

Court File No. M40606

**ONTARIO  
COURT OF APPEAL**

**BETWEEN:**

**SIERRA CLUB CANADA**

Applicant

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO  
AS REPRESENTATIVE OF THE MINISTRY OF NATURAL RESOURCES and  
THE MINISTRY OF TRANSPORTATION**

Respondent

**FACTUM OF THE RESPONDENT,  
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

December 28, 2011

**MINISTRY OF THE ATTORNEY GENERAL**  
Crown Law Office- Civil  
720 Bay Street, 8<sup>th</sup> Floor  
K:Toronto, Ontario M7A 2S9

**W. J. Manuel** (LSUC # 164461F)  
Tel: 416-326-9855

**Lise G. Favreau** (LSUC # 37800S)  
Tel: 416-325-7078  
Fax : (416) 326-4181

Lawyers for the Respondent, Her Majesty  
the Queen in right of Ontario as  
Representative of the Ministry of Natural  
Resources and the Ministry of  
Transportation

**TO: ILER CAMPBELL LLP**  
Barristers & Solicitors  
700-890 Yonge Street  
Toronto, Ontario  
M4W 3P4

**Paula Boutis**  
Tel. No.: 416-598-0103  
Fax No. : 416-598-3484

Lawyer for the Applicant

## TABLE OF CONTENTS

<b>PART I – OVERVIEW .....</b>	<b>1</b>
<b>PART II – THE FACTS .....</b>	<b>4</b>
The Endangered Species Act .....	4
Process Leading to the Issuance of the Permit to Ministry of Transportation.....	6
Application for Judicial Review .....	6
<b>PART III – ISSUES AND THE LAW .....</b>	<b>9</b>
The Test for Leave to Appeal.....	9
<b>ISSUE 1: The Precautionary Principle.....</b>	<b>11</b>
<b>ISSUE 2: The Independence of Mr. Kamstra .....</b>	<b>17</b>
<b>ISSUE 3: The two Eastern Foxsnake populations .....</b>	<b>18</b>
<b>PART IV – ORDER REQUESTED .....</b>	<b>20</b>
<b>Schedule “A” – Authorities .....</b>	<b>Tab A</b>
<b>Schedule “B” – Statutes and Regulations .....</b>	<b>Tab B</b>

**ONTARIO  
COURT OF APPEAL**

B E T W E E N:

**SIERRA CLUB CANADA**

Applicant  
(Moving Party)

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO  
AS REPRESENTATIVE OF THE MINISTRY OF NATURAL RESOURCES and  
THE MINISTRY OF TRANSPORTATION**

Respondent  
(Responding Party)

**FACTUM OF THE RESPONDENT,  
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

**PART I -- OVERVIEW**

1. On this motion, the moving party, Sierra Club Canada ("Sierra") seeks leave to appeal the Order of the Divisional Court dated September 27, 2011, dismissing its application for judicial review. It is the position of the respondent, Her Majesty the Queen in Right of Ontario as Representative of the Ministry of Natural Resources and the Ministry of Transportation ("Ontario"), that the motion should be dismissed as the proposed appeal does not raise any issues that warrant review by this Honourable Court.

2. The application for judicial review brought by Sierra sought to challenge a permit issued by the Minister of Natural Resources (the “Minister”) on February 9, 2010, to the Ministry of Transportation (“MTO”) under the *Endangered Species Act, 2007* (the “ESA”) in relation to the construction of the Windsor Essex Parkway (“WEP”) portion of the Detroit River International Crossing (“DRIC”) Project (the “Permit”).

3. The decision was made pursuant to section 17(2)(d) of the ESA. This provision represents an exception to the prohibition in the ESA against harming or killing species at risk (“SAR”) and damaging or destroying their habitat in Ontario. As found by the Divisional Court, this exception is meant to balance the important objectives of protecting SAR against the ongoing need for social and economic development, including major infrastructure projects such as the WEP. In other words, this provision foresees that individual SAR or even pockets of SAR may be harmed or killed by a project. However, as long as the Minister has consulted with an expert on the potential effects of the proposed activity on the SAR and has formed the opinion that (1) the project provides significant social or economic benefit, (2) the project will not jeopardize the survival or recovery of the species in Ontario, and (3) reasonable mitigation measures are put in place, the Minister can exercise her discretion to issue the permit.

4. In its lengthy and comprehensive reasons, the Divisional Court found that there was no basis for Sierra’s challenge to the issuance of the Permit, emphasizing the discretionary nature of the decision at issue. The Court further held that the issues raised

by Sierra effectively amounted to an improper invitation to the Court to engage in policy making, a role to be performed by the Minister and not the courts:

The Minister was asked to make a decision concerning, on the one hand, social and economic benefit, and, on the other, the possible impact on SAR. There is an obvious tension between these values. The decision she has been required to make is, at its core, a matter of government policy. The requirement that she form opinions (as opposed to making a quasi judicial decision) confirms this understanding. Ultimately, applying and weighing the values at stake is for the Minister and not the court. In this case, the applicant has consistently sought to have the court enter considerations leading to an analysis that would take the court outside the applicable law and its appropriate role. This approach, if followed, would have required the court to ignore the breadth of the deference owed, particularly to the degree owed to the Minister in circumstances such as this.<sup>1</sup>

5. Ontario submits that similarly the issues raised by Sierra in its proposed appeal do not warrant review by this Honourable Court:

