

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

**WILDLANDS LEAGUE and
FEDERATION OF ONTARIO NATURALISTS**

Applicants

and

**LIEUTENANT GOVERNOR IN COUNCIL and
MINISTER OF NATURAL RESOURCES**

Respondents

FACTUM OF THE RESPONDENTS

Date: September 4, 2014

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PART I – OVERVIEW

1. The Applicants seek to judicially review the *vires* of recent amendments to Ontario Regulation 242/08 passed pursuant to the *Endangered Species Act, 2007*, S.O. 2007, c. 6 (“*ESA*” or “*Act*”). The amendments to the regulation create species or activity based exemptions that permit proponents to engage in activities that would otherwise be prohibited by the *ESA* (e.g. harm endangered or threatened species) if the proponent satisfies a number of onerous conditions meant to mitigate impacts on the species. If the conditions are not satisfied, then the *ESA* prohibitions would apply.

2. The Applicants challenge the *vires* of the amendments on two grounds. First, the Applicants argue that the Minister of Natural Resources and Forestry did not satisfy a statutory condition precedent necessary for the enactment of the amendments. Specifically, the Applicants allege that the Minister did not comply with section 57 of the *ESA* that requires the Minister to form the opinion that the regulatory amendments would not likely jeopardize the survival of an endangered or threatened species or cause any significant adverse effect on the endangered or threatened species. Second, the Applicants allege that the amendments are inconsistent with the objects and purposes of the *ESA*. The Applicants submit that the sole purpose of the *ESA* is the protection and recovery of endangered or threatened species and that any regulation that is promulgated for any motivation outside of the protection and recovery of endangered or threatened species is inconsistent with the *ESA*.

3. In response, the Respondents respectfully submit the following:

- (a) The Minister complied with s. 57 and formed the requisite opinion;
- (b) When read as a whole, the *ESA* reflects a more 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. The *ESA* reflects this nuanced approach by permitting exemptions to the prohibitions for activities even where the primary purpose of the activity is not aimed at the protection and recovery of endangered or threatened species; and

- (c) In order to qualify under one of the regulatory exemptions from the *ESA* prohibitions, the amendments to the regulation require a proponent to engage in a number of activities intended to minimize adverse effects on endangered and threatened species, mitigate any effects on the species, and in some cases, benefit the species. As such, the amendments to the regulation are consistent with the purposes of the *ESA*.

PART II – THE FACTS

A. The Endangered Species Act, 2007

(i) Purposes of the Act – A Nuanced Approach

4. The *ESA* provides statutory protection to species listed as threatened, endangered and extirpated species. The Preamble and s. 1 of the *ESA* set out the purposes and context for its enactment.

5. As set out in s. 1 of the *ESA*, the purposes of the *ESA* are: (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.¹ Section 1 must be read in a manner consistent with the Preamble. In particular, the Preamble states that, “the People of Ontario wish to do their part in protecting SAR, with appropriate regard to social, economic and cultural considerations”.² The Hansard debates from the second and third reading of the *ESA* also demonstrate the considerations reflected in the Preamble:³

The proposed legislation would also allow the government to make decisions that would accommodate compatible land use activities and, at the same time, support sustainable social and economic development. The goal would be an overall outcome that ultimately benefits the species and its habitat.⁴

When the decision was made to update and modernize the existing Endangered Species Act, the government was mindful of a number of these considerations:

—the need to provide better protection measures for species and their habitat, while at the same time allowing for social and economic concerns to be addressed;⁵

¹ *Endangered Species Act, 2007*, S.O. 2007, c. 6, s. 1 (“*ESA*”)

² *ESA*, Preamble

³ Complete extracts of the second and third reading can be found in the Book of Authorities

⁴ Bill 184, Second Reading, Hansard, 28 March 2007, Hon. David Ramsay (Minister of Natural Resources)

⁵ Bill 184, Third Reading, Hansard, 16 May 2007, Hon. Mr. David Oraziatti

6. The Applicants argue that the “sole” purpose of the *ESA* is the protection and recovery of SAR.⁶ As a result, the Applicants argue that the promulgation of regulations that are motivated by any factor outside of the protection and recovery of SAR contravenes the purposes of the *ESA*. Respectfully, a review of the *ESA* as a whole does not support the Applicants’ interpretation. Rather, the Minister submits that the *ESA* reflects a more 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.

(ii) Species at Risk and the prohibitions

7. Subsection 5(1) of the *ESA* sets out 5 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

8. Subsection 9(1) of the *ESA* prohibits killing, harming, harassing, possessing, capturing, taking, 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 habitat of a species listed as threatened, endangered or extirpated⁹ (s. 9 and s. 10 collectively, “the prohibitions”).¹⁰

9. Section 11 of the *ESA* requires the Minister to ensure that a strategy is prepared for the

⁶ Applicants’ factum at para. 42

⁷ *ESA*, s. 5(1), at p. 46

⁸ The consolidated regulation is Ontario Regulation 230/08 (Species at Risk in Ontario List).

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

recovery of each species that is listed on the SARO List as an endangered or threatened species.¹¹ Section 12 of the *ESA* requires the Minister to ensure that a management plan is prepared for each species that is listed on the SARO List as a special concern species.¹² The Minister may consider social and economic factors in ascertaining whether the steps the government of Ontario will take in response to the strategy or plan are feasible.

(iii) *Exceptions to the prohibitions*

10. The prohibitions support the main purposes of the *ESA*. The *ESA* does, however, create exceptions to the prohibitions. The exceptions, described further below, demonstrate that the *ESA* allows a balancing of the protection and recovery of SAR with economic, social, health and cultural concerns.

11. Section 17 of the *ESA* authorizes the Minister to issue a permit exempting a person from the prohibitions when the Minister forms one of the following four opinions:

- (i) That the activity authorized by the permit is necessary for the protection of human health and safety (ss. 17(2)(a));
- (ii) That 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) That 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: (a) an overall benefit to the species will be achieved in a reasonable time; (b) reasonable alternatives have been considered that would not adversely affect the species and the best alternative has been adopted; and (c) reasonable steps to minimize adverse effects on the members of the species are required by the permit (ss. 17(2)(c)); and
- (iv) That 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 (a) the activity will result in significant social or economic benefit to Ontario; (b) that the activity will not jeopardize the “survival or recovery” of the species after obtaining an independent expert opinion on whether the activity will jeopardize the “survival or recovery” of the species; (c) reasonable alternatives have been considered that would not adversely affect the species and the best alternative has been adopted; and (d) reasonable steps to minimize adverse effects on the members of the species are required by the permit (ss. 17(2)(d)).

¹¹ *ESA*, s. 11(1)

¹² *ESA*, s. 12(1)

12. Clauses 17(2)(a), (c) and (d) recognize that the Minister may issue permits to achieve policy objectives other than the protection or recovery of SAR.¹³ Section 17(2)(a) and (d) allows prohibited activities without requiring the permit holder to create an overall benefit to the species specified in the permit.

13. Section 19 of the *ESA* enables the Minister to enter into an agreement or grant a permit to various levels of First Nation governments that permit an exemption to the prohibitions. The Minister is precluded from entering into an agreement or issuing a permit under this section if the Minister forms the opinion that the agreement or permit would authorize an activity that would jeopardize the survival or recovery of the species specified in the agreement or permit.¹⁴ The Minister is not required to form the opinion that an overall benefit would result to a SAR when entering into an agreement or granting a permit pursuant to section 19.

14. Pursuant to clause 55(1)(b) of the *ESA*, the Lieutenant Governor in Council (“LGIC”) may make regulations, “prescribing exemptions from subsections 9(1) or 10(1), subject to any conditions or restrictions prescribed by the regulations”.¹⁵ Clause 55(1)(b) is very broad. It does not prescribe the activities that can obtain an exemption nor does it prescribe the “conditions or restrictions” required by the regulation. Rather, the LGIC has the discretion to determine what, if any, “conditions or restrictions” are required.

15. If a proposal for a regulation under subsection 55(1) is being considered by the Ministry, section 57 of the *ESA* must be complied with.

16. When making a regulation that prescribes exemptions to the prohibitions, ss. 57(1) of the *ESA* requires the Minister to determine whether the proposed regulation would apply to an endangered or threatened species and consult with an expert on that species in cases where the Minister forms the opinion that the proposed regulation is “likely to jeopardize the survival of the species in Ontario or

¹³ *ESA*, s. 17(2)

¹⁴ *ESA*, s. 19

¹⁵ *ESA*, s. 55

to have any other significant adverse effect on the species” (ss. 57(1) paragraph 1). If the Minister does not form this opinion, then the Minister is not required to consult an expert on the species nor is the Minister required to comply with ss. 57(2). Unlike s. 17 and 19 of the *ESA*, paragraph 1 of ss. 57(1) does not explicitly address the “recovery” of endangered or threatened species.

17. Read as a whole, the statutory scheme demonstrates that social, economic, safety and cultural considerations may be balanced with concerns for the protection and recovery of SAR. The *ESA* reflects a nuanced approach that permits activities that cause varying degrees of harm to SAR or their habitat in situations where the primary motivation for the activity is not solely related to the protection or recovery of species at risk.

(iv) Ontario Regulation 176/13

18. On May 15, 2013, Ontario Regulation 176/13 was made by the LGIC. Ontario Regulation 176/13 amended Ontario Regulation 242/08 to include 5 species specific exemptions (Bobolink and Eastern Meadowlark (s. 23.6), Barn Swallow (s. 23.5), Chimney Swift (s. 23.8) Butternut (s. 23.7) and Aquatic Species (s. 23.4)) and 14 activity based exemptions (total 19 exemptions).¹⁶ 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. 23.13); Aggregate Operations (s. 23. 14); Operation of a Wind Facility (s. 23.20); Drainage (s. 23.9); and Forestry Operations (s. 22.1).

19. On May 1, 2013, 14 days prior to the LGIC making Ontario Regulation 176/13, the then Minister of Natural Resources, the Honourable David Oraziatti came to the opinion, based on the

¹⁶ Ontario Regulation 176/13, **Application Record (“AR”), Tab 2B, at pp. 62-154**

Ministry's recommendation 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").¹⁷ 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").¹⁸

(v) *The Minister's Explanatory Note*

20. The Applicants' main argument is that the "[EN] failed to identify or assess each species to which [the] proposed regulatory exemptions would apply" and that the Minister never "[identified] the existence or type of...adverse effects caused by the Regulations".¹⁹ This is incorrect.

21. The EN begins with an explanation of the relevant sections of the *ESA* that must be considered, including s. 55 and s. 57 of the *ESA*.²⁰ The EN explains that the regulatory proposals contain conditions that a proponent must follow in order to qualify for an exemption to the prohibitions. The conditions are intended to "minimize the impact on [SAR], increase administrative efficiencies and provide clear direction when applied to a specific set of circumstances".²¹ The conditions are intended to lead to one of three desired 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."²²

22. As detailed below and reflected in the EN, the regulatory proposals include a suite of conditions that must be met in order for the exemption to apply. In most cases, the conditions include:

¹⁷ Minister's Explanatory Note, **AR, Tab 2A, at p. 52**

¹⁸ Minister's Explanatory Note, **AR, Tab 2A**

¹⁹ Applicants' factum, at paras. 75, 78-87

²⁰ Minister's Explanatory Note, **AR, Tab 2A, at p. 17**

²¹ Minister's Explanatory Note, **AR, Tab 2A, at p. 18**

²² Minister's Explanatory Note, **AR, Tab 2A, at p. 18**

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 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.²³

23. The EN states that in a majority of the regulatory proposals, the exemption requires the proponent to prepare a mitigation plan that identifies the steps in which the proponent will engage to minimize adverse effects on the SAR. The mitigation plan must be prepared by a species specific expert using the best available information including information obtained from the Ministry. Where a mitigation plan is required, it must be accompanied by monitoring requirements and must be updated periodically to reflect information obtained through monitoring. The persons relying on an exemption for which a mitigation plan is required must provide the plan to the Minister within 14 days of receiving a request.²⁴

24. The EN also described how the proposal specific conditions were developed:

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.

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.²⁵

25. The next three pages of the EN explain the broad categories of conditions that are applied in

²³ Minister's Explanatory Note, **AR, Tab 2A, at p. 18**

²⁴ Minister's Explanatory Note, **AR, Tab 2A, at pp. 19-21**

²⁵ Minister's Explanatory Note, **AR, Tab 2A, p. 20**

the majority of the regulatory proposals that manage the risk to endangered or threatened species affected by each proposal. Of importance to this Application is the section entitled “Excluding specific species”. In arguing that the “[EN] failed to identify or assess each species” the Applicants fail to draw this Honourable Court’s attention to the following extract:

- 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:
- 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 1.²⁶

26. Contrary to the Applicants’ position, the EN demonstrates that the Ministry considered **every** endangered and threatened species when determining whether a particular species should be excluded from each regulatory proposal. The EN further identifies the species that have been excluded from each regulatory proposal.

27. Importantly, and contrary to the Applicants’ position, the EN also describes the potential adverse impact that each of the exempted activities may have on endangered or threatened species.

For example:

²⁶ Minister’s Explanatory Note, **AR, Tab 2A, p. 21**

Early Mineral Exploration

The risks to species at risk in the areas of these activities relate to disturbances in the natural habitat on which the species at risk depend for critical life processes such as hibernation or reproduction, including rearing.

To address the risks that early mineral exploration activities may pose to species at risk, this proposal employs a suite of conditions as summarized in Summary Table 1 and further detailed below.²⁷

Operation of Hydro-electric generating stations (Waterpower Operations)

The alteration of water flows and levels resulting from the operation of hydro-electric generating stations may affect aquatic species migration and spawning requirements. Additionally, fish passage up and downstream may be impeded or result in species mortality as they pass through the turbines or are prevented from accessing habitat beyond the station.²⁸

28. Finally, the EN details how each of the activity based exemptions were scoped to “[Exclude] high-risk activities” or “clearly [define]...the intent and application of the exemption”.²⁹ To summarize, the EN advised the Minister of the following:

- (a) Why the regulatory proposals were developed;³⁰
- (b) The intended outcomes of the regulatory proposals (para. 21)
- (c) The expertise used in crafting the conditions for each regulatory proposal (para. 24);
- (d) Why each condition is required (para. 22);
- (e) That the regulatory proposals generally include requirements that are targeted at minimizing the adverse effects on species or requiring a beneficial action (paras. 22 and 22);
- (f) That activities subject to an exemption have been scoped and restrictively defined to ensure that high risk activities do not fall within the exemption (para. 24);
- (g) How the activity was scoped or application of the proposal limited (para. 28);
- (h) The adverse impacts likely caused by the activity (para. 27);
- (i) A majority of the regulatory proposals require a mitigation plan (para. 23);
- (j) The mitigation plan must be prepared by a species specific expert using the best available information including information obtained from the Ministry (para. 23);

²⁷ Minister’s Explanatory Note, **AR, Tab 2A, p. 29**

²⁸ Minister’s Explanatory Note, **AR, Tab 2A, p. 28**

²⁹ Minister’s Explanatory Note, **AR, Tab 2A, at p.21**

³⁰ Minister’s Explanatory Note, **AR, Tab 2A, at p. 17**

- (k) Where a mitigation plan is required it must be accompanied by monitoring requirements and must be updated periodically to reflect information obtained through monitoring (para. 23); (para. 23);
- (l) That persons relying on an exemption for which a mitigation plan is required must provide the plan to the Minister within 14 days of receiving a request (para. 23);
- (m) That the Ministry considered **every** species that the prohibitions apply to when determining whether a particular species should be excluded from each regulatory proposal (para. 25); and
- (n) Based on the above, 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 effects on these SAR.

