1. Wildlands League and Ontario Nature ("the Environmental Groups") make five points in reply to the Respondents' submissions.

A. The *EBR* cases do not decide whether the *Dunsmuir* framework applies to review of ministerial decisions that are also statutory conditions precedent

2. The Respondents concede that whether the *Dunsmuir* framework[1] applies to review of ministerial decisions that are statutory conditions precedent to subordinate legislation would be an issue of public importance, but for two decisions of the Divisional Court.[2]

3. The Respondents mischaracterize the holdings of these two decisions in *Hanna v Ontario* and *Animal Alliance of Canada v Ontario* ("the *EBR* cases").[3] The *EBR* cases are confined to the unique statutory context of the *Environmental Bill of Rights, 1993* ("*EBR*"),[4] do not mention *Dunsmuir*, and do not decide this issue of public importance.

4. The applicants in the *EBR* cases argued that regulations were *ultra vires* because the respondent Ministers failed to consider their ministries' Statements of Environmental Values ("SEVs")[5] before the regulations were made. The *EBR* requires ministers to take

[1] *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*], Environmental Groups' Book of Authorities [BOA], Tab 8. See Environmental Groups' Factum at para 60 for explanation of the *Dunsmuir* framework.
[2] Respondents' Factum, at para 73.
[3] *Hanna v Ontario (Attorney General)*, 2011 ONSC 609 (Div Ct) [*Hanna*], Respondents' BOA, Tab 16; *Animal Alliance v Ontario (Minister of Natural Resources)*, 2014 ONSC 2826 (Div Ct) [*Animal Alliance*], Respondents' BOA, Tab 13.
[4] SO 1993, c 28 [Environmental Groups' Reply Factum, Sch A].
[5] SEVs are statements of, among other things, how the *EBR*'s purposes will be applied and weighed against social, economic and scientific considerations when ministries make decisions that might significantly affect the environment: see *EBR*, s 7.

every reasonable step to ensure their ministries' SEVs are considered when decisions that might significantly affect the environment, including regulations,[6] are made.[7]

5. Importantly, judicial review of a minister's consideration of a SEV is uniquely limited because the *EBR* contains two relevant privative clauses.[8] These privative clauses were the reason that the Divisional Court held, in the *EBR* cases, that judicial review was "therefore quite circumscribed."[9]

6. In contrast to the *EBR* cases, no privative clause exists in the *Endangered Species Act, 2007* ("*ESA*").[10] Nor do privative clauses apply to the examples of analogous preconditions contained in other Ontario statutes given by the Environmental Groups.[11]

7. The Divisional Court declined to rely on or even cite to the *EBR* cases when analyzing the Minister's s. 57(1) determination, despite the Respondents' submission below that they should do so.[12]

8. In specific reply to paragraph 58 of the Respondents' factum, the quote from *Hanna* is also misleading because it quotes paragraphs from separate parts of the Court's decision without ellipses, incorrectly implying that one paragraph flowed directly from the other.

9. Finally, the *EBR* cases do not even mention *Dunsmuir*. It is risible to say that these cases decide the issue of whether the *Dunsmuir* framework governs the review of statutory

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[6] *EBR*, s 3(1).
[7] *Ibid*, s 11.
[8] *EBR*, ss 37, 118.
[9] *Hanna*, *supra* at para 10; applied in *Animal Alliance* at para 26.
[10] SO 2007, c 26.
[11] Environmental Groups' Factum, at para 63.
[12] Respondents' Factum at the Divisional Court, at paras 59-60 [Environmental Groups' Reply Factum, Sch D].

decisions that also serve as conditions precedent to recommending or making subordinate legislation. Properly read, the *EBR* cases do not settle this issue.

B. Ministerial statutory decision-making cannot be shielded from judicial review by erroneously labelling it as "legislative"

10. Troublingly, the Respondents appear to advance a bolder proposition still – that ministerial decisions required by statute as conditions precedent to the recommending or making of subordinate legislation can be shielded from review if labelled "legislative."[13]

11. In reply, a minister's s. 57(1) determination of jeopardy is not "legislative" in nature. Further, the Respondents' proposition runs counter to the Supreme Court's affirmation in *Dunsmuir* that all statutory decision-making is subject to judicial review:

> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.[14] (emphasis added)

12. Therefore, in specific reply to the Respondents' reliance on the Divisional Court's decision in *Huron-Perth Children's Aid Society v Ontario*,[15] to the extent that decision derogates from this rule of law principle, it supports this Honourable Court granting leave. The Court held the Minister's statutory duty to disburse funds according to a

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[13] See for example the subheading to paras 53-66 of the Respondents' Factum: "*(i) In any event, the Minister's Opinion is a statutory precondition not subject to review*"; See also Respondents' Factum at paras 7(b), 57, 59, 65 and 73.

[14] *Dunsmuir*, *supra* at para 28.

