APPLICANTS' MEMORANDUM OF ARGUMENT

PART I - OVERVIEW AND STATEMENT OF FACTS

1. Ontario Nature and Wildlands League ("the Environmental Groups") seek leave to appeal the Ontario Court of Appeal's decision upholding Ontario Regulation 176/13 ("the Exemption Regulation").[1] The Exemption Regulation exempts most harmful industrial activities in Ontario from the core prohibitions of the *Endangered Species Act, 2007,* SO 2007, c 6 ("ESA"). It deprives each of the province's 167 endangered and threatened species of statutory protection against being killed and against their habitats being destroyed.[2]

2. This proposed appeal would resolve the proper approach to judicial review of decisions serving as conditions precedent to the making of subordinate legislation. In upholding the Exemption Regulation, the Court of Appeal held that courts cannot permissibly review the correctness or reasonableness of such decisions. It thus refused to assess whether the Minister of Natural Resources correctly or reasonably performed his duty under s. 57(1) of the *ESA*, which was a precondition to the Exemption Regulation. Yet, as acknowledged by the Court, the law on this issue is unclear and divided, including in the area of endangered species law. Under the federal *Species at Risk Act*, the Federal Courts have taken the opposite approach.

3. The Court of Appeal also upheld the Exemption Regulation as consistent with the purpose of the *ESA*. It did so by reading out from the Act's express purpose the goal of *recovering* species, and by evaluating the regulation against exceptional aspects of the statutory scheme. This proposed appeal would resolve whether, in assessing consistency with statutory purpose, regulations should be reviewed against the act's purpose or instead against the act's scheme.

4. The validity of the Exemption Regulation turns, in part, on these important administrative law issues – as do the survival and recovery of Ontario's most vulnerable species.

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

5. In 2007, the Ontario Legislature enacted a modernized *ESA*, intended to "provide significantly broader and more effective provisions for protecting species at risk and their habitats" and with

---

[1] O Reg 176/13 ("the Exemption Regulation") [Leave Application V. 1, Tab 3].

[2] When the Exemption Regulation came into force, on July 1, 2013, it applied to **155** listed endangered and threatened species (see O Reg 25/13, s 1, Schedules 2 and 3; and O Reg 176/13, s 1). As a result of more species being listed as endangered or threatened since 2013 and with subsequent amendments to O Reg 242/08, the regulatory exemptions now cover all **167** species currently listed as endangered and threatened species; see O Reg 230/08, Schedules 2 and 3; O Reg 242/08, s 1; and O Reg 242/08, s 0.1.

"a stronger commitment to species recovery".[3] In the words of then-Minister David Ramsay, the new *ESA* would create a "presumption of protection" for all listed species.[4]

B. In 2012, the government tried, and failed, to weaken the *ESA* through legislative amendment, and so instead decided to weaken it through an exemption regulation

6. In the spring of 2012, as part of an omnibus budget bill, the government proposed significant legislative amendments intended to weaken the *ESA*.[5] The amendments would have exempted many activities from the Act's prohibitions. After public and political opposition through the democratic process, the government removed the proposed *ESA* amendments from its bill.[6]

7. However, by late 2012, it became clear that the executive had not given up trying to weaken the *ESA*. On December 5, 2012, the Ministry of Natural Resources ("MNR") posted a notice to the Environmental Bill of Rights ("EBR") Registry, proposing vague changes to *ESA* implementation that were intended to reflect the MNR's ongoing Modernization of Approvals process. Further details were posted on January 24, 2013, revealing that MNR was proposing regulations that would exempt entire industrial sectors from the *ESA*'s core prohibitions.[7]

8. As confirmed by the Court of Appeal, the Exemption Regulation was precipitated by the MNR's Modernization of Approvals.[8] This policy framework was directed at "streamlining" permit approvals, to achieve cost savings and to "reduce the burden on individuals, businesses and government".[9] Thus, the proposed regulation was intended to achieve costs savings by:

    - reducing MNR's administrative burdens and costs related to permitting;[10] and
    - promoting economic interests of a vast array of industries that harm species at risk.[11]

---

[3] 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).

[4] 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).

[5] Bill 55, *Strong Action for Ontario Act (Budget Measures)*, 1st Sess, 40th Parl, Ontario, 2012, Schedule 19 (see Schultz Affidavit, Exhibit C [Leave Application V. 3, Tab 12A]).

[6] Baggio Affidavit, Exhibits H, L and M [Leave Application V. 2, Tabs 11A, 11B and 11C].

[7] Schultz Affidavit, Exhibits O and P [Leave Application V. 3, Tabs 12C and 12D].

[8] Reasons for Judgment of van Rensburg J.A. at para. 96 [Leave Application V. 1, Tab 7]

[9] EBR Registry posting, 27 September 2012, in Schultz Affidavit, Exhibit J [Leave Application V. 3, Tab 12B]; ECO Special Report, *Laying Siege to the Last Line of Defence*, November 2013 at pp. 20-21, in Baggio Affidavit, Exhibit EE [Leave Application V. 2, Tab 11I].

[10] Schultz Affidavit, Exhibits J, O and P [Leave Application V. 3, Tabs 12B, 12C and 12D]; Decision of the Minister of Natural Resources, signed on May 1, 2013 ("Minister's Opinion"), pp. 1-3 [Leave Application V. 1, Tab 2]; and ECO 2012/2013 Annual Report, *Serving the Public,* in Baggio Affidavit, Exhibit DD [Leave Application, V. 2, Tab 11H].

[11] Minister's Opinion, pp. 1-3 [Leave Application V. 1, Tab 2]; Reasons for Judgment of Lederer J. at paras. 9-11, 49 and 51 [Leave Application V. 1, Tab 4].

9. The regulatory proposal provoked major public concern. Over 10,000 Ontarians commented on the EBR Registry notice.[12] Dozens of organizations from across the province, including the Environmental Groups, expressed concerns in numerous letters to Minister Orazietti and Premier Wynne, as well as through comments submitted to the EBR Registry.[13]

10. In addition, Ontario Nature wrote to Minister Orazietti through counsel in February and April of 2013. Ontario Nature put the Minister on notice of his duty, under s. 57(1) of the *ESA*, to reach an opinion on whether the regulatory proposal was likely to jeopardize the survival of, or have any other significant adverse effect on, ***each*** of the individual species to which the proposed exemptions would apply.[14] In his reply letter in July 2013, the Minister declined to acknowledge that s. 57(1) required him to reach an opinion on each individual species.[15]

C. In May 2013, the Minister purported to make his decision under s. 57(1), and Cabinet made the Exemption Regulation

11. The Cabinet made the Exemption Regulation on May 15, 2013, by amending Regulation 242/08 through Amending Regulation 176/13.[16] The Exemption Regulation came into effect on July 1, 2013 – the same day by which all endangered and threatened species were intended to receive mandatory habitat protection under the *ESA*.[17]

12. Before Cabinet made the Exemption Regulation, Minister Orazietti signed the Minister's Opinion on May 1, 2013.[18] The Minister's Opinion is a document prepared by MNR staff to comprise and serve as the Minister's statutory decision and reasons under s. 57(1). The Minister adopted the document as his decision and his reasons, by signing his concurrence.[19]