29. Equipped with this information and advice, along with the draft regulation, the Minister adopted the recommendation in the EN and formed his Opinion.

(vi) The Regulatory Proposals

30. The only amendments of relevance are the 19 exemptions to the prohibitions introduced by Ontario Regulation 176/13 that are contained in sections 12, 22.1, and 23.3 to 23.20 of Ontario Regulation 242/08 (hereinafter, “*Regulation*”). Given the length and detail of the *Regulation*, this factum will provide a generalized review of the exemptions and the suite of conditions that generally apply to each exemption.

31. A summary chart of the exempted activities and the suite of conditions required for each activity was included in the EN:

Proposal	Registry Y/N	Conditions						
		A	B	C	D	E	F	G
Transition for Activities that are Approved or Planned, but not Completed or Operating (for new species or habitat protection)	Y	✓		✓	✓	✓	✓	✓
Forest Operations	N	*		✓		✓	*	
Early Mineral Exploration	Y	✓	✓	✓	✓		✓	✓
Waterpower Operations	Y	✓	✓	✓	✓		✓	✓
Aggregate Operations	Y	✓	✓	✓	✓	✓	✓	✓
Operation of a Wind Facility	Y	✓	✓	✓	✓		✓	✓

Drainage	Y	✓	✓	✓	✓	✓	✓	✓
Protection and Recovery of Species at Risk	Y	✓		✓	✓	✓	✓	✓
Ecosystem Activities	Y	✓		✓	✓		✓	✓
Butternut – Standard Approaches	Y	✓	N/A	✓	✓		✓	✓
Aquatic Species	Y	✓	✓	✓	✓		✓	✓
Bobolink and Eastern Meadowlark	Y	✓	N/A	✓	✓		✓	✓
Built Structures (Barn Swallow and Chimney Swift provisions)	Y	✓	N/A	✓			✓	✓
Safe Harbour	Y	✓		✓		✓	✓	✓
Human Health and Safety Activities	Y	✓	✓	✓	✓		✓	✓
Incidental Trapping of Species at Risk	Y					✓		
Possession of SAR Specimens for Scientific or Educational Purposes	Y			✓				
Commercial Cultivation of Vascular Plants	N			✓				

Condition Legend

A - Minimize adverse effects

D - Species expertise

G - Provision of Information to NHIC

B - Exclude specific species

E - Link to existing instrument or approvals

C - Limited application

F - Plans and reports

*Included in FMP requirement

(vi) Suite of Conditions Explained

32. **Limited Application.** As detailed above, each of the exempted activities is limited in scope. While, it is not possible to detail the limited application of each provision in this factum, one section of the *Regulation* requires greater review as it is referenced in the Applicants' factum.³¹

33. At first blush, s. 23.13 of the *Regulation* may seem to apply to a large number of development activities (i.e., development activities listed in paras. 1-19 of ss. 23.13(1)) than it actually does. There are several aspects of section 23, 13, however, that limit the number of species, habitation and activities to which it applies. Section 23.13 is designed to address fairness issues for proponents of activities that have long approval processes under schemes other than the *ESA* (e.g. *Planning Act* or *Environmental Assessment Act*) where certain SAR or their habitat receive protection or

³¹ Applicants' factum, at para. 65

consideration during the course of that approval process.³² Typically, proponents in these circumstances have already invested considerable time and resources as part of the approval process, and in the majority of cases, the activities identified in paragraph 1 to 19 are activities that have been previously reviewed and approved pursuant to other legislative schemes that include consideration of impacts on SAR.³³

34. Pursuant to ss. 23.13(1) and (2), the following species are the only species to which this exemption applies:

“transition species” (those 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*),

“newly listed species” (those that were added for the first time to the Species at Risk in Ontario 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).³⁴

35. Pursuant to ss. 23.13(5), the exemption to the s. 9 prohibition only applies to “newly listed species” (i.e. five species). As such, species like the American Eel and the Blanding Turtle (which are “transition species”) could not be “killed, harmed or harassed” by any of the activities listed in paragraphs 1 to 18 of ss. 23.13(1). The exemption provided for “transition species” is limited to an exemption from the section 10 prohibitions on damage or destruction of habitat. Section 23.13 is further scoped in that a majority of the activities listed in paragraphs 1 to 18 are activities that have been previously reviewed and approved pursuant to other legislative schemes that include consideration of impacts on SAR. .

36. Finally, s. 23.13 only applies to projects that meet timing eligibility. The timing windows are specific to each activity for both transition species and newly listed species. 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

³² Minister’s Explanatory Note, **AR, Tab 2A, at p. 24**

³³ Minister’s Explanatory Note, **AR, Tab 2A, at p. 25**

³⁴ Ontario Regulation 242/08 (“*Regulation*”), ss. 23.13 (1) and (2)

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.

37. **Registration.** In all but two activities, the *Regulation* requires the person engaging in the exempted activity to give notice of the activity on the Ministry’s Registry.³⁵ In the majority of the provisions, the person must register prior to engaging in anything that would be prohibited by the *ESA*.³⁶ Registration of the activity allows the Ministry to conduct monitoring, compliance and enforcement activities.³⁷ Pursuant to s. 23.3³⁸ of the *Regulation* and the Ministry’s on-line registration forms, the proponent must provide the Ministry with, amongst other things, its name, a description and location of an activity being undertaken, the SAR that are likely to be affected and which regulatory exemption is being relied upon.³⁹

38. The Forest Operations and the Commercial Cultivation of Vascular Plants (“CCVP”) exemptions do not include registration requirements. Forest operations need not be registered because the activities subject to the exemption must be conducted under an approved forest management plan (“FMP”) pursuant to the *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25 (“*CFSA*”), which is also administered by the Ministry. As a result, the Ministry is already involved in the approval process under the *CFSA*.⁴⁰ Consideration of SAR is a component of forest management planning under the *CFSA* and FMP process.⁴¹ CCVP is excluded from registration requirements because the exemption only applies to plants that are commercially cultivated and does

³⁵ For example, see *Regulation*, s. 23.4(6)

³⁶ In the case of the Trapping exemption (s. 23.19), the person has to give notice promptly after the species is killed (if it is not a furbearing mammal). In the case of the Transition exemption (s. 23.13), if the activity had already begun prior to the enactment of the amendments to the *Regulation*, then the person must give notice promptly after the *Regulation* came into effect.

³⁷ Minister’s Explanatory Note, **AR, Tab 2A, at p. 21**

³⁸ *Regulation*, s. 23.3

³⁹ Minister’s Explanatory Note, **AR, Tab 2A, at p. 21**

⁴⁰ *Regulation*, s. 22.1(1)

⁴¹ Minister’s Explanatory Note, **AR, Tab 2A, at p. 27**; see also *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25, s. 9(2)

not apply to activities conducted in the wild.⁴²

39. **Minimizing Adverse Effects.** As detailed below, for a majority of the activity exemptions, the *Regulation* requires the proponent to prepare a species-specific mitigation plan for each endangered or threatened species that is affected by its activities prior to engaging in the exempted activity.⁴³ Additionally, in a majority of the exemptions, conditions necessary to satisfy the exemption require the proponent to take reasonable steps to minimize the adverse effects the activity will have on each endangered or threatened species while the activity is occurring. Finally, 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 each endangered or threatened species and, in some cases, prepare an annual report or similar record detailing the monitoring results.⁴⁴ Reports and mitigation plans must be produced to the Ministry within 14 days of a request.⁴⁵

40. **Mitigation Plan.** With the exception of the Forest Operations exemption, all exemptions within the Industrial and Development Activities category include a requirement to prepare a mitigation plan and to take steps to minimize the adverse effects of the activity on an endangered or threatened species. Of the five species specific exemptions, only the Aquatic Species exemption requires a mitigation plan. However, as described below (see para. 46), the other species-specific exemptions have significant conditions that must be satisfied including record keeping requirements. For example, the Barn Swallow exemption requires a barn swallow mitigation and restoration record to be created and updated that includes information on the activity, barn swallow nests on the building or structure that will be impacted by the activity, and information collected during monitoring of the activity.

41. Where applicable, the *Regulation* requires mitigation plans to: (a) be prepared by a species

⁴² *Regulation*, s. 12(1)

⁴³ One exception to this is the operation of a hydro-electric generating station – see s. 23.12(2)

⁴⁴ Fox example, see *Regulation*, s. 23.13(1), para. 7 “Hydro-electric generating station”

⁴⁵ For example, see *Regulation*, s. 23.6(6), para. 6(ii) – “Drainage Works”

specific expert using the best available information on the steps that may help minimize or avoid adverse effects on the species; (b) be updated as required by the *Regulation*; (c) be retained for a specific period of time; (d) include the name and contact information of the person carrying out the activity; (e) describe the activity and the area in which it is occurring; (f) identify the endangered or threatened species that could be adversely affected by the activity; (g) provide detailed plans on the steps the proponent will take to minimize adverse effects on the species; and (h) describe the monitoring steps that will be taken.⁴⁶

42. **Reasonable Steps to Minimize the Adverse Effects.** The majority of exemptions (15 of 19) require proponents to take reasonable steps to minimize the adverse effects of the activity on the endangered or threatened species. 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.⁴⁷ For example, these provisions include limitations on conducting activities during sensitive times for the species.

43. Adaptive management approaches are built into many of the exemptions, requiring proponents to take additional measures to minimize adverse effects if the results of monitoring demonstrate the steps that had been taken had not been effective.

44. Neither mitigation plans nor steps to minimize adverse effects are required for the following activities: 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 for reasons identified above (i.e., FMP recruitments). 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.⁴⁸

45. **Provision of Information to NHIC and Preparation of Report Records.** Most of the

⁴⁶ For example, see *Regulation*, s. 23.12(1), paras. 1, 4, 5, 23.13(4) “Hydro-electric generating station”

⁴⁷ For example, see *Regulation*, s. 23.12(5), para. 5, “Hydro-electric generating stations”

⁴⁸ Minister’s Explanatory Note, **AR, Tab 2A, at pp. 49-50**

species and activity exemptions include a requirement to report information related to SAR encountered during the activity to the Natural Heritage Information Centre (NHIC). The purpose of this requirement is to increase the understanding of SAR and to assist in better species management decisions in the future.⁴⁹ The exemptions also require proponents to periodically (most often annually) prepare reports or records related to the steps they have taken to minimize adverse effects to or provide benefits for SAR.

46. Species Exclusions and Limitations. Of the 19 exemptions, six include exceptions for particular species (29 threatened or endangered species have been excluded from the six exemptions). In addition, the *Regulation* provides five species specific exemptions detailed in paragraph 15, which only apply to those species that are specified.⁵⁰ Furthermore, as described above, s. 23.13 only applies to the subset of species defined a “transition species” or “newly listed species”. In some cases, sensitive areas have been excluded as well. For example, the aquatic species exemption does not apply in certain sensitive water bodies.

47. Benefits to Species. In the case of the five species specific exemptions, the *Regulation* requires the proponent to engage in activities that will benefit the species.⁵¹ For example, ss. 23.7(10) of the Butternut tree exemption requires a proponent to, amongst other things, plant Butternut seedlings for each Butternut tree that is killed, harmed or taken in ratios targeted at improving the number of Butternut on the landscape.⁵²

48. Enforcement. The Applicants argue that there is no offence for a violation of any of the conditions necessary to satisfy the exemptions.⁵³ This is inaccurate. If a condition is not satisfied, then the proponent is not in compliance with the *Regulation* and is not exempt from the prohibitions. Pursuant to s. 36 of the *ESA*, a person in contravention of the prohibitions is guilty of an offence and

⁴⁹ Minister’s Explanatory Note, **AR, Tab 2A, at pp. 18 and 22**

⁵⁰ A chart detailing all the species exclusions can be found at Schedule “C” to this factum.

⁵¹ For example, see *Regulation*, s. 23.4(8), para. 6(ii), “Aquatic Species”

⁵² *Regulation*, s. 23.7(1)

⁵³ Applicants’ factum, at para. 58

therefore subject to prosecution under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P.33.⁵⁴

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*.⁵⁵

49. The Ministry is entitled to audit proponents to determine compliance with the conditions of the *Regulation* that must be fulfilled in order to be exempt from the prohibitions. As reflected in the EN, the “The Ministry will continue associated monitoring, compliance and enforcement activities”.⁵⁶

PART III – THE ISSUES

50. The Minister agrees with the Applicants that the sole issue to be addressed on this Application is whether the *Regulation* is *ultra vires*. As reflected in paragraph 35 of the Applicants’ factum, this issue is divided into the following two sub issues:

- (a) Whether the Minister satisfied the mandatory condition precedent required in s. 57(1); and
- (b) Whether the *Regulation* is consistent with the purposes of the *ESA*.

In addition, the Respondents raise is a preliminary issue with respect to the admissibility of the affidavits filed by the Applicants.

PART IV – THE LAW

Preliminary Issue: The Applicants’ Evidence is irrelevant and inadmissible

51. The relevance of the Applicants’ evidence is intimately tied to the scope of this Application. As such, the Respondents did not commence a separate motion to strike before a single judge of the Divisional Court. Rather, the parties agreed that it was best to address the issue in submissions before this Honourable Court.⁵⁷

⁵⁴ *ESA*, s. 36(1)

⁵⁵ *ESA*, s. 36(1)

⁵⁶ Minister’s Explanatory Note, **AR, Tab 2A, p. 18**

⁵⁷ In *Sierra Club Canada v. Ontario (Ministry of Natural Resources)*, [2011] O.J. No. 3071 the Divisional Court held that admissibility issues should be addressed prior to hearing of the Application. However, in *Lockridge v. Ontario*

52. The Affidavits of Ms. Shultz and Ms. Baggio do not provide any evidence relevant to the *vires* of the *Regulation*. The sole purpose of the paragraphs is an attempt to impugn the motives of the government in proposing the *Regulation* and the LGIC in enacting the *Regulation*. As detailed below, the Supreme Court of Canada has explicitly prohibited this line of inquiry when challenging the *vires* of a regulation.⁵⁸ Paragraphs 12 to 28 of the Applicants' factum detail the legislative proposals that preceded the *Regulation* amendments. These paragraphs rely heavily on paragraphs 19-56, exhibits C-W and exhibits Y-CC of the Shultz affidavit, and paragraphs 12-74 and exhibits A-FF of the Baggio affidavit. The history of the legislative proposals does not provide any relevant evidence on whether the s.57 precondition was satisfied. Moreover, the evidence is not relevant to the legal interpretation of the *ESA* or the *Regulation*.

53. In light of the above, the offending paragraphs of Ms. Shultz's and Ms. Baggio's affidavit, the offending exhibits, and paragraphs 12-28 of the Applicants' factum should be struck or ignored by this Honourable Court.

