File No.: M45222

COURT OF APPEAL FOR ONTARIO

BETWEEN:

WILDLANDS LEAGUE and
FEDERATION OF ONTARIO NATURALISTS

Applicants
(Moving Parties)

- and -

LIEUTENANT GOVERNOR IN COUNCIL and
MINISTER OF NATURAL RESOURCES

Respondents
(Responding Parties)

NOTICE OF MOTION FOR LEAVE TO APPEAL

THE MOVING PARTIES, Wildlands League and Federation of Ontario Naturalists will make a motion for leave to appeal to the Court of Appeal for Ontario in writing 36 days after service of the Moving Parties' motion record and factum or on the filing of the Moving Parties' reply factum, if any, whichever is earlier, at Osgoode Hall, 130 Queen Street West, Toronto.

THE MOVING PARTIES propose that the motion be heard in writing as an opposed motion under Rule 61.03.1.

THE MOTION IS FOR:

1. An order granting leave to appeal from the order of the Divisional Court made on May 28, 2015, dismissing the Moving Parties' application for judicial review;
2. Costs of this motion; and
3. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

4. On May 15, 2013, the Lieutenant Governor in Council ("Cabinet") made Ontario Regulation 176/13 (the "Regulation"), on the recommendation of the Minister of Natural Resources and Forestry (the "Minister"). The Regulation amends Ontario Regulation 242/08 to exempt many industrial activities from compliance with the *Endangered Species Act, 2007*, SO 2007, c 6 ("*ESA*"). Specifically, it exempts many industrial activities from the *ESA*'s core prohibitions against killing, harming, harassing, capturing, or taking endangered or threatened species, and against damaging or destroying their habitat.

5. The Moving Parties challenged the Regulation's validity in an application for judicial review before the Divisional Court, on two grounds, but the application was dismissed.

6. The issues to be addressed in the proposed appeal are:

    a. 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?

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

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

7. The proposed appeal raises issues of public importance. These issues will directly impact the development of Ontario's jurisprudence, with respect to environmental and administrative law.

8. The *vires* of the Regulation transcends the interests of the parties to this proposed appeal. Over 10,000 Ontarians commented on the Regulation at the time of its proposal. Furthermore, the *vires* of the Regulation is a matter of fundamental importance to the survival and recovery of every endangered and threatened species in Ontario.

9. The *ESA* is Ontario's only law protecting endangered and threatened species. It has never been interpreted by this Honourable Court. Both the judiciary and the Executive would benefit from this Court's guidance on how to interpret and apply the *ESA*.

10. The proposed appeal raises questions fundamental to the integrity and coherence of the *ESA*'s statutory scheme as a whole. In particular, the proposed appeal would resolve the issue of the Act's purpose. The purpose of the *ESA* must be correctly construed, as it informs the interpretation and application of every provision in the statute. This Honourable Court should provide much needed clarity on the Act's purpose.

11. The proposed appeal also raises important and unresolved issues regarding the judicial review of statutory decisions that happen to serve as conditions precedent to the recommendation or making of subordinate legislation. Following the Supreme Court of Canada's decisions in both *Dunsmuir v. New Brunswick* ("*Dunsmuir*") and *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)* ("*Katz*"), it appears that no Canadian appellate court has squarely addressed the correct approach to judicially reviewing a statutory decision that serves as a condition precedent to subordinate legislation. Other legislative schemes in Ontario impose a duty on statutory decision-

makers to reach opinions or make determinations before Cabinet may enact regulations or orders in council. Whether such statutory decisions should be subject to modern administrative law principles including the standard of review analysis set out in *Dunsmuir,* or should instead be reviewed according the criteria set out in *Katz* for reviewing regulations themselves, is an important question for the development of Ontario's administrative law jurisprudence.