13. With a few exceptions, the Minister's Opinion fails to assess whether the proposed regulation will jeopardize, or have any other significant adverse effect, on each of the listed species to which it would apply. Of the 155 endangered and threatened species that were listed at the

---

[12] Schultz Affidavit, para. 55 [Leave Application V. 3, Tab 12].
[13] Schultz Affidavit, Exhibits V, X, Y and BB [Leave Application V. 3, Tabs 12E, 12F, 12G and 12H].
[14] Schultz Affidavit, Exhibit X [Leave Application V. 3, Tab 12F].
[15] Schultz Affidavit, Exhibit DD [Leave Application V. 3, Tab 12I].
[16] O Reg 176/13 ("the Exemption Regulation") [Leave Application V. 1, Tab 3].
[17] *ESA,* s. 10(3).
[18] Minister's Opinion, p. 36 [Leave Application V. 1, Tab 2]. The courts below refer to the Minister's Opinion as "the Explanatory Note". The official title of the decision document signed by the Minister is "MINISTER'S EXPLANATORY NOTE – Changes to Ontario Regulation 242/08 under the ESA related to Modernization of Approvals".
[19] Minister's Opinion, pp. 1 and 36 [Leave Application V. 1, Tab 2].

time,[20] the Minister only turned his mind to five species in his Minister's Opinion: Butternut,[21] Bobolink and Eastern Meadowlark,[22] and Barn Swallow and Chimney Swift.[23]

14. Rather than focus on the species affected by the regulatory proposals, the Minister's Opinion focuses on the 18 exemptions being proposed. Most of these exemption proposals exempt sectors or activities – including forestry, early mining exploration, aggregate operations, hydro operations, operation of wind facilities, and drainage works. The Minister's Opinion states that the 18 proposed regulatory exemptions are intended to "increase administrative efficiency and reduce burdens on individuals and businesses engaged in activities that affect species at risk and their habitat while providing for the protection of species at risk."[24]

D. The Exemption Regulation means that no endangered or threatened species in Ontario enjoys the full protection of the *ESA*'s prohibitions

15. The Exemption Regulation replaces a legislative scheme intended to create a *presumption of protection* with a regulatory regime operating from a *presumption of permission*. The Exemption Regulation introduces a vast suite of exemptions from the *ESA*'s two core prohibitions.[25] Most major industrial activities are now presumptively exempt; proponents conducting these activities may now kill endangered and threatened species and destroy their habitats. Specifically, a proponent may now conduct these activities if it meets standardized regulatory conditions, which are self-monitored. As confirmed by the Divisional Court, the conditions merely require proponents to "minimize adverse effects" to species at risk.[26]

16. The Exemption Regulation applies to all endangered and threatened species in Ontario. Not one of the 167 endangered or threatened species of lichens, mosses, molluscs, vascular plants, insects, fishes, reptiles, birds or mammals enjoys the full protection of the prohibitions against

---

[20] Currently, 167 species are listed as endangered or threatened. See *supra*, note 1.
[21] Minister's Opinion, p. 25, opining that "It is unlikely that the section will result in any significant adverse effect on Butternut or jeopardize the survival of the species" [Leave Application V. 1, Tab 2].
[22] Minister's Opinion, pp. 27-28 [Leave Application V. 1, Tab 2].
[23] Minister's Opinion, pp. 28-30 [Leave Application V. 1, Tab 2].
[24] Minister's Opinion, p. 2 [Leave Application V. 1, Tab 2].
[25] Subsection 9(1) provides that no person shall "kill, harm, harass, capture or take" a member of an endangered or threatened species. Paragraph 10(1)(a) provides that no person shall "damage or destroy the habitat" of an endangered or threatened species.
[26] Reasons for Judgment of Lederer J. at paras. 22-23 [Leave Application V. 1, Tab 4].

killing them or destroying their habitats. For a visual representation of these effects of the Exemption Regulation, see the Applicants' Table of Endangered and Threatened Species.[27]

E. The Courts below dismissed the application, but for different reasons

17. On September 9, 2013, the Environmental Groups filed a Notice of Application in Ontario's Divisional Court.[28] It challenged the *vires* of the Exemption Regulation on two grounds. First, it challenged the Minister's failure to lawfully perform duties under s. 57(1), which serve as a condition precedent to making the Exemption Regulation under s. 55(1)(b) of the *ESA.* Second, it challenged the Exemption Regulation as inconsistent with the purposes of the *ESA.*

18. On May 28, 2015, the Divisional Court denied the application for judicial review, with reasons authored by Justice Lederer. With respect to first ground of review, the Divisional Court held that it could not review either the correctness or the reasonableness of the Minister's Opinion under s. 57(1). Rather, the Court held that it was limited to reviewing if the condition precedent was "met". According to the Court, it was.[29]

19. More specifically, the Court held that, as a matter of law, "[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". Importantly, the Court then found, as a matter of fact, that "what happened in this case" was that the Minister had <u>not</u> given any "independent and separate" consideration to each species to which the regulation would apply.[30]

20. On the second ground of review, without referring to s. 1 in its legal analysis, the Divisional Court held that the *ESA* aims to balance species' needs against industry's economic interests. It held that the purpose of the Exemption Regulation was to promote the economics of industry. Thus, the Exemption Regulation was consistent with the statute's purpose.[31]

21. On October 11, 2016, the Ontario Court of Appeal denied the Environmental Groups' appeal. With respect to the first ground of review, for the Court, Justice van Rensburg also held that decisions under s. 57(1) were not subject to correctness or reasonableness review. However, on

---

[27] Applicants' Table of Endangered and Threatened Species [Leave Application V. 3, Tab 17]. Note that the Table only contains information relating to the 155 species that were listed as threatened or endangered at the time the Exemption Regulation was made.
[28] Applicants' Notice of Application for Judicial Review, September 9, 2013 [Leave Application V. 2, Tab 10]
[29] Reasons for Judgment of Lederer J. at paras. 36-37 [Leave Application V. 1, Tab 4].
[30] Reasons for Judgment of Lederer J. at para. 3d5 [Leave Application V. 1, Tab 4].
[31] Reasons for Judgment of Lederer J. at paras. 47-53 [Leave Application V. 1, Tab 4].

the merits of the Minister's Opinion, while agreeing with the result below,[32] the Court of Appeal reached opposite findings – on both the law and the facts – as had the lower court. As a matter of law, the Court of Appeal agreed with the Environmental Groups that s. 57(1) requires the Minister to determine whether the proposed exemptions would jeopardize the survival of ***each*** individual species to which they would apply.[33] Thus, to find that the Minister met this test, the Court had to reverse facts that were found below. It found that the Minister did, in fact, consider the effect of the regulation on each affected species at risk.[34]

22. On the second ground of review, the Court of Appeal again took a different approach. It held that "the fundamental purpose of the *ESA*, its legislative goal or aim, is to protect SAR, and is not the promotion of economic and social interests".[35] Thus, it rejected the Environmental Groups' submission that the *ESA*'s overarching purpose is not just to protect species and their habitats, but ***to recover*** species. The Court further held that, when assessing if a regulation is inconsistent with an act's purpose, judges should not limit their review to the act's purpose but should consider the act's scheme. In this respect, the Court held that "question is whether the regulation is consistent with the *ESA* in terms of approach and scheme".[36] As the scheme allows for exceptions to ss. 9 and 10, and as the Exemption Regulation operates under a "similar approach", the Court held that the regulation was consistent with the Act's purpose.[37]

PART II – QUESTIONS IN ISSUE

23. This proposed appeal raises two issues of broad public importance warranting guidance by this Honourable Court:

Issue 1: Should statutory decisions that serve as conditions precedent to the making of subordinate legislation be reviewed using *Dunsmuir* standard of review analysis? Or should such decisions be carved out of the *Dunsmuir* approach, as done by the courts below, and reviewed by some different and/or less rigorous standard?

