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OVERVIEW

1. The Moving Parties seek leave to appeal the Divisional Court's decision upholding Ontario Regulation 176/13 ("the Exemption Regulation"). The Exemption Regulation creates wide-ranging exemptions from the *Endangered Species Act, 2007*, SO 2007, c 6 ("*ESA*") for most industrial activities in Ontario. It deprives each of the province's 161 endangered and threatened species of statutory protections against killing them and destroying their habitats.

2. In its decision, the Divisional Court undermines the entire scheme of the *ESA.* It does so by ignoring and misconstruing the Act's purposes, as legislated at s. 1. Instead, the Court read into the *ESA* the non-legislated purpose of promoting the economic interests of industry.

3. The Divisional Court also held that the Minister of Natural Resources had met a statutory precondition under s. 57(1) of the *ESA*, giving him the power to recommend the Exemption Regulation to Cabinet. Strikingly, the Court held that the Minister's performance of his duty under s. 57(1) was not reviewable under either a correctness or reasonableness standard. Further, the Court held that the Minister had met this duty despite failing to consider whether the proposed regulation would jeopardize each individual species affected by it.

4. The Moving Parties submit that the legislature intended the *ESA* to protect and recover Ontario's species at risk. The Exemption Regulation is inconsistent with that overarching purpose. Further, a correct interpretation of s. 57(1) requires consideration of whether a proposed regulation would likely jeopardize each individual species to which it would apply.

5. The validity of the Exemption Regulation turns on these important environmental and administrative law issues – as does the survival and recovery of Ontario's most imperilled species.

PART I - THE PARTIES AND THE DECISION APPEALED FROM

6. The Environmental Groups CPAWS-Wildlands League ("Wildlands League") and the Federation of Ontario Naturalists ("Ontario Nature") are non-profit organizations with long histories of advocating for the protection and recovery of species at risk in Ontario.[1] They come to the Court as public interest litigants.[2]

7. The Respondent Minister of Natural Resources ("Minister") is responsible for administering the *ESA*, while the Respondent Lieutenant Governor in Council ("Cabinet") has regulation-making power under s. 55 of the *ESA*.[3]

8. The Environmental Groups seek leave to appeal the Divisional Court's order, dated May 28, 2015, dismissing their application for judicial review of the *vires* of Ontario Regulation 176/13 (the "Exemption Regulation").

PART II - CONCISE SUMMARY OF THE FACTS

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

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

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[1] Affidavit of Caroline Schultz ("Schultz Affidavit"), paras 6-18 [Environmental Groups' Motion Record ("MR"), Vol 3, Tab 7, pp 604-608]; Affidavit of Anna Baggio ("Baggio Affidavit"), paras 4-11 [MR Vol 2, Tab 6, pp 177-181].
[2] Reasons for Judgment of Lederer J. at para 2 [MR Vol 1, Tab 3, p 13].
[3] Referred to in the collective as the "government."
[4] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 143, (20 March 2007) at 7195 (Hon David Ramsay, Minister of Natural Resources) [Environmental Groups' Book of Authorities ("BOA") at Tab 13].

10. The new *ESA* remedied major shortcomings in the previous *Endangered Species Act*.[5] In contrast to the old Act, which offered only limited protection for 42 of 176 species designated at risk, the *ESA* extended some immediate protection to all listed species in Ontario.[6] Notably, it also provided general habitat protection for all endangered and threatened species as of July 1, 2013.[7] In the words of then-Minister of Natural Resources David Ramsay, the *ESA* created a "presumption of protection" for all listed species.[8]

11. In the spring of 2012, the government proposed significant legislative amendments weakening the *ESA* as part of an omnibus budget bill.[9] The amendments would have exempted many sectors of economic activity from the prohibitions in the *ESA* against killing endangered or threatened,[10] or destroying their habitats.[11] After significant public outcry, the government removed the proposed amendments from the omnibus bill.[12]

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

12. By late 2012, it became clear that the government had not given up on its desire to weaken the *ESA*. On December 5, 2012, the Ministry of Natural Resources ("MNR") made a formal posting to the Environmental Bill of Rights ("EBR") Registry, proposing changes to the

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[5] *Endangered Species Act*, RSO 1990 c E.15 (repealed 30 June 2008).
[6] Environmental Commissioner of Ontario, *Reconciling our Priorities: Annual Report 2006-2007*, submitted to Legislative Assembly of Ontario November 2007 (Toronto: ECO, 2007) at 96 [BOA at Tab 8].
[7] *Endangered Species Act*, SO 2007, c 6 ("*ESA*") s 10(3).
[8] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 148, (28 March 2007) at 7500 (Hon David Ramsay, Minister of Natural Resources) [BOA at Tab 11].
[9] Bill 55, *Strong Action for Ontario Act (Budget Measures)*, 1st Sess, 40th Parl, Ontario, 2012, Schedule 19 (see Schultz Affidavit, Ex C [MR Vol 3, Tab 7C, pp 641]).
[10] Section 9(1) of the *ESA* says no person shall "kill, harm, harass, capture or take" a member of an endangered or threatened species at risk [prohibition against "killing"].
[11] Section 10(1)(a) of the *ESA* says no person shall "damage or destroy the habitat" of an endangered or threatened species [prohibition against "destroying habitat"].
[12] Baggio Affidavit, paras 19-25 and Exs I, L and M [MR Vol 2, Tab 6, pp 183-186, Tab 6.I, pp 292, Tab 6.L, pp. 324, Tab 6.M, pp 326]; Schultz Affidavit, paras 19-31 and Ex I at pp 5-6 [MR Vol 3, Tab 7, pp 608-612, Tab 7.I, pp 683-684].

implementation of the *ESA* consistent with the MNR's ongoing "Modernization of Approvals" process.[13]

13. "Modernization of Approvals" is an MNR policy framework aimed, in essence, at "streamlining" permit approvals to introduce cost savings and "reduce the burden on individuals, businesses and government."[14] MNR was concerned that, since 2007, the number of permit applications to be dealt with under the *ESA* had grown.[15]

14. The MNR's posting to the EBR Registry on January 24, 2013, made it clear that the MNR was in fact contemplating significant regulatory exemptions for entire industrial sectors.[16] The proposed exemptions would significantly reduce the number of activities requiring permits under the *ESA.* The MNR's proposal did not consider the specific authority given to it by the legislature to charge fees for permitting.[17]

15. These exemption proposals provoked major public concern. Over 10,000 Ontarians commented publically on the MNR's December 2012 EBR Registry posting.[18]

16. The Environmental Groups expressed concerns about the proposed regulation in meetings with MNR officials, letters to Minister David Orazietti and Premier Kathleen Wynne, and comments on EBR Registry notices.[19]

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[13] Schultz Affidavit, para 40 and Ex O [MR Vol 3, Tab 7, pp 616-617 and Tab 7.O, pp 779].
[14] See MNR EBR Registry posting of 27 Sept 2012, Schultz Affidavit, Ex J [MR Vol 3, Tab 7.J, pp 703].
[15] *Ibid.*
[16] Schultz Affidavit, para 41 and Ex P [MR Vol 3, Tab 7, pp 617 and Tab 7.P, pp 785].
[17] *ESA*, s 50(1)(a).
[18] Schultz Affidavit, para 55 [MR Vol 3, Tab 7, pp 622].
[19] Baggio Affidavit, paras 47-53 and Ex T [MR Vol 2, Tab 6, pp 191-193 and Tab 6.T, pp 388]; Schultz Affidavit at paras 43, 48-54 and Exs Q, X, Y, Z, AA, & BB [MR Vol. 3, Tab 7, pp 618-622, and Tabs 7.Q, 7X-7.BB, pp 797, 849-886].