54. In addition, the Applicants filed affidavits from an expert on the American Eel, Robert MacGregor, and an expert on the Blanding's Turtle, Justin Congdon. Both affidavits provided opinion evidence on whether the *Regulation* was likely to jeopardize the survival of the relevant species or cause significant harm to the relevant species. In their factum, the Applicants do not refer to these affidavits or the cross-examination evidence obtained from the experts. The expert evidence was filed for the purpose of challenging the merits of the regulations to determine whether they are "necessary, wise, or effective in practice".⁵⁹ The Supreme Court of Canada has explicitly rejected this type of attack when reviewing the *vires* of a regulation. As such, the Respondents respectfully submit that the affidavits of Mr. MacGregor and Mr. Congdon be struck or ignored by

(*Director, Ministry of the Environment*), [2012] O.J. No. 3016 the Divisional Court held that court should be reluctant to deal with issues of admissibility and relevance of evidence in advance of the hearing on the merits (at para. 50)

⁵⁸ *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, para. 24

⁵⁹ *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, para. 24

this Honourable Court.

Scope of Review

55. The Respondents respectfully submit that there is no standard of review when determining whether a regulation is *ultra vires* either for failure to satisfy a condition precedent or inconsistency with the statute. The Respondents submit that a review of the *vires* of a regulation is similar to a review of procedural fairness. In procedural fairness cases, a reviewing court determines whether procedural fairness was or was not granted.⁶⁰ Similarly, when reviewing the *vires* of a regulation, the reviewing court is required to determine, relying on the limiting principles detailed below, whether the regulation is *ultra vires*.⁶¹

56. In engaging in a review of the *vires* of the *Regulation*, this Honourable Court will 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 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*⁶²;
- (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

⁶⁰ *Ontario (Commissioner, Provincial Police) v. MacDonald*, 2009 ONCA 805, paras. 34-38

⁶¹ In at least one case, *Animal Alliance of Canada v. Ontario (Minister of Natural Resources)*, [2014] O.J. No. 2216 (Div. Ct.), para. 19, the Divisional Court has held that the *vires* of a regulation is reviewed on a correctness standard. Practically speaking, there is little difference between no standard of review and correctness as long as the Supreme Court’s limiting principles for the review of a regulation are followed.

⁶² *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, paras. 25-26

purpose; and

- (h) A regulation will only be struck down as *ultra vires* in the most egregious cases.⁶³

57. In this Application, a review of the *vires* of the *Regulation* requires this Honourable 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, this Honourable Court’s review cannot include a review of the merits of the *Regulation*. The Respondents respectfully submit that subjecting the merits 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 the Opinion is directly tied to the *Regulation*, any attack on the merits of the Opinion is an indirect attack on the merits of the *Regulation*.

58. Despite purporting to limit this Application to the *vires* of the *Regulation*, the Applicants argue that the merits of the Opinion are subject to review on a reasonableness standard, but only after the Opinion is determined to satisfy the pre-condition to the enacting of the *Regulation*.⁶⁴ This argument, however, runs contrary to the Supreme Court’s decision in *Katz* and a number of Divisional Court cases which have limited the scope of review permissible when challenging a Minister’s legislative or policy action.

59. Where a Minister is required to take certain actions prior to the promulgation of a regulation, the Divisional Court has held that a review of the merits of a Minister’s action in satisfying any conditions precedent “is unassailable on a judicial review application”.⁶⁵ In *Hanna v. Ontario*

⁶³ *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, paras. 24-28; see also *Animal Alliance of Canada v. Ontario (Minister of Natural Resources)*, [2014] O.J. No. 2216 (Div. Ct.), para. 11; *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 (CA), paras. 39-4; *Thorne’s Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13; *Alaska Trainship Corporation v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 23

⁶⁴ Applicants’ factum, paras. 79 and 89

⁶⁵ *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609, 105 O.R. (3d) 111 (Div. Ct.), para. 31; see also *Animal Alliance of Canada v. Ontario (Minister of Natural Resources)*, [2014] O.J. No. 2216 (Div. Ct.), para. 23; see also *Association for the Protection of Amherst Island v. Director of Environmental Approvals, Ministry of the Environment (MOE)*, et al 2014 ONSC 5474, paras. 21-22, 28

(*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.⁶⁶ (emphasis added)

60. Similarly, the Divisional Court in *Huron-Perth Children's Aid Society v. Ontario (Ministry of Children and Youth Services)* ("CAS"), held that where a Minister is engaging in "policy-making" 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)⁶⁷

61. In support of their position that the Opinion is subject to review on a reasonableness standard, the Applicants rely on the Federal Court of Appeal's decision in *Alberta Wilderness Assn. v. Canada*.⁶⁸ In *Alberta Wilderness* (decided before *Katz*), the issue was whether to require the

⁶⁶ *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609, 105 O.R. (3d) 111 (Div. Ct.), paras. 11 and 32; see also *Animal Alliance of Canada v. Ontario (Minister of Natural Resources)*, [2014] O.J. No. 2216 (Div. Ct.), para. 23

⁶⁷ *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 p. 704

⁶⁸ *Alberta Wilderness Assn. v. Canada*, 2013 FCA 190

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*.⁶⁹ 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”.⁷⁰ In that case, the Minister refused to advise whether a recommendation to Cabinet was made. The Minister claimed Cabinet immunity over the documents requested.

62. 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 Cabinet immunity.⁷¹ 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 held that a Minister’s refusal to make a recommendation could be subject to judicial review:

If the position asserted by the respondents is correct, it would have the effect of sheltering from review every refusal to make a recommendation for an emergency order. This cannot be so. The Minister's discretion to decline to make a recommendation to Cabinet must be exercised within the legal framework provided by the legislation. The authority for that proposition is at least as old as the seminal case of *Roncarelli v. Duplessis*,

The Minister's decision to decline to make a recommendation is therefore reviewable. The standard of review is reasonableness: see *Halifax (Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108, at paragraph 43.

63. Respectfully, the Federal Court of Appeal’s reliance on *Roncarelli v. Duplessis* 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, are subject to judicial review.

64. *Halifax (Municipality) v. Canada*, also relied upon in support of subjecting the Opinion to a

⁶⁹ *Species at Risk Act*, SC 2002, c. 29

⁷⁰ *Species at Risk Act*, SC 2002, c. 29, s. 80

⁷¹ *Alberta Wilderness Assn v. Canada*, 2013 FCA 190, para. 50

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.⁷²

65. 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 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”.⁷³

66. 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.⁷⁴ 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*

⁷² *Halifax (Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108, para. 4

⁷³ *Halifax (Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108, para. 5

⁷⁴ *Halifax (Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108, para. 43

decision is distinguishable from the case at hand.

Issue 1: The Condition Precedent was satisfied

67. As detailed above, 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 his 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.

68. The Applicants allege s. 57 was not complied with because the Minister failed to “identify or assess each species” to which the proposed regulatory exemptions would apply.⁷⁵ The Applicants argue that pursuant to ss. 57(1), the Minister must ask himself whether the proposed regulation is “likely to affect each listed species to which the regulation applies”.⁷⁶

69. There are two problems with the Applicants’ submission. First, the Applicants’ argument misstates the requirements of ss. 57(1). Subsection 57(1) requires a two-step process: Step 1 - determine whether the proposed regulation would apply to an endangered or threatened species on the SARO List; and Step 2 - determine whether the **regulation** is likely to jeopardize the survival or have any other significant adverse effect on the endangered or threatened species to which the proposed regulation will apply (relying on the results of Step 1). Where a particular activity does not apply to a species on the SARO list, then the Minister does not need to engage in Step 2 for that particular species. The Applicants’ argument fails to recognize Step 2.

70. In addressing Step 2, the Minister need only be satisfied that the proposed regulatory exemption will not jeopardize the survival of the species or have any other significant adverse effect. The Minister may form the opinion on the basis that conditions imposed by the regulatory exemption will avoid jeopardizing the survival of the species and that the species will not be subject

⁷⁵ Applicants’ factum, para. 75

⁷⁶ Applicants’ factum, para. 79

to any other significant adverse effect. Step 2 does not require the conditions be species specific. In this case, the significant conditions (i.e., mitigation plan and reasonable steps to minimize adverse impacts) require species-specific mitigation as a condition.

71. Second, the EN clearly demonstrates that all endangered and threatened species were considered for each activity exemption. As a result, some species were excluded from particular activity exemptions because, as expressly noted in the EN, the species was at “greater risk of being negatively affected from the proposed regulation”; “[t]here is a plausible intersection/overlay between species occurrences and the types of impacts and possible locations of the activity”; and “[e]xisting or previously issued authorizations containing well established conditions for a species have not been issued making it difficult to standardize rules in regulation”.⁷⁷ On the facts of the record before this Honourable Court, the Applicants’ argument must fail.

72. Respectfully, in reviewing whether the section 57 condition precedent was satisfied, this Honourable Court is limited to ascertaining whether the record demonstrates that the Minister engaged in the steps identified above. Reviewing the *vires* of the *Regulation* does not permit this Honourable Court to determine whether the Opinion is 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). 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 deemed inappropriate.⁷⁸

73. The Applicants’ argument that the EN does not reflect the “significant adverse effects” posed by each activity exemption is also without merit.⁷⁹ As detailed above, the EN summarizes the adverse effects to SAR for each activity based exemption. None of the adverse effects were deemed significant because they would be minimized as a result of the suite of conditions that attach to each

⁷⁷ Minister’s Explanatory Note, **AR, Tab 2A, p. 21**

⁷⁸ *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, paras. 25-26

⁷⁹ Applicants’ factum, para. 87

exemption. Again, on the facts of the record before this Honourable Court, the Applicants' argument must fail.

74. The Applicants' position amounts to an argument that the EN must contain the full details of the analysis conducted by the Ministry when preparing its advice to the Minister. Respectfully, such a requirement would grind government to a halt requiring briefing notes to be unwieldy large. The EN demonstrates that the analysis required by ss. 57(1) was conducted by the Ministry which then provided advice to the Minister. The Minister was entitled to rely on this advice and not have the minutiae of every part of the Ministry's analysis detailed in the EN.

75. Finally, contrary to the Applicants' argument at paragraph 83 of their factum, nothing in the wording of ss. 55(1)(b) or s. 57 of the *ESA* requires an exemption regulation to be species specific. While ss. 57(1) requires the Minister to consider all endangered and threatened species that the proposed regulation affects, it does not require the proposed exemptions to be species specific. Rather, ss.57(1) requires the Minister to form the opinion that the exemption ensures, in any manner deemed appropriate, that the activity will not likely jeopardize the survival of the endangered or threatened species or have any other significant adverse effect on the species to which it applies. The Minister was able to form the requisite opinion because the *Regulation* grants exemptions for activities that must be carried out in accordance with a suite of conditions that include species-specific mitigation.

Issue 2: The *Regulation* is consistent with the *ESA*

76. In challenging the *vires* of the *Regulation*, the Applicants take the position that the protection and recovery of SAR is a trump card that renders all other factors meaningless. As detailed above, the *ESA* does not support the Applicants' position. Rather, 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.

77. At paragraphs 112-115 of their factum, the Applicants argue that “reducing administrative burdens” is not one of the legislated objectives of the *ESA* and, as a result, the *Regulation* is *ultra vires*. The Applicants argue, contrary to *Katz*, that the motivation of the Minister in recommending the *Regulation* is relevant to this Application.

78. Respectfully, the Applicants have confused the Supreme Court’s analysis in *Katz*. The motivations behind the *Regulation* are irrelevant to this application. The question this Honourable Court must address is whether the *Regulation* itself, irrespective of the motivations for the enactment, conflicts with a purpose of the *ESA*. In the case at hand, the *Regulation* does not supplant the purpose of the *ESA*. Rather, the purpose is achieved by ensuring that proponents satisfy species- specific conditions in order to minimize the adverse effects on or provide benefits to the species.

79. In support of their argument, the Applicants rely upon the 1976 Divisional Court case in *Doctors Hospital v. Minister of Health*.⁸⁰ In *Doctors* a number of hospitals challenged an Order-in-Council issued by the LGIC purporting to cancel the licenses of a number of hospitals for financial reasons or budgetary restraints. The Divisional Court held that the Order-in-Council was *ultra vires* because the legislative scheme was regulatory in nature and did not contemplate exercising financial or budgetary control over hospitals. The Divisional Court held that exercising the power to revoke approval for financial reasons was extraneous to the purpose of the statute and therefore invalid.⁸¹ Subsequent decisions of the Divisional Court have held that the case stands for the proposition that parliament cannot use a statute designed for one purpose for another.⁸²

80. *Doctors* is not applicable to the present case because the *ESA* explicitly contemplates exclusions to the prohibitions and allows for a balancing of social, economic, safety and cultural

⁸⁰ *Doctors Hospital v. Minister of Health*, (1976) 12 O.R. (2d) 164

⁸¹ *Doctors Hospital v. Minister of Health*, (1976) 12 O.R. (2d) 164, paras. 34-38

⁸² *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)*, [1991] O.J. No. 439 (Div. Ct.) (leave to appeal dismissed), para. 48; see also *Re Metropolitan General Hospital and Ontario (Minister of Health)* (1979), 25 O.R. (2d) 699 (Div. Ct)

considerations with the protection and recovery of SAR. In *Doctors* the legislative scheme did not contemplate exercising financial or budgetary control over hospitals. Here, section 55(1)(b) explicitly provides the LGIC with the power to promulgate regulations granting exemptions to the prohibitions with any conditions or requirements deemed appropriate. The *Regulation* is not an attempt to use the *ESA* for a purpose it was not intended for.

81. Two other aspects of the Applicants' argument require attention. First, at paragraph 103 of its factum, the Applicants argue that the *Regulation* makes once illegal activities now legal. Respectfully, this is a perverse reading of the *Regulation*. The prohibitions remain in effect and proponents can only obtain an exemption from the prohibition if the proponent **complies** with the *Regulation* and its many conditions. Absent compliance, the prohibitions remain in effect.

82. Secondly, the Applicants argue that the *Regulation* renders the s. 17 permit provisions useless. This is incorrect. The *Regulation* and s. 17 work together. If a proponent cannot satisfy the requirements of the *Regulation* then a s. 17 permit must be obtained in order to be exempt from the prohibitions. This point is reflected in the EN: "Activities that do not comply with the proposed rules would not be able to proceed without an approval i.e., permit or agreement, from the Ministry under the *ESA*."⁸³ If a proponent is unable to comply with the conditions or obtain an authorization, then the proponent may not carry out the activity.