Issue 2: In reviewing whether an exemption regulation is consistent with statutory purpose, should courts assess the exemption regulation against the statute's purpose or should they also review it against the statutory scheme? Should provisions that authorize exemptions from a statute nonetheless be construed purposively?

---

[32] Reasons for Judgment of van Rensburg J. at para. 11 [Leave Application V. 1, Tab 7].
[33] Reasons for Judgment of van Renburg J. at paras. 34-35, 58, 69 [Leave Application V. 1, Tab 7]. As noted at para. 35, the Respondents conceded "at least in this court" that s. 57(1) requires the Minister to consider each species.
[34] Reasons for Judgment of van Rensburg J. at para 58, 60, 69 and 81 [Leave Application V. 1, Tab 7].
[35] Reasons for Judgment of van Rensburg J.A. at para. 89 [Leave Application V. 1, Tab 7].
[36] Reasons for Judgment of van Rensburg J.A. at para. 96, and at paras. 90-94 [Leave Application V. 1, Tab 7].
[37] Reasons for Judgment of van Rensburg J.A. at paras. 97-99 [Leave Application V. 1, Tab 7].

24. These issues are fundamental to the survival of Ontario's endangered and threatened species. Moreover, they are significant to the coherent development of administrative law in Canada.

25. If leave is granted, this Court will also be asked to resolve, in this case, in respect of Issue 1:

- Should ministerial decisions made under s. 57(1) of the *ESA* be reviewed using a correctness or reasonableness standard consistent with *Dunsmuir*?
- If so, was the Minister's Opinion under s. 57(1) correct (that is, did he apply the correct legal test in reaching his opinion) and was it reasonable?

26. If leave is granted, this Court will also be asked to resolve, in this case, in respect of Issue 2:

- Is subordinate legislation that aims merely at *minimizing harm* to species at risk consistent with a statutory purpose of *protecting and recovering* species at risk?

27. Finally, if leave is granted, these questions will determine whether O Reg 176/13 is valid.

PART III – STATEMENT OF ARGUMENT ON PUBLIC IMPORTANCE OF ISSUES

28. This proposed appeal provides this Honourable Court with the chance to consider legislation that, in the words of the Environmental Commissioner of Ontario, serves as the "last line of defence" for highly imperilled species.[38] The Exemption Regulation removes the last line of defence, jeopardizing the survival and recovery of Ontario's most vulnerable species.

29. The context of this case is biodiversity loss and species extinction - in Ontario and globally. This year, the World Wildlife Fund reported that wildlife populations globally have declined by 58 percent since 1970, and that these declines are likely to reach 67 percent by 2020.[39]

30. The *ESA* was designed to arrest and reverse this alarming rate of species decline and extinction.[40] Sadly, in the years since, Ontario's biodiversity has continued to decline.[41]

31. The Legislature enacted the *ESA* in 2007 because it recognized that a stronger approach was needed to protect species in Ontario. In contrast to the old *Endangered Species Act* of 1971,[42]

---

[38] ECO Special Report, *Laying Siege to the Last Line of Defence*, November 2013, *supra* note 8.
[39] WWF. 2016. *Living Planet Report 2016. Risk and resilience in a new era.* WWF International, Gland, Switzerland, at pp. 6, 12 and 15.
[40] *ESA,* Preamble. See also 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).
[41] Ontario Biodiversity Council, *State of Ontario's Biodiversity 2015* (Peterborough, 2015) at pp. 3 and 6.
[42] *Endangered Species Act*, RSO 1990 c E.15 (repealed 30 June 2008).

which as of 2007 offered only limited protection for 43 of 176 species designated at risk,[43] the *ESA* extended immediate protections to all listed species. Notably, the *ESA* requires habitat protection for all endangered and threatened species, to commence by June 30, 2008.[44]

32. When the Exemption Regulation came into force on July 1, 2013, it largely supplanted a legislative protection scheme with a permissive regulatory regime. Proponents may now kill endangered and threatened species and destroy their habitats if they create mitigation plans and meet standardized, self-monitored regulatory conditions. As rightly held by the Divisional Court, the regulation aims merely to *minimize* killing of species and destruction of habitats.[45]

A. AN OVERVIEW OF THE ESA: THE PURPOSES AND THE SCHEME

33. Before turning to the two issues of broad public importance, the Environmental Groups summarize the overarching purpose of the *ESA* and relevant aspects of the statutory scheme.

1) The overarching purpose of the *ESA* is to protect and recover species at risk

34. The overarching or fundamental purpose of the ESA is to protect species at risk and their habitats, and to promote these species' recovery. Section 1 expressly sets out these purposes:

> 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. (emphases added)

35. The Divisional Court repeatedly mischaracterized the Environmental Groups' position by suggesting they argued that the protection and recovery of species was the Act's *sole* or *only* or *single* purpose.[46] That has never been their position. That position would be nonsensical, as the Legislature enacted three statutory purposes. Unlike the other two provisions, s. 1.2 is the overarching or fundamental purpose as it applies to every operative provision in the Act.[47]

---

[43] Reasons for Judgment of van Rensburg J.A. at para. 13 [Leave Application V. 1, Tab 7].
[44] *ESA,* s. 10(3).
[45] Reasons for Judgment of Lederer J. at paras 22-23. [Leave Application V. 1, Tab 4].
[46] Reasons for Judgment of Lederer J. at paras. 39, 45 and 47 [Leave Application V. 1, Tab 4].
[47] The first legislated purpose, at s. 1. 1, only applies to the classification and listing provisions at ss. 3-7. The third legislated purpose, at s. 1. 3, only applies to the stewardship provisions at s. 16 and ss. 47-48. Section 1. 2 is the overarching or fundamental purpose of the ESA, because it applies to every operative provision within the Act.

36. The Divisional Court never clearly established the ESA's overarching purpose.[48] However, it emphasized its view that the *ESA*'s purpose cannot only be to protect and recover species, but that this purpose must be balanced against the promotion of industries' economic interests.[49]

37. The Court of Appeal distanced itself from this incorrect analysis by the lower court. At paragraph 89 of its Reasons, it held that "the fundamental purpose of the ESA, its legislative goal or aim, is to protect SAR, and is not the promotion of economic and social interests."

