08.
[58] The Regulation, s 14, adding by amendment s 23.13(8)5 to O Reg 242/08.
[59] The Regulation, s 14, adding by amendment s 23.13(7)6 to O Reg 242/08.

C1. Cabinet's limited power to make regulations is circumscribed by s.57

61. All subordinate legislation requires a statutory grant of authority for its enactment.[60] If it exceeds that grant, or is inconsistent with the purpose of its enabling act, it is *ultra vires*.[61]

62. The Legislature has granted Cabinet only a limited, constrained power to make regulations under the ESA. The general source of its regulation-making power is s. 55.

63. For the Regulation, the specific source of authority is s. 55(1)(b), granting Cabinet authority to prescribe exemptions from ss. 9(1) and 10(1). However, due to strict conditions precedent in ss. 57(1) and (2), the authority is highly circumscribed. In relevant part, s. 57(1) provides:

> 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:
>
> 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.

64. The modern approach to statutory interpretation requires s. 57(1) to be read in its full context, which includes s. 57(2).[62] Doing so indicates that a ministerial determination under s. 57(1), of whether a proposed regulation is likely to jeopardize a species' survival or cause it any other significant adverse effect, is a mandatory precondition to the Minister recommending the regulation to Cabinet and a mandatory precondition to Cabinet making that regulation.[63]

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[60] *Dunsmuir*, *supra* note 37 at para 28.
[61] *Katz*, *supra* note 38 at para 24.
[62] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21.
[63] At s 57(4), the ESA provides that "proposal for a regulation" has the same meaning as in the *Environmental Bill of Rights, 1993,* namely "a proposal to make, amend or revoke a regulation is a proposal for a regulation." *Environmental Bill of Rights, 1993,* SO 1993, c 28, s 1(3).

Only if the Minister determines that a proposed regulation is not likely to have these effects on a species to which it would apply may the Minister lawfully recommend the regulation.

65. If the Minister determines that the proposed regulation *is* likely to have these effects, then under s. 57(1), he or she must consult with a person considered to be an expert on the possible effects of the regulation on that species. Furthermore, under s. 57(2), the Minister must take a number of additional steps. These include the Minister reaching the opinion that the regulation will not result in a species' extirpation; the expert submitting a written report on the possible effects of the regulation on that species; the Minister considering alternatives to the regulation; and the Minister giving public notice of the proposed regulation on the EBR Registry.[64] That notice must include the Minister's opinion on whether the regulation will jeopardize the survival of a species or have any other significant adverse effect on it, the Minister's opinion that the regulation will *not* result in the species' extirpation, the Minister's reasons for those opinions, and the expert's report.[65]

66. These constraints on Cabinet's regulation-making authority are significant and unique. The intent is that any exemption of an endangered or threatened species from statutory protection, to its likely detriment, could only be made after rigorous and reasoned consideration of that species' needs, consideration of alternatives, and public scrutiny of these considerations.

[64] ESA, ss 57(2)(a), (b), (c) and (d), respectively.
[65] ESA, s 57(2)(e).

C2. The Regulation was recommended, and made, absent the Minister's compliance with a condition precedent and is therefore *ultra vires*

67. Courts will declare a regulation invalid when the Executive has not followed a condition precedent in the enabling statute.[66] Here, the Minister failed to perform mandatory duties under s. 57(1) before he recommended the Regulation to Cabinet and before Cabinet made it.

(i) *Availability of judicial review for failure to meet the s. 57(1) precondition*

68. If a decision maker fails to observe a condition precedent before exercising statutory power, this failure is a fatal jurisdictional defect and the purported exercise of power is a nullity.[67] This trite principle applies to the promulgation of regulations just as to other exercises of statutory power. It applies to preconditions to be met by Ministers before recommending regulations, as well as to preconditions to be met by Cabinet before making regulations.[68]

69. Thus, the Respondents' primary position is wholly without merit. That position, set out in the record,[69] is "that the Minister's opinion cannot be judicially reviewed." They take this position because, in their view, the condition precedent in s. 57(1) does not decide the Applicants' rights, powers or privileges, and therefore is not a statutory power of decision.[70]

70. The Respondents' position must be rejected. It is not the law that a statutory power of decision must decide an *applicant's* rights or powers; rather, it decides the rights or powers of *any party.* Absent the Minister's compliance with the s. 57(1) statutory precondition, the Minister lacks the right to recommend the Regulation, and Cabinet lacks the right to make it.