- a) The application of the precautionary principle advocated by the applicant was carefully considered and properly rejected by the Divisional Court. The Divisional Court's decision on this issue is entirely consistent with the ESA and other case law, and does not engage any broader issues of statutory interpretation or public policy;
- b) The Divisional Court's factual finding on the independence of Mr. Kamstra was legally sound and consistent with the unique circumstances of the case; and
- c) The Divisional Court properly found on the evidence before it that the Minister was aware that the regulations under the ESA had divided the Eastern Foxsnake into two distinct populations between the time when the expert report was obtained and the issuance of the permit; and that she had taken this change into consideration prior to making her decision since the report addressed in substance

---

<sup>1</sup> *Sierra Club Canada v. Ontario (Ministry of Natural Resources)* dated September 27, 2011, para. 110, Applicant's Motion Record, Tab 4.

the survival of the separate populations. In any event, the Minister has since obtained a new report dealing with the separate population and issued a new permit on that basis.

6. The issues raised by the applicant do not raise any matters of public importance which require adjudication. There is no obvious misapprehension of the facts or clear departure from the law that would make the hearing of the appeal on these issues a matter of public importance. Moreover, the factual circumstances of the case, specifically in respect of the independence of Mr. Kamstra and the two populations of Eastern Foxsnake, are idiosyncratic and not likely to arise again.

## **PART II – THE FACTS**

### **The Endangered Species Act**

7. The ESA prohibits anyone in Ontario from “killing, harming, harassing, capturing, taking, possessing, transporting, collecting and buying or selling any living member of a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species.”<sup>2</sup>

8. In addition, in respect of a limited number of designated species, the ESA also prohibits anyone in Ontario from damaging or destroying the habitat of SAR. At the time the Permit was issued, the only SAR whose habitat was protected under the ESA relevant to this proceeding was the Eastern Foxsnake.<sup>3</sup>

---

<sup>2</sup> *Endangered Species Act, 2007*, S.O. 2007, c. 6, s. 9.

<sup>3</sup> *Endangered Species Act, 2007*, S.O. 2007, c. 6, s. 10.

9. Despite these prohibitions, section 17 of the ESA provides that the Minister can issue various permits allowing activities otherwise prohibited under the ESA, including under s. 17 (2) (d), which is the provision in issue in this proposed appeal:

17(1) The Minister may issue a permit to a person that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes the person to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10.

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

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

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

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

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

(iii) the Minister is of the opinion that the activity will not jeopardize the survival or recovery of the species in Ontario,

(iv) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted,

(v) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit, and

(vi) the Lieutenant Governor in Counsel has approved the issuance of the permit.<sup>4</sup>

10. In addition, when issuing a permit under s. 17 of the ESA, the Minister can impose conditions on the permit.<sup>5</sup>

---

<sup>4</sup> *Endangered Species Act, 2007*, S.O. 2007, c .6, s. 17.



**Process Leading to the Issuance of the Permit to Ministry of Transportation**

11. Ontario, along with Canada, Michigan and the United States, has been involved in a partnership for the purpose of completing the DRIC project, which will result in a new international crossing between Windsor and Detroit. As part of the DRIC Project, the MTO is involved in the design, financing, construction and maintenance of the WEP, which will connect Highway 401 in the Town of Tecumseh to a new customs plaza site in the City of Windsor and the new bridge crossing over the Detroit River.<sup>6</sup>

12. As part of the approvals required for the WEP, MTO applied for a permit under the ESA, as the construction of the WEP may impact a number of SAR classified under the ESA. A permit for eight SAR was required, including Butler's Gartersnake, Colicroot, and Eastern Foxsnakes.<sup>7</sup>

13. As required under section 17(2)(d)(ii) of the ESA, the MNR obtained reports from independent experts in respect of each of the eight species.<sup>8</sup>

14. While there was no requirement for public consultation on the issuance of a permit under s. 17 of the ESA, MNR voluntarily held a stakeholder meeting and posted an Information Notice regarding the proposed ESA permit on the electronic Environmental Registry for the purpose of soliciting broader public comments on the proposed permit. In addition, in response to requests it received from members of the

---

<sup>5</sup> *Endangered Species Act, 2007*, S.O. 2007, c .6, s. 17.

<sup>6</sup> "Analysis of Type D Permit Requirements", p. 76, Applicant's Motion Record, Tab 5.

<sup>7</sup> "Analysis of Type D Permit Requirements", p. 77, Applicant's Motion Record, Tab 5.

<sup>8</sup> "Analysis of Type D Permit Requirements", p. 82, Applicant's Motion Record, Tab 5.

public, including Sierra, MNR provided copies of the expert reports to those who requested them.<sup>9</sup>

15. As part of the decision making process, MNR staff compiled a record of relevant information for the Minister's review, including the expert reports on each of the SAR, a socio-economic review prepared by MNR staff, an analysis of all of the submissions received from members of the public including two submissions made by Sierra, and a twenty page document summarizing and analyzing the information obtained and to be considered by the Minister in relation to the Permit.<sup>10</sup>

16. On January 11, 2010, the Minister of Natural Resources signed a decision in which she stated her opinion that the preconditions for seeking approval of the LGIC for the issuance of the permit under the ESA had been met.<sup>11</sup>

17. On February 9, 2010, following LGIC approval as required by section 17(2) (d) (vii), the permit was issued by the Minister.<sup>12</sup>

18. The permit includes extensive conditions, including mitigation measures designed to reduce the impact of the project on the SAR at issue, and requirements to protect and manage the lands for these species in the long-term.<sup>13</sup>

---

<sup>9</sup> "Analysis of Type D Permit Requirements", p. 80, Applicant's Motion Record, Tab 5.