38. However, even this is not the purpose of the *ESA*. Rather, as submitted by the Environmental Groups below, the *ESA*'s overarching, fundamental purpose is to protect ***and recover*** species at risk. The *ESA* aims not only to maintain endangered and threatened species in their current state, akin to being "on life support" in an emergency room. Nor does the *ESA* aim merely to lessen their decline. Rather, it aims to *improve* their status. Reading out recovery was essential and necessary for the Court's holding that the Exemption Regulation – aimed at minimizing harm to species and not at improving their lot – is consistent with the purpose of the *ESA.*

2) The *ESA* scheme allows only narrow, circumscribed exceptions to core prohibitions

39. Under the *ESA,* species are classified and listed in a science-based process. If COSSARO, a body of independent scientists,[50] classifies a species as endangered or threatened, a Minister's delegate must add the species to the Species at Risk in Ontario List. This is known as listing.[51]

40. Listing triggers automatic protections. Two prohibitions are at the core of the Act, serving as central mechanisms for achieving the protection and recovery of species at risk. In brief, s. 9 prohibits the killing of endangered or threatened species, and s. 10 prohibits damage and destruction of their habitats. Section 36 makes violation of these prohibitions an offence.

41. The Legislature built a few narrow exceptions into this scheme aimed at species protection and recovery. Under ss. 17 and 18, the government has very narrow and tightly circumscribed authority to issue permits or instruments that authorize violations of the core prohibitions. Further, under s. 55(1)(b), Cabinet has power to make regulations exempting activities from ss. 9 and 10. Before this may occur, the Minister must comply with s. 57(1) and, where applicable,

---

[48] On determining the overarching purpose of an enabling statute, see *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 ("*Katz*") at paras. 30-31.
[49] Reasons for Judgment of Lederer J. at para. 51 [Leave Application V. 1, Tab 4].
[50] Committee on the Status of Species at Risk in Ontario ("COSSARO"); see *ESA,* s. 3.
[51] *ESA*, ss. 4-7 and O Reg 230/08. Species can also be classified as extinct, extirpated or special concern; *ESA,* s. 5(1).

with s. 57(2). Subsection 57(1) requires the Minister to reach an opinion on whether a proposed regulation is likely to jeopardize the survival of, or have another significant adverse effect on, each endangered or threatened species to which the exemption would apply. If the Minister determines that proposed exemptions would likely jeopardize a species' survival, he must initiate the scientific and public consultation process under s. 57(2).

B. ISSUE 1: SHOULD STATUTORY DECISIONS THAT SERVE AS CONDITIONS PRECEDENT BE CARVED OUT OF THE *DUNSMUIR* APPROACH?

42. Should statutory decisions that serve as conditions precedent to the making of subordinate legislation be reviewed under a standard of either correctness or reasonableness? Or, as here, should courts carve out such decisions from the *Dunsmuir* approach? If so, by what alternate standard should courts review whether a decision maker had "met" a statutory precondition?

43. These questions cannot be answered with any confidence in Canada. The law is divided. The divisions exist within administrative law generally and endangered species law specifically. The proposed appeal would clarify the approach to judicial review of conditions precedent.

1) What approach should be taken to this question: *Dunsmuir, Katz,* or something else?

44. In *Dunsmuir v New Brunswick,* this Court confirmed that, consistent with the rule of law, all administrative decisions pursuant to statute are subject to review. *Dunsmuir* directs courts to apply one of two standards: correctness or reasonableness.[52] In *Katz*, this Court excluded one type of decision from this approach – namely, the exercise of regulation-making powers.[53]

45. However, this leaves unresolved the question of what approach should be used to review administrative decisions serving as conditions precedent to subordinate legislation. An opinion under s. 57(1) is just such a decision. On one hand, it is like any other administrative decision made under a statute. On the other, it serves as a condition precedent, conferring jurisdiction on the Minister to recommend a regulation and Cabinet to make that regulation.

46. This question has wide-ranging consequences. Many laws in Ontario's statute book contain statutory conditions precedent that are analogous to s. 57(1).[54]. Both the federal Parliament and

---

[52] *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at paras. 27-31.
[53] *Katz, supra* note 46, at paras. 24-28.
[54] In Ontario, see e.g. *Securities Act,* RSO 1990, c S.5, ss 2.2(3),(9) and (16); *Occupational Health and Safety Act,* RSO 1990, c O.1, ss 22.4; and *Fire Protection and Prevention Act, 1997*, SO 1997, c 4, s 2(8), (9).

the provincial legislatures have enacted statutes that require decision-makers to perform duties comprising conditions precedent before subordinate legislation may be made.[55]

47. Refusing to review for correctness or reasonableness can shield decisions from meaningful scrutiny. In this case, echoing the Respondents' position that the Opinion was not subject to review, the Divisional Court declined to "examine and determine whether the opinion is correct or reasonable," accepting that such a review is "beyond what can be properly asked".[56]

48. The Court of Appeal properly acknowledged that the law lacks clarity.[57] At paragraph 50, it held that the law is unclear on "the scope of permissible judicial review when the condition precedent involves, as here, an opinion as to the existence of certain facts to be reached by the Minister." At paragraph 52, it noted that "[t]he parties were unable to refer this court to any reported case involving the judicial review of a regulation where a statutory condition precedent, as here, requires an opinion to be formed as to the existence of certain facts".[58]

49. The Court of Appeal then tried to craft its own standard for reviewing how statutory decision-makers perform statutory duties that serve as conditions precedent. The Court held that:

> [56] … where a statutory condition precedent itself requires an opinion to be reached or a determination to be made, it is beyond the scope of judicial review to assess whether the determination was objectively correct or reasonable. At the same time, it is not sufficient that the decision maker purported to make the determination. <u>The determination must have been made in good faith and based on the factors specified in the enabling statute.</u>

50. Under the Court of Appeal's test, a judge asks if the decision was "based on" the statute and made in good faith. In effect, this is no standard at all. It invites reasoning along the lines of "the minister satisfied the law's requirements because she based her decision on the law's requirements". This standard is less rigorous, defensible or accountable than is review for reasonableness – which requires that, where a minister concludes that a law's requirements are satisfied, her reasons for that conclusion must be transparent, intelligible and justified.

---

[55] See e.g. *Quarantine Act*, SC 2005, c 20, s 58(1); *Water Sustainability Act*, SBC 2014, c 15, s 128; *Medical Profession Act*, 1981, SS 1980-81, c M-10.1, s 32; *The Essential Services Act (Government and Child and Family Services)*, CCSM c E145, s 6; *Reciprocal Enforcement of Judgments Act*, SNB 2014, c 127, s 9; *Employment Standards Act*, RSPEI 1988, c E-6.2, s 42(1).

[56] Reasons for Judgment of Lederer J. at para. 37 [Leave Application V. 1, Tab 4].

[57] Reasons for Judgment of van Rensburg J.A. at paras. 48-53 [Leave Application V. 1, Tab 7].