17. Ontario Nature wrote to Minister Orazietti in February and April of 2013, putting him on notice of his duties under s. 57(1) of the *ESA*. It stressed his obligation to determine whether the regulatory proposal was likely to jeopardize the survival of, or have any other significant adverse effect on, each of the endangered and threatened species to which it would apply.[20]

18. The Minister's response months later was silent on whether s. 57(1) required the effects on each individual species to be assessed.[21] The correctness of the Environmental Groups' interpretation was eventually conceded by the Respondents in the hearing before the Divisional Court.

C. In May 2013, the Minister purported to make a statutory determination under s. 57(1) of the *ESA*

19. Cabinet made the Exemption Regulation on May 15, 2013.

20. Prior to Cabinet's making of the Exemption Regulation, Minister Orazietti had signed the Minister's Determination on May 1, 2013. By this act, Minister Orazietti purported to satisfy his duty under s. 57(1).[22]

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

21. After initiating this litigation, the Environmental Groups obtained the Minister's Determination from the Respondents.[23] The Minister's Determination consists of a recommendation from MNR staff to which Minister Orazietti signed his concurrence.[24]

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[20] Schultz Affidavit, para 50 [MR Vol 3, Tab 7, p 620]. In addition, Ontario Nature alerted the Premier and Cabinet members to its concerns that the Minister may not have performed his s 57(1) duty. See Schultz Affidavit, para 53 and Exs AA, W, X and Y [MR Vol 3, Tab 7, p 621 and Tabs 7.AA, 7.W-7.Y, pp 875, 841-866].
[21] Schultz Affidavit, para 60, Ex DD [MR Vol 3, Tab 7, p 624 and Tab 7.DD, p 897].
[22] *Ibid* at paras 64-68 [MR Vol 3, Tab 7, pp 625-627].
[23] *Ibid.*
[24] Minister's Determination, p 36 [MR Vol 1, Tab 4, p 30].

22. With the exception of five species, the Minister's Determination does not assess the effect of the proposed regulation on any of the endangered or threatened species to which it would apply.[25] For example, at no point does the Minister conclude that the Exemption Regulation would not likely jeopardize the survival of, or have any other significant effects on, Blanding's Turtle in Ontario. To the contrary, Blanding's Turtle is not even mentioned. Likewise, the Minister's Determination does not at any point assess or determine the effects of the Exemption Regulation on the American Eel.[26]

23. Of the 155 endangered and threatened species listed at the time of the Minister's Determination,[27] only five are specifically assessed: Butternut,[28] Bobolink, Eastern Meadowlark,[29] Barn Swallow and Chimney Swift.[30]

24. Rather than assessing the proposed regulation's effect on each of the 155 individual species to which it would apply, the Minister's Determination focuses on the 18 proposals for exemptions. Of these, fifteen proposals focus on individual sectors or activities to be exempted—including forestry, early mining exploration, aggregate operations, hydro

[25] At the time of the Minister's Determination, 155 species were listed on the Species at Risk in Ontario List as endangered or threatened.

[26] Minister's Determination, p 14 [MR Vol 1, Tab 4, p 30]. American Eel is exempted from the Exemptions Regime for only one hydro-electric generating station (R. H. Saunders Station), but is otherwise exempted by the Exemption Regulation from s. 9(1) and 10(1) of the *ESA*. This exemption from the Exemptions Regime continues the prior exemption that applied to all hydro-electric generating stations. The prior exemption (see O Reg 242/08 as originally made at s 11) imposed stricter conditions than the Exemptions Regime, including an agreement with the Minister that required ministerial determinations in relation to "reasonable steps to minimize adverse effects" and that "if the agreement is complied with, the operation will not jeopardize survival or recovery."

[27] There are now 161 species listed as endangered or threatened on the Species at Risk in Ontario List, O Reg 230/08. See Schedule B, p 33.

[28] Minister's Determination, p 25, noting that "It is unlikely that the section will result in any significant adverse effect on Butternut or jeopardize the survival of the species" [MR Vol 1, Tab 4, p 61].

[29] *Ibid* at pp 27-28 [MR Vol 1, Tab 4, pp 63-64].

[30] *Ibid* at pp 28-29 [MR Vol 1, Tab 4, pp 64-65].

operations, operation of wind facilities, drainage works, and an exemption for all activities not completed or operating, but that have been approved or planned.

25. The Minister's Determination states that the 18 proposals are meant to "increase administrative efficiency and reduce burdens on individuals and businesses engaged in activities that affect species at risk and their habitat while providing for the protection of species at risk."[31]

E. The Exemption Regulation means no endangered or threatened species enjoys the full protection of the *ESA*'s prohibitions against killing them or destroying their habitats

26. The Exemption Regulation introduces a broad suite of exemptions from the *ESA*'s prohibitions by amending Ontario Regulation 242/08. Major industrial activities are now presumptively exempt from the *ESA*'s prohibitions against killing species or destroying their habitats, subject to standardized conditions.

27. As confirmed by the Environmental Commissioner of Ontario, the Exemption Regulation accomplished, in part, what government had tried to do through its omnibus bill in 2012.[32]

28. Overall, the Exemption Regulation applies to every endangered and threatened species in Ontario. Put another way, not one of the now 161 endangered or threatened species of lichens, mosses, vascular plants, molluscs, insects, fishes, reptiles, birds or mammals enjoys the full protection of the *ESA*'s legislated prohibition against killing them or destroying their habitats. For a visual aid representing the legal effect and scope of the Exemption

[31] *Ibid* at p 2 [MR Vol 1, Tab 4, p 38].
[32] Baggio Affidavit, paras 68-69 and Ex DD, p 48 [MR Vol 2, Tab 6, pp 197-198 and Tab 6.DD, p 508].