12. On this question, the Divisional Court took an approach to reviewing the Minister's determination under s. 57(1) of the *ESA* that is inconsistent with the approaches taken by the Federal Court and Federal Court of Appeal to reviewing ministerial determinations under the *Species at Risk Act*, SC 2002, c 29 ("*SARA*").

13. In the judicial review application below, the Divisional Court was not acting in any appellate capacity but rather as a court of original jurisdiction on a matter of first instance.

14. With respect to the first issue proposed to be addressed on appeal, the Divisional Court erred in failing to establish the purpose of the *ESA*. To the extent that the Court did analyze and establish the Act's purpose, it misconstrued its purpose by:

    a. failing to consider or to apply the legislated purpose provision at s. 1;

    b. disregarding evidence of the Act's purpose in the legislative history, including that the *ESA* was enacted to create a "presumption of protection" for endangered and threatened species;

    c. putting undue weight on one phrase in the *ESA*'s non-binding preamble; and

    d. considering only those statutory provisions which themselves comprise narrow exceptions to the Act's species protection and recovery purpose.

15. With respect to the second issue proposed to be addressed on appeal, the Divisional Court erred in holding that the Minister's determination satisfied his duty under s. 57(1). The Court held that the Minister's determination was not reviewable. This holding is contrary to modern principles of judicial review and administrative law, pursuant to which all administrative decisions are subject to review under either a correctness or reasonableness standard. Further, the Divisional Court's holding on this point is contrary to jurisprudence of the Federal Court and Federal Court of Appeal in analogous contexts under the *SARA*.

16. With respect to the third issue proposed to be addressed on appeal, the Divisional Court failed to identify the correct legal test that ministers must apply when making determinations under s. 57(1). Instead, the Court erroneously interpreted s. 57(1) as not requiring an individual assessment of the Regulation's adverse effect on each species to which it would apply, according to each species' individual needs. The Court's interpretation was contrary to the modern approach to statutory interpretation. The Court failed to correctly construe the ordinary and grammatical sense of the text of s. 57(1). Further, when interpreting s. 57(1), the Court ignored the Act's broader scheme, including similar language in other provisions within the statute. Finally, when interpreting s. 57(1), the Court ignored the *ESA*'s legislated purpose. Through its interpretive errors, the Court reached an unjust and unreasonable result that fails to advance the Act's purpose of protection and recovery of species at risk.

17. The Divisional Court's order means the Regulation stands – and not one endangered or threatened species in Ontario enjoys the full protection of the *ESA*'s legislated prohibitions on killing them or destroying their habitats.

18. Section 6(1)(a) of the *Courts of Justice Act*, RSO 1990, c C.43 and Rule 61.03.1 of the *Rules of Civil Procedure*, RRO 1990, Reg 194;

19. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

20. The complete application record that was before the Divisional Court; and

21. Such further and other materials as counsel may advise and this Honourable Court may permit.

Lara Tessaro, LSUC #: 67052M
Charles Hatt, LSUC #: 64418I

550 Bayview Ave, Suite 401
Centre for Green Cities
Toronto, ON M4W 3X8
T: 416-368-7533 ext. 531
F: 416-363-2746

Lawyers for the Moving Parties
Wildlands League and Federation of Ontario Naturalists

Dated this 12th day of June, 2015

TO: MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
F: 416-326-4181

Bill Manuel, LSUC #: 16446I
T: 416-326-9855

Sunil Mathai, LSUC #: 49616O
T: 416-326-0486

Lawyers for the Respondents
Lieutenant Governor in Council and Minister of Natural Resources

Wildlands League and Federation of Ontario Naturalists Applicants/Moving Parties	and	Lieutenant Governor in Council and Minister of Natural Resources Respondents/Responding Parties	File No: M45222

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PROCEEDING COMMENCED AT Toronto

Notice of Motion

Ecojustice
Lara Tessaro, LSUC# 67052M
Charles Hatt, LSUC# 64418I

550 Bayview Ave, Suite 401
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Toronto, ON M4W 3X8
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