[58] If "regulation" in this sentence were changed to "subordinate legislation", the sentence would be incorrect. See e.g. paragraphs 52-54 of this submission below, regarding *Alberta Teachers Association.*

51. Contrary to paragraph 52 of the Court of Appeal's reasons, courts have used a standard of review analysis to assess decisions serving as conditions precedent to subordinate legislation.[59]

52. One such case, strikingly analogous to that at bar, is *Alberta Teachers Association.* The Alberta Court of Queen's Bench was asked if Cabinet had lawfully performed a condition precedent before issuing an order in council ordering striking teachers back to work. To answer this, Chief Justice Wachowich used the pragmatic and functional approach.[60] Under the *Labour Relations Code,* Cabinet could 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". The Chief Justice held that the Cabinet had failed to consider ***each*** dispute, in each of the 22 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, some were in deficit; some teachers were locked out, some were not. Yet Cabinet had treated them all the same, considering hardship generally across Alberta. A blanket opinion for ***all*** districts, that failed to consider if ***each*** district was suffering hardship, was especially objectionable when its effect was to eradicate a statutory right to strike for all districts.[61]

53. Here, it was equally objectionable for the Minister to reach a blanket opinion on jeopardy covering all listed species. Its effect was to eradicate those species' right not to be killed.

54. Ignoring *Alberta Teachers*, the Court of Appeal instead relied on *Canadian Council for Refugees*.[62] In so doing, it took paragraph 55 of that decision wholly out of its proper context. Paragraph 55 just confirms that the Federal Courts have jurisdiction under ss. 18 and 18.1 of the *Federal Courts Act* to review the *vires* of regulations.[63] No condition precedent was even at issue in *Canadian Council for Refugees.*[64] Ironically, while the Court relied on this decision to

---

[59] See e.g. *David Suzuki Foundation et al v The AG for BC,* 2004 BCSC 620 at paras. 7, 149 and 176; and *Alberta Teachers Association v Alberta,* 2002 ABQB 240. While not a decision that addresses conditions precedent *per se,* see also *The Nova Scotia Barristers' Society v Trinity Western University,* 2016 NSCA 59 at paras. 40-47.
[60] *Alberta Teachers Association v Alberta, ibid* at paras. 1, 7-8 and 17-18.
[61] *Ibid* at paras. 4-6 and 35-48.
[62] *Canadian Council for Refugees v. Canada*, 2008 FCA 229.
[63] *Strickland v Canada (Attorney General),* 2013 FC 475 at paras. 12-15; *Saputo Inc. v Canada (Attorney General),* 2011 FCA 69 at para. 8; *Novopharm Limited v Eli Lilly Canada Inc.,* 2009 FCA 138 at para. 10.
[64] See e.g. *Saputo Inc. v Canada (Attorney General*), 2011 FCA 69 at para. 9.

shield the Minister's Opinion from correctness or reasonableness review, it has often been cited for the proposition that an attack on a regulation's *vires* attracts correctness review.[65]

2) This Court has not considered statutory condition precedents in many decades

55. In *Thorne's Hardware*, the Court confirmed that failure to perform a statutory condition precedent is a fatal jurisdictional defect going to a regulation's validity. However, neither *Thorne's Hardware* nor *Katz* involved any alleged failure to perform a condition precedent.[66]

56. The last time this Court reviewed compliance with a condition precedent appears to have been in *Reference re Regulations in Relation to Chemicals.* At issue in that case was the validity of an order issued under the *War Measures Act*, which could be made where the Governor General in Council first deemed "by reason of the existence of real or apprehended war, invasion or insurrection" it to be "necessary or advisable". Chief Justice Duff held that courts could not review the merits of a conclusion by Cabinet (or its delegate) that a measure was necessary or advisable, subject to two exceptions: 1) it was clear from the plain terms of the order that the opinion had not been reached; or 2) the opinion was not reached in good faith.[67]

57. The Court of Appeal's standard of "in good faith and based on the statute" resonates with *Reference re Regulations in Relation to Chemicals*. This appeal would allow this Court to consider whether the rule of law is better promoted by a more modern approach that requires review of the correctness or reasonableness of decisions serving as conditions precedent.

3) Endangered species law is divided on the approach to reviewing ministerial decisions that comprise, or that serve as, conditions precedent to subordinate legislation

58. The proposed appeal would allow this Honourable Court to decide if Ontario's species are entitled to the same degree of judicial oversight of executive action as occurs in the Federal Courts, which have taken a different approach under the *Species at Risk Act* ("SARA").[68]

59. The provisions at issue in some of the SARA jurisprudence are highly analogous to s.57(1). Notably, the Federal Courts have not hesitated to review the correctness or reasonableness of ministerial action under s. 80 of SARA. Much like s. 57, 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

---

[65] See e.g. *Saputo, ibid,* at paras. 9-10.
[66] *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106 at 111; *Katz, supra* note 46, at para. 27.
[67] *Reference re Regulations in Relation to Chemicals*, [1943] SCR 1, pp. 12-13.
[68] SC 2002, c 29.

she reaches the opinion that a species faces such threats, she is then obliged to recommend an emergency order to the Governor in Council [s. 80(2)]. In a case involving the Sage Grouse, Canada argued that whether the Minister had reached this opinion could not be disclosed as it was part and parcel of one "Cabinet decision making process". Rejecting this, the Federal Court of Appeal held this would impermissibly shelter opinions under s. 80(2) from review, and that such opinions were reviewable for reasonableness.[69] In cases involving Western Chorus Frog and Boreal Caribou, the Federal Court held that the ministerial opinions reached under s. 80(2) were unreasonable, and referred those decisions back to the Ministers.[70]

60. In litigation involving Resident Killer Whales, Canada argued that the Federal Court could not review a critical habitat protection order made by ministers under s. 58(4) of SARA, as such orders are regulations within the meaning of the *Statutory Instruments Act*.[71] The Court rejected the argument that the order's status as a regulation meant that it was not reviewable.[72]

61. The Court of Appeal could not effectively distinguish the SARA case law, holding only that:

> **[51] …** It is sufficient to say that these cases involved judicial review of decisions made within the framework of SARA, which the courts treated as reviewable administrative decisions. These cases did not involve the review of a regulation, as no emergency order had been made, and the decisions were not attacked on vires grounds.

62. Is this weak attempt to distinguish SARA sustainable? The SARA cases under s. 80 did not involve review of a regulation because the ministers' opinions were unlawful; the ministers relied on those unlawful opinions to evade their duty to recommend that a regulation be made. Does the proper approach to reviewing ministerial opinions that serve as conditions precedent to regulations truly depend, as the Court here implies, on the outcome of particular opinions?

4) Reasonableness review would likely reverse the outcome of this proceeding

63. In this case, the approach to reviewing compliance with conditions precedent is not academic or hypothetical. For the species for which the Exemption Regulation has removed protections against killing and against habitat destruction, this issue is literally a matter of life and death.