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[66] *Katz*, *supra* note 38 at para 27, citing *Ontario Federation of Anglers & Hunters v Ontario (MNR)* (2002), 211 DLR (4th) 71 (Ont CA) at para 41 [*OFAH*].
[67] *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106 at 111 [*Thorne's Hardware*]; *Inuit Tapirisat of Canada v Canada (Attorney General)*, [1980] 2 SCR 735 at 748; *Katz*, *ibid* at paras 27-28; *OFAH*, *ibid* at para 41, citing to Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada* loose-leaf (Toronto: Carswell, 1998) ch 12 at paras 12:4441, 12:4443; *Animal Alliance of Canada v Ontario (MNR)*, 2014 ONSC 2826 at para 11; *Hanna v Ontario (AG)*, 2011 ONSC 609 at paras 11-12.
[68] *Katz*, *supra* note 38.
[69] Schultz Affidavit, para 63 and Ex FF [AR Vol 2, Tab 4, p 576 and Tab 4.FF, p 818].
[70] *Judicial Review Procedure Act,* RSO 1990, c J1, s.1 "statutory power of decision"

Further, the Respondents' position that the Applicants' rights must be at stake for this matter to be justiciable offends decades of Canadian jurisprudence on public interest standing.[71]

71. In the context of the *Species at Risk Act*, the Federal Court of Appeal has held that a ministerial opinion under s. 80 cannot be shielded from judicial review.[72] Section 80 is highly analogous to s. 57, as it requires a minister to determine if a species faces imminent threats to its survival or recovery before making a recommendation to Cabinet.[73] Likewise, the Federal Court has firmly rejected the argument that a ministerial order under the *Species at Risk Act* was not justiciable.[74]

(ii) *The standard of review for Issue 1 is correctness*

72. The Applicants submit that Issue 1 is subject to a correctness standard of review. Failure to meet the mandatory condition precedent in s. 57(1) is a true question of *vires*. Further, the Minister must apply the "correct legal test" – in brief, whether a regulation may cause harm to *each* species to which it applies – before his opinion may attract any deference.[75]

73. In determining the standard of review, a court must first ascertain if jurisprudence already determines in a satisfactory manner the degree of deference for a particular category of question. An exhaustive review is not always required, as existing case law may help in identifying questions that fall to be determined under a correctness standard. Only if the inquiry proves unfruitful must courts then apply a standard of review analysis.[76]

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[71] *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.
[72] *Alberta Wilderness Association* v *Canada (Minister of the Environment),* 2013 FCA 190 at paras 46-49.
[73] See also *Alberta Wilderness Assn.* v *Canada (Minister of Fisheries and Oceans)*, [1999] 1 FC 483 (CA) at para 17, holding that assessments by review panels under the *Canadian Environmental Assessment Act* are "an essential statutory pre-requisite" to the issuance of ministerial approvals.
[74] *David Suzuki Foundation* v *Canada (Minister of Fisheries and Oceans)*, 2010 FC 1233 at paras 155-210.
[75] *Halifax (Municipality) v Canada (Public Works and Government Services),* 2012 SCC 29 at para 43.
[76] *Dunsmuir, supra* note 37 at paras 62-64.

74. The jurisprudence satisfactorily determines that a correctness standard applies to this "true jurisdiction question" of the Minister's interpretation of a jurisdiction-conferring provision. As held in *Dunsmuir*, for this category of question, a decision-maker must "interpret the grant of authority correctly or its action will be found to be *ultra vires*."[77] Likewise in *Thorne's Hardware*, the Supreme Court held that a decision maker's failure to meet statutorily prescribed conditions before making an enactment is a "fatal jurisdictional defect".[78] Ontario courts have also applied a correctness standard to whether this same minister satisfied a jurisdictional condition precendent in the *Crown Forest Sustainability Act, 1994;* this Court declined "to defer to the Minister in the performance of a task he did not perform".[79]

75. To be clear, in this case, the Applicants do not challenge the scientific, technical or factual merits of the Minister's opinion under s. 57(1). Any such challenge here would be premature. The Minister's Determination 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.