Regulation, refer to the Table of Endangered and Threatened Species, located at the final tab of the Environmental Groups' Motion Record.[33]

29. The Exemption Regulation largely came into effect on July 1, 2013.[34] This was the same day that all endangered and threatened species had been scheduled to receive general habitat protection under the *ESA*.[35]

F. The Divisional Court dismisses the Environmental Groups' application

30. The Divisional Court dismissed the Environmental Groups' application for judicial review by order dated May 28, 2015.[36]

31. The Court held that the Exemption Regulation was consistent with the purpose of the *ESA*. In reaching this conclusion, the Court rejected the Environmental Groups' position that the overarching purpose of the *ESA* is the protection and recovery of species at risk. While the Court never established the purpose of the Act, it held that the Act calls for balancing species' needs against the economic interests of industries whose activities harm species.[37]

32. The Court accepted that the Minister's Determination under s. 57(1) was a condition precedent to Cabinet's making of the Exemption Regulation.[38] However the Court held that it could not review the correctness or reasonableness of the Minister's Determination.[39] Rather, the Court believed that it was limited to reviewing whether the condition precedent was "met". According to the Court, the condition was met.[40]

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[33] Table of Endangered and Threatened Species [MR Vol 5, Tab 15, pp 1475].
[34] O Reg 176/13, s 16 [MR Vol 1, Tab 5, p 83]. See also Schultz Affidavit at para 56 [MR Vol 3, Tab 7, p 622].
[35] See para 6 above.
[36] Order of the Divisional Court dated May 28, 2015 [MR Vol 1, Tab 2, p 9].
[37] Reasons for Judgment of Lederer J. at paras 49-53 [MR Vol 1, Tab 3, pp 31-33].
[38] *Ibid* at paras 35-36 [MR Vol 1, Tab 3, pp 27-28].
[39] *Ibid* at para 37 [MR Vol 1, Tab 3, p 28].
[40] *Ibid* at para 36 [MR Vol 1, Tab 3, p 28].

PART III - QUESTIONS TO BE ANSWERED ON APPEAL

33. The questions proposed to be answered on appeal are:

    1. Is the *ESA*'s overarching purpose the protection and recovery of species at risk? Does the *ESA* have other purposes, for example the promotion of economic interests or industrial development that the legislature chose not to express when it enacted the Act's purpose provision in s. 1?

    2. Is a ministerial statutory decision, where it functions as a condition precedent to subordinate legislation, shielded from judicial review?

    3. Did the Minister's determination here satisfy his duty under s. 57(1), such that he lawfully assumed jurisdiction to recommend the Exemption Regulation to Cabinet?

34. The Environmental Groups first address how this proposed appeal will resolve environmental and administrative law issues of public importance.

35. The Environmental Groups then address Questions 2 and 3 above. These two questions are addressed first for chronological reasons. They both address the lawfulness of the Minister's Determination under s. 57(1). Importantly, that statutory decision is separate from, and a *precondition* to, the making of the Exemption Regulation by Cabinet.

36. Finally, the Environmental Groups address Question 1. They submit that, had the Court below correctly determined the overarching purpose of the *ESA*, it would have held that the Exemption Regulation is inconsistent with that purpose. For clarity, while not pleaded with precision in the Notice of Motion, the Environmental Groups propose that, on any appeal for which leave may be granted, this Honourable Court should ask whether the Exemption Regulation is inconsistent with the purpose of the *ESA* and thus *ultra vires*.

PART IV - ISSUES AND THE LAW

I. PUBLIC IMPORTANCE

37. The Environmental Groups submit that the proposed appeal will contribute to the development of Ontario's jurisprudence and resolve questions of broad public importance.[41] It is noted that Divisional Court did not act in an appellate capacity, but as a court of original jurisdiction assessing the *vires* of the Exemption Regulation at first instance.[42]

38. The Exemption Regulation exempts major industrial activities known to harm species and their habitats from complying with the Act's core prohibitions. Persons conducting these activities may now kill species and destroy their habitats, subject only to a largely self-monitored requirement to minimize species death and habitat destruction. Thus the government has taken a legislated regime intended to create a "presumption of protection" and replaced it with a regulatory regime that operates from a presumption of permission.

39. No regulation can be made by Cabinet under s. 55(1) unless the statutory condition precedent in s. 57(1) is satisfied by the Minister. Whether the Minister performed this mandatory duty depends on the interpretation of s. 57(1), a novel question for this Court.

40. The Exemption Regulation is controversial and concerning. Indeed, over 10,000 Ontarians submitted comments on the regulation proposal. The Environmental Commissioner of Ontario expressed serious concerns as well. The Environmental Groups submit that the Exemption Regulation frustrates the Legislature's intent in enacting the *ESA*. Without the *ESA*'s protections, Ontario's endangered and threatened species will not survive or recover.

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[41] *Re Sault Dock Co Ltd and City of Sault Ste Marie*, [1973] 2 OR 479 (Ont CA) [BOA at Tab 22].
[42] *Re United Glass & Ceramic Workers of North America (AFL-CIO-CLC), Local 246 and Dominion Glass Co Ltd et al*, [1973] 2 OR 763 (Ont CA) [BOA at Tab 23].

A. The *ESA* is aimed at protecting Ontario's most vulnerable species

41. The *ESA* is Ontario's only statute aimed at protecting species at risk. It was enacted in 2007 and came into force on June 30, 2008.

42. The Legislature enacted the legislation because it recognized that a stronger, more effective approach was needed to protect species in Ontario. The *ESA* was designed to arrest and reverse the alarming rate of species decline and extinction seen around the world.[43]

43. Sadly, in the years since, Ontario's at-risk species have continued to decline.[44]

44. This Honourable Court has never interpreted the *ESA*. This proposed appeal provides an opportunity to consider, and to improve government implementation of, an environmental law that serves as the "last line of defence"[45] for Ontario's most imperilled species.

B. The proposed appeal is needed to restore integrity and coherence to the *ESA*'s statutory scheme and purpose

45. The Exemption Regulation and the Divisional Court's decision below threaten the integrity and coherence of the *ESA*. They do so, in particular, by misconstruing the Act's purpose.

46. In short, the *ESA* is about putting species first. The Act's purposes are legislated at s.1. Importantly, the overarching purpose of the *ESA* is to protect species at risk and their habitats, and to promote these species' recovery.[46]

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[43] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 38th Parl, 2nd Sess, No 143, (28 March 2007) at 7499 (Hon David Ramsay, Minister of Natural Resources) [BOA at Tab 13].
[44] Ontario Biodiversity Council, *State of Ontario's Biodiversity 2015: Summary*, (Peterborough, 2015) at 3, 6 [BOA at Tab 12].
[45] ECO Report "The Last Line of Defence", February 2009, referred to in Baggio Affidavit, para 67 and Ex CC [MR Vol 2, Tab 6, p 197, Tab 6CC, p 432].
[46] The first legislated purpose of the Act, at s. 1.1, is to identify species at risk based on the best available scientific information; this applies to the Act's listing provisions at ss. 3-7. The third legislated purpose of the Act, at s. 1.3, is to promote stewardship activities; this applies to the Act's stewardship provisions at ss. 16 and 47-48. The second legislated purpose of the Act, at s. 1.2, is the overarching purpose applying to every operative provision in the Act.