---

[69] *Alberta Wilderness Assn v Canada (Attorney General),* 2013 FCA 190 at paras. 43-49.
[70] *Centre Québécois du droit de l'environnment v Canada (Environment)*, 2015 FC 773 ("*Western Chorus Frogs*") at paras. 1-2 and 69-75; *Adam v Canada (Environment)*, 2011 FC 962 at paras. 2-5, 25-28 and 48-52.
[71] *Statutory Instruments Act,* RSC 1985, c S-22, s 2, definition of "regulation"; and *Interpretation Act,* RSC 1985, c I-21, s 2, definition of "regulation".
[72] *David Suzuki Foundation v Canada*, 2010 FC 1233 at paras. 129-137 and 171-184. In distinguishing the SARA case law as not reviewing a regulation, the Court of Appeal ignored this decision in the Killer Whale matter, which did.

64. As the Court of Appeal correctly held,[73] s. 57(1) requires a Minister determine whether a proposed exemption would jeopardize ***each individual species to which it would apply***.

65. This is the legal test that the Minister must apply. Provided he applies this correct test then, following this Court's 2012 decision in *Halifax v. Canada*, his opinion will be reviewed for reasonableness because a s. 57(1) opinion involves some subjective judgement or discretion.[74]

66. Without conceding that the Minister applied the correct test, the Environmental Groups say that his Opinion cannot survive scrutiny even under the deferential reasonableness standard. Reasonableness review examines a decision's outcome, in terms of its justification, and its transparency and intelligibility. As held by this Court: "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met".[75]

67. Within the Minister's Opinion, it impossible to identify any place where he transparently or intelligibly opines that a proposed exemption would not likely jeopardize the survival of, or have other significant adverse effect on, *any individual species*.[76] At the final page, he reaches a blanket opinion that, "having considered the information above", the proposed regulation is not likely to jeopardize any of "the affected endangered or threatened species in Ontario". Yet the "information above" does not consider any individual species. If the Minister believed the exemptions would not jeopardize plants like the Lakeside Daisy or Wild Hyacinth, he never said so. If he thought the exemptions would not jeopardize animals like the Piping Plover, Jefferson Salamander or Wolverine, he again never said so. The reader has no idea *how* or *why* the Minister purportedly reached a 'no jeopardy' opinion for any of these individual species.

68. Courts may fill in evidentiary *lacunae* where the record helps to assess the reasonableness of the outcome. However, a court may not substitute its own reasons, or speculate on what a minister may have been thinking, where the reasons and record are silent.[77] This is especially so where, as here, the decision-maker was put on notice of the issue *before* making his decision.[78]

---

[73] Reasons for Judgment of van Rensburg J.A. at paras 34-35 and 69 [Leave Application V. 1, Tab 7].
[74] *Halifax (Regional Municipality) v Canada (Public Works)*, 2012 SCC 29 at para. 43.
[75] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para. 16. See also *Dunsmuir*, *supra* note 50, at para. 47.
[76] Again, excepting five species: Bobolink and Meadowlark; Butternut; and Barn Swallow and Chimney Swift.
[77] *Newfoundland Nurses, supra* note 73, at paras. 12-17; *Komolafe v Canada*, 2013 FC 431 at para. 11.
[78] Schultz Affidavit, Exhibit X [Leave Application V. 3, Tab 12F]. See also para. 10 of these submissions above.

69. The Court of Appeal made precisely this error. Rather than review the Minister's actual reasons, the Court systematically "filled in the gaps" based on conclusions unsupported by the record.

70. First, at paragraphs 70-71 and 73, the Court infers that the Minister must have performed his duty because, in developing the proposed regulation, ministry staff had excluded some species from the exemptions. However, under s. 57(1), the Minister's concern is not with the species lucky enough to have escaped the Ministry's proposed exemptions; his concern is not with the species to which the exemptions *would **not** apply*. Rather, his duty is to reach a reasoned jeopardy opinion on each species to which the Ministry's proposed exemptions ***would** apply*.

71. Second, at paragraph 72, the Court noted that, prior to the Minister opining on the proposed regulation, ministry staff had used scientific information in preparing the proposed regulation. From this, the Court infers that the regulation must have been developed by staff with each species' needs in mind. Leaving aside the doubtful merits of this inference, the question is not what information staff relied on in developing a proposed regulation. The question is whether the Minister then evaluated that proposed regulation, developed by the Ministry, and reached an opinion on whether the regulation would jeopardize each species to which it would apply.

72. Third, at paragraphs 75-77, the Court draws conclusions from the fact that a few regulatory exemptions have a few species-specific conditions. It infers that the Minister must have reached an opinion for *every one* of the species affected by those exemptions. Nothing in his Opinion – which is completely exhaustive of the record – supports this illogical inference.

73. Expert reports filed by the Environmental Groups also show the unreasonableness of the Minister's Opinion. They show that had he assessed whether the proposed exemptions would jeopardize or have other adverse effects on the American Eel or Blanding's Turtle, he would have been required to reach a different opinion.[79]

C. ISSUE 2: HOW SHOULD COURTS REVIEW WHETHER AN EXEMPTION REGULATION IS CONSISTENT WITH A STATUTE'S EXPRESS PURPOSE?

74. The proposed appeal would resolve the important question of what approach courts should use when reviewing whether a regulation, made pursuant to a provision authorizing an exemption from statutory provisions, is consistent with the express purposes of the enabling statute.

[79] Expert Report of Robert MacGregor, Expert Report of Justin Congdon [Leave Application V. 3, Tabs 13 and 14].

75. In this respect, this case raises the specific question of whether, when reviewing if a regulation is consistent with the statutory purpose, courts should assess the regulation against the statutory purpose or against the statutory scheme.[80] The Court of Appeal held that it should not focus its review on the act's purpose but also on the act's scheme. Indeed, it held that the legal question, under the inconsistent purpose branch of the *Katz* test, is whether "the regulation is consistent with the *ESA* in terms of approach and scheme".[81] It formulated this test based solely on the case of *Re Doctors Hospital.*[82] Notably, in the statute at issue in that case, the Legislature had not enacted any express purpose provisions.

76. The Environmental Groups submit that the Court of Appeal's approach turns the rule against inconsistency with statutory purpose into a rule against inconsistency with statutory scheme.

77. Assessing the validity of a regulation against a statute's scheme, instead of against its purpose, can invite a judicial end-run around express purpose provisions crafted by legislatures. Here, the courts below relied on certain narrow, circumscribed exceptions, in the *ESA*, to the ss. 9 and 10 prohibitions. For example, they relied on the Minister's ability to consider significant social or economic benefits to Ontario, before Cabinet may issue a permit under s. 17(2)(d). However, read fully and in context, s. 17(2)(d) is a highly exceptional provision that allows permits only in highly exceptional circumstances. Moreover, by selectively picking out highly exceptional provisions, against which they assessed the Exemption Regulation's consistency "in terms of approach and scheme", the courts below turned "the exceptions into the purpose".

78. Relatedly, this case raises the more specific question of whether provisions that authorize exemptions from a statute must nonetheless be construed purposively. Put in the context of this case, should s. 55(1)(b) of the *ESA* be construed such that exemption regulations made thereunder must nonetheless still be aimed at the purpose of protecting and recovering species?