83. Moreover, ss. 55(1)(b) of the *ESA* is very broad. It permits the LGIC to enact regulations that provide exemptions to the prohibitions subject to "**any conditions or restrictions**". Other than s. 57, there is no limiting language on the exemption to prohibitions that the LGIC can enact by regulation or the form that the exemption must take. Subsection 55(1)(b) permits the LGIC to enact regulations that exempt proponents from the prohibitions on conditions that may be different from s. 17. Adopting an interpretation of ss. 55(1)(b) that only permits the LGIC to enact regulations with

⁸³ Minister's Explanatory Note, **AR, Tab 2A, p. 19**

the same conditions as s. 17 would render the section redundant. It is trite law that courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant.⁸⁴

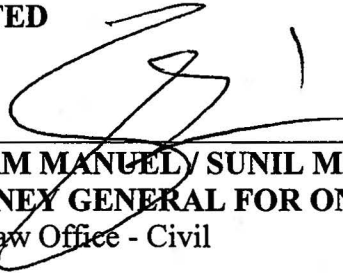
84. It is respectfully submitted that the Applicants cannot establish a direct or indirect conflict between the *Act* and the *Regulation*. As such, for the Applicants' argument to succeed, they must demonstrate that the *Regulation* is "irrelevant", "extraneous" or "completely unrelated" to the *ESA*. The *ESA* permits varying degrees of harm to SAR for reasons not limited to the protection and recovery of SAR (i.e., safety - s. 17(2)(a); cultural Aboriginal permits or agreements - s. 19; and economic benefit - s. 17(2)(d)). The *ESA* exemption scheme is a nuanced balancing of protection and recovery of SAR with other factors that are important to Ontario. While the Applicants may question the wisdom and efficacy of the *Regulation*, it cannot be said that the *Regulation* is "irrelevant", "extraneous" or "completely unrelated" to the *ESA*.

PART V – ORDER SOUGHT

85. The Respondents respectfully request an order: (a) striking out the impugned affidavits, exhibits and paragraphs of the Applicants' factum; and (b) dismissing the Application with costs to the Respondents on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: September 4, 2014



WILLIAM MANUEL / SUNIL MATHAI
ATTORNEY GENERAL FOR ONTARIO
 Crown Law Office - Civil
 Counsel for the Respondents

⁸⁴ *Ontario (Minister of Transportation) v. 1520658 Ontario Inc*, 2011 ONCA 373, para. 88

SCHEDULE “A”**Authorities Relied Upon**

1. *Ontario (Commissioner, Provincial Police) v. MacDonald*, 2009 ONCA 805
2. *Animal Alliance of Canada v. Ontario (Minister of Natural Resources)*, [2014] O.J. No. 2216 (Div. Ct.)
3. *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609, 105 O.R. (3d) 111 (Div. Ct.)
4. *Association for the Protection of Amherst Island v. Director of Environmental Approvals, Ministry of the Environment (MOE), et al* 2014 ONSC 5474
5. *Huron-Perth Children's Aid Society v. Ontario (Ministry of Children and Youth Services)*, [2012] O.J. No. 4982 (Div. Ct.)
6. *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)*, [1991] O.J. No. 439 (Div. Ct.) (leave to appeal dismissed)
7. *Re Metropolitan General Hospital and Ontario (Minister of Health)* (1979), 25 O.R. (2d) 699 (H.C.J.)
8. *Alberta Wilderness Assn. v. Canada*, 2013 FCA 190
9. *Halifax (Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108
10. *Re Metropolitan General Hospital and Ontario (Minister of Health)* (1979), 25 O.R. (2d) 699 (Div. Ct.)
11. *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64
12. *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 (CA)
13. *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106
14. *Alaska Trainship Corporation v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261
15. *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 23
16. *Doctors Hospital v. Minister of Health*, (1976) 12 O.R. (2d) 164
17. *Ontario (Minister of Transportation) v. 1520658 Ontario Inc.*, 2011 ONCA 373

SCHEDULE "B"**Legislation Relied Upon**

1. *Endangered Species Act*, Preamble, ss. 1, 5(1), 9, 10, 11(1) and (12), 12(1) and (8), 17(2)(d), 19, 36(1) and 55
2. Bill 184, Second Reading, Hansard, 28 March 2007, Hon. David Ramsay (Minister of Natural Resources)
3. Bill 184, Third Reading, Hansard, 16 May 2007, Hon. Mr. David Oraziatti,
4. Ontario Regulation 242/08, ss. 12(1), 22.1(1), 23.3, 23.4(6) and (8), 23.6(6), 23.7(1), 23.12(1), (2) and (5), 23.13, and 23.19
5. *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25, s. 9(2)
6. *Species at Risk Act*, SC 2002, c 29, s 80

1. *Endangered Species Act*, Preamble, ss. 1, 5(1), 9, 10, 11(1) and (12), 12(1) and (8), 17(2)(d), 19, 36(1) and 55

Endangered Species Act, 2007

S.O. 2007, CHAPTER 6

Preamble

Biological diversity is among the great treasures of our planet. It has ecological, social, economic, cultural and intrinsic value. Biological diversity makes many essential contributions to human life, including foods, clothing and medicines, and is an important part of sustainable social and economic development.

Unfortunately, throughout the world, species of animals, plants and other organisms are being lost forever at an alarming rate. The loss of these species is most often due to human activities, especially activities that damage the habitats of these species. Global action is required.

The United Nations Convention on Biological Diversity takes note of the precautionary principle, which, as described in the Convention, states that, where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.

In Ontario, our native species are a vital component of our precious natural heritage. The people of Ontario wish to do their part in protecting species that are at risk, with appropriate regard to social, economic and cultural considerations. The present generation of Ontarians should protect species at risk for future generations.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

INTRODUCTION

Purposes

1. The purposes of this Act are:

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. 2007, c. 6, s. 1.

[...]

Rules for classification

5. (1) For the purposes of this Act, COSSARO shall classify species in accordance with the following rules:

1. A species shall be classified as an extinct species if it no longer lives anywhere in the world.
2. A species shall be classified as 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.
3. A species shall be classified as an endangered species if it lives in the wild in Ontario but is facing imminent extinction or extirpation.
4. A species shall be classified as 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.
5. A species shall be classified as a special concern species if it lives in the wild in Ontario, is not endangered or threatened, but may become threatened or endangered because of a combination of biological characteristics and identified threats. 2007, c. 6, s. 5 (1).

[...]

PROTECTION AND RECOVERY OF SPECIES

Prohibition on killing, etc.

9. (1) No person shall,

- (a) kill, harm, harass, capture or take a living member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;
- (b) possess, transport, collect, buy, sell, lease, trade or offer to buy, sell, lease or trade,
 - (i) a living or dead member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species,
 - (ii) any part of a living or dead member of a species referred to in subclause (i),
 - (iii) anything derived from a living or dead member of a species referred to in subclause (i); or
- (c) sell, lease, trade or offer to sell, lease or trade anything that the person represents to be a thing described in subclause (b) (i), (ii) or (iii). 2007, c. 6, s. 9 (1).

Possession, etc., of species originating outside Ontario

(2) Clause (1) (b) does not apply to a member of a species that originated outside Ontario if it was lawfully killed, captured or taken in the jurisdiction from which it originated. 2007, c. 6, s. 9 (2).

Specified geographic area

[\(3\)](#) If the Species at Risk in Ontario List specifies a geographic area that a classification of a species applies to, subsection (1) only applies to that species in that area. 2007, c. 6, s. 9 (3).

Possession by Crown

[\(4\)](#) Clause (1) (b) does not apply to possession by the Crown. 2007, c. 6, s. 9 (4).

Transfer for certain purposes

[\(5\)](#) If the Crown is in possession of anything referred to in clause (1) (b), the Minister may transfer it to another person or body and authorize the person or body to possess it, despite clause (1) (b), for,

- (a) scientific or educational purposes; or
- (b) traditional cultural, religious or ceremonial purposes. 2007, c. 6, s. 9 (5).

Interpretation

[\(6\)](#) A reference in this section to a member of a species,

- (a) includes a reference to a member of the species at any stage of its development;
- (b) includes a reference to a gamete or asexual propagule of the species; and
- (c) includes a reference to the member of the species, whether or not it originated in Ontario. 2007, c. 6, s. 9 (6).

Prohibition on damage to habitat, etc.

[10. \(1\)](#) No person shall damage or destroy the habitat of,

- (a) a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species; or
- (b) a species that is listed on the Species at Risk in Ontario List as an extirpated species, if the species is prescribed by the regulations for the purpose of this clause. 2007, c. 6, s. 10 (1).

Specified geographic area

[\(2\)](#) If the Species at Risk in Ontario List specifies a geographic area that a classification of a species applies to, subsection (1) only applies to that species in that area. 2007, c. 6, s. 10 (2).

Transition

[\(3\)](#) Clause (1) (a) does not apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species under clause 7 (7) (c) or (d) until the earlier of the following dates:

1. The date that a regulation made under clause 55 (1) (a) that applies to the species comes into force.
2. The fifth anniversary of the day section 7 comes into force. 2007, c. 6, s. 10 (3).

Recovery strategies

11. (1) The Minister shall ensure that a strategy is prepared for the recovery of each species that is listed on the Species at Risk in Ontario List as an endangered or threatened species. 2007, c. 6, s. 11 (1).

[...]

Feasibility

(12) The Minister may consider social and economic factors in reaching his or her opinion on whether something is feasible for the purpose of subsection (7) or (9). 2007, c. 6, s. 11 (12).

[...]

Management plans for special concern species

12. (1) The Minister shall ensure that a management plan is prepared for each species that is listed on the Species at Risk in Ontario List as a special concern species. 2007, c. 6, s. 12 (1).

[...]

Feasibility

(8) The Minister may consider social and economic factors in reaching his or her opinion on whether something is feasible for the purpose of subsection (6). 2007, c. 6, s. 12 (8).

[...]

Limitation

17. **(2)** The Minister may issue a permit under this section only if,

[...]

(d) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,

(i) the Minister is of the opinion that the activity will result in a significant social or economic benefit to Ontario,

(ii) the Minister has consulted with a person who is considered by the Minister to be an expert on the possible effects of the activity on the species and to be independent of the person who would be authorized by the permit to engage in the activity,

(iii) the person consulted under subclause (ii) has submitted a written report to the Minister on the possible effects of the activity on the species, including the person's opinion on whether the activity will jeopardize the survival or recovery of the species in Ontario,

- (iv) the Minister is of the opinion that the activity will not jeopardize the survival or recovery of the species in Ontario,
- (v) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted,
- (vi) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit, and
- (vii) the Lieutenant Governor in Council has approved the issuance of the permit. 2007, c. 6, s. 17 (2).

[...]

Aboriginal persons

19. (1) The Minister may, for the purposes of this Act, enter into an agreement with any of the following persons or bodies that relates to a species specified in the agreement that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species:

1. A band as defined in the *Indian Act* (Canada).
2. A tribal council.
3. An organization that represents a territorially-based aboriginal community. 2007, c. 6, s. 19 (1).

Authorization

(2) An agreement under subsection (1) may authorize aboriginal persons described in the agreement or a party to the agreement to engage in an activity specified in the agreement that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 19 (2).

Permits

(3) The Minister may issue a permit to a person or body referred to in subsection (1) that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes aboriginal persons described in the permit or the holder of the permit to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 19 (3).

Limitation

(4) The Minister shall not enter into an agreement or issue a permit under this section if he or she is of the opinion that the agreement or permit would authorize an activity that would jeopardize the survival or recovery, in Ontario, of the species specified in the agreement or permit. 2007, c. 6, s. 19 (4).

Response to recovery strategy

(5) Before entering into an agreement or issuing a permit under this section, the Minister shall consider any statement that has been published under subsection 11 (8) with

respect to a recovery strategy for the species specified in the agreement or permit. 2007, c. 6, s. 19 (5).

Permit conditions

(6) Subsections 17 (4) and (5) apply, with necessary modifications, to a permit issued under this section. 2007, c. 6, s. 19 (6).

Reliance on authorization

(7) An authorization described in subsection (2) or (3) does not apply to,

- (a) an aboriginal person who seeks to rely on the authorization, unless he or she complies with any requirements imposed on the aboriginal person by the agreement or permit; or
- (b) a person or body referred to in subsection (1) who seeks to rely on the authorization, unless the person or body complies with any requirements imposed on it by the agreement or permit. 2007, c. 6, s. 19 (7).

Compliance with permit

(8) The holder of a permit issued under this section and the aboriginal persons who are authorized by the permit to engage in an activity that would otherwise be prohibited by section 9 or 10 shall comply with any requirements imposed on them by the permit. 2007, c. 6, s. 19 (8).

Amendment or revocation of permit

(9) The Minister may,

- (a) with the consent of the holder of a permit issued under this section, revoke or amend the permit; or
- (b) without the consent of the holder of a permit issued under this section, but subject to section 20, revoke or amend the permit, if the Minister is of the opinion that the revocation or amendment,
 - (i) is necessary to prevent jeopardizing the survival or recovery, in Ontario, of the species specified in the permit, or
 - (ii) is necessary for the protection of human health or safety. 2007, c. 6, s. 19 (9).

[...]

OFFENCES AND PENALTIES

Offences

36. (1) A person is guilty of an offence if the person contravenes any of the following provisions:

1. Subsection 9 (1), 10 (1), 24 (2) or 26 (5), section 35, or subsection 49 (1) or (2).
2. Any provision of an agreement entered into under section 16 or 19, if the agreement authorizes a person to engage in an activity that would otherwise be prohibited by section 9 or 10.

3. Any provision of a permit issued under section 17 or 19.
4. Any provision of an order made under section 27, 28 or 41. 2007, c. 6, s. 36 (1).

[...]

Regulations

55. (1) Subject to subsection (2) and section 57, the Lieutenant Governor in Council may make regulations,

- (a) prescribing, for the purpose of clause (a) of the definition of “habitat” in subsection 2 (1), an area as the habitat of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;
- (b) prescribing exemptions from subsection 9 (1) or 10 (1), subject to any conditions or restrictions prescribed by the regulations;
- (c) providing that subsection 11 (1) or (7) has no application to a species, if subsections 9 (1) and 10 (1) have no application to the species;
- (d) governing the preparation of recovery strategies under section 11 and management plans under section 12;
- (e) prescribing or respecting any matter that this Act refers to as a matter prescribed by the regulations or as otherwise dealt with by the regulations, other than regulations that are required by section 7. 2007, c. 6, s. 55 (1).

Consideration of recovery strategy

(2) Before a regulation is made under clause (1) (a) prescribing an area as the habitat of a species, the Minister shall consider any recovery strategy that has been prepared for the species under section 11 and any statement that has been published under subsection 11 (8) with respect to the recovery strategy. 2007, c. 6, s. 55 (2).

Description of habitat

(3) Without limiting the generality of clause (1) (a), a regulation under that clause prescribing an area as the habitat of a species,

- (a) may describe the area by,
 - (i) describing specific boundaries for the area,
 - (ii) describing features of the area, or
 - (iii) describing the area in any other manner;
- (b) may prescribe areas where the species lives, used to live or is believed to be capable of living; and
- (c) may prescribe an area that is larger or smaller than the area described by clause (b) of the definition of “habitat” in subsection 2 (1). 2007, c. 6, s. 55 (3).

Conditions and restrictions on exemptions

(4) Without limiting the generality of clause (1) (b), a regulation under that clause may, as a condition or restriction on an exemption, provide that the exemption only applies

to a person if the person complies with an agreement entered into between the person and the Minister. 2007, c. 6, s. 55 (4).

2. Bill 184, Second Reading, Hansard, 28 March 2007, Hon. David Ramsay (Minister of Natural Resources)

ENDANGERED SPECIES ACT, 2007 /
LOI DE 2007 SUR LES ESPÈCES EN VOIE
DE DISPARITION

Mr. Ramsay moved second reading of the following bill:

Bill 184, An Act to protect species at risk and to make related changes to other Acts / Projet de loi 184, Loi visant à protéger les espèces en péril et à apporter des modifications connexes à d'autres lois.