47. Because the purpose of the *ESA* informs every other provision in the Act, it deserves to be clearly determined by this Honourable Court. The purpose guides the actions of all public officials charged with implementing the *ESA*, not just the Minister or Cabinet. This Honourable Court should hear the proposed appeal in order to determine the *ESA*'s purpose.

48. To determine whether the Exemption Regulation is inconsistent with the *ESA*'s objects and purposes, it is necessary first to determine or establish the Act's purpose.[47] Troublingly, the Divisional Court failed to do this critical first step in the analysis.

49. To the extent that the Court did analyze the *ESA*'s purpose, it undermined the Legislature's intent. For example, the Court entirely ignored the Act's legislated purpose provision, in s.1, when analyzing the Act's purpose. It also declined to rely on legislative history.[48]

50. Instead, the Court's decision sanctions the balancing of species' needs against the economic interests of industries that harm species at risk. This reads in a purpose that the Legislature debated but then did not include in the Act.[49]

51. In this respect, the *ESA*'s purpose contrasts sharply with the purposes of Ontario's resource management statutes.[50] These statutes seek to balance society's often competing interests in the economic uses of natural resources – wood, water, minerals, fish and game – with their

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[47] *Katz Group Canada Inc v Ontario (Health and Long -Term Care)*, 2013 SCC 64 ("*Katz*") at para 30 [BOA at Tab 18].

[48] Reasons for Judgment of Lederer J. at para 47 [MR Vol 1, Tab 3, p 31].

[49] During the legislative debates on Bill 184, then-MPP David Orazietti specifically queried the ESA's ability to promote economic interests as well as protect and recover species at risk. His interpretation was challenged by a representative of one of the Environmental Groups. Two days later, the Committee's only amendment to the Act's purpose provision in section 1, at Mr. Orazietti's motion, was the addition of a paragraph on the "promotion of stewardship activities." See Ontario, Legislative Assembly, Official Report of Debates (Hansard): Standing Committee on General Government, 38th Parl, 2nd Sess, No 169, (7 May 2007) at G-1139; Ontario, Legislative Assembly, Official Report of Debates (Hansard): Standing Committee on General Government, 38th Parl, 2nd Sess, No 171, (9 May 2007) at G-1147 [BOA at Tabs 15 and 16].

[50] See para 99 below.

conservation. The *ESA* shares more in common with social welfare legislation aimed at protecting vulnerable persons than it does with resource management laws. Yet the Divisional Court's analysis places it among the latter.

52. The Divisional Court's analysis of the *ESA*'s purpose also stands in stark contrast to the approaches of other courts. In the United States, the *Endangered Species Act* has afforded endangered species "the highest of priorities" ever since the seminal 1978 Supreme Court decision in *Tennessee Valley Authority v Hill*.[51] In *Guelph (City) v Soltys*,[52] the Ontario Superior Court looked to the *ESA*'s purpose provision as an indicator of the importance the legislature ascribed to the Act's policy goals.

53. Many of the species listed as endangered or threatened under the *ESA* are transboundary species, with habitat straddling political jurisdictions; or are migratory species that only reside in Ontario for a time before moving on to other jurisdictions. By weakening legal protections under the *ESA* for these species in Ontario, the Exemption Regulation undermines the efficacy of neighbouring jurisdictions' efforts to protect these species.[53]

54. The Environmental Groups submit that this Honourable Court should hear the proposed appeal and should properly establish the *ESA*'s overarching purpose as the protection and recovery of species at risk. This will provide much needed guidance to all public officials charged with implementing the *ESA*, now and in the future.

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[51] *Tennessee Valley Authority v Hill*, 437 US 153 (USSC 1978), at pp 20-21 [BOA at Tab 27].
[52] *Guelph (City) v Soltys* (2009), 45 CELR (3d) 26 (Ont Sup Ct) [BOA at Tab 10].
[53] The Federal Courts have appreciated the interdependent nature of species protection legislation in neighbouring jurisdictions. See *Centre Québécois Du Droit De L'environnement et Nature Québec c Le Ministère De L'environnement*, 2015 CF 773 ("*Western Chorus Frogs*") [BOA at Tab 6].

C. The proposed appeal will address an important administrative law issue left unresolved by the Supreme Court of Canada in *Dunsmuir* and *Katz*

55. Section 57(1) requires the Minister to assess whether a proposed regulation is likely to jeopardize the survival in Ontario of, or have any other significant adverse effect on, an endangered or threatened species to which it applies.

56. A ministerial determination under s. 57(1) is properly characterized in two ways. Firstly, it is akin to any other administrative decision governed by statute, and is a decision made pursuant to "a statutory power of decision."[54] Second, it is a decision that also serves as a statutory condition precedent to possible, future subordinate legislation.

57. Despite this, and at the Respondents' insistence that the Minister's Determination was not subject to review, the Divisional Court held, at paragraph 37, that decisions under s. 57(1) are not reviewable under either a correctness or reasonableness standard of review.

58. Therefore, the question arises: what approach or framework should courts use when they are judicially reviewing the performance of statutory duties serving as conditions precedent to a statutory decision-maker recommending, or Cabinet making, subordinate legislation?

59. It is trite that failure to perform a statutory precondition is a fatal jurisdictional defect going to a regulation's validity.[55] Yet the decisions confirming this truism do not themselves give instruction on how to review whether a condition precedent was lawfully performed.

60. In *Dunsmuir v New Brunswick*, the Supreme Court confirmed a long-standing trend in modern administrative law – namely that, to maintain the principle of the rule of law, *all*

[54] *Judicial Review Procedure Act*, RSO 1990, c J.1, s 1.
[55] *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106 at 111 ("*Thorne's Hardware*") [BOA at Tab 28]. See also this Court's decision in *Apotex Inc. v Ontario (Office of the Lieutenant Governor)*, 2007 ONCA 570 at paras 32-34 [BOA at Tab 3]

administrative decisions made under statute are subject to judicial review.[56] The main innovation in *Dunsmuir* was that courts would now only apply two standards of review: correctness or reasonableness.

61. On the other hand, in *Katz Group Canada Ltd v Ontario*, the Supreme Court excluded one type of decision from standard of review analysis – namely, the exercise of regulation-making powers. The Supreme Court instead rearticulated various existing common law criteria unique to reviewing regulations.[57]

62. Thus, these two decisions leave open the question of *how* judges should review compliance with a statutory condition precedent. Must courts apply the *Dunsmuir* analysis to determine by what standard they should review performance of a statutory precondition? By what alternate standard would courts review whether a decision maker had "met" a mandatory statutory precondition? Are decision makers relieved from applying the correct legal test in making such decisions? Currently these questions cannot be answered with any confidence.