76. Should the Court conclude that the jurisprudence does not already satisfactorily determine the standard of review, then application of the relevant factors in a standard of review analysis supports a correctness standard. The ESA lacks any privative clause. The purposes of the ESA, with which the Minister must act consistently under s. 57(1), are solely about protection and recovery of species at risk and not about "balancing" of competing interests or polycentric considerations. The Minister has relatively less expertise than does this Court in interpreting

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[77] *Ibid* at paras 57-59.
[78] *Thorne's Hardware, supra* note 67 at 111
[79] *Algonquin Wildlands League v Ontario (Minister of Natural Resources)* [1998], 110 OAC 201 (Ont Div Crt) at paras 232-242; upheld in *Algonquin Wildlands League v Ontario (Minister of Natural Resources)* [1998], 117 OAC 174 (CA).

the nature and extent of his duties under s. 57(1). Finally the question is one of true jurisdiction – whether the Minister has authority to recommend a regulation without assessing if it will likely jeopardize or have other significant adverse effects on *each* species to which it applies.

77. Finally, the Applicants submit that this Court's decision in *Sierra Club* does not assist the Respondents in securing a deferential standard of review. Central to the Court's reasons in *Sierra Club* was the distinguishable nature of the question. The applicants had challenged a decision to issue a permit under s. 17(2)(d), which engages matters of public policy and expressly allows a minister to trade-off species' survival for social and economic benefits.[80] Thus s. 17(2)(d) is distinguishable from s. 57(1) and from the question at issue in this case.

(iii) *The correct interpretation of s. 57(1) requires the Minister to reach an opinion on <u>each</u> species to which a proposed regulation would apply*

78. If MNR is considering a proposed regulation that "would apply to ***a species*** that is on the Species at Risk in Ontario List as an endangered or threatened species," s.57(1) requires that if "the Minister is of the opinion that the regulation is likely to jeopardize the survival of *the species* in Ontario or have any other significant adverse effect on *the species*," then before recommending any proposed regulation to Cabinet, the Minister must satisfy additional steps.

79. The Applicants say that the correct legal question that the Minister must ask, under s. 57(1), is whether a proposed regulation is likely to affect ***each*** *listed species to which the regulation applies*. The Minister may not lawfully ask whether the regulation will affect only *a few* such species, or if it will affect *any and all* listed species. This interpretation arises from the plain words of s. 57(1) read in their full context, and from the scheme and purpose of the ESA.

[80] *Sierra Club, supra* note 42 at paras 26-35 and 110.

80. First, the text of s. 57(1) requires this interpretation. The Minister's duty under s. 57(1) is triggered where a regulatory proposal would apply to "a species" in the singular—not to "species generally" or "any and all species." Once this is triggered, s. 57(1) imposes a duty to determine the effects of the regulation on "the species." This definite article refers back to a noun already identifiable to the reader—namely, the singular listed species already identified.

81. The same reading results from the French version of s. 57(1). It also begins with a singular noun later referred back to with a definite article, stating that where "le règlement proposé s'appliquerait à ***une espèce***," the Minister must then assess the effects on "l'espèce."

82. Second, the broader context requires this interpretation. In English and French versions of the ESA, the Legislature employs a consistent pattern in related provisions, referring first to "a species" and then referring back to it as "the species."[81] In *Sierra Club*, this Court reviewed a permitting decision under s. 17, which employs this pattern of expression, and confirmed that the Minister must apply s. 17 to *each* species to which a s. 17 permit would apply.[82]

83. Finally, the ESA's purposes demand a species-specific approach. Its purposes of protecting and recovering species are strongly reflected in s. 57(1), which limits the Minister to assessing a species' needs–namely, the likelihood that a regulation may harm it. This purpose would be undermined if the Minister could assess the impact of proposed exemptions on "species generally," without identifying and assessing harm to each listed species affected.

84. As held by the U.S. Supreme Court in the leading case under the US *Endangered Species Act*, that Act "indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." Notably, the Court reached that conclusion in the context

[81] ESA, ss. 9(6), 10(1)(b), 11, 17, 18, 28(1) and 56(1).
[82] *Sierra Club, supra* note 42 at para 23.

of an interpretation of s. 7 of that Act, which, as in the case at bar, requires government agencies to assess if individual species would be jeopardized by government actions.[83]

(iv) *By applying the wrong test, the Minister failed to form the requisite opinion*

85. The Applicants submit that, with the exception of the five species noted above,[84] the Minister unlawfully failed to reach the requisite opinion as to whether the proposed regulation is likely to affect *each* of the 155 listed endangered and threatened species to which it would apply.

86. Rather than look at each species to which the Regulation would apply, the Minister considered each *sector* to which the Regulation would apply. He looked at 18 regulatory proposals. Except for 3 proposals,[85] in the remaining 15 sector-specific (or activity-specific) proposals, the Minister unlawfully fails to assess their effects on each species caught by each proposal. Indeed, he usually fails to even *identify* the species caught by the proposals: which species each proposal applies to is rarely discernible. In none of the 15 proposals does the Minister conclude that the survival of a species would, or would not, likely be jeopardized.