<sup>10</sup> "Analysis of Type D Permit Requirements", pp. 75-92, Applicant's Motion Record, Tab 5.

<sup>11</sup> "Minister's Opinion" in "Analysis of Type D Permit Requirements", p. 91, Applicant's Motion Record, Tab 5.

<sup>12</sup> Permit No. AY-D-001-09, p. 176, Applicant's Motion Record Tab 9.

<sup>13</sup> Permit No. AY-D-001-09, pp. 176-205.31, Applicant's Motion Record, Tab 9.

19. Although there is no legislative requirement to do so, the permit was publicly posted on MTO's website on April 7, 2010. Sierra was aware that the Permit had been issued by late April 2011.<sup>14</sup>

20. Prior to the hearing of the application for judicial review, MTO applied for a new permit in respect of the Carolinian population of eastern Foxsnake. On May 11, 2011, MNR obtained a new report from Robert Willson, the expert who had prepared the original report dealing with Eastern Foxsnake, in which Mr. Willson concluded that the WEP would not jeopardize the survival of the Carolinian population of the Eastern Foxsnake.<sup>15</sup> Following the hearing of the application for judicial review, the Minister issued a new permit to MTO in respect of Eastern Foxsnake (Carolinian population).<sup>16</sup>

### **Application for Judicial Review**

21. Sierra commenced the application for judicial review on August 18, 2010. Sierra brought two motions for interim relief for the purpose of preventing demolition work related to the WEP from being conducted prior to the hearing of the application. Both motions were dismissed.<sup>17</sup>

22. On the application for judicial review itself, Sierra raised a lengthy list of issues in support of its challenge to the issuance of the Permit, including allegations of bias against the Minister and her staff. The Court rejected all of these arguments, and throughout its

---

<sup>14</sup> Affidavit of D. McDermott, para. 58, Responding Record of the Respondent, Tab 3.

<sup>15</sup> Report dated May 11, 2011 prepared by Robert Willson, Responding Record of the Repondent, Tab 1.

<sup>16</sup> Information Notice 011-3238 from the Environmental Registry dated August 22, 2011, Responding Record of the Respondent, Tab 2 (Note that this permit had not been issued at the time of the hearing, so it was not part of the record before the Divisional Court. If leave is granted, Ontario will seek to have it admitted as fresh evidence).

<sup>17</sup> *Sierra Club Canada v. Ontario (Ministry of National Resources)* [2010] O.J. No. 3924 (Div. Ct.) and *Sierra Club Canada v. Ontario (Ministry of Natural Resources)*, [2011] O.J. No. 3960 (Div. Ct.).

decision the Court emphasized the discretionary nature of the decision. In particular, the Court described the Minister's task under section 17(2)(d) of the ESA as follows:

The substantive requirements to be met are restricted to the Minister consulting experts and forming opinion. This serves to broaden the deference the court should provide to the decision to issue the Permit. There is nothing that requires that the Minister follow the opinions of the experts. The obligation is limited to the Minister undertaking the consultation and forming his or her own opinions. This reflects the fact that there are considerations other than the impact on SAR that must be accounted for in determining whether a project such as an international crossing should proceed. This is made clear by reference, in s. 17(2)(d)(i) of the ESA, to the need for the Minister to be of the opinion that the activity will result in a significant social economic benefit to Ontario. This demonstrates the public policy aspects of this determination and confirms the wide nature of the deference to be offered.<sup>18</sup>

23. The Court went on to find that the Minister had met the substantive requirements for issuance of the permit and that based on the information before her, the decision to issue the permit was reasonable. More specifically, as reviewed in more detail below, the Court also addressed in detail each of the three issues raised by the moving party in support of its proposed appeal.

### **PART III – ISSUES AND THE LAW**

#### **The Test for Leave to Appeal**

24. Section 6(1) of the *Courts of Justice Act* provides that an appeal lies to the Court of Appeal from an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of Court.<sup>19</sup>

---

<sup>18</sup> *Sierra Club Canada v. Ontario (Ministry of Natural Resources)* dated September 27, 2011, para. 39. Applicant's Motion Record, Tab 4.

<sup>19</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(a), *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, Rule 61.03.1

25. On a motion for leave to appeal, this Honourable Court must be satisfied that the matter will present an arguable question of law, or of mixed fact and law, on matters such as, *inter alia*:

- (a) the interpretation of a statute or regulation; or
- (b) the interpretation or clarification of some general rule or principle of law.<sup>20</sup>

26. Moreover, generally leave will not be granted where the question before the court would largely have significance only to the parties and would not settle for the future a question of general interest to the public or a broad segment of the public.<sup>21</sup>

27. Ontario submits that leave to appeal should be denied because:

- i. In applying the provisions of the ESA, the role of the precautionary principle advocated by the applicant was carefully considered and properly rejected by the Divisional Court. The Divisional Court's decision on this issue is entirely consistent with the ESA and other case law, and does not engage any broader issues of statutory interpretation;
- ii. The Divisional Court's ruling on the independence of Mr. Kamstra was a finding of fact which was legally sound and consistent with the unique circumstances of the case; and
- iii. The Divisional Court properly found on the evidence before it that the Minister was aware that the regulations under the ESA had

---

<sup>20</sup> *Re Sault Dock Co. Ltd. And City of Sault Ste. Marie*, [1973] 2 O.R. 479 (C.A.)