63. It is of broad importance to public administration in Ontario that this question be resolved. Many laws found in Ontario's statute book create analogous statutory preconditions to the recommendation or making of subordinate legislation, in diverse areas such as securities regulation,[58] occupational health and safety,[59] fire protection services,[60] and privacy rights in health care.[61] Applying the logic of the Divisional Court, decision-makers' compliance with these many, varied statutory preconditions is effectively shielded from judicial review.

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[56] *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at paras 27-31 [BOA at Tab 8]
[57] *Katz, supra* note 47 at paras 24-28 [BOA at Tab 18]
[58] *Securities Act,* RSO 1990, c S.5, ss 2.2(3),(9) and (16)
[59] *Occupational Health and Safety Act,* RSO 1990, c O.1, ss 22.4
[60] *Fire Protection and Prevention Act, 1997*, SO 1997, c 4, s 2(8), (9)
[61] *Quality of Care Information Protection Act, 2004*, SO 2004, c 3, Sch B, ss 9, 10

64. The Divisional Court held it could not review the correctness or reasonableness of the Minister's Determination as this would conflict with the Supreme Court's holding in *Katz* that courts must not review whether regulations are "necessary, wise, or effective in practice".[62] Thus the Court conflated the Minister's Determination with Cabinet's Exemption Regulation, treating the former as part and parcel of the latter. Notably, on this point, the Court's reasons are internally inconsistent. The Court had observed earlier in its reasons that a "challenge to the *vires* ... of the Lieutenant Governor in Council in making a regulation stands apart from the review of an administrative decision."[63]

65. It appears incorrect in law and principle to shield from judicial scrutiny administrative decisions, like those under s. 57(1) of the *ESA*, that confer on Cabinet the power to legislate. Yet in the wake of *Dunsmuir* and *Katz*, this question is unresolved in Ontario. No other appellate court appears to have considered it.[64] It is submitted that this Court should.

D. The proposed appeal will ensure greater consistency with the Federal Courts' approach to judicial review under endangered species laws

66. The proposed appeal would allow this Court to assess if Ontario's species at risk are entitled to the same level of judicial oversight of executive action as they receive in the Federal Courts. Under the *Species at Risk Act* ("SARA"),[65] the Federal Courts take a different approach to reviewing ministerial decisions that constitute subordinate legislation, or that serve as statutory preconditions to subordinate legislation.

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[62] Reasons for Judgment of Lederer J. at para 37 [MR Vol 1, Tab 3, p 28]
[63] *Ibid* at para 27 [MR Vol 1, Tab 3, p 24]
[64] Some superior courts have rejected governments' efforts to limit judicial review of conditions precedent, and applied a standard of review analysis (whether under *Dunsmuir* or the predecessor "pragmatic and functional approach"). See e.g. *Alberta Teachers' Association v Alberta,* 2002 ABQB 240 at paras 17-18 [BOA at Tab 1]
[65] SC 2002, c 29.

67. In Federal Court litigation involving Resident Killer Whales, the federal government argued that a Critical Habitat Protection Order, made by two ministers under s. 58(4) of the SARA, was not justiciable as it was a statutory enactment. The Court firmly rejected that position.[66]

68. The Federal Courts have likewise not hesitated to review government action under s. 80 of the SARA. Much like s. 57 of the *ESA*, s. 80 requires a minister to reach an opinion about whether a species faces imminent threats to its survival or recovery [s. 80(1)]. If he reaches the opinion that a species faces such threats, he is obliged to recommend an emergency order to the Governor in Council [s. 80(2)]. In a 2013 decision regarding the Greater Sage Grouse, Canada argued that whether the Minister had reached this opinion or made a recommendation could not be disclosed as it was part and parcel of one "Cabinet decision making process". The Court of Appeal held this would impermissibly shelter ministerial determinations under s. 80(2) from judicial review, and that such decisions were reviewable on a reasonableness standard.[67] In proceedings regarding Woodland Caribou and Western Chorus frogs, the Federal Court held that ministers had acted unreasonably under s. 80(2).[68]

II. BRIEF OVERVIEW OF THE *ESA*

69. The *ESA* is a complete scheme for the protection and recovery of species at risk.

70. Section 1 of the *ESA* provides the Act's purposes as follows:

> 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.

[66] *David Suzuki Foundation v Canada*, 2010 FC 1233 at paras 156-235 [BOA at Tab 7].
[67] *Alberta Wilderness Assn v Canada (Attorney General),* 2013 FCA 190 at paras 43-49 [BOA at Tab 2]
[68] *Athabasca Chipewyan First Nation v Canada (Minister of the Environment)*, 2011 FC 962, 62 CELR (3d) 218 ("*Caribou*") [BOA at Tab 4]; *Western Chorus Frogs* [BOA at Tab 6].

> 3. To promote stewardship activities to assist in the protection and recovery of species that are at risk. (emphasis added)[69]

71. Species are identified and classified as endangered or threatened through a science-based process. The Committee on the Status of Species at Risk in Ontario ("COSSARO"), an independent body of expert scientists, periodically reviews the status of species.[70] If COSSARO classifies a species as endangered or threatened,[71] the Minister's delegate must add that species to the Species at Risk in Ontario List, a process known as listing.[72]

72. Listing triggers automatic protections and the Minister's obligation to develop recovery strategies for each individual listed species.[73] The *ESA*'s prohibitions on killing endangered or threatened species, and destroying their habitats,[74] form the core of the Act. It is an offence to violate the prohibitions.[75] The Act provides substantial enforcement powers to those charged with upholding it.[76]

73. The Legislature built a few narrow exceptions into the Act's general scheme prioritizing the protection and recovery of species. The Minister has narrow authority to issue permits[77] or instruments[78] authorizing violations of the prohibitions, where stringent conditions are satisfied. Cabinet has power to make regulations prescribing exemptions from the Act's

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[69] See explanation of how these purposes apply to the Act at note 46 above.
[70] *ESA*, ss 3-6.
[71] Species can also be classified as "extinct," "extirpated" or "special concern species".
[72] *ESA*, s 7; O Reg 230/08.
[73] *ESA* ss 9(1), 10(1), 11(1).
[74] As noted above at para 25, the extension of the *ESA*'s habitat protection to all endangered and threatened species was scheduled to begin on July 1, 2013, the same day the Exemption Regulation largely came into force.
[75] *ESA*, s 36.
[76] *Ibid* at ss 21-35.
[77] *Ibid* at s 17. The Act also provides for specific permits for Aboriginal persons in s 19.
[78] *Ibid* at s 18.

prohibitions.[79] However this authority is subject to the Minister's duties under s. 57(1) and, where applicable, s. 57(2).