87. The Minister Determination also never identifies the *existence* or *type* of any other significant adverse effects caused by the Regulation—if any—on any individual species. It is impossible to discern, on the face of the Minister's Determination, whether any significant adverse effects of the Regulation were ever identified for individual species; what the nature and extent of any such effects might be; and if those effects were considered to be likely.

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[83] *Tennessee Valley Authority v. Hill*, 437 US 153 (USSC 1978) at 174. For a leading decision construing "jeopardy" in s. 7 of the US ESA, refer to *Nat'l Wildlife Fedn v Nat'l Marine Fisheries Serv*, 524 F (3d) 917 (9th Cir 2008).

[84] See *supra* notes 32-34 and text at para 32.

[85] Namely, the three proposals for Butternut, for Bobolink and Eastern Meadowlark, and for Barn Swallow and Chimney Swift. See *ibid*.

88. This information is not discernible because the Minister applied the wrong test. Rather than identify and assess each species that may be affected, the Minister unlawfully assumed that conditions incorporated into the regulation addressed impacts to *any and all* species.[86]

89. To be clear, 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" the species that it impacts—because Minister Orazietti never reached that opinion. He failed to determine the impacts of the proposed exemptions on *each* of the species to which they would apply. Had he asked the correct question, and determined the impacts of the Regulation on each species, that would surely have led to a different opinion.[87]

(v) *Strictly in the alternative, the Minister's Determination was unreasonable*

90. In the alternative, the Applicants submit that the Minister's Determination was legally unreasonable for the same reasons as submitted above. The Minister's Determination fails to assess the impacts of proposed exemptions on each listed species affected by them—without justification, transparency or intelligibility as to why each species was not assessed. That failure cannot fall within a range of possible, acceptable outcomes that are defensible here.[88]

91. Moreover, even under the former highly deferential standard of patent unreasonableness, the Supreme Court has confirmed that ministers must exercise their statutory powers "in a manner consistent with the purpose and objects of the statute that conferred the power."[89]

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[86] This approach was taken, in the Minister's Determination, to the regulatory proposals for: activities approved or planned, but not completely or operating; forest operations; early mining exploration; operation of hydro-electric generating stations; aggregate operations; drainage works; and operation of wind facilities.
[87] See e.g. Expert Report of Robert MacGregor, pp 38-41 [AR Vol 3, Tab 5.B, pp 946-49]; Expert Report of Dr. Justin Congdon, pp 29-30 [AR Vol 3, Tab 6.B, pp 1147-48].
[88] *Dunsmuir*, *supra* note 37 at para 47.
[89] *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 49. In the context of an exercise of ministerial discretion reviewed under a reasonableness standard, see *Halifax (Regional Municipality) v Canada,* 2012 SCC 29 at para 47.

C3. The Regulation is contrary to the objects and purposes of the ESA

92. The Applicants submit that the Regulation is inconsistent with the purposes and objects of the ESA and that, as a result, it is *ultra vires*.

(i) *The approach to reviewing regulations for validity is settled*

93. It is well-established that Cabinet's authority to enact subordinate legislation is circumscribed by the purposes of the enabling statute. As recently confirmed by the Supreme Court in *Katz*, a regulation that is inconsistent with the object and purpose of its enabling statute is invalid.[90]

94. A standard of review analysis, following the test in *Dunsmuir*, is not required to assess the *vires* of a regulation. Rather, the approach to judicial review is that set out in *Katz*.

95. While the *vires* of a regulation is by definition a jurisdictional question, courts have nonetheless tended to review the *vires* of regulations with deference.[91] However, courts will find a regulation to be invalid on the basis of its inconsistency with its parent statute in egregious cases.[92] Further, for subordinate legislation to be valid, it is not enough that it merely follow the letter of the law.[93] A regulation must also be enacted "within the spirit" of the enabling statute and "strictly in accordance with the regulation making power."[94]

96. The Applicants submit that matter at bar raises an egregious case of inconsistency. The Regulation is a blatant attempt by the Executive—having failed to secure the Legislature's approval of its desired changes in Bill 55—to circumvent and make "substantive revisions" to the legislative scheme.