<sup>21</sup> *Ibid.*

divided the Eastern Foxsnake into two distinct populations between the time when the expert report was obtained and the issuance of the permit; and that as a matter of fact she had taken this change into consideration prior to making her decision since the report she had obtained did address in substance the survival of that distinct population.

**Issue 1: The Precautionary Principle**

28. Sierra argues that the Divisional Court erred in its application of the precautionary principle. More specifically, Sierra argues that the Court ought to have found that the ESA “underpins” every section of the statute and must be applied by the Minister “when making decisions about jeopardy and when considering mitigation methods.”<sup>22</sup> Sierra further appears to argue that the precautionary principle requires the Minister to know with certainty whether a mitigation measure will be successful prior to issuing a permit under the ESA.

29. Ontario submits that this issue does not raise an arguable question of law of public importance. The Divisional Court considered these same arguments advanced by Sierra in some detail and rejected them as inconsistent with the ESA and the case law dealing with the precautionary principle. In effect, the Divisional Court’s approach is based on a careful review of the ESA and relevant case law. In contrast, the position advocated by Sierra is unsupported by the law and in any event entirely unworkable and unrealistic.

---

<sup>22</sup> Factum of the Applicant (Moving Party) Sierra Club Canada at para. 23.

30. The Divisional Court properly concluded that “the precautionary principle is a guiding principle not a statutory or regulatory requirement.”<sup>23</sup> As found by the Divisional Court, section 17(2)(d) of the ESA does not require the application of the precautionary principle as a separate consideration under that section. If it were the intent of the legislature to have the precautionary principle underpin the decisions of the Minister made under s.17(2)(d), it would have made it one of the many conditions listed under that section. As stated by the Divisional Court, “if [the precautionary principle] was meant to apply to permits, it was open to the Legislature to include it within that section.”<sup>24</sup> This is supported by the fact that the precautionary principle is an explicit requirement under the procedure of s.11, but not s.17 of the ESA.

31. Sierra suggests that the reference to the precautionary principle in the ESA’s preamble makes it applicable to all of the Minister’s decisions. However, again, this issue was considered by the Divisional Court, which properly held that the wording of the preamble as a whole must be considered:

The description, found in the preamble to the *ESA* [...], does nothing more than observe that the precautionary principle is taken note of by the United Nations Convention on Biological Diversity. Its presence in the preamble does not make it law. The preamble serves to introduce the ideas and concerns which inform the legislation that follows. It is worthwhile noting that among the ideas found in the preamble, is the need to balance the concerns dealt with by the *ESA* with others. The preamble states:

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

---

<sup>23</sup> *Sierra Club Canada v. Ontario (Ministry of Natural Resources)* dated September 27, 2011, para. 53, Applicant’s Motion Record, Tab 4.

<sup>24</sup> *Sierra Club Canada v. Ontario (Ministry of Natural Resources)* dated September 27, 2011, para 58, Applicant’s Motion Record, Tab 4.

Ontarians should protect species at risk for future generations.  
(emphasis in original) <sup>25</sup>.

32. This approach is consistent with the law on the role of preambles in legislation. While the preamble is an obvious tool for a purposive analysis as it often sets out “direct descriptions of purpose or descriptions of the circumstances giving rise to the enactment...”<sup>26</sup>, it is not a binding provision of the statute. The limited role of the preamble is addressed by Ruth Sullivan in the Fifth edition of her ongoing update to *Driedger on the Construction of Statutes*:

Although purpose statements and preambles offer the most authoritative evidence of purpose or draw attention to the presence of mixed or competing purposes, the assistance they offer is often quite limited. They typically recite the primary objectives of legislation, which are apt to be obvious in any event, while failing to mention secondary purposes. Even purpose statements or preambles that are relatively specific rarely indicate how multiple purposes should be weighed or how competing purposes should be balanced. It is left to the courts to work out the relationship between purposes declared in preambles, or purpose statements and the purpose of individual provisions within the legislation, generally through scheme analysis.<sup>27</sup>

33. In this instance the Divisional Court did precisely as quoted above; it worked out the relationship between the preamble and the individual provisions of legislation in question. In determining that the exclusion of the precautionary principle from s.17 was deliberate, the court followed a common rule of statutory interpretation: that “preambles must be measured against other indicators of legislative purpose or meaning, which may

---

<sup>25</sup> *Sierra Club Canada v. Ontario (Ministry of Natural Resources)* dated September 27, 2011, para. 54, Applicant’s Motion Record, Tab 4.

<sup>26</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5<sup>th</sup> ed. (Markham: LexisNexis, 2008) at 271.

<sup>27</sup> *Ibid.*



34. In support of its argument that the precautionary principle must “underpin” all decisions under the ESA, Sierra relies on a case which defines the precautionary principle,<sup>29</sup> a case that speaks to its use as an interpretive tool,<sup>30</sup> and a case in which the precautionary principle was a statutory requirement in the body of the specific statute at issue.<sup>31</sup> However, none of these cases deal with the application of the precautionary principle in circumstances where it is not explicitly referred to in the applicable section of the statute, as in this case.