III. PROPOSED APPEAL QUESTIONS 2 AND 3: THE MINISTER'S DETERMINATION

74. The Minister recommended the Exemption Regulation to Cabinet without having lawfully performed his duty under s. 57(1). Failure to comply with a condition precedent in the enabling statute is, in the words of *Thorne's Hardware*, a "fatal jurisdictional defect". Consequently, the Exemption Regulation is *ultra vires.*[80]

A. The Minister's Determination is reviewable and must use the correct legal test

75. The Environmental Groups submit that the Minister's Determination is justiciable. It should be examined under either a correctness or reasonableness standard of review. Regardless of which standard is used, the Minister's Determination cannot survive judicial scrutiny.

76. Regardless of which standard is adopted, the Minister must still apply the correct legal test in reaching his opinion under s. 57(1). Support for this proposition arises from the Supreme Court's decision in *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*.[81] At issue were, *inter alia*, the scope of the Minister of Public Works' discretion to reach an opinion determining a "property value"; and the standard of review applicable to that determination.[82] The Court held that, while the Minister of Public Works clearly has discretion in reaching an opinion about the property value, in doing so he

[79] *ESA*, s 55(1)(b).
[80] *Thorne's Hardware*, *supra* note 55 at p 111 [BOA at Tab 28]; *Katz*, *supra* note 47 at paras 27-28 [BOA at Tab 18].
[81] *Halifax (Municipality) v Canada (Public Works and Government Services),* 2012 SCC 29 ("*Halifax*") [BOA at Tab 11].
[82] *Ibid* at para 37.

"must comply with the requirements of the Act". His exercise of discretion is reviewed for reasonableness only if he applies "the correct legal test".[83]

77. As explained below, the correct legal test under s. 57(1) is whether a proposed regulation is likely to jeopardize ***each individual species*** to which it would apply. Only if the Minister asks the correct question, can his ensuing opinion then attract any deference.[84] The Minister did not do so here. In the alternative, even if he is said to have asked the correct question, the Minister's answer is unreasonable. The Minister's Determination is unjustified, non-transparent and unintelligible.[85] For example, it is entirely impossible to discern *why* the Minister may have concluded that the Blanding's Turtle would not likely be jeopardized by the proposed regulatory exemptions, or *why* the American Eel would not likely suffer any other significant adverse effects.

B. The correct legal test under s. 57(1) requires the Minister to reach an opinion on <u>each</u> individual species to which a proposed regulation would apply

78. Section 57(1) sets out the legal test for the Minister:

> **57(1)** If a proposal for a regulation under subsection 55 (1) is under consideration in the Ministry, the proposed regulation would apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, and either or both of the following criteria apply, the Minister shall consult with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation on the species:
>
> 1. In the case of any proposed regulation under subsection 55(1), the Minister is of the opinion that the regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species.[86]

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[83] *Ibid* at paras 40-43.
[84] *Ibid* at para 43 [BOA at Tab 11].
[85] *Dunsmuir*, supra note 56 at paras 62-64 [BOA at Tab 8]. See also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 15-17 [BOA at Tab 19].
[86] The second criterion mentioned in s. 57(1) is not relevant. It only applies to regulations made under s. 55(1)(a), whereas the Exemption Regulation was made under s. 55(1)(b).

79. A Ministerial opinion that a proposed regulation *is* likely to jeopardize a species' survival, or have any other significant adverse effect, triggers additional duties under s. 57(2).

80. The Environmental Groups submit that the correct legal test under s. 57(1) is whether a proposed regulation is likely to jeopardize ***each individual species*** to which it would apply. The Minister acts unlawfully if he assesses only whether a regulation will jeopardize ***a few species*** to which it would apply. Likewise, he acts unlawfully if he assesses whether a regulation is likely to jeopardize a ***collective group of species*** or ***all species overall*** – without ever turning his mind to any impacts on any individual species.

81. The modern approach to statutory interpretation requires that s. 57(1) must be construed in light of the provision's text, the broader context and scheme, and the Act's purpose.[87]

82. The Divisional Court declined to apply the modern approach to statutory interpretation when interpreting s. 57(1). It considered only the provision's text, without regard to the Act's scheme or purpose. Moreover, the Court misconstrued the text, by failing to recognize its grammatical imperatives.

i. Subsection 57(1) must be interpreted according to the grammatical meaning of its text

83. The text of s. 57(1) provides that if the MNR is considering a proposal for a regulation that "would apply to **a species**" listed as endangered or threatened, then the Minister must reach an opinion on whether the regulation "is likely to jeopardize the survival of **the species**". As a matter of English grammar and syntax, this definite article refers back to a noun already

[87] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 ("*Rizzo Shoes*") at para 21 [BOA at Tab 24].

identifiable to the reader—namely, the single listed species already identified. Indeed the same syntactic structure is employed in the French version of s. 57(1).[88]

84. In *Pastore v Aviva Canada Inc*,[89] this Court addressed the meaning of "a" in s. 2(1.1)(g) of the Statutory Accident Benefits Schedule ("SABS") under the *Insurance Act*. In overturning the Divisional Court, this Court held that the tribunal at first instance had reasonably construed the meaning of "a" in this context. The tribunal had held that "a" referred to "any or one single marked or extreme impairment out of the four areas of functioning" – and that it did not refer to an "overall" impairment, across the board, in all four functions.[90]

85. Despite being overturned in *Pastore*, in his reasons for the Court here, Lederer J. construed "a species" in s. 57(1) as effectively meaning ***species overall and across the board***.[91] He held that "[t]here is nothing that says that the Minister has to examine the impact on each species to which the regulation would apply separately or independently of the others".

86. Indeed, as found as a fact by the Divisional Court, the Minister's Determination did not give any "independent" or "separate" consideration to the individual species that would be affected by the proposed regulation.[92] Rather, the Court found that the Minister considered whether the proposed regulatory exemptions, including their conditions, were likely to jeopardize "any" of the affected species.[93] Thus, the Court's interpretative errors are not academic or hypothetical – they go directly to the *vires* of the Exemption Regulation.

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[88] Specifically, where "le règlement proposé s'appliquerait à ***une espèce***," the Minister must then assess the effects of the proposed regulation on "***l'espèce***."
[89] *Pastore v Aviva Canada Inc.,* 2012 ONCA 642 [BOA at Tab 20].
[90] *Ibid* at paras 39-43.
[91] It should be noted that the Reasons for Judgment never actually analyze the phrase "a species" in s. 57(1). Subsection 57(1) is introduced in paragraph 7. However, the Court misquotes it as saying "the species to which it would apply". The actual words of s. 57(1) are "the proposed regulation would apply to a species".
[92] Reasons for Judgment of Lederer J. at para 35 [MR Vol 1, Tab 3, pp 27-28].
[93] *Ibid* at paras 34-35 [MR Vol 1, Tab 3, pp 27-28].