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[90] *Katz*, *supra* note 38 at para 24, citing to *Waddell v Canada*, [1983] BCJ No 2017 (SC) at para 29 [*Waddell*].
[91] *Apotex Inc v Ontario (Lieutenant Governor in Council)*, 2007 ONCA 570.
[92] *Katz*, *supra* note 38 at para 28, citing *Thorne's Hardware*, *supra* note 67 at 111.
[93] *Barrick Gold Corp v Ontario (Minister of Municipal Affairs and Housing)* (2000), 51 OR (3d) 194 (CA) at para 59; *Waddell*, *supra* note 89 at para 29.
[94] *Yu v BC (AG)*, 2003 BCSC 1869 at para 67, citing *R v National Fish Co Ltd*, [1931] Ex CR 73 at 81-82.

(ii) ***The Regulation's scheme and function undermines the ESA's purposes***

97. As set out above at paragraphs 55-62, the Regulation functions so as to deprive almost all listed endangered and threatened species of the protection of the ESA's key operative prohibitions in ss. 9(1) and 10(1) and the associated authorizing scheme in ss. 17 and 18.

98. Put another way, the Regulation puts an end to the ESA's core statutory protections for almost all of Ontario's most seriously at-risk species.

99. In its place, the Regulation supplants the scheme with a parallel Exemptions Regime that enables many activities dangerous to species and their habitats. This effect is not remedied—and, in fact, is worsened—by the Regulation's prescribed conditions to be met for an activity to qualify for exemptions. The conditions are significantly weaker than those required to obtain a permit under s. 17(2)(c), which requires a proponent to demonstrate that its activity will bring an overall benefit to an affected species and that it will minimize adverse effects.[95] Now proponents of exempted activities need only to make reasonable efforts, at their own discretion and without MNR involvement, to avoid or minimize adverse effects through measures outlined in their own mitigation plans.[96] This proponent-driven Exemptions Regime results in a broad-based erosion of the ESA.

100. Indeed, the Exemption Regime under the Regulation is more discretionary and less protective than the former ineffective statute that the ESA replaced in 2007.[97] That statute offered some limited protection for at least 42 of 176 species. By contrast, the

[95] This is required for an activity that will not assist in a species' recovery or protection, and will not result in a significant social or economic benefit to Ontario; see ESA, s 17(2)(c). Only under s. 17(2)(d), where the Minister is of the opinion that the activity will result in a significant social or economic benefit to Ontario, may a permit be issued without it resulting in an overall benefit to that species.

[96] See e.g., s 14 of the Regulation, adding by amendment s 23.10(4)-(10) to O Reg 242/08, which outline the requirements for preparation of a mitigation plan for early exploration mining. The mitigation plan is only submitted to MNR upon its request.

[97] See text at paras 9-10 and 40, *supra.*

industrial activities subject to the Regulation may now lawfully harm most species and their habitats, provided that they make reasonable efforts to minimize these outcomes.

101. Unlike in *Katz*, where the Supreme Court found that the impugned regulations were part of a series of incremental responses to a long-standing problem,[98] the Regulation at bar represents a sweeping and sudden change to the ESA. Indeed, unlike in *Katz*, the Respondents offer no evidence of any long-standing problem as context for the Regulations.

102. The Applicants accept that Cabinet is permitted by s. 55(1)(b) to create exemptions by regulation. However, Cabinet is not permitted to introduce wholesale exemptions that, by ending the operation of the Act's key provisions for almost all species, frustrate its purposes.

103. Not only does the Regulation undercut the ESA's purposes, it turns the scheme as a whole on its head. For most industrial activities in Ontario, the Regulation makes exemption from the ESA's core provisions the rule, rather than the exception. Harmful activities that were illegal under ss. 9(1) or 10(1) are rendered legal under a Regulation that does not prioritize affected species' needs and does not strive for their protection or recovery.

104. Thus the ESA scheme has been inverted—from one characterized upon First Reading as a "presumption of protection," to one which rests upon a "presumption of permission."

105. Thus, the Applicants respectfully urge, on this Court, the findings of the Environmental Commissioner of Ontario in his November 2013 special report to the Legislature: that "[b]y effectively exempting most of the major activities on the landscape that can adversely affect species and risk and their habitats, the regulation thwarts the very purposes of the Act."[99]

[98] *Katz*, *supra* note 38 at para 33.
[99] Baggio Affidavit at para 70 and Ex EE [AR Vol 1, Tab 3, p 177 and Tab 3EE, p 526].