35. In contrast, the Divisional Court’s decision is consistent with case law from other courts in Canada. For example, in *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)*, the Court of Appeal for British Columbia concluded that the decision maker did not err in not explicitly applying the precautionary principle as it was not codified in the statute governing the decision-making process.<sup>32</sup> A later decision of the Court of Appeal for British Columbia followed this decision and refused to give the precautionary principle the force of a “mandatory rule of construction” as requested by the applicants.<sup>33</sup>

---

<sup>29</sup> *Davidson v. Ontario (Ministry of the Environment)* (2006), 24 C.E.L.R. (3d) 165 (O.E.R.T.), Applicant’s Book of Authorities, Tab 3.

<sup>30</sup> *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)* [2001] S.C.J. No. 42, Applicant’s Book of Authorities, Tab 1.

<sup>31</sup> *Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans)* [2009] F.C.J. No. 1052 (F.C.), Applicant’s Book of Authorities, Tab 4.

<sup>32</sup> *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)* 2003 BCCA 403 at paras. 79-80.

<sup>33</sup> *Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. British Columbia (Utilities Commission)* 2007 BCCA 211.

36. Moreover, as found by the Divisional Court, in this case the Minister “accounted for and considered” the precautionary principle in coming to her decision:

The issue of whether the precautionary principle was properly accounted for in considering whether the Permit would be granted was raised by the applicants in submissions made to the Minister of Natural Resources. The staff of the Ministry responded:

MNR is of the opinion that a precautionary approach has been taken in developing the permit and the conditions of the permit. Examples of this approach include consulting with species experts; requiring that trials be undertaken to test and identify the best approaches to mitigation (e.g. planting techniques) prior to impacting species; requirements for long-term monitoring; and the adoption of an adaptive management approach that may require additional mitigation steps to be undertaken where merited.

There is nothing which supports the proposition that the precautionary principle must not only be considered, but adhered to before a permit can be issued. In this case, it was accounted for and considered.<sup>34</sup>

37. Sierra argues that the mitigation measures in the Permit fail to follow the precautionary principle as the Permit does not require that the mitigation measures be proven to be successful before they are implemented. In advancing this argument, Sierra relies on a definition of the precautionary principle from a decision of the Environmental Review Tribunal in *Davidson v. Ontario (Director, Ministry of the Environment)*.<sup>35</sup> Again, this gives the precautionary principle the weight of a statutory requirement rather than what it actually is in this context: “a guiding principle.”<sup>36</sup> In any event, as found by the Divisional Court, a description of the precautionary principle in a decision of the Environmental Review Tribunal does not give it the force of law and, moreover, as reviewed by the Divisional Court, the *Davidson* decision does not stand for the

<sup>34</sup> *Sierra Club Canada v. Ontario*, dated September 27, 2011, paras. 59-60, Applicant’s Motion Record, Tab 4.

<sup>35</sup> Factum of the Applicant at para. 39.

<sup>36</sup> *Sierra Club Canada v. Ontario* dated September 27, 2011, para. 53, Applicant’s Motion Record, Tab 4.

proposition that those involved in the issuance of permits must “always be certain or [...] assume the worst”.<sup>37</sup>

38. The Divisional Court’s approach to the precautionary principle is consistent with other case law in Ontario. In *Hanna v. Ontario (Attorney General)*, the Applicant argued that the Minister of Environment had not considered the precautionary principle as required by its Statement of Environmental Values (“SEV”) in making the decision to enact regulations regarding renewable energy.<sup>38</sup> The Divisional Court found that although s.11 of the Environmental Bill of Rights (“EBR”) required the Minister to consider the precautionary principle, it also required him to consider all the other principles of the SEV, “a process which involves a policy laden weighing and balancing of competing principles.”<sup>39</sup> The court held that the Minister had followed the general process mandated by s.11 of the EBR, and as such his decision was not open to review.<sup>40</sup>

39. A similar approach to the precautionary principle was taken by the British-Columbia Supreme Court in *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)* in the context of a license for raising Atlantic salmon.

The court found that:

[...] the precautionary principle does not require governments to halt all activity which may pose some risk to the environment until that can be proven otherwise. The decisions on what activity to allow and how to control it often require a balancing of interests and concerns and a weighing of risks.<sup>41</sup>

<sup>37</sup> *Sierra Club Canada v. Ontario*, dated September 27, 2011, para.57, Applicant’s Motion Record, Tab 4.

<sup>38</sup> *Hanna v. Ontario (Attorney General)* [2011] O.J. No. 944 (Div. Ct.).

<sup>39</sup> *Ibid.*, at para. 28.

<sup>40</sup> *Ibid.*, at para. 31.

<sup>41</sup> *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)* 2005 BCSC 283 at para. 45.

40. The Divisional Court found that the Minister was not under any obligation to strictly apply the precautionary principle in issuing the Permit; but rather that the precautionary principle was one of the general factors to be taken into consideration when balancing all of the different factors at stake. The Court further found that the Minister had considered the precautionary principle. The Court's approach to the precautionary principle is consistent with the ESA and case law across Canada dealing with the role of the precautionary principle. Sierra has therefore not presented an arguable case nor has it demonstrated that this issue is of general or public legal importance. On the contrary, as courts have already observed, the approach proposed by Sierra would require projects to "come to a halt" in the absence of certainty, which is on its face absurd and also clearly not what is contemplated by the ESA which requires a balancing of environmental, economic and social factors.