The Acting Speaker (Mr. Michael Prue): Mr. Ramsay.

Hon. David Ramsay (Minister of Natural Resources, minister responsible for aboriginal affairs): It's a pleasure for me to rise in my place today to lead off second reading of a piece of legislation that I and the McGuinty government are very proud of. I'd like to just notify the House that I will be sharing my time with my parliamentary assistant, the member from Sault Ste. Marie.

If passed, this legislation would represent a milestone in the protection and recovery of Ontario's species at risk and establish a benchmark for the rest of North America. By extending protection for species and their habitats, the new act would also help ensure that future generations of Ontarians will enjoy the benefits of a healthy, abundant and biologically diverse natural environment.

Biological diversity is one of the greatest treasures of our planet. Unfortunately, throughout the world, species of animals, plants and other organisms are being lost forever at an alarming rate.

Right now in Ontario, more than 175 of the province's 30,000 species are identified as being at risk. This means they may disappear from our province if their current rate of decline continues, lending urgency to our task here today. The proposed legislation I am presenting for second reading today would help us reverse that rate of decline in Ontario by providing more effective protection provisions for native species and their habitats.

The proposed legislation also includes a stronger commitment to implement species recovery measures, and it provides more support for volunteer stewardship from private landowners, resource users, stakeholders and partners who want to do their part in protecting or restoring essential habitat.

It's important to note that the proposed legislation is the outcome of a very extensive public review of the current Endangered Species Act that I launched last May. An impressive amount of work was undertaken during this review to ensure that we have properly identified and addressed the measures needed for optimum protection and recovery of species and their habitats.

The ministry met with a wide range of stakeholders to discuss ideas for the proposed legislative changes. These groups include farmers, rural landowners, land developers, environmentalists, rural

communities, municipalities and representatives of resource industries, including forestry and mining.

We are also grateful for the contributions of an advisory panel that was made up of individuals with experience and expertise related to species-at-risk protection and recovery planning. The members of the advisory planning worked with my ministry and provided input into proposals for a discussion paper that was used in the public consultation sessions that took place between May and July of last year. As part of the consultation process, the discussion paper was posted on Ontario's Environmental Registry, and we received more than 300 responses. A separate process involving consultation with aboriginal communities and organizations is still ongoing.

The individuals, organizations, stakeholders and aboriginal representatives we heard from throughout the consultation process strongly supported improved legislation for species at risk. So we will continue to consult with interested groups and organizations as we develop guidelines and policies for implementation of the proposed legislation.

1530

If this legislation is passed, I also look forward to acting on one of the provisions that would allow establishment of a permanent advisory committee. I would make this a priority. This advisory committee is intended to represent a cross-section of interests and expertise, and would contribute to our objectives of greater accountability and transparency.

The committee's role would be to make recommendations to the Minister of Natural Resources on matters related to implementing the act. These matters would include development and delivery of stewardship programs, development and promotion of best management practices for protection and recovery, and development and delivery of public education and outreach programs. The committee would also advise on approaches that may be under the act to promote sustainable social and economic activities that assist in the protection or recovery of species.

One of the things we heard throughout the consultation process was that people want to be more involved and want to work together with us to proceed with the important task of recovering species at risk. Overwhelmingly, there was a demand for effective programs to support implementation of the act and a package of stewardship incentives that support landowners in their efforts to protect and recover species at risk. We are, subsequently, proceeding with a three-part approach to species recovery and protection: updated legislation, policies for implementation and enhanced stewardship programs. I would also like to acknowledge the contribution of other provincial ministers in developing the proposed legislation. If this legislation is passed, I look forward to working co-operatively with other ministries and stakeholders as we move ahead with the implementation.

There are a number of provisions in the proposed legislation that would fundamentally change Ontario's approach to implementing protection for species at risk. Right now in Ontario, no species is protected until the government decides to do so, and then regulates that species under the Endangered Species Act. This cumbersome process has been a hindrance to providing adequate species-at-risk protection.

By comparison, the new legislation stipulates that all species that have been scientifically assessed as being at risk would be protected automatically. This automatic protection would also be extended to their habitats.

This is what we call presumption of protection. It represents a very different approach and a very different starting point from the current act. From that starting point, another key difference between the two acts comes into play, and that difference is flexibility. Under the current act, once a species is regulated, the legislation allows no flexibility regarding how protection measures for that species are carried out. In many situations, this inflexibility has prevented the application of practical and sensible approaches that would benefit both the species and the landowners. By comparison, the proposed legislation would allow the government to consider a variety of factors in deciding how protection should be applied in individual cases and if exceptions should be made.

I'll give you a quick example of how this would work. One of the species protected under the Endangered Species Act is the butternut tree. A major reason the butternut tree is in danger is due to serious disease affecting the species. Under the terms of the existing act, a butternut tree cannot be cut down under any circumstances, even if it is diseased. Under the proposed act a landowner would be allowed to cut down a diseased butternut tree to prevent the spread of the disease and would be encouraged to plant a healthy one through stewardship incentives. You can see from this example how flexibility would remove current impediments to protection and recovery. It would also encourage and support greater and more effective stewardship by our private landowners.

The proposed legislation would also allow the government to make decisions that would accommodate compatible land use activities and, at the same time, support sustainable social and economic development. The goal would be an overall outcome that ultimately benefits the species and its habitat.

An example of this would be if a pit or quarry wants to expand its operations but, in doing so, would encroach on a habitat for an endangered species. The old act would not allow the expansion. The proposed act, though, would let us determine whether it's possible or feasible for the quarry owners to provide other adjacent land of equal or greater habitat value for the species in question in exchange for a permit to expand the operations. This could be a win-win for all of us.

If it turned out to be possible, the outcome would be a net gain for the habitat for that particular endangered species and an economic gain for the community. This is the kind of effective species-at-risk legislation that Ontario needs now: legislation that provides stronger and better protection for our unique natural heritage and rich biodiversity and at the same time has the capacity and flexibility to take into consideration the social and economic needs and well-being of our citizens and all of our communities. Regardless of how we go about it, helping species to recover can be costly and complex. The best course of action is always to prevent species from declining in the first place through responsible land and stewardship practices.

Many of our province's species that need protection are found on private land. This makes voluntary stewardship activities essential and the primary approach to achieving any kind of success in reversing the rate of species decline that is now happening in Ontario. Stewardship is not just a responsibility for government. The agricultural community, rural landowners, the land use and resource management sectors, municipalities and the general public all have an important role to play in protecting and restoring our habitats. We already owe a great deal to the farmers and

landowners who have been volunteering for years now to help with recovery programs on their lands. There are also many environmental, agricultural, business and community organizations that have voluntarily taken on important stewardship roles to protect essential habitat and green space.

We've made sure that the proposed legislation includes new provisions that would provide even stronger support and facilitation for private land stewardship. One of these provisions stipulates the creation of the species-at-risk-in-Ontario stewardship program to promote stewardship and other related activities. This program would recognize the leadership and contribution of landowners, the agricultural community, the land and resource use sectors, aboriginal people and the general public in the protection and recovery of species at risk. The stewardship program would work in conjunction with existing stewardship agencies and other partners. The program would support province-wide stewardship and recovery of species at risk, embrace new scientific information and be responsive to changing environmental, social and economic conditions.

As I stated in the House last week when presenting Bill 184 for first reading, the government proposes to back up this commitment to enhanced stewardship with funding of \$18 million over four years to support public stewardship efforts. A species-at-risk-in-Ontario stewardship fund would be established under the proposed legislation to promote public stewardship. The fund would provide incentives to landowners, farmers, aboriginal peoples, research institutions, industries, conservation organizations and many others to encourage activities that support the protection and recovery of these species at risk.

Ontario has had many successes regarding species protection and recovery. In 2006, we were pleased to announce progress in the recovery of both the peregrine falcon and the bald eagle. In the 1960s and 1970s, pesticide contamination nearly wiped out peregrines in Ontario and drastically reduced the provincial population of bald eagles. The combination of bans on DDT and other pesticides and aggressive recovery efforts on the part of government staff and partners allowed both species to make significant recoveries. Local grassroots partnerships of volunteers, naturalist groups and corporations have also been a big part of our success to date in bringing back these species. In June 2006, the status of the peregrine falcon was changed from endangered to threatened, a lower-risk category. The status of the bald eagle in northern Ontario, where its recovery has been most significant, was changed from endangered to that of special concern, an even lower-risk category. The recovery of the bald eagle in southern Ontario is also well underway. Both of these species will continue to receive the protection they need to achieve further recovery under the proposed Endangered Species Act, 2007.

The wild turkey was once common in parts of southern Ontario but was extirpated in the early 1900s due to a combination of habitat laws and overharvesting. An Ontario restoration program was initiated in 1984 in co-operation with a number of stakeholder organizations. From 1984 to 1987, wild-caught birds were taken from several parts of the United States and released in southern Ontario. Populations were successfully established and have spread to other areas through both natural dispersal and trap-and-transfer operations. The wild turkey population is now thriving throughout much of southern Ontario and the provincial population of this species is now estimated to exceed 70,000 birds. These are tremendous success stories.

The proposed Endangered Species Act, 2007, would give us the means to build on our achievements to date and continue to work with our conservation partners to ensure even greater accomplishments in the future. It would allow for compatible land use and recreational activities that in some cases would support further recovery efforts. There are more than 175 species in our province that need our attention and help, and it is up to us to act now and work to shorten that list before handing it over to the next generation.

The current Endangered Species Act is 36 years old. It is out of date, it is rigid and it doesn't provide the kinds of effective protection tools that we need in the 21st century. The proposed legislation this government is putting forward is the first step in a new era of species-at-risk protection for Ontario. We have the advantage today of a broad range of tools that we just didn't have in 1971. We have knowledge and technology that allow us to better understand the natural world and our impact upon it. We have concerned citizens who are eager to get involved in public stewardship initiatives. We are indeed fortunate to live in a province with such an abundance and variety of natural plants, animals and habitats.

As I said earlier, the people of Ontario deserve the benefits that come from conserving this unique natural heritage and our rich biodiversity. I believe we have succeeded in developing progressive, precedent-setting legislation that would offer optimum protection for Ontario species at risk, while at the same time supporting the overall social and economic well-being of our citizens.

3. Bill 184, Third Reading, Hansard, 16 May 2007, Hon. Mr. David Orazietti,

ENDANGERED SPECIES ACT, 2007 /
LOI DE 2007 SUR LES ESPÈCES EN VOIE
DE DISPARITION

Mr. Ramsay moved third reading of the following bill:

Bill 184, An Act to protect species at risk and to make related changes to other Acts / Projet de loi 184, Loi visant à protéger les espèces en péril et à apporter des modifications connexes à d'autres lois.

[...]

Mr. David Orazietti (Sault Ste. Marie): I'm pleased to rise in the House this afternoon to support the Minister of Natural Resources on third reading of Bill 184, the Endangered Species Act, 2007.

If I was asked to describe Bill 184 in a few words, I'd say that it was science-based, stewardship-focused, flexible and balanced. I would also say it's progressive and well designed to meet the environmental challenges of the 21st century. We know that it's been 36 years since this bill has been updated—1971—and only 42 of 176 endangered species are currently protected. So we have much work to do, and this bill takes us in a direction that Ontarians want to go, that this government wants to go, and that makes our endangered species legislation the best in Canada.

There are a number of key considerations I'd like to highlight. When the decision was made to update and modernize the existing Endangered Species Act, the government was mindful of a number of these considerations:

—the need to provide better protection measures for species and their habitat, while at the same time allowing for social and economic concerns to be addressed;

—the need to create legislative provisions, policies and programs that take into account the views and interests of a range of key partners and stakeholders. That was certainly something that was done during the consultation process, and it will continue;

—the need to ensure a science-based process for determining which species are at risk. It's not a political decision; it's not a partisan issue. It is a science-based decision that needs to be made with respect to species at risk;

—the need to provide adequate resources and develop the necessary tools to implement the proposed legislation effectively; and

—the need to engage the Ontario public, key partners and other stakeholders, all of whom have a shared interest and responsibility in the protection and recovery of species and their habitat.

The proposed legislation that Minister Ramsay has put forward for third reading today reflects all of those considerations and incorporates the input received during an extensive consultation process.

Some of the highlights of the bill in terms of moving forward with some of the amendments that have been made: The proposed legislation contains a number of significantly improved provisions over the existing act, some of which I'm going to highlight in the next few minutes.

First of all, the purposes we have established for the proposed act are:

—to identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge, all of which we heard at the hearings and the consultations. Those amendments have been incorporated;

—to protect species that are at risk and their habitats, and to promote the recovery of species that are at risk; and

—to promote stewardship activities to assist in the protection and recovery of species at risk.

We've talked a little bit about the role of science. There is a strong role for science in this bill. The bill also stipulates that science must play a strengthening role in determining which species are added to the list for protection and their designation on that list. Under the provisions of the proposed legislation, the status of a species would be determined by an independent, science-based body called the Committee on the Status of Species at Risk in Ontario, or COSSARO, which would base its decision on the best available scientific information. This is significant in that it places responsibility for designating a species at risk in the hands of independent scientific experts, where it belongs, and out of the political arena. We're further ensuring that the independence of this committee be maintained by adding a stipulation to the bill that would require that the committee not include lobbyists who have worked on matters related to the act.

Another benefit of the bill is that once the committee has assessed a species as being at risk, that species would automatically be added to the species-at-risk-in-Ontario list. This stipulation eliminates the erroneous and time-consuming process that is currently required to have a species regulated under the act. Automatic protection means that, unless otherwise authorized, a person may not kill, harm, harass, capture, take, collect, possess, transport or buy or sell any species on that list. Similarly, the habitat of species assessed by the committee as endangered or threatened will automatically be protected.

It is, however, recognized that a transition strategy is necessary for the large number of species currently identified as endangered or threatened but not currently protected under the existing Endangered Species Act. The habitat protection provisions of the proposed legislation would not apply to these species until five years after proclamation of the act, unless a specific scientific habitat protection regulation had in fact been passed.

With respect to recovery strategies, which form an important aspect of this legislation, Bill 184 places a strong emphasis on recovery in addition to protection. First of all, it includes a stipulation that recovery strategies be prepared for all species identified as endangered or threatened. Elements that must be included in the recovery strategies are identified in the legislation. These include the

habitat needs of a species, a description of threats to the survival and recovery of the species, and recommendations on objectives for protection and recovery.

Another stipulation is the nine-month timeline within which the minister must make public a statement of the actions the government intends to take in response to a recovery strategy. The bill also requires that such statements be considered when decisions are made under the act, such as issuing of permits. Furthermore, Bill 184 requires that the Ministry of Natural Resources implement actions which are feasible and for which it has responsibility, and also requires that a review be undertaken within five years of statements being issued in response to recovery strategies to assess progress towards achieving protection and the recovery of the species.

The bill also achieves additional flexibility and balance, unlike the current act, which is somewhat more rigid in a number of respects. Bill 184 incorporates a balanced approach that includes a much-needed degree of flexibility. We need the kind of flexibility that would remove current impediments to protecting and recovering species, and encourage and support greater and more effective stewardship by private landowners.

The proposed legislation would also allow the government to make decisions to accommodate compatible land use activities and, at the same time, support sustainable social and economic development. The goal would be an overall outcome that ultimately benefits the species and the habitat.