(iii) *The Regulation's purposes are contrary to the ESA's purposes*

106. It has long been the law in Ontario that subordinate legislation will be found to be *ultra vires* if its purposes are inconsistent with the purposes of the parent statute.[100]

107. In the instant case, as set out above, the purpose of the Regulation is to reduce perceived administrative and financial burdens on the MNR and on industry proponents. As such, the Regulation is aimed at a purpose unrelated, extraneous, and contrary to the ESA's purposes.

108. The Exemption Regime—the centrepiece of the Regulation—was not made to further the protection of species. Rather, its primary purpose is costs saving. The Exemption Regime is meant to ease the burden on industry of satisfying permitting requirements under ss. 17 and 18, and to ease the perceived burden on the MNR in administering that permitting scheme.

109. This purpose of cost savings for government and industry is also reflected in the Minister's Determination, which shows that the regulatory changes were intended to:

- "increase administrative 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";
- "address fairness issues for proponents of activities that have long approval processes";
- address that "issuance of these permits was often time and resource intensive."[101]

110. The Minister's Determination also indicates that conditions imposed to allow an exemption are meant 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."[102] However, for those proposals to exempt forestry, mining, hydro, aggregate, wind energy and other industrial activities, the only applicable

[100] *Re Doctors Hospital and Minister of Health et al* (1976), 12 OR 92d) 164 (HCJ Div Crt) [*Doctors Hospital*]; *OFAH*, *supra* note 66 at para 41.
[101] Minister's Determination, pp 2, 8, 32 [AR Vol 1, Tab 2A, pp 18, 24, 48].
[102] Minister's Determination, p 2 [AR Vol 1, Tab 2A, p 18] [emphasis added].

outcome is "mitigation of adverse effects" to species or habitat. Mere mitigation of impacts is less than, and inconsistent to, the ESA purpose of species protection and recovery.

111. In lessening perceived administrative burdens on MNR, the Exemption Regime is part of the MNR's "Modernization of Approvals" agenda.[103] While MNR is free to pursue policy agendas, it may not do so through any regulation that undermines legislative enactments.

112. Put simply, "reducing administrative burdens" is not one of the legislated objectives of the ESA. The administrative burden of protecting and recovering Ontario's species at risk is one that the Legislature fully intended the Minister and the Cabinet to bear.

113. When a regulation is enacted with the ultimate purpose of improving fiscal prudence, Cabinet must ensure that this purpose is consistent with and not extraneous to its power to enact the regulation. In *Doctors Hospital*, the Court held that a series of hospital closures ordered by Cabinet in exercising its statutory power was *ultra vires*. The orders were made to reduce expenditures—and as such were extraneous to the purpose of the enabling act, which was not intended to permit hospital closure for budgetary reasons.[104]

114. The Respondents may argue that *one* of the Regulation's purposes somehow falls within the ambit of the ESA's purposes. Yet the *primary* purpose of the Regulation is clearly to reduce costs and increase administrative efficiencies. Decisions of Cabinet have been found *ultra vires* where their primary purpose was not one authorized by statute.[105]

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[103] Minister's Determination, p 1 [AR Vol 1, Tab 2A, p 17]. See also the MNR's posting to the EBR Registry, Schultz Affidavit, Ex O [AR, Vol 2, Tab 4.O, pp 717-20].
[104] *Re Doctors*, *supra* note 100
[105] *Heppner v Alberta* [1977], 80 DLR (3d) 112 (Alta SC (AD)) at para 43.

115. Cabinet may not make regulations that, whether in purpose or in effect, are inconsistent with the purposes of the ESA. The ESA's purposes of protection and recovery of species at risk cannot lawfully be rendered secondary to the MNR's policy priority of cutting costs for government and industry. Yet this is precisely what the Regulation does.

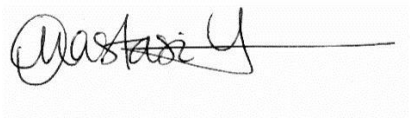
PART IV – ORDER SOUGHT

116. The Applicants request the declaratory relief pleaded at paragraphs (a), (c) and (d) of their Notice of Application.[106]

117. Strictly in the alternative, the Applicants request the declaratory relief pleaded at paragraphs (b), (c) and (d) of their Notice of Application.[107]

118. With respect to paragraph (e) of the prayer for relief, the Applicants respectfully seek the opportunity to address costs after disposition of this matter and in any event of the cause.

All of which is respectfully submitted this 30th day of June, 2014 by:



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[106] Notice of Application, p 5 [AR Vol 1, Tab 1, p 5].
[107] *Ibid.*