**Issue 2: The Independence of Mr. Kamstra**

41. Ontario submits that the issues raised in respect of Mr. Kamstra's independence do not warrant granting leave to appeal. The Court's decision in this respect was primarily based on findings of fact, and they certainly do not raise any issues of importance beyond this case.

42. As accepted by the Divisional Court, Mr. Kamstra signed a statement in which he asserted his independence:

I hereby declare that I have no financial or working relationship with the Ontario Ministry of Transportation in connection with the Detroit River International

primarily based on findings of fact, and they certainly do not raise any issues of importance beyond this case.

42. As accepted by the Divisional Court, Mr. Kamstra signed a statement in which he asserted his independence:

I hereby declare that I have no financial or working relationship with the Ontario Ministry of Transportation in connection with the Detroit River International Crossing Study. I have however worked on some projects for the Ontario Ministry of Transportation at other locations in Ontario. I am also completely independent from any connections to LGL Limited.<sup>42</sup>

43. Furthermore, the announcement that the consortium to which AECOM belongs was shortlisted for the project was not made until October of 2009, two months after the expert submitted his report.<sup>43</sup>

44. Based on this evidence, the Divisional Court was satisfied that this was not a ground warranting judicial review.

45. In support of its argument on this issue, Sierra purports to rely on case law dealing with lawyers' conflicts. However, experts retained under the ESA are more analogous to expert witnesses. As held by the Divisional Court, in such cases it is the "independence of the individual and not the employer that is at issue. [...] The integrity of an expert rests, in large part, on the acceptance and recognition of his independence."<sup>44</sup>

---

<sup>42</sup> "Expert Report on the Possible Effects of the Windsor-Essex Parkway on Butler's Gartersnake" prepared by James Kamstra, s.8.0, Applicant's Motion Record, Tab 7.

<sup>43</sup> Affidavit of Dan McDermott sworn October 13, 2010, para. 232, Responding Record of the Respondents, Tab 3.

<sup>44</sup> *Sierra Club Canada v. Ontario*, dated September 27, 2011, para. 67, Applicant's Motion Record, Tab 4.

47. Sierra argues that the Divisional Court made an error of law in finding that the expert report on Eastern Foxsnakes supported the issuance of the Permit. Sierra advances this argument on the basis that at the time the report was prepared, the Eastern Foxsnake was treated as one SAR, whereas when the Permit was issued the regulations had divided the Eastern Foxsnakes into two distinct populations.

48. In his report, Mr. Willson, although recognizing that there are two geographically distinct populations of Eastern Foxsnake, does not distinguish between them in concluding there would be no jeopardy to the survival of the species in Ontario. However, at the time the report was prepared, namely in July 2009, the ESA regulations did not distinguish between these two populations.<sup>45</sup> Therefore, while Mr. Willson makes reference to this distinction in his report, he specifically notes that it is not a distinction in the regulations.

49. However, as found by the Divisional Court, at the time the Minister issued the Permit, she was aware that this distinction had been made in the Regulations as reflected in a footnote to the Analysis document prepared for the Minister.<sup>46</sup> In addition, as accepted by the Divisional Court, the small proportion of Eastern Foxsnakes affected by the WEP suggests that the failure to distinguish between the two populations is of no moment, based on the analysis found in Mr. Willson's report.<sup>47</sup>

---

<sup>45</sup> O. Reg. 230/08, Sched. 3 (in effect from February 18, 2009 to September 9, 2009).

<sup>46</sup> "Analysis of Type D Permit Requirements", p. 77, Applicant's Motion Record, Tab 5 and *Sierra Club Canada v. Ontario* dated September 27, 2011, para. 78. Applicant's Motion Record, Tab 4.

<sup>47</sup> *Sierra Club Canada v. Ontario* dated September 27, 2011, para. 79, Applicant's Motion Record, Tab


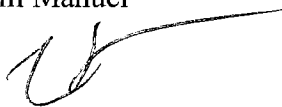
50. The issue of whether it was appropriate for the Minister to decide the issue of Eastern Foxsnake on the basis of a report that did not explicitly state an opinion in respect of both populations is again an issue that does not warrant review by this Court. It does not raise issues of general statutory interpretation of public importance.

51. Notably, since the permit was issued, the Minister has obtained a further opinion from Mr. Willson dealing with the Carolinian population only. His opinion continues to be that even if only the Carolinian population is considered, the WEP does not jeopardize the survival of the eastern Foxsnake in Ontario.<sup>48</sup> In fact, a new permit has been issued in respect of the Carolinian Population of Eastern Foxsnake and therefore it is Ontario's position that the matter is now moot.<sup>49</sup>

#### **PART IV – ORDER SOUGHT**

52. Ontario respectfully requests an order dismissing this motion with costs.

**ALL OF RESPECTFULLY** dated this 23<sup>rd</sup> day of December, 2011.

  
 fr Bill Manuel  
  
 Lise Favreau

Lawyers for the Respondents, Her Majesty  
 the Queen in right of Ontario

<sup>48</sup> Report dated May 11, 2011 prepared by Robert Willson, Responding Record of the Respondent, Tab 1.

<sup>49</sup> Information Notice 011-3238 from the Environmental Registry dated August 23, 2011, Responding Record of the Respondent, Tab 2 (Note that this permit had not been issued at the time of the hearing, so it was not part of the record before the Divisional Court. If leave is granted, Ontario will seek to have it admitted as fresh evidence for the purpose of arguing mootness).