The proposed legislation contains a suite of mechanisms, including agreements, permits and regulations, that allow for flexibility and maintain an appropriate role for government.

In addition, a number of improvements have been made to the reporting requirements and enforcement section of the legislation. Bill 184 includes significant public requirements to report on species to be assessed, species status reports, recovery strategies for species, and priorities for government actions to implement these recovery plans. The bill also includes a comprehensive set of enforcement provisions to reflect the importance placed on the protection and recovery of species at risk and to help ensure effective enforcement.

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With respect to aboriginal and treaty rights, our government certainly is mindful of the aboriginal and treaty rights protected under the federal Constitution Act. In addition to a commitment to ongoing dialogue with aboriginal peoples as the new legislation is implemented, the proposed legislation includes a non-derogation clause and provisions to help address aboriginal interests. The act also recognizes and incorporates the important role that aboriginal traditional knowledge can play in achieving protection and recovery of species at risk.

When it comes to stewardship, as Minister Ramsay has made clear, the proposed legislation takes a stewardship-first approach. Stewardship is not just a responsibility for government. The agricultural community, rural landowners, the land use and resource management sectors, municipalities and the general public all have a very important role to play in protecting and restoring habitats. The proposed legislation supports the role by explicitly providing for the creation of a stewardship program. This program aims to promote stewardship and other related activities that would assist in the protection and recovery of species at risk.

In conclusion, I am proud to support third reading of this important piece of legislation. By passing this bill, we would fundamentally change Ontario's approach to protecting species at risk, making it more effective and, as I said at the outset, better able to meet the environmental challenges of the 21st century. There is no doubt that with Bill 184 we have succeeded in developing progressive, precedent-setting legislation that would offer optimum protection for Ontario's species at risk as well as support the overall social and economic well-being of our citizens now and in the future. I urge all members to support Bill 184.

4. Ontario Regulation 242/08, ss. 12(1), 22.1(1), 23.3, 23.4(6) and (8), 23.6(6), 23.7(1), 23.12(1), (2) and (5), 23.13, and 23.19

Endangered Species Act, 2007

ONTARIO REGULATION 242/08

GENERAL

Commercial cultivation of vascular plants, etc.

[12. \(1\)](#) Clauses 9 (1) (a) and (b) of the Act do not apply in respect of a vascular plant species to a person who is engaged in the commercial cultivation of that species, if,

- (a) the person cultivates the species without the use of any material from the species, such as seeds, roots or cuttings, that was taken from the wild in Ontario on or after the date the species was listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;
- (b) the person is not engaged in cultivating the species in the wild in Ontario; and
- (c) the person is not engaged in cultivating the species in a manner that is likely to spread disease or pests to, or to compromise the genetic integrity of, wild populations of the species.
- (d), (e) Revoked: O. Reg. 176/13, s. 7 (1).

[...]

Forest operations in Crown forests

[22.1 \(1\)](#) This section applies to a person who conducts forest operations in a Crown forest before July 1, 2018 if the person does so on behalf of the Crown or under the authority of a licence granted under the *Crown Forest Sustainability Act, 1994*. O. Reg. 176/13, s. 10 (1).

[...]

EXEMPTIONS REQUIRING NOTICE TO BE GIVEN ON REGISTRY

Submission of notice of activity

[23.3 \(1\)](#) This section applies with respect to a notice of activity form that a person or entity is required to submit to the Minister through the Registry under sections 23.4 to 23.20. O. Reg. 176/13, s. 14.

[\(2\)](#) Before submitting a notice of activity form to the Minister, a person or entity shall ensure that,

- (a) all mandatory information requested on the form, including the contact information for the person or entity, has been provided; and

(b) the information provided on the form is complete and accurate. O. Reg. 176/13, s. 14.

(3) After submitting a notice of activity form to the Minister, the person or entity shall,

(a) promptly upon obtaining from the Ministry confirmation that a notice of activity form submitted through the Registry has been received by the Minister, make a record of the confirmation;

(b) for as long as the activity is being carried out,

(i) keep the record of the confirmation and, if applicable, ensure that a copy of the record is kept at the site where the activity is being carried out, and

(ii) make the record of the confirmation available to the Ministry upon receiving a request for it; and

(c) if there is a change in the contact information for the person or entity who submitted the notice of activity form, update the information on the Registry within 10 business days of the change. O. Reg. 176/13, s. 14.

(4) A person or entity who provides incomplete, false or misleading information on a notice of activity form or when updating information on the Registry shall be deemed to have not submitted the notice of activity form. O. Reg. 176/13, s. 14.

[...]

23.4 (6) The following are the conditions that a person who carries out an activity described in subsection (1) must satisfy for the purposes of subsection (4):

1. Before commencing the activity, the person must,

i. give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry, and

ii. prepare in accordance with subsection (7) a mitigation plan that meets the requirements of subsection (8).

2. The person must ensure that the notice of activity includes,

i. a description of the activity,

ii. the proposed start and end dates of the activity and the location at which it will be carried out, and

iii. the name of every species referred to in the Schedule to this section that will likely be affected by the activity.

3. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.

4. While carrying out the activity, the person must,

- i. comply with all the requirements of the mitigation plan, including the requirements that relate to the action that the person must complete under paragraph 8 in order to provide a benefit to the species identified in the notice of activity form, and
 - ii. ensure that reasonable steps are taken to minimize the adverse effects of the activity on the species identified in the notice of activity form, including the steps described in subsection (9) and such other steps as may be described in the mitigation plan.
5. After the plan is prepared, the person must,
 - i. retain a copy of the mitigation plan for at least five years after the activity is completed, and
 - ii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
6. While carrying out the activity and for a period of five years following the completion of the activity, the person shall monitor the effectiveness of,
 - i. the steps taken under subparagraph 4 ii to minimize the adverse effects of the activity on each species identified in the notice of activity form, and
 - ii. the action completed under paragraph 8 to benefit each species identified in the notice of activity form.
7. While the person is carrying out the activity and carrying out the monitoring requirements of paragraph 6, the person must create and maintain a monitoring record and the person must,
 - i. retain the record for at least five years after the activity is completed, and
 - ii. provide a copy of the record to the Ministry within 14 days of receiving a request for it.
8. Subject to subsection (12), within one year of the completion of the activity, the person must complete one of the actions described in subsection (11) in order to provide a benefit to each species identified in the notice of activity form and the action must be carried out in an area that would benefit the species.
9. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on the form. O. Reg. 176/13, s. 14.

[...]

[\(8\)](#) A mitigation plan shall include the following information:

1. The name and contact information of the person who is proposing to carry out an activity described in subsection (1).
2. A map indicating the geographic location of the property on which the activity will occur and the names and location of all watercourses on the property.
3. With respect to the activity that the person proposes to carry out,
 - i. a description of the activity,
 - ii. the proposed start and completion dates of the activity, and
 - iii. a description of all of the stages of the activity and a timeline for the stages.
4. A list of species referred to in the Schedule to this section that may be affected by the activity and,
 - i. a description of the survey methodology used or the records reviewed to determine if a species referred to in the Schedule to this section could be affected by the activity, and
 - ii. a description of how the activity may affect the species or its habitat, including a list of any works to be carried out in or adjacent to the habitat of the species, such as works involving water crossings, structures, or any other works that may affect the species or its habitat.
5. Detailed plans on the steps the person shall take during the activity to minimize the adverse effects on the species, including,
 - i. details of the steps described in subsection (9), including the specific dates, locations and methods applicable to each step,
 - ii. the times during the year at which a species identified under paragraph 4 is likely to be carrying out a life process related to reproduction or rearing and at which activities should not be carried out in the habitat of a species,
 - iii. details of the steps the person must take in accordance with paragraph 2 of subsection (9) to isolate the work area and relocate a species identified under paragraph 4, including the coordinates of the relocation area, and
 - iv. details of the steps the person must take to restore substrate and riparian areas that are damaged during the activity in accordance with paragraph 13 of subsection (9).
6. A description of the steps the person must take in accordance with subsection (10) to monitor the effectiveness of,
 - i. the actions taken to minimize the adverse effects of the activity on the species, and
 - ii. the action completed under paragraph 8 of subsection (6) to benefit the species identified in the notice of activity form.
7. With respect to an action described under paragraph 8 of subsection (6) that will be completed to benefit the species identified in the notice of activity form, reports

or other evidence that the action will meet the requirements of one of the paragraphs of subsection (11), such as studies or evidence of the conditions of the area before the beneficial action was undertaken.

8. Details of the action that will be completed under paragraph 8 of subsection (6) to benefit the species identified in the notice of activity form, including the dates, locations at which the action will be completed and the methods that will be employed to carry it out. O. Reg. 176/13, s. 14.

[...]

23.6 (6) A habitat management plan shall include the following information:

1. The name and contact information of the person on whose behalf the activity described in subsection (1) is being carried out.
2. With respect to the area of bobolink or eastern meadowlark habitat that is likely to be damaged or destroyed by the activity described in subsection (1),
 - i. a description of the area's location, including a detailed map,
 - ii. the ecoregion in which the area is located, and
 - iii. the size of the area in hectares.
3. With respect to the activity described in subsection (1) that the person proposes to carry out,
 - i. a description of the activity, and
 - ii. the proposed start date of the activity,
4. With respect to the area intended as new or enhanced habitat under paragraph 6 of subsection (4),
 - i. a description of the area's location, including a detailed map,
 - ii. the ecoregion in which the area is located,
 - iii. the size of the area in hectares,
 - iv. the composition of the soils covering the area, and
 - v. the percentage of the area covered by grass species at the time the habitat management plan is prepared.
5. A description of how the area intended as new or enhanced habitat under paragraph 6 of subsection (4) will be created or enhanced and managed for eastern meadowlark or bobolink, including,
 - i. a description of the areas to be seeded, and of the composition of the seed mixture such as the species and their relative percentage within the seed mixture,
 - ii. phasing and times of the year for site preparation, planting, seeding, tending and maintenance, and

- iii. a description of the practices that will be undertaken for site preparation, planting, seeding, tending and maintenance, including the requirements set out in subsections (8) and (9). O. Reg. 176/13, s. 14.

[...]

Butternut

23.7 (1) In this section,

“butternut health assessor” means a person or member of a class of persons designated by the Minister for the purpose of assessing whether, and the extent to which, butternut trees are affected by butternut canker; (“évaluation de la santé des noyers cendrés”)

“seed zone” means a seed zone identified in the document entitled “Southern Ontario Tree Seed Zone Atlas” that is published by the Ministry of Natural Resources, dated 2011, as amended from time to time, and that is available to the public at the Ministry’s district offices, at the Ministry’s corporate library in Peterborough or on the Ministry’s website. (“zone de semences”) O. Reg. 176/13, s. 14.

[...]

Hydro-electric generating stations

23.12 (1) Clause 9 (1) (a) and subsection 10 (1) of the Act do not apply to a person who is engaged in the operation of a hydro-electric generating station and who, in the course of operating the station, kills, harms, harasses, captures or takes a member of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, or damages or destroys the habitat of such a species, if the person satisfies the following conditions:

1. Before doing anything, in the course of operating the hydro-electric generating station, that is prohibited under clause 9 (1) (a) or subsection 10 (1) of the Act,
 - i. the person must give the Minister notice of the fact that the person is operating a hydro-electric generating station by submitting a notice of activity form available on the Registry to the Minister through the Registry, and
 - ii. subject to subsection (2), prepare in accordance with subsection (3) a mitigation plan that meets the requirements of subsection (4).
2. The person must ensure that the notice of activity form includes,
 - i. the location of the hydro-electric generating station, and
 - ii. the name of every species listed on the Species at Risk in Ontario List as an endangered or threatened species that will likely be affected by the operation of the hydro-electric generating station.
3. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
4. While operating the hydro-electric generating station, the person must,
 - i. comply with the requirements of the mitigation plan,

- ii. take reasonable steps to minimize the adverse effects of the operation of the hydro-electric generating station on the species identified in the notice of activity form, including the steps described in subsection (5) and such other steps as may be described in the mitigation plan.
5. The person must,
 - i. retain a copy of the mitigation plan while operating the hydro-electric generating station and for a period of five years after the person ceases to operate the station,
 - ii. ensure that the plan is updated in accordance with subsection (3) at least once every five years to include information obtained while carrying out the monitoring requirements described in paragraph 6, and
 - iii. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
 6. The person must monitor the effects that the operation of the station has on the species identified in the notice of activity form and the effectiveness of the mitigation plan.
 7. On or before December 31 of each year, the person must prepare an annual report in accordance with subsection (6) on the effects that the operation of the station has on the species identified in the notice of activity form and the person must,
 - i. retain a copy of the annual report for at least five years after it is prepared, and
 - ii. provide a copy of the annual report to the Ministry within 14 days of receiving a request for it.
 8. If the person, or an employee or agent of the person, observes a species identified in the notice of activity form in the vicinity of the station in the course of operating the station, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of observation and any other information requested on that form. O. Reg. 176/13, s. 14.

(2) A person who operates a hydro-electric generating station is not required to complete the preparation of a mitigation plan until the following dates if the following circumstances apply:

1. If the mitigation plan relates to a species that was added to the Species at Risk in Ontario List as an endangered or threatened species on January 24, 2013, the third anniversary of that day.
2. If the mitigation plan relates to a species that first appears in the area of the hydro-electric generating station after the station begins operation, three years after the date the species first appears in the area of the station. O. Reg. 176/13, s. 14.

[...]

(5) The following are the steps that a person must take to minimize the adverse effects of the operation of a hydro-electric generating station on a species identified in a notice of activity form submitted under paragraph 1 of subsection (1):

1. The person must inform all employees, agents and contractors conducting activities at the station that members of the species are present at or near the station and of the steps required under paragraphs 2 to 4.
2. If the species uses nests or hibernacula or other terrestrial features to carry out its life processes, the person must, before and during the period of time when the species is likely to require the terrestrial features to carry out its life process,
 - i. install and maintain barriers or other structures to create a protective zone around the terrestrial features and to protect the terrestrial features and limit the adverse effects that may be caused by the operation of the station, and
 - ii. make adjustments to the operation of the station so as to minimize the adverse effects of the operation of the station on the terrestrial features and the species' life processes.
3. The person must, if feasible, undertake maintenance activities of the station at such times and in such a manner as to minimize the impact of such activities on the species and must, if feasible, select maintenance activities that may have a benefit to the species and carry them out in a manner that may have a benefit to the species.
4. If, in carrying out the steps required under the person's mitigation plan, it is necessary to capture, take, possess or transport a member of the species, such actions must be undertaken by, or in consultation with, a person who is knowledgeable about, or has training in, the handling of the species.
5. If the person discovers that the steps described in paragraphs 1 to 4 or in the mitigation plan have not been effective in minimizing the adverse effects of the operation of the station on the species, the person shall,
 - i. take such actions as are necessary to increase the effectiveness of those steps,
or
 - ii. take such other reasonable steps as may be necessary to minimize the adverse effects of the operation of the station on the species. O. Reg. 176/13, s. 14.

[...]