87. Analogous errors caused the Alberta Court of Queen's Bench to overturn an Order in Council that ordered Alberta's striking teachers back to work. Under Alberta's *Labour Relations Code*, Cabinet may only make such an order if, in its opinion, "an emergency arising out of a dispute exists or may occur in such circumstances that…unreasonable hardship is being caused". Chief Justice Wachowich held that the Cabinet had failed to consider each dispute, in each of the 22 separate school districts covered by the Order, on a separate and individual basis. Each dispute had its own issues – some school boards had a surplus of money and some were in deficit, some teachers were locked out and some were not – yet the Cabinet had treated them all the same, considering hardship generally across Alberta. A "blanket" opinion for all districts, that failed to consider whether each district was suffering hardship, was held to be especially objectionable when its effect was to eradicate a statutory right to strike for all districts.[94] The Environmental Groups submit that it is equally objectionable to reach a blanket opinion on jeopardy covering all affected species, when the effect is to eradicate those species' statutory right not to be killed.

ii. Subsection 57(1) must be interpreted consistently with the *ESA*'s scheme

88. With respect to the broader context and scheme of the *ESA*, the Legislature has employed the same syntactic pattern found in s. 57(1) in many other provisions throughout the Act. These provisions first mention "a species" and then refer back to it as "the species."[95]

89. In *Sierra Club*, the Divisional Court reviewed a permitting decision under s. 17, which uses this same pattern of expression. For the Court, Lederer J. observed that the Minister must

[94] *Alberta Teachers' Association v Alberta*, 2002 ABQB 240 at paras 4-6 and 35-48 [BOA at Tab 1].
[95] *ESA*, ss. 9(6), 10(1)(b), 11, 17, 18, 28(1) and 56(1). Again, this is true of both the English and French versions.

apply s. 17 to *each* species to which a s. 17 permit would apply.[96] That holding is irreconcilable with the case at bar.

90. By giving the same words different meanings in different decisions, the Court takes a result-oriented approach that will wreak havoc on the Act's implementation. Faced with divided authority, how will the MNR know whether to apply the *ESA* provisions containing this pattern of expression to "an individual species" or to "a collective group of species without differentiation"? To resolve the confusion, this Court should grant leave to appeal.

iii. Subsection 57(1) must be interpreted consistently with the *ESA*'s purpose

91. The overarching purpose of the *ESA* demands that the Minister, in performing his duties under s. 57(1), assess a proposed regulation's adverse effects on each individual species. Ministers must always exercise their statutory powers in a manner consistent with the purpose of the statute conferring those powers.[97] The Act's overarching purpose of protecting and recovering species would be undermined if the Minister could simply do a blanket assessment of a regulation's impacts on "species overall" without considering each individual species affected. Not all species face the same conservation threats, and not all species have the same recovery needs. It is self-evident that one cannot protect a species from threats left unidentified; one cannot recover a species if its needs are ignored. The *ESA* must be interpreted as being remedial,[98] and s. 57(1) is no exception to this rule.

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[96] *Sierra Club Canada v Ontario (Natural Resources & Transportation),* 2011 ONSC 4655 at para 23 [BOA at Tab 26].
[97] See e.g. *Halifax, supra* note 81 at paras 47, 55-56 [BOA at Tab 11].
[98] *Rizzo Shoes, supra* note 87 at para 22 [BOA at Tab 24].

IV. PROPOSED APPEAL QUESTION 1: THE REGULATION'S INCONSISTENCY WITH THE PURPOSE OF THE *ESA*

A. The Divisional Court failed to perform the first step of the analysis – determining the *ESA*'s purpose

92. The Environmental Groups argued before the Divisional Court that the Exemption Regulation is *ultra vires* the *ESA* for being inconsistent with the Act's objects and purposes. The Divisional Court erred in deciding this ground without conducting the correct analysis as set out by the Supreme Court of Canada in *Katz*.

93. Specifically, the Supreme Court held in *Katz* that the first step of the analysis is determining the purpose of the enabling statute – there, the *Drug Interchangeability and Dispensing Fee Act*,[99] and the *Ontario Drug Benefit Act*.[100] The Court looked to statements made by the Minister of Health when introducing the bills in the legislature as evidence of legislative intent. The Court held that the "overarching purpose of the statutory scheme" created by the Acts was to control prescription drug costs without compromising safety.[101] With this determination made, the Court then set about determining the purpose of the impugned regulations and assessing whether they were consistent with the Acts' purpose.[102]

94. The Divisional Court's analysis fails at this crucial first step – the Court never established the overarching purpose of the *ESA*.

[99] RSO 1990, c P.23.
[100] RSO 1990, c O.10.
[101] *Katz*, *supra* note 47 at paras 30-33 [BOA at Tab 18].
[102] *Ibid* at paras 34-42.

B. To the extent the Divisional Court analyzed the *ESA*'s purpose, it misconstrued that purpose

95. A correct interpretive approach reveals that the *ESA*'s overarching purpose is the protection and recovery of species at risk.

96. In its analysis, at paragraphs 47-53, the Court ignored the *ESA*'s legislated purpose provision in section 1. As noted earlier, this provision speaks to three purposes.[103] There is no mention of social or economic interests in the purpose provision. To the contrary, the legislature debated but did not include such language in s. 1.[104]

97. The Court also rejected as "not helpful"[105] statements made by then-Minister of Natural Resources, David Ramsay, when describing the proposed *ESA* to the Legislature in 2007. Minister Ramsay expressed the government's concern about the alarming rate of global species loss. He also stressed the fundamental change that automatic protection for species and their habitats would bring – namely, a "presumption of protection" for species.[106]

98. Professor Sullivan describes both statutory purpose provisions and legislative history as "authoritative sources" of legislative purpose.[107] Statutory purpose provisions are "[t]he most direct and authoritative evidence of legislative purpose,"[108] while the statements of Ministers sponsoring bills in the legislature are "direct evidence of purpose" and "the type of legislative history most often relied on by courts."[109]

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[103] See explanation of how these purposes apply to the Act at footnote 46 above.
[104] *Hansard*, *supra* note 49 [BOA at Tab 15]; *Hansard, supra* note 49 [BOA at Tab 16].
[105] Reasons for Judgment of Lederer J. at para 47 [MR Vol 1, Tab 3, p 31]
[106] *Hansard, supra,* note 8 [BOA at Tab 14].
[107] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008), at 269 [BOA at Tab 25].
[108] *Ibid* at 270.
[109] *Ibid* at 609.

99. By ignoring the *ESA*'s purpose provision, and rejecting legislative history as "not helpful," the Divisional Court refused to consider authoritative sources of legislative purpose. Instead the Court substituted its own purpose for the *ESA* by placing far too much weight on isolated language in a few narrowly confined provisions.