## SCHEDULE "A" – AUTHORITIES

### Cases:

1. *Sierra Club Canada v. Ontario (Ministry of Natural Resources)*, [2010] O.J. No. 3924 (Div. Ct.)
2. *Sierra Club Canada v. Ontario (Ministry of Natural Resources)*, [2010] O.J. No. 3960 (Div. Ct.)
3. *Re Sault Dock Co. Ltd. And City of Sault Ste. Marie*, [1973] 2 O.R. 479 (C.A.)
4. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5<sup>th</sup> ed. (Markham: LexisNexis, 2008)
5. *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)*, 2003 BCCA 403
6. *Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. British Columbia (Utilities Commission)*, 2007 BCCA 211
7. *Hanna v. Ontario (Attorney General)*, [2011] O.J. No. 944 (Div. Ct.)
8. *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283



## **SCHEDULE "B"**

### **Legislation**

1. *Endangered Species Act, 2007*, S.O. 2007, c. 6
2. *Courts of Justice Act*, R.S.O. 1990, c. 43, s.6(1)
3. *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, Rule 64.03.1
4. *Species at Risk in Ontario List*, O. Reg 230/08, Sched. 3, (in effect from February 18, 2009 to September 9, 2009), made pursuant to the *Endangered Species Act, 2007*

*Endangered Species Act, 2007, S.O. 2007, CHAPTER 6*

**Preamble**

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

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

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

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

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

INTRODUCTION

**Purposes**

1. The purposes of this Act are:
  1. To identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge.
  2. To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.
  3. To promote stewardship activities to assist in the protection and recovery of species that are at risk. 2007, c. 6, s. 1.

**Definitions**

2. (1) In this Act,

“aboriginal person” means a member of the aboriginal peoples of Canada, as defined in section 35 of the *Constitution Act, 1982*; (“personne autochtone”)

“COSSARO” means the Committee on the Status of Species at Risk in Ontario; (“CDSEPO”)

“enforcement officer” means an enforcement officer under section 21; (“agent d’exécution”)

“habitat” means,

(a) with respect to a species of animal, plant or other organism for which a regulation made under clause 55 (1) (a) is in force, the area prescribed by that regulation as the habitat of the species, or

(b) with respect to any other species of animal, plant or other organism, an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding,

and includes places in the area described in clause (a) or (b), whichever is applicable, that are used by members of the species as dens, nests, hibernacula or other residences; (“habitat”)

“justice” has the same meaning as in the *Provincial Offences Act*; (“juge”)

“Minister” means the Minister of Natural Resources or such other member of the Executive Council as may be assigned the administration of this Act under the *Executive Council Act*; (“ministre”)

“Ministry” means the ministry of the Minister; (“ministère”)

“officer in charge” has the same meaning as in Part VIII of the *Provincial Offences Act*; (“agent responsable”)

“person” includes an unincorporated body referred to in paragraph 1, 2 or 3 of subsection 19 (1); (“personne”)

“recovery strategy” means a strategy prepared under section 11 for the recovery of a species; (“programme de rétablissement”)

“regulations” means the regulations made under this Act; (“règlements”)

“species” means a species, subspecies, variety or genetically or geographically distinct population of animal, plant or other organism, other than a bacterium or virus, that is native to Ontario; (“espèce”)

“Species at Risk in Ontario List” means the regulations made under section 7. (“Liste des espèces en péril en Ontario”) 2007, c. 6, s. 2 (1).

**Definition of “habitat”, cl. (b)**

(2) For greater certainty, clause (b) of the definition of “habitat” in subsection (1) does not include an area where the species formerly occurred or has the potential to be reintroduced unless existing members of the species depend on that area to carry on their life processes. 2007, c. 6, s. 2 (2).

CLASSIFICATION OF SPECIES

**Committee on the Status of Species at Risk in Ontario**

3. (1) The committee known in English as the Committee on the Status of Species at Risk in Ontario and in French as Comité de détermination du statut des espèces en péril en Ontario is continued. 2007, c. 6, s. 3 (1).

**Composition**

(2) COSSARO shall be composed of such number of members as may be appointed by the Lieutenant Governor in Council. 2007, c. 6, s. 3 (2).

**Chair**

(3) The Lieutenant Governor in Council shall designate one of the members as chair of COSSARO. 2007, c. 6, s. 3 (3).

**Qualifications**

(4) A person may be appointed to COSSARO only if the Minister considers that the person has relevant expertise that is drawn from,

- (a) a scientific discipline such as conservation biology, population dynamics, taxonomy, systematics or genetics; or
- (b) aboriginal traditional knowledge. 2007, c. 6, s. 3 (4).

**Independence**

(5) The members of COSSARO shall perform their functions in an independent manner, and not as representatives of their employers or of any other person or body. 2007, c. 6, s. 3 (5).

**Lobbying**

(6) A member of COSSARO shall not, with respect to any matter related to this Act,

- (a) act as a consultant lobbyist within the meaning of subsection 4 (10) of the *Lobbyist Registration Act, 1998*; or
- (b) act as an in-house lobbyist within the meaning of subsection 5 (7) or 6 (5) of the *Lobbyist Registration Act, 1998*. 2007, c. 6, s. 3 (6).