[15] *Huron-Perth Children's Aid Society v Ontario (Ministry of Children and Youth Services)*, 2012 ONSC 5388 (Div Ct) [*Huron-Perth*], Respondents' BOA, Tab 18.

regulation was "essentially legislative" and thus not subject to normal judicial review. *Huron-Perth* is controversial and novel, and has not been applied by any court.

C. The Respondents incorrectly characterize the Divisional Court's Reasons regarding s. 57(1)

13. The Respondents attempt to argue that the proposed appeal does not engage the legal interpretation of s. 57(1) of the *ESA*, but merely a "question of fact" about whether the Minister considered whether the proposed regulation would jeopardize each species to which it applied.[16] Further they claim that: "the Divisional Court found as fact that the Minister did assess each [species at risk] against each exemption when determining which species to exclude from the exemptions".[17]

14. In reply, these two submissions are unsupported by the Court's Reasons. The Divisional Court did not agree with the Environmental Groups' interpretation of s. 57(1), which is that the Minister must reach an opinion about each individual species affected by a proposed regulation. Instead, the Court held that the Minister's duty under s. 57(1) is satisfied *whether or not* each individual species affected is assessed, and further that he may reach a global opinion without regard to individual species or their separate needs:

> [35] ... There is nothing that says that the Minister has to examine the impact on each species to which the regulation would apply separately or independently of the others. There could be a program, approach or other condition that, in the opinion of the Minister, demonstrates there will be no jeopardy to the survival of any of them and no risk of other significant adverse effects. While it may not be independent and separate, **this could be said to be a means by which each of the species at risk, to which the regulation would apply, was considered. Whether it is or is not, it is enough to satisfy the condition precedent imposed by s. 57(1) of the *ESA*.** It is what happened in this case. (emphasis added)

[16] Respondents' Factum, at paras 8, 49 and 71.
[17] Respondents' Factum, at para 46, citing to the Divisional Court's Reasons for Decision, at paras 34-35, [Environmental Groups' Motion Record [MR], Vol 1, Tab 3].

15. Second, it is incorrect to claim that the Divisional Court found as a fact that the Minister assessed each individual species. At paragraph 34, the Court notes that the Minister's Determination "states that '[a]ll endangered species and threatened species on the Species at Risk [List] were considered in this assessment'." This recitation of a sentence in the Minister's Determination cannot be characterized as a finding of fact. The Court is simply reciting a sentence that claims steps were taken by Ministry staff prior to the Minister's Determination. Specifically, the sentence refers to staff's earlier screening assessment to pick which species would be covered by the proposed regulation. The Respondents tendered no evidence that *either* this earlier staff screening to pick species to which the proposed regulation would apply, *or* the latter Ministerial Determination to assess if the proposed regulation would jeopardize those species, assessed *each* species individually. Thus the Court properly made no such factual finding.

D. The Environmental Groups have never abandoned their alternative position that a s. 57(1) determination attracts a reasonableness standard of review

16. The Respondents allege that the Environmental Groups "abandoned" their position, in the alternative, that the standard of review of the Minister's determination under s. 57(1) is reasonableness.[18] Initially, the Respondents claim that declaratory relief was abandoned at the hearing;[19] elsewhere, they allege that what was abandoned was an argument on the applicable standard of review.[20] Later, the Respondents admit that the

[18] Respondents' Factum, at paras 7(b), 39, 41, 44(b), 50-52, 66 and 73.
[19] Respondents' Factum at para 7(b), where they allege that the Environmental Groups "abandoned their request for a declaration that the Minister's opinion was unreasonable at the hearing below".
[20] Respondents' Factum at para 44(b), where they allege that the Environmental Groups "abandoned in the proceedings below" the argument "that the Minister's opinion is subject to review on a reasonableness standard".

reasonableness of the Minister's determination was argued, but say that it was not "fully" argued before the Court below.[21] The Respondents submit that, as a result, this Court cannot hear an appeal raising the reasonableness of the Minister's determination.[22]

17. In reply, the Environmental Groups say these allegations are incorrect and unjustified. They have never, through counsel or otherwise, either before or during the hearing, abandoned any relief sought. Nor have they ever abandoned their alternative argument that the standard of review applicable to the Minister's determination under s. 57(1) is reasonableness. These issues were argued below, in writing and in particular orally.

18. One can only assume that Respondents' counsel did not appreciate precisely what was argued at the hearing below.[23] Otherwise, the Respondents' claim that certain relief was abandoned – when it absolutely was not – is surprising and troubling.