Newly-listed and transition species — development

23.13 (1) In this section,

“effective date” means,

- (a) with respect to a newly-listed species, January 24, 2013, and

(b) with respect to a transition species, June 30, 2013, being the date on which clause 10 (1) (a) of the Act begins to apply to transition species; (“date d’effet”)

“newly-listed species” means a species that was listed on the Species at Risk in Ontario List as an endangered or threatened species for the first time on January 24, 2013; (“espèce nouvellement inscrite”)

“transition species” means a species that is listed in Schedule 3 or 4 to the Act and to which clause 10 (1) (a) of the Act does not apply until June 30, 2013. (“espèce touchée par des mesures transitoires”) O. Reg. 176/13, s. 14.

(2) Subsections (5) to (15) apply with respect to the following activities that have an adverse effect on a transition species or a newly-listed species and that are commenced within the following time periods in relation to the species’ effective date:

1. Constructing drainage works under an agreement filed under subsection 2 (2) of the *Drainage Act* if,

i. the agreement is filed before the effective date or within two years after that date, and

ii. the construction is commenced before the effective date or it is commenced after the effective date but no later than,

A. in a case relating to a newly-listed species,

1. the fifth anniversary of the day the agreement is filed, where the agreement is filed on or after June 30, 2010, or

2. June 30, 2015 where the agreement was filed before June 30, 2010, or

B. in a case relating to a transition species, June 30, 2015.

2. Constructing drainage works in respect of which an engineer’s report was adopted under subsection 45 (1) of the *Drainage Act* if,

i. the report is adopted before the effective date or within two years after that date, and

ii. the construction is commenced before the effective date or it is commenced after the effective date but no later than,

A. in a case relating to a newly-listed species,

1. the fifth anniversary of the day the report is adopted where the report is adopted on or after June 30, 2010, or

2. June 30, 2015 where the report was adopted before June 30, 2010, or

B. in a case relating to a transition species, June 30, 2015.

3. Laying down highways and lots upon the ground within a plan of subdivision under the authority of subsection 51 (57) of the *Planning Act* if,

- i. the draft plan of subdivision is approved under the *Planning Act* before the effective date or within two years after that date, and
 - ii. the laying down of highways and lots is commenced before the effective date or it is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the draft plan of subdivision is approved where the draft plan of subdivision is approved on or after June 30, 2010, or
 - 2. June 30, 2015 where the draft plan of subdivision was approved before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015.
4. Development of land within a plan of subdivision approved under the *Planning Act*, including a plan of subdivision registered under the *Registry Act* or the *Land Titles Act* if,
- i. the land is within a draft plan of subdivision approved under the *Planning Act* before the effective date or within two years after that date,
 - ii. the development is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the draft plan of subdivision is approved where the draft plan of subdivision is approved on or after June 30, 2010, or
 - 2. June 30, 2015 where the draft plan of subdivision was approved before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015,
 - iii. the approval of the plan of subdivision has not lapsed, and
 - iv. the development is not prohibited by any zoning by-law passed under subsection 34 (1) of the *Planning Act* or by any order made under section 47 of that Act.
5. Development in an area designated as a site plan control area under subsection 41 (2) of the *Planning Act* and in respect of which appropriate approvals have been obtained under subsection 41 (4) of that Act if,
- i. the appropriate approvals are obtained under the *Planning Act* before the effective date or within two years after that date, and
 - ii. the development is commenced before the effective date or after that date but no later than,
 - A. in a case relating to a newly-listed species,

1. the fifth anniversary of the day the approvals are obtained where the approvals are obtained on or after June 30, 2010, or
 2. June 30, 2015 where the approvals were obtained before June 30, 2010, or
- B. in a case relating to a transition species, June 30, 2015.
6. Development that is authorized by a development permit issued under Ontario Regulation 608/06 (Development Permits) made under the *Planning Act* after 2005 if,
- i. the development permit is issued before the effective date or within two years after that date, and
 - ii. the development is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 1. the fifth anniversary of the day the development permit is issued where the development permit is issued on or after June 30, 2010, or
 2. June 30, 2015 where the development permit was issued before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015.
7. Development of a unit within the meaning of the *Condominium Act, 1998*, including a unit in respect of which a declaration and description are registered under the *Land Titles Act*, in respect of which a declaration and description are approved or exempted under section 9 of the *Condominium Act, 1998* if,
- i. the declaration and description are approved or exempted before the effective date or within two years after that date, and
 - ii. the development is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 1. the fifth anniversary of the day the declaration and description are approved or exempted where the declaration and description are approved or exempted on or after June 30, 2010, or
 2. June 30, 2015 where the declaration and description were approved or exempted before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015,
 - iii. the approval or exemption has not lapsed, and

- iv. the development is not prohibited by any zoning by-law passed under subsection 34 (1) of the *Planning Act* or by any order made under section 47 of that Act.
8. Carrying out an undertaking in respect of which approval to proceed was given under Part II of the *Environmental Assessment Act* if,
- i. the approval to proceed is given before the effective date or within two years after that date, and
 - ii. the undertaking is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the approval to proceed is given where the approval to proceed is given on or after June 30, 2010, or
 - 2. June 30, 2015 where the approval to proceed was given before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015.
9. Carrying out an undertaking to which a class environmental assessment approved under Part II.1 of the *Environmental Assessment Act* applies and in respect of which the requirements that are necessary to proceed with the undertaking under the class environmental assessment have been satisfied if,
- i. the requirements are satisfied before the effective date or within two years after that date, and
 - ii. the undertaking is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the requirements to proceed with the undertaking are satisfied where they are satisfied on or after June 30, 2010, or
 - 2. June 30, 2015 where the requirements to proceed with the undertaking were satisfied before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015.
10. Carrying out a transit project, as defined in subsection 1 (1) of Ontario Regulation 231/08 (Transit Projects and Metrolinx Undertakings) made under the *Environmental Assessment Act*, in respect of which the Minister has given a notice to proceed with the transit project under clause 12 (1) (a) or (c) of Ontario Regulation 231/08 if,
- i. the notice is given before the effective date or within two years after that date, and

- ii. the transit project is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the notice is given where the notice is given on or after June 30, 2010, or
 - 2. June 30, 2015 where the notice was given before June 30, 2010, or
 - B. in a case relating to a transit species, June 30, 2015.
11. Carrying out an undertaking that is designated as an undertaking to which the *Environmental Assessment Act* applies under Ontario Regulation 116/01 (Electricity Projects) made under that Act, that is required under that regulation to be carried out in accordance with the Environmental Screening Process described in that regulation and in respect of which all the requirements of the Environmental Screening Process that are necessary to proceed with the undertaking have been satisfied if,
- i. the requirements are satisfied before the effective date or within two years of that date, and
 - ii. the undertaking is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the requirements to proceed with the undertaking are satisfied where they are satisfied on or after June 30, 2010, or
 - 2. June 30, 2015 where the requirements to proceed with the undertaking were satisfied before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015.
12. Carrying out an undertaking that is designated as an undertaking to which the *Environmental Assessment Act* applies under Ontario Regulation 101/07 (Waste Management Projects) made under that Act, that is required under that regulation to be carried out in accordance with the Environmental Screening Process for Waste Management Projects described in that regulation and in respect of which all the requirements of the Environmental Screening Process for Waste Management Projects that are necessary to proceed with the undertaking have been satisfied if,
- i. the requirements are satisfied before the effective date or within two years of that date, and
 - ii. the undertaking is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,

1. the fifth anniversary of the day the requirements to proceed with the undertaking are satisfied where they are satisfied on or after June 30, 2010, or
 2. June 30, 2015 where the requirements to proceed with the undertaking were satisfied before June 30, 2010, or
- B. in a case relating to a transition species, June 30, 2015.
13. Constructing a hydrocarbon line or station under the authority of an order made under Part VI of the *Ontario Energy Board Act, 1998* if,
- i. the order is made before the effective date or within two years after that date, and
 - ii. the construction is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 1. the fifth anniversary of the day the order is made, where the order is made on or after June 30, 2010, or
 2. June 30, 2015, where the order was made before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015.
14. Constructing a renewable energy generation facility under the authority of, and in accordance with, a renewable energy approval issued under Part V.0.1 of the *Environmental Protection Act* if,
- i. the approval is issued before the effective date or within two years after that date, and
 - ii. the construction is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 1. the fifth anniversary of the day the approval is issued, where the approval is issued on or after June 30, 2010, or
 2. June 30, 2015, where the approval was issued before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015.
15. An activity described in section 3 of Ontario Regulation 350/12 (Registrations under Part II.2 of the Act — Solar Facilities) made under the *Environmental Protection Act* in respect of which a confirmation of registration has been provided under section 20.22 of that Act by the Director appointed under section 5 of that Act if,
- i. the confirmation of registration is provided before the effective date or within two years of that date, and

- ii. the activity is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the confirmation of registration is provided, where the confirmation of registration is provided on or after June 30, 2010, or
 - 2. June 30, 2015, where the confirmation of registration was provided before June 30, 2010, or
 - B. in a case relating to a transition species, June 30, 2015.
16. Advanced exploration carried out under Part VII of the *Mining Act* in respect of which the Director of Mine Rehabilitation has issued a written acknowledgement of receipt of a certified closure plan under subsection 140 (5) of that Act or a written acknowledgement of receipt of amendments to a certified closure plan under subsection 143 (8) of that Act if,
- i. the written acknowledgement is received before the effective date or within two years of that date, and
 - ii. advanced exploration is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the written acknowledgement is received where it is received on or after June 30, 2010, or
 - 2. June 30, 2015, where the written acknowledgement was received before June 30, 2010, or
 - B. in the case of a transition species, June 30, 2015.
17. Mine production carried out under Part VII of the *Mining Act* in respect of which the Director of Mine Rehabilitation has issued a written acknowledgement of receipt of a certified closure plan under clause 141 (4) (a) of that Act or a written acknowledgement of receipt of amendments to a certified closure plan under subsection 143 (8) of that Act if,
- i. the written acknowledgement is received before the effective date or within two years of that date, and
 - ii. mining production is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the written acknowledgement is received where it is received on or after June 30, 2010, or
 - 2. June 30, 2015, where the written acknowledgement was received before June 30, 2010, or

B. in the case of a transition species, June 30, 2015.

18. Rehabilitation of a mine hazard in compliance with a certified closure plan filed pursuant to an order made under subsection 147 (1) of the *Mining Act* if,
- i. the certified closure plan is filed before the effective date or within two years of that date, and
 - ii. rehabilitation of the mine hazard is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the certified closure plan is filed where it is filed on or after June 30, 2010, or
 - 2. June 30, 2015, where the certified closure plan was filed before June 30, 2010, or

B. in the case of a transition species, June 30, 2015.

19. Voluntary rehabilitation of a mine hazard that was approved by the Director of Mine Rehabilitation under section 139.2 of the *Mining Act* if,
- i. the written approval of the Director was granted before the effective date or within two years of that date, and
 - ii. the voluntary rehabilitation of the mine hazard is commenced before the effective date or is commenced after that date but no later than,
 - A. in a case relating to a newly-listed species,
 - 1. the fifth anniversary of the day the approval is granted where it is granted on or after June 30, 2010, or
 - 2. June 30, 2015, where the approval was granted before June 30, 2010, or

B. in the case of a transition species, June 30, 2015. O. Reg. 176/13, s. 14.

(3) The carrying out of an undertaking referred to in paragraph 8, 9 or 11 of subsection (2) does not include the operation of a hydro-electric generating station or the operation of a wind facility within the meaning of Ontario Regulation 359/09 (Renewable Energy Approvals under Part V.0.1 of the Act) made under the *Environmental Protection Act*. O. Reg. 176/13, s. 14.

(4) Despite anything in subsection (2), subsections (5) to (15) do not apply to an activity described in section 23.4 in respect of a species listed in the Schedule to that section. O. Reg. 176/13, s. 14.

(5) Subsection 10 (1) of the Act does not apply to a person who, while engaging in an activity described in subsection (2), damages or destroys the habitat of a newly-listed species or transition species if the conditions set out in subsection (7) are satisfied. O. Reg. 176/13, s. 14.

(6) Clause 9 (1) (a) of the Act does not apply to a person who, while engaging in an activity described in subsection (2), kills, harms, harasses, captures or takes a member of a newly-listed species if the conditions set out in subsection (7) are satisfied. O. Reg. 176/13, s. 14.

(7) The following are the conditions that a person carrying out an activity described in subsection (2) must satisfy for the purposes of the exemptions set out in subsections (5) and (6):

1. The person must give the Minister notice of the activity by submitting a notice of activity form available on the Registry to the Minister through the Registry.
2. The person must ensure that the notice of activity form includes,
 - i. a description of the activity the person is carrying out or is proposing to carry out,
 - ii. a statement that the activity has already commenced or the date the activity will commence,
 - iii. the location at which the activity is being carried out or will be carried out, and
 - iv. the name of every newly-listed or transition species that will be affected by the activity.
3. The person must give notice under paragraph 1,
 - i. promptly after June 30, 2013, if the activity has already commenced on that date, or
 - ii. before the activity is commenced, if the activity has not commenced on or before June 30, 2013.
4. The person must follow the requirements of section 23.3 with respect to the completion of the notice of activity form, the keeping of records relating to the notice of activity form and the updating of the information on the Registry.
5. While carrying out the activity, the person must take reasonable steps to minimize the adverse effects of the activity on each species identified in the notice of activity form, including those steps identified in subsection (8).
6. The person must,
 - i. ensure that a mitigation plan is prepared in accordance with subsections (9) and (10),
 - ii. subject to subsection (11), ensure that the mitigation plan referred to in subparagraph i is prepared within two years of the day a notice of activity form is submitted to the Minister under paragraph 1 and before the person begins to take steps to restore, create or enhance habitat as required under paragraph 10 of subsection (8), and

- iii. in the case of a person described in subsection (11), ensure that the conditions set out in subsection (12) are satisfied.
7. After a mitigation plan is prepared, the person must,
- i. carry out the activity in accordance with the mitigation plan,
 - ii. ensure that the mitigation plan is updated in accordance with subsections (9) and (10) at least once every five years to include information obtained while monitoring the effects of the activity under paragraph 8.
 - iii. retain a copy of the mitigation plan until at least five years after the activity is complete, and
 - iv. provide a copy of the mitigation plan to the Ministry within 14 days of receiving a request for it.
8. The person must,
- i. monitor the effects of the activity on the species identified in the notice of activity form until the day the activity is complete,
 - ii. monitor the effectiveness of steps described in paragraphs 1 to 9 of subsection (8) that are taken to minimize adverse effects of the activity on the species until the day those steps are complete, and
 - iii. monitor the effectiveness of the steps taken to restore, create or enhance habitat under paragraph 10 of subsection (8) until 12 months after those steps are completed.
9. On or before December 31 of each year in which the activity is carried out and in which the person is required under paragraph 8 to monitor the effectiveness of any steps taken to minimize adverse effects of the activity, the person must prepare an annual report in accordance with subsection (14) and thereafter the person must,
- i. retain a copy of the annual report for at least five years after it is prepared, and
 - ii. provide a copy of the annual report to the Ministry within 14 days of receiving a request for it.
10. If the person or an employee or agent of the person observes a species identified in the notice of activity form in the course of carrying out the activity, the person must ensure that, within three months of the observation, the Natural Heritage Information Centre Rare Species Reporting Form available on the Ministry website is completed, detailing the species and number of individual members that were observed, the date and location of the observation and any other information requested on that form. O. Reg. 176/13, s. 14.