79. Many acts empower exemptions to be made by regulation, and yet Canadian courts have not confirmed that such provisions should themselves be construed purposively. This Court should take this opportunity to answer this second statutory interpretation question under Issue 2.

---

[80] On determining (or establishing) the purpose of a statute, see Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed (Markham: LexisNexis, 2008) at pp. 269-270.
[81] Reasons for Judgment of van Rensburg J.A. at para. 96; see also paras 97-99 [Leave Application V. 1, Tab 7].
[82] Reasons for Judgment of van Rensburg J.A. at para. 90 [Leave Application V. 1, Tab 7].

80. If leave is granted, the Environmental Groups submit that the answer to this question should be yes. Cabinet does not have a blank slate under s. 55(1)(b). As with any provision, s. 55(1)(b) must be interpreted and applied to promote the *ESA's* purposes. Put another way, a s. 55(1)(b) exemption regulation must still aim to protect and recover the species to which it applies.[83]

81. The Exemption Regulation does not aim to protect or recover species. It merely aims to "minimize adverse effects" to endangered and threatened species.[84] Despite this, the Courts below held that the regulation is consistent with the *ESA*'s purpose (while disagreeing on the purpose). Thus, this case asks whether a regulation that aims at *minimizing harm* to species at risk is consistent with a statutory purpose of *protecting and recovering* species at risk.

82. Significantly, the Ontario courts' answer to this question diverges strongly from the analysis of the Federal Courts in the Killer Whales litigation under SARA. There, Canada argued that the discretionary management scheme of the *Fisheries Act* is consistent with a protection order under s. 58 of SARA. Rejecting this, the Federal Court of Appeal held that legislation that relies on discretion to manage habitat was not equivalent to a s. 58 order, which relies on enforceable measures to protect habitat from destruction.[85] For the Court, Mainville J.A. held:

> **[109]** The difficulty I have with the Minister's position is that it is not compatible with the provisions of the SARA, which clearly require compulsory "legal protection" for all identified critical habitat of listed endangered or threatened aquatic species. If I were to accept the Minister's position, the compulsory non-discretionary critical habitat **protection** scheme under the SARA would be effectively replaced by the discretionary **management** scheme of the *Fisheries Act.* That is not what the SARA provides for. (emphasis in original)
>
> ...
>
> **[115]** A legal protection scheme is not a regulatory management scheme. Had Parliament's intent been to authorize the Minister to regulate critical habitat of aquatic species through existing regulatory schemes – such as the *Fisheries Act* – it would not have adopted a provision requiring the compulsory non-discretionary legal protection of that habitat.

83. The Exemption Regulation is completely unrelated to the purpose of protecting and recovering species. It aims merely to lessen the killing of species and the destruction of their habitats,

---

[83] The Court of Appeal declined to address this and, at times, wrongly identified s. 57(1) as the regulation-making authority; see Reasons for Judgment of van Rensburg J.A. at paras. 87 and 99 [Leave Application V. 1, Tab 7].
[84] Reasons for Judgment of Lederer J. at paras. 22-23 [Leave Application V. 1, Tab 4].
[85] *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40 at paras. 7-9 and 106-116. On this issue, the Federal Court of Appeal upheld the Federal Court's decision (*supra* note 70). The Ontario Court of Appeal declined to address either the Federal Court or Federal Court of Appeal decisions in the Killer Whale litigation.

through an unenforceable regulatory management regime that is designed not to save species, but to save government and industry money. Not one endangered or threatened species in Ontario retains full protection of the law.[86] As found by the Environmental Commissioner of Ontario: "[b]y effectively exempting most of the major activities on the landscape that can adversely affect species at risk and their habitats, the regulation thwarts the very purposes of the Act."[87] This Honourable Court should consider whether, given this egregious case of inconsistency with statutory purpose,[88] the Exemption Regulation is *ultra vires.*

D. INTERNATIONAL, TRANSBOUNDARY AND COMPARATIVE CONTEXT

84. The public importance of this proposed appeal is further highlighted by its international, transboundary and comparative law context. That context is summarized briefly here.

85. Ontario's removal of legal protection for species and habitats undermines Canada's ability to meet its obligations under the *Convention on Biological Diversity* ("CBD").[89] After ratifying the CBD in 1992, Canada entered the National Accord on Species at Risk with the provinces and territories. In it, Canada and Ontario committed to establish complementary legislation that would *inter alia* provide immediate legal protection for threatened or endangered species, and provide protection for their habitats.[90] Subsequently, Canada and Ontario enacted SARA and the *ESA* respectively, which both refer to the CBD in their respective preambles.[91]

86. Parties and interveners in at least one previous appeal have urged consideration of this treaty,[92] yet this Court has not yet taken an opportunity to interpret domestic laws in light of the CBD.

---

[86] Applicants' Table of Endangered and Threatened Species [Leave Application V. 1, Tab 17].
[87] ECO Special Report, *Laying Siege to the Last Line of Defence*, November 2013 at p. 39, *supra* note 8. See also Environmental Commissioner of Ontario, Press Release, November 6, 2013 at Baggio Affidavit, Exhibit FF [Leave Application V. 2, Tab 11J]. At paragraph 74 of its Reasons, the Court of Appeal impliedly rejected these assessments of the Environmental Commissioner of Ontario, namely that the Exemption Regulation exempts most of the major activities on the landscape that can adversely affect species at risk and their habitats.
[88] *Katz, supra* note 46, at para. 28.
[89] *Convention on Biological Diversity,* 5 June 1992, 1760 UNTS 79, 31 ILM 818 (1992) (entered into force 29 December 1993).
[90] Government of Canada. National Accord for the Protection of Species at Risk, 1996.
[91] SARA, preamble and *ESA,* preamble. See also *Western Chorus Frogs, supra* note 68 at paras. 6-9.
[92] The Appellant and some interveners relied on the CBD in *MiningWatch Canada v Canada*, SCC Docket #32797.

87. Further, many species listed under the *ESA* are transboundary or migratory species, with habitat straddling political jurisdictions. By removing legal protections for these species, the Exemption Regulation undermines neighbouring jurisdictions' efforts to protect these species.

88. In its seminal decision in *Tennessee Valley Authority v Hill*,[93] the US Supreme Court held that the US *Endangered Species Act* affords endangered species "the highest of priorities". In contrast, while accepting that the *ESA* is a species protection law not a resource management law,[94] the Court of Appeal resisted interpreting the *ESA* to afford species the highest priority.

89. This Honourable Court has never heard an appeal regarding species at risk. It is difficult to envision any appeal being presented for this Court's consideration that could raise both such widely important legal issues and such broadly significant, urgent issues of species survival.