19. Unfortunately, there is no hearing transcript. However, whenever the Environmental Groups modified their positions at the hearing, there is a written record. This occurred twice. First, the Environmental Groups proposed alternative relief.[24] Second, they conceded the inadmissibility of some paragraphs and exhibits to a factual affidavit.[25]

20. At the hearing, the Environmental Groups developed their alternative argument on the unreasonableness of the Minister's s. 57(1) determination. As one example, through

[21] Respondents' Factum, at para 50.
[22] Respondents' Factum, at paras 50-52.
[23] In fairness, it should be noted that one of the Respondents' counsel is new to the matter and was not at the hearing.
[24] Environmental Groups' MR, Vol 5, Tab 14. Specifically, the Environmental Groups submitted that only parts of the Exemption Regulation were *ultra vires.* The Divisional Court did not consider or rule upon this alternative argument in its Reasons for Judgment.
[25] Environmental Groups' MR, Vol 5, Tab 13.

counsel, they provided to Respondents' counsel and the Court a further authority on reasonableness review, namely *Newfoundland and Labrador Nurses' Union*;[26] they submitted that the Minister's reasons and determination do not allow a reviewing court to understand why the Minister reached the jeopardy opinion that he reached or to hold that opinion satisfies the requirements of justification, transparency and intelligibility.[27]

21. Leaving aside that the Environmental Groups did not abandon this argument as a matter of fact, the standard of review was a question of law for the Court below to determine. Neither party could prevent the Court below, or this Court on any appeal, from determining what standard applies, or from applying the correct standard. The standard of review must always be judicially identified. Parties to a judicial review application, or an appeal therefrom, cannot purport to dictate the standard of review that a court must apply – whether by agreement of the parties, or by one party "abandoning" a standard.[28]

22. The Respondents' effort to limit this Court's jurisdiction to hear the proposed appeal is an undue resort to technical arguments that have little to do with the public importance or merits of the proposed appeal. Nordheimer J. recently criticized Ontario for raising overly technical arguments against the availability of judicial review:

> [10] I will begin by saying that the respondent's argument in this regard is a very technical one that does not, in any way, address the merits of the issues raised by the applicants. I would note that, if the respondent is correct in its position, it does not end the issue. It would simply force the applicants to re-launch their application in one or more other venues. If the respondent's argument succeeds, the only accomplishments would then be delay and additional expense. **It is the type of overly legalistic argument that governments should strive to avoid when they are responding to issues**

[26] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* [2011] 3 SCR 708, 2011 SCC 62, Environmental Groups' BOA, Tab 19.
[27] *Ibid*, at para 16.
[28] *Monsanto Canada Inc v Ontario (Superintendent of Financial Services)*, [2004] 3 SCR 152, 2004 SCC 54, at para 6 [Environmental Groups' Reply Factum, Sch B].

> **involving the rights of a group of its citizens in relation to the exercise of government powers, unless the jurisdictional issues are clear and compelling.**[29] (emphasis added)

E. The Respondents' allegation that unreasonableness arguments were abandoned is a collateral attack on the expert evidence

23. The Respondents' claim that this relief was abandoned seems, in part, to be a collateral attack on the admissibility of the Environmental Groups' expert evidence. In the proceedings below, the Respondents unsuccessfully asked the Court to strike out this evidence.[30] At paragraph 51 of their factum, they resurrect this unsuccessful challenge, claiming that "[a]rguably, the reports were not properly before the Divisional Court".

24. At paragraph 39 of their factum, the Respondents submit that:

> In support of the request for a declaration that the Minister's Opinion was unreasonable, the Moving Parties filed two reports purporting to give expert evidence on the effects of the *Regulation* on the American eel and the Blanding's turtle. The Respondents cross-examined both affiants. At the Divisional Court, the Moving Parties abandoned their request for a declaration that the Minister's decision was unreasonable and did not rely on the reports.

25. In specific reply, this submission is misleading. The Respondents imply that their cross-examination of the expert affiants had some influence. In fact, the Respondents chose not to put the transcripts of these examinations before the Divisional Court – presumably because those examinations did not advance their case in the slightest.[31]

26. Similarly at paragraph 51 of their factum, the Respondents submit that:

> The only evidence the Moving Parties would have relied upon in support of a finding that Minister's Opinion was unreasonable were the purported expert reports. As detailed above, the Moving Parties did not rely upon the

[29] *Copeland & Soucie v HMQ*, 2014 ONSC 620 (Div Ct), at para 10 (emphasis added) [Environmental Groups' Reply Factum, Sch C]. See also para 12.
[30] Respondents' Factum at the Divisional Court, at para 54 [Environmental Groups' Reply Factum, Sch D].
[31] The Environmental Groups' motion record contains all the evidence before the Divisional Court below.

reports in their main factum on the application, and no oral arguments were made on how the reports demonstrate that the Minister's Opinion was unreasonable.

27. In specific reply, the expert reports were not the only evidence that the Environmental Groups relied upon below, or that they would reply upon on in any appeal, to submit that the Minister's determination was incorrect or unreasonable. They also relied on the record, namely the Minister's Determination and his reasons. They further relied on evidence of events prior to the Minister's Determination – including their efforts to have the Minister acknowledge his duty to assess jeopardy for *each* of the individual species affected by the proposed Regulation, and his failure to do so. At the hearing, they briefly explained that the reports show considerations that the Minister would have taken into account had he correctly or reasonably assessed jeopardy for *each* affected species.

28. In conclusion, the Environmental Groups respectfully request that this Honourable Court grant leave to appeal the proceeding below, on all issues proposed for appeal.

All of which is respectfully submitted this 10th day of August, 2015 by:

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