100. The Court seized on a single phrase in the Act's non-binding preamble.[110] The *ESA*'s preamble recites the importance of biodiversity, the alarming rate of species loss, the utility of the precautionary principle, and Ontario's resolve to protect species at risk. However the Court locked onto one phrase about giving "appropriate regard to social, economic and cultural considerations" to support its belief that the *ESA* balances species' needs against social and economic interests. The Court went so far as to call this isolated statement in the non-binding preamble an "injunction."[111] Unfortunately, Lederer J. has used these preambular words before to support his belief that the *ESA* is about balancing species' needs with social and economic interests.[112]

101. The Court also placed undue weight on several narrowly confined provisions in the *ESA*. The Court turned these exceptions into the rule, implying an overarching purpose for the *ESA* that is implausible given the Act's purpose provision, scheme, and legislative history. For example, the Court noted the Minister's ability to consider significant social or economic benefits to Ontario when issuing one type of permit. This consideration is strictly limited to this type of permit and, even there, the Minister must consider reasonable

[110] Reasons for Judgment of Lederer J. at paras 47-49 [MR Vol 1, Tab 3, pp 31-32].
[111] *Ibid* at para 49 [MR Vol 1, Tab 3, pp 31-32].
[112] *Sierra Club*, *supra* note 96 at para 54 [BOA at Tab 26].

alternatives, consult with a species-specific expert, and opine that the permit will not jeopardize the relevant species' survival in Ontario.[113]

102. Finally, the Court repeatedly mischaracterized the Environmental Groups' position, suggesting they had argued that the protection and recovery of species at risk was the Act's *sole* or *only* or *single* purpose.[114] That has never been their position. That position would be nonsensical – as the Legislature decided to expressly legislate *three* purposes.[115]

103. The *ESA*'s purpose provision contrasts with those found in resource management statutes such as the *Ontario Water Resources Act*,[116] the *Lakes and Rivers Improvement Act*,[117] the *Aggregate Resources Act*,[118] the *Mining Act*,[119] or the *Crown Forest Sustainability Act, 1994*.[120] These laws balance the economic uses of natural resources with their conservation.

C. The Exemption Regulation is inconsistent with the purpose of the *ESA*

104. The second step of the analysis requires a court to determine the purpose of the impugned regulation and assess its consistency with the objects and purposes of its enabling statute.[121]

105. The Divisional Court failed to determine the purpose of the Exemption Regulation. The Court erred by not applying a purposive approach to interpreting Cabinet's authority to make exemption regulations under s. 55(1)(b), as set out by this Court.[122] To the extent the

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[113] *ESA*, s 17(2)(d).
[114] Reasons for Judgment of Lederer J. at paras 39, 45 and 47 [MR Vol 1, Tab 3, pp 28-31].
[115] None of the three legislated purposes are mentioned in the Divisional Court's analyses of either of the grounds of review; see Reasons for Judgment of Lederer J. at paras 34-37 and 47-53 [MR Vol 1, Tab 3, pp 27-28, 31-33].
[116] RSO 1990, c O.40, s 0.1.
[117] RSO 1990, c L.3, s 2.
[118] RSO 1990, c A.8 s 2.
[119] RSO 1990, c M.14, s 2.
[120] SO 1994, c 25, s 1.
[121] *Katz*, *supra* note 47 at paras 34-42 [BOA at Tab 18].
[122] *Wawanesa Mutual Insurance Company v Axa Insurance (Canada)*, 2012 ONCA 592, 112 OR (3d) 354, at paras 33-35 [BOA Tab 29].

Court interpreted Cabinet's authority, its interpretation disregarded the entire context in which Cabinet's regulation-making authority is found and produced a result that is not just and reasonable, in that it does not advance the overarching purpose of the *ESA*.[123]

106. Had the Court employed a correct approach, it would have held the purpose of the Exemption Regulation is to balance off the protection and recovery of species at risk with a host of social and economic interests. These interests, ranging from providing certainty and fairness to proponents,[124] to reducing administrative burden,[125] to promoting the economics of industries that harm species at risk,[126] were discussed at various points by the Court but never identified as the purpose of the Exemption Regulation. The Exemption Regulation privileges these social and economic interests over the *ESA*'s purpose. It requires exempt activities only "minimize" the number of species they kill, or habitats they destroy.[127]

107. Given its purpose, the Exemption Regulation is an "egregious case"[128] of subordinate legislation inconsistent with the objects and purposes of its enabling statute. Through its sweeping nature the Exemption Regulation does violence to its statutory scheme.[129] Previous cases involved regulations or orders-in-council aimed at an isolated problem: the extension of a single harbour boundary;[130] the closure of a single hospital;[131] the curtailment of a particular business practice of large retail pharmacies.[132] However, in its effect the

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[123] *Bapoo v Co-operators General Insurance Co* (1997), 36 OR (3d) 616 (Ont CA), at para 8 [BOA at Tab 5].
[124] Reasons for Judgment of Lederer J. at para 9 [MR Vol 1, Tab 3, pp 15-16].
[125] *Ibid.*
[126] *Ibid* at para 51.
[127] Minimization of harm is the protection standard found in most of the exemptions in the Exemption Regulation. The Divisional Court accepted this point: see Reasons for Judgment of Lederer J. at paras 22-23 [MR Vol 1, Tab 3, pp 22-23].
[128] *Katz*, *supra* note 47 at para 28, quoting *Thorne's Hardware*, *supra* note 55.
[129] See Table of Endangered and Threatened Species, [MR Vol 5, Tab 15].
[130] *Thorne's Hardware*, *supra* note 55.
[131] *Re Doctors Hospital v Minister of Health* (1976), 12 OR (2d) 164 (HCJ - Div Ct) [BOA Tab 21].
[132] *Katz*, *supra* note 47.

Exemption Regulation removes the core protections of the *ESA* for all endangered and threatened species.

108. The Exemption Regulation creates a parallel regime to the *ESA* where industrial activities are presumptively allowed to kill species and destroy their habitats, as long as this harm is "minimized." It does so to protect the interests of industry and government, not species. In purpose and effect, the Exemption Regulation is inconsistent with the purpose of the *ESA.*

109. For these reasons, the Environmental Groups request that leave to appeal be granted.

110. Should leave to appeal be granted, the Environmental Groups request the costs of this motion. Should leave be denied, they request that the Court exercise its discretion to exempt them from adverse costs liability. Wildlands League and Ontario Nature seek to pursue an appeal not out of any personal, pecuniary or proprietary interest. Rather, they are motivated solely by a desire to ensure that this province's most vulnerable non-human species receive the protection that the Legislature intended, for the benefit of all Ontarians.

All of which is respectfully submitted this _____ day of July, 2014 by:

_____ _____

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