PART IV – COSTS SUBMISSIONS

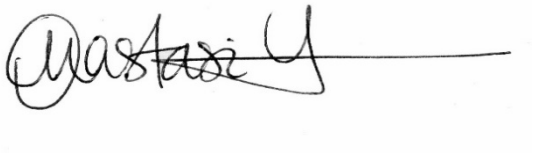
90. Should leave be granted, the Environmental Groups respectfully request the costs of this public interest application in any event of the cause. Should leave be denied, they request an order exempting them from costs. They have pursued public interest litigation only as a last resort to restore legal protections to highly vulnerable species. In the courts below, the parties agreed that the Environmental Groups, if unsuccessful, would not bear Ontario's costs.[95]

PART V – ORDER SOUGHT

91. The Environmental Groups respectfully request an order granting them leave to appeal, with costs in any event of the cause. If their application is unsuccessful, they ask that leave be denied without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of December, 2016

Lara Tessaro
Counsel for the Applicants



Anastasia M. Lintner
Counsel for the Applicants

[93] *Tennessee Valley Authority v Hill*, 437 US 153 (USSC 1978) at pp. 20-21.
[94] Reasons for Judgment of van Rensburg J.A. at para. 89 [Leave Application V. 1, Tab 7].
[95] Reasons for Judgment of Lederer J. at para. 55 [Leave Application V. 1, Tab 4]; Reasons for Judgment of van Rensburg J.A. at para. 100 [Leave Application V. 1, Tab 7].

PART VI - LIST OF AUTHORITIES

Tab	Case Law	At paragraphs
	Alberta Teachers Association v Alberta, 2002 ABQB 240	48, 51-54
	Alberta Wilderness Assn v Canada (Attorney General), 2013 FCA 190	59
	Adam v Canada (Environment), 2011 FC 962	59
	Canada (Fisheries and Oceans) v David Suzuki Foundation, 2012 FCA 40 (*sub nom Georgia Strait Alliance v Canada (Minister of Fisheries & Oceans)* (2012), 427 NR 110)	84
	Canadian Council for Refugees v Canada, 2008 FCA 229	54
	Centre Québécois du droit de l'environnment v Canada (Environment), 2015 FC 773	59
	David Suzuki Foundation et al v The AG for BC, 2004 BCSC 620	51
	David Suzuki Foundation v Canada, 2010 FC 1233	60
	Dunsmuir v New Brunswick (Board of Management), 2008 SCC 9	23, 25, 42, 44, 66
	Halifax (Regional Municipality) v Canada (Public Works), 2012 SCC 29	65
	Katz Group Canada Inc v Ontario (Health and Long-Term Care), 2013 SCC 64	36, 44, 55, 75
	Komolafe v Canada (Citizenship and Immigration), 2013 FC 431	68
	Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62	66, 68
	Novopharm Limited v Eli Lilly Canada Inc, 2009 FCA 138	54
	Re Doctors Hospital and Minister of Health (1976), 12 OR (2d) 164 (HCJ - Div Crt)	75
	Reference as to the Validity of the Regulations in Relation to Chemicals Enacted by Order in Council and of an Order of the Controller of Chemicals Made Pursuant Thereto, [1943] SCR 1	56, 57
	Saputo Inc v Canada (Attorney General), 2011 FCA 69	54
	Strickland v Canada (Attorney General), 2013 FC 475	54
	The Nova Scotia Barristers' Society v Trinity Western University, 2016 NSCA 59	51
	Thorne's Hardware Ltd v The Queen, [1983] 1 SCR 106	55
22A	*Tennessee Valley Authority v Hill*, 437 US 153 (USSC 1978)	88

	Secondary Authorities	**At paragraphs**
22B	Ontario Biodiversity Council. *State of Ontario's Biodiversity 2015* (Peterborough, 2015).	30
22C	Ruth Sullivan, *Sullivan on the Constructions of Statutes*, 5th ed (Markham: LexisNexis, 2008) (excerpts)	75
	WWF. 2016. *Living Planet Report 2016. Risk and resilience in a new era*. WWF International, Gland, Switzerland.	29
	Intergovernmental Agreements	
	Government of Canada. National Accord for the Protection of Species at Risk, 1996.	85
	International Treaties	
	Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, 31 ILM 818 (1992) (entered in force 29 December 1993).	85-86
	Hansard	
	Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 143, (20 March 2007).	5
	Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 148, (28 March 2007).	5, 30
	Ontario, Legislative Assembly, *Official Report of Debates (Hansard), Committee Transcripts: Standing Committee on Finance and Economic Affairs*, 40th Parl, 1st Sess (6 June 2012) at F-70—F-72.	6
	Ontario, Legislative Assembly, *Official Report of Debates (Hansard), Committee Transcripts: Standing Committee on Finance and Economic Affairs*, 40th Parl, 1st Sess (7 June 2012) at F-112—F-117.	6
	Ontario, Legislative Assembly, *Official Report of Debates (Hansard), Committee Transcripts: Standing Committee on Finance and Economic Affairs*, 40th Parl, 1st Sess (8 June 2012) at F-157—F-159.	6
	Ontario, Legislative Assembly, *Official Report of Debates (Hansard), Committee Transcripts: Standing Committee on Finance and Economic Affairs*, 40th Parl, 1st Sess (18 June 2012) at F-262	6

[Hyperlinks to all Authorities Above, Except those in Tabs 22A-C of Leave Application]

PART VII – STATUTES & REGULATIONS

Tab	Title
9A	*Endangered Species Act, 2007*, SO 2007, c 6, Preamble, ss 1, 3-7, 9, 10, 17, 18, 55, 57 *Loi de 2007 sur les espèces en voie de disparition*, LO 2007, c 6, Préambule, ss 1, 3-7, 9, 10, 17, 18, 55, 57
9B	O Reg 230/08, ss 1-6, Schedule 2, Schedule 3
9C	O Reg 25/13, amending O Reg 230/08, s 1
9D	O Reg 200/16, amending O Reg 230/08, s 1
9E	O Reg 308/16, amending O Reg 242/08, s 1 O Reg 242/08, s O.1
9F	*Endangered Species Act*, RSO 1990, c E.15 *Loi sur les espèces en voie de disparition*, LRO 1990, c E.15
9G	*Species at Risk Act*, SC 2002, c 29, ss 58, 80 *Loi sur les espèces en peril*, LC. 2002, ch 29, ss 58, 80
9H	*Interpretation Act*, RSC, 1985, c I-21, s 2 *Statutory Instruments Act*, RSC, 1985, c S-22, s 2
9I	*Fire Protection and Prevention Act, 1997*, SO 1997, c 4, ss 2(8), 2(9) *Occupational Health and Safety Act*, RSO 1990, c O.1, s 22.4 *Securities Act*, RSO 1990, c S.5, ss 2.2(3), 2.2(9), 2.2(16)
9J	*Quarantine Act*, SC 2005, c 20, s 58(1) *Water Sustainability Act*, SBC 2014, c 15, s 128 *Medical Profession Act, 1981*, SS 1980-81, c M-10.1, s 32 *The Essential Services Act (Government and Child and Family Services)*, CCSM c E145, s 6 *Reciprocal Enforcement of Judgments Act*, SNB 2014, c 127, s 9 *Employment Standards Act*, RSPEI 1988, c E-6.2, s 42(1)