(8) The following are the steps that a person must take to minimize adverse effects of an activity described in a notice of activity form submitted under paragraph 1 of subsection (7) on a species identified in the notice of activity form:

1. The person shall take steps to minimize or avoid the killing, harming or harassing of members of the species during a time of year when the species is likely to be carrying out a life process related to hibernation or reproduction, including rearing.
2. The person must not carry out any part of the activity in an area while it is being used by a member of the species to carry out a life process related to hibernation or reproduction, including rearing.
3. The person shall take steps to exclude animals that are members of the species from an area in which the activity is occurring or is likely to occur, such as installing temporary fencing to prevent members of the species from accessing the area.
4. If the person encounters an animal that is a member of the species in the course of carrying out the activity, the person must cease carrying out the activity and provide the animal with a reasonable amount of time to leave the area in which the activity is occurring before continuing with the activity.
5. If, after providing an animal with a reasonable amount of time in accordance with paragraph 4 the animal does not leave the area, the person must take measures to relocate the animal to a nearby location that is suitable and safe for the animal.
6. If the person encounters a moss, lichen or vascular plant that is a member of the species in the course of carrying out the activity and it is not necessary to kill or harm the member for the purpose of carrying out the activity, the person must,
 - i. cease the activity in the area of the encounter,
 - ii. install and maintain barriers to create a protective zone around the species, and
 - iii. after establishing the protective zone referred to in subparagraph ii, continue the activity in a manner that does not impair the ability of the species to carry out its life processes, including reproduction.
7. If it is necessary to kill or harm a moss, lichen or vascular plant for the purpose of carrying out the activity, the person must relocate the moss, lichen or vascular plant to a nearby location within the species' habitat that is suitable and safe for the species so that it is not killed or harmed, provided it is feasible to do so.
8. The determination under paragraph 7 as to whether it is feasible to relocate a moss, lichen or vascular plant must be made by the person using the best available information with respect to the suitability of relocating that species, including information obtained from the Ministry.
9. The relocation of an animal or of a moss, lichen or vascular plant in accordance with paragraph 5 or 7 must be undertaken by, or in consultation with, a person who is knowledgeable about, or has training in, the handling of the species.

10. Within two years of the day the person submitted the notice of activity form to the Minister under paragraph 1 of subsection (7), the person shall begin to take steps to,
- i. restore any habitat of the species that is damaged or destroyed by the activity, to the extent that it is feasible to do so, or
 - ii. create habitat for the species or enhance any existing habitat for the species in an area that is in the same ecoregion as the habitat that was damaged or destroyed by the activity and in a manner that minimizes the overall loss of habitat for the species resulting from the activity.
11. The person must not carry out any part of the activity in an area that is being used, or has been used at any time in the previous three years, by woodland caribou (forest-dwelling boreal population) to carry out a life process related to reproduction, including rearing. O. Reg. 176/13, s. 14.

(9) A mitigation plan must be prepared and updated by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information on steps that may help minimize or avoid adverse effects on the species, which includes consideration of information obtained from the Ministry, aboriginal traditional knowledge and community knowledge if it is reasonably available. O. Reg. 176/13, s. 14.

(10) A mitigation plan prepared in respect of an activity described in subsection (2) must include the following information:

1. The following information with respect to the activity:
 - i. a description of the activity,
 - ii. the proposed start and completion dates of the activity,
 - iii. a description of all of the stages of the activity and a timeline for the stages, and
 - iv. a map indicating the geographic location of the property on which the activity will occur.
2. A list of the newly-listed species or transition species that will likely suffer adverse effects as a result of the activity and an assessment of the activity's likely effects on the local population of each newly-listed or transition species.
3. Details on the steps the person will take to minimize adverse effects of the activity on the species identified in paragraph 2, including,
 - i. a description of each step to be taken and the dates and locations at which the steps will be taken,
 - ii. the times during the year at which a species identified under paragraph 2 is likely to be carrying out a life process related to hibernation or reproduction, including rearing, and at which activities that are likely to kill, harm or harass a member of the species, or damage or destroy its habitat, must not be carried out.

4. Details regarding the monitoring the person plans to conduct to assess the effects of the activity on members of the species identified under paragraph 2 and the effectiveness of steps taken to minimize adverse effects on the species. O. Reg. 176/13, s. 14.

(11) A person who proposes to carry out an activity described in paragraph 14 of subsection (2) and who has not been issued a renewable energy approval under Part V.0.1 of the *Environmental Protection Act* on or before the effective date must prepare a mitigation plan in respect of the activity before either of the following days:

1. If the person has not submitted an application for a renewable energy approval under Part V.0.1 of the *Environmental Protection Act* on or before the effective date, the day the person submits the application.
2. If the person has submitted an application for a renewable energy approval under Part V.0.1 of the *Environmental Protection Act* on or before the effective date, the day the renewable energy approval is issued. O. Reg. 176/13, s. 14.

(12) A person who prepares a mitigation plan under subsection (11) shall ensure that the following conditions are satisfied:

1. The person must submit the mitigation plan to the Minister promptly after it is prepared.
2. The Minister must approve the mitigation plan, subject to subsection (13).
3. The person must receive written notice of the approval of the Minister. O. Reg. 176/13, s. 14.

(13) The Minister may refuse to approve a mitigation plan submitted under subsection (12) if, in his or her opinion,

- (a) the mitigation plan has not been prepared by one or more persons with expertise in relation to every species that is the subject of the plan, using the best available information; or
- (b) the steps set out in the mitigation plan may not be sufficient to,
 - (i) restore any habitat of the species that is damaged or destroyed by the activity, to the extent that it is feasible to do so,
 - (ii) create habitat for the species or enhance any existing habitat for the species in a manner that minimizes the overall loss of habitat for the species resulting from the activity, or
 - (iii) otherwise effectively minimize the adverse effects of the activity on the species. O. Reg. 176/13, s. 14.

(14) An annual report referred to paragraph 9 of subsection (7) shall document, and assess the effectiveness of, the steps taken by the person in the previous 12 months to minimize adverse effects of an activity described in a notice of activity form submitted under paragraph 1 of subsection (7) on the newly-listed or transition species identified in the

notice of activity form, including the locations where the steps were taken. O. Reg. 176/13, s. 14.

(15) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (5) or (6), clause 9 (1) (a) or subsection 10 (1) of the Act did not apply with respect to the species or its habitat; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (7). O. Reg. 176/13, s. 14.

(16) Subsection 10 (1) of the Act does not apply to a person who damages or destroys the habitat of a newly-listed or transition species while carrying out the undertaking described in the order made under section 3.2 of the *Environmental Assessment Act* and approved by Order in Council 2174/99 on December 8, 1999 with respect to hydroelectric facilities on the Mattagami River if the person satisfies the conditions set out in subsection (7). O. Reg. 176/13, s. 14.

(17) Clause 9 (1) (a) of the Act does not apply to a person who kills, harms, harasses, captures or takes a living member of a newly-listed species while carrying out the undertaking described in the order made under section 3.2 of the *Environmental Assessment Act* and approved by Order in Council 2174/99 on December 8, 1999 with respect to hydroelectric facilities on the Mattagami River if the person satisfies the conditions set out in subsection (7). O. Reg. 176/13, s. 14.

(18) Subclauses 9 (1) (b) (i) and (ii) of the Act do not apply to the possession or transport of a member of a species if,

- (a) pursuant to subsection (16) or (17), clause 9 (1) (a) or subsection 10 (1) of the Act did not apply with respect to the species or its habitat; or
- (b) the possession or transport of the member of the species is necessary in order to satisfy the conditions set out in subsection (7). O. Reg. 176/13, s. 14.

(19) Clause 10 (1) (a) of the Act does not apply to a person who, after the effective date, damages or destroys the habitat of a transition species while carrying out an activity that is authorized by a permit issued under section 17 of the Act before June 30, 2013 if,

- (a) the permit is still in effect; and
- (b) the activity is carried out in accordance with the conditions of the permit. O. Reg. 176/13, s. 14.

[...]

Trapping — incidental catch

23.19 (1) Clause 9 (1) (a) of the Act does not apply to a person who incidentally traps an animal that belongs to a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, if,

- (a) the person is trapping under the authority of a trapping licence under the *Fish and Wildlife Conservation Act, 1997*;

- (b) the person is trapping in accordance with Ontario Regulation 667/98 (Trapping) made under the *Fish and Wildlife Conservation Act, 1997*;
- (c) the person traps the animal despite the exercise of all due diligence;
- (d) the incidentally trapped animal,
 - (i) is immediately released in a manner that causes it the least harm, if the animal is alive when it is found and has a reasonable chance of survival in the wild, or
 - (ii) is killed in a humane manner, if the animal is alive when it is found and does not have a reasonable chance of survival in the wild;
- (e) in cases where the animal is killed and is a furbearing mammal as defined in the *Fish and Wildlife Conservation Act, 1997*, the person obtains a licence to possess a pelt, as required under Part II of Ontario Regulation 666/98 (Possession, Buying and Selling of Wildlife) made under that Act; and
- (f) in cases where the animal is killed and is not a furbearing mammal as defined in the *Fish and Wildlife Conservation Act, 1997*, the person,
 - (i) promptly after the killing, gives notice of the incidental trapping and killing to the Minister by completing a notice of incidental trapping form available on the Registry and submitting it to the Minister through the Registry, and
 - (ii) follows the requirements of subsections (2) and (3) with respect to the completion of the notice of incidental trapping form, the keeping of records relating to the notice of incidental trapping form and the updating of the information on the Registry. O. Reg. 176/13, s. 14.

(2) Before submitting a notice of incidental trapping form to the Minister under clause (1) (f), a person must ensure that,

- (a) all mandatory information requested on the form, including the person's contact information, has been provided; and
- (b) the information provided on the form is complete and accurate. O. Reg. 176/13, s. 14.

(3) After submitting a notice of incidental trapping form to the Minister, a person who submitted the form must,

- (a) promptly upon obtaining from the Ministry confirmation that a notice of incidental trapping form submitted through the Registry has been received by the Minister, make a record of the confirmation;
- (b) for as long as the person possesses the animal, or a part of the animal, that was incidentally trapped and killed,
 - (i) keep the record of the confirmation, and
 - (ii) make the record of the confirmation available to the Ministry within 14 days of receiving a request for it;

(c) if there is a change in the contact information of the person who submitted the notice of incidental trapping form, update the information on the Registry within 10 business days of the change. O. Reg. 176/13, s. 14.

(4) A person who provides incomplete, false or misleading information on a notice of incidental trapping form or when updating information on the Registry shall be deemed not to have submitted the notice of incidental trapping form. O. Reg. 176/13, s. 14.

(5) Clause 9 (1) (b) of the Act does not apply to a person who possesses or transports a dead animal or a part of an animal if, pursuant to subsections (1) to (4), the person is exempt from clause 9 (1) (a) of the Act in respect of the incidental trapping of the animal. O. Reg. 176/13, s. 14.

5. Crown Forest Sustainability Act, 1994, S.O. 1994, c. 25, s. 9(2)

Crown Forest Sustainability Act, 1994

S.O. 1994, CHAPTER 25

Approval by Minister

9. (1) A forest management plan is of no effect unless it is approved by the Minister.
1994, c. 25, s. 9 (1).

6. Species at Risk Act, SC 2002, c 29, s. 80

Species at Risk Act

S.C. 2002, c. 29

Assented to 2002-12-12

EMERGENCY ORDERS

Marginal note:Emergency order

80. (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.

Marginal note:Obligation to make recommendation

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

Marginal note:Consultation

(3) Before making a recommendation, the competent minister must consult every other competent minister.

Marginal note:Contents

(4) The emergency order may

- o (a) in the case of an aquatic species,
 - (i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and
 - (ii) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat;
- o (b) in the case of a species that is a species of migratory birds protected by the [Migratory Birds Convention Act, 1994](#),
 - (i) on federal land or in the exclusive economic zone of Canada,
 - (A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and
 - (B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and
 - (ii) on land other than land referred to in subparagraph (i),
 - (A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

- (B) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat; and
- (c) with respect to any other species,
 - (i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada,
 - (A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and
 - (B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and
 - (ii) on land other than land referred to in subparagraph (i),
 - (A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and
 - (B) include provisions prohibiting activities that may adversely affect the species and that habitat.

Marginal note: Exemption

- (5) An emergency order is exempt from the application of section 3 of the [Statutory Instruments Act](#).

SCHEDULE "C"

INDUSTRY/ACTIVITY/ SPECIES	SECTION	SPECIES
Drainage	23.9	<ol style="list-style-type: none"> 1. Bogbean Buckmoth. 2. Cherry Birch. 3. False Hop Sedge. 4. False Rue Anemone. 5. Grey Fox. 6. Heart-leaved Plantain. 7. Pugnose Minnow. 8. Scarlet Ammannia. 9. Small-mouthed Salamander. 10. Toothcup.
Early exploration mining	23.10	Golden Eagle
Waterpower Operations	23.12	<ol style="list-style-type: none"> 1. Hungerford's Crawling Water Beetle. 2. Pygmy Snaketail.
Aggregate Operations	23.14	<ol style="list-style-type: none"> 1. Blue racer. 2. Butler's gartersnake. 3. Common five-lined skink (Carolinian population). 4. Henslow's sparrow. 5. Small-mouthed salamander. 6. Virginia mallow. 7. Yellow-breasted chat.
Human Health and Safety Activities	23.18	<ol style="list-style-type: none"> 1. Bird's-foot Violet. 2. Bluehearts. 3. Forked Three-awned Grass. 4. Heart-leaved Plantain. 5. Juniper Sedge. 6. Spotted Wintergreen. 7. Virginia Goat's-rue. 8. Virginia Mallow.
Operation of a Wind Facility	23.20	Golden Eagle
Species Specific Exemptions		
Aquatic Species	23.4	<p>The exemption in this section is limited to the following species, other species being excluded from the exemption:</p> <ol style="list-style-type: none"> 1. The following species of mussels listed as endangered or threatened on the Species at Risk in Ontario List:

		<ul style="list-style-type: none"> i. Eastern Pondmussel. ii. Fawnsfoot. iii. Hickorynut. iv. Kidneyshell. v. Rayed Bean. vi. Round Pigtoe. vii. Salamander Mussel. viii. Snuffbox. ix. Mapleleaf Mussel. x. Rainbow Mussel. xi. Wavy-rayed Lampmussel. <p>2. The following species of fish listed as endangered or threatened on the Species at Risk in Ontario List:</p> <ul style="list-style-type: none"> i. Eastern Sand Darter. ii. Pugnose Shiner. iii. Redside Dace. iv. Black Redhorse. v. Channel Darter. vi. Cutlip Minnow. vii. Silver Shiner. viii. Spotted Gar.
Barn swallow	23.5	
Bobolink and Eastern meadowlark	23.6	
Butternut	23.7	
Chimney swift	23.8	

WILDLANDS LEAGUE et al

and

LIEUTENANT GOVERNOR IN COUNCIL et al

Applicants

Respondents

Court File No. 400/13

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceeding commenced at Toronto

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OF THE RESPONDENTS**

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