**Functions of COSSARO**

4. (1) COSSARO shall perform the following functions:

- 1. Subject to section 5, maintain criteria for assessing and classifying species.

2. Maintain and prioritize a list of species that should be assessed and classified, including species that should be reviewed and, if appropriate, reclassified.
3. Subject to section 8, assess, review and classify species in accordance with the list maintained under paragraph 2.
4. Submit reports to the Minister in accordance with this Act.
5. Provide advice to the Minister on any matter submitted to COSSARO by the Minister.
6. Perform any other function required under this or any other Act. 2007, c. 6, s. 4 (1).

#### **List of species to be assessed**

(2) COSSARO shall ensure that the list referred to in paragraph 2 of subsection (1) includes every Ontario species that,

- (a) has been classified by the Committee on the Status of Endangered Wildlife in Canada as extirpated, endangered, threatened or of special concern under the *Species at Risk Act* (Canada); and
- (b) has not yet been assessed by COSSARO. 2007, c. 6, s. 4 (2).

#### **Information for Minister**

(3) COSSARO shall ensure that the Minister is provided with up to date copies of the criteria referred to in paragraph 1 of subsection (1) and the list referred to in paragraph 2 of subsection (1). 2007, c. 6, s. 4 (3).

#### **Rules for classification**

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

1. A species shall be classified as an extinct species if it no longer lives anywhere in the world.
2. A species shall be classified as an extirpated species if it lives somewhere in the world, lived at one time in the wild in Ontario, but no longer lives in the wild in Ontario.
3. A species shall be classified as an endangered species if it lives in the wild in Ontario but is facing imminent extinction or extirpation.
4. A species shall be classified as a threatened species if it lives in the wild in Ontario, is not endangered, but is likely to become endangered if steps are not taken to address factors threatening to lead to its extinction or extirpation.
5. A species shall be classified as a special concern species if it lives in the wild in Ontario, is not endangered or threatened, but may become

threatened or endangered because of a combination of biological characteristics and identified threats. 2007, c. 6, s. 5 (1).

### **Geographic limitation**

(2) When COSSARO classifies a species, the classification shall be deemed to apply to all of Ontario unless COSSARO indicates that the classification applies only to a specified geographic area in Ontario. 2007, c. 6, s. 5 (2).

### **Best available scientific information**

(3) COSSARO shall classify species based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge. 2007, c. 6, s. 5 (3).

### **Reports by COSSARO**

6. (1) COSSARO may at any time submit a report to the Minister that,
- (a) classifies a species as an extinct, extirpated, endangered, threatened or special concern species;
  - (b) states that an assessment of a species indicates that it is not at risk; or
  - (c) states that there is insufficient information available to classify a species. 2007, c. 6, s. 6 (1).

### **Annual report**

(2) COSSARO shall annually submit a report to the Minister on its work, and shall include in the report the classification of each species that COSSARO classified since its last annual report and the reasons for the classification. 2007, c. 6, s. 6 (2).

### **Species at Risk in Ontario List**

7. (1) The Ministry official who holds the office designated under subsection (6) shall make and file a regulation that lists the following:

1. All the species that are classified by COSSARO as extirpated species.
2. All the species that are classified by COSSARO as endangered species.
3. All the species that are classified by COSSARO as threatened species.
4. All the species that are classified by COSSARO as special concern species. 2007, c. 6, s. 7 (1).

### **Contents of regulation**

(2) The Ministry official shall ensure that the regulation contains the following information for each species:

1. The common name and scientific name of the species.
2. COSSARO's classification of the species.

3. If COSSARO indicated that the classification applies only to a specified geographic area, the area specified by COSSARO. 2007, c. 6, s. 7 (2).

#### **Amendments to regulation**

(3) The Ministry official shall make and file such amendments to the regulation as are required to ensure that the regulation accurately reflects new information reported to the Minister by COSSARO. 2007, c. 6, s. 7 (3).

#### **Same**

(4) For the purpose of subsection (3), if the Minister receives a report from COSSARO classifying or reclassifying a species, the Ministry official shall, not later than three months after the day the report is received, make and file an amendment to the regulation so that the regulation accurately reflects new information contained in the report. 2007, c. 6, s. 7 (4).

#### **Commencement of regulations**

(5) A regulation under this section comes into force on the day it is filed. 2007, c. 6, s. 7 (5).

#### **Ministry official**

(6) The Minister shall, for the purposes of this section, designate an office within the Ministry that is held by a public servant. 2007, c. 6, s. 7 (6).

#### **Transition**

(7) The Ministry official shall make and file the first regulation under this section not later than the day this section comes into force, and the regulation shall,

- (a) list each of the species set out in Schedule 1 as an endangered species and, if a footnote to Schedule 1 specifies a geographic area for a species, indicate that the classification of the species as an endangered species applies to that area;
- (b) list each of the species set out in Schedule 2 as an extirpated species;
- (c) list each of the species set out in Schedule 3 as an endangered species;
- (d) list each of the species set out in Schedule 4 as a threatened species; and
- (e) list each of the species set out in Schedule 5 as a special concern species and, if a footnote to Schedule 5 specifies a geographic area for a species, indicate that the classification of the species as a special concern species applies to that area. 2007, c. 6, s. 7 (7).

#### **Same**

(8) For the purpose of subsections (1) and (2), any classifications or geographic areas that are required by subsection (7) to be included in a regulation and that are not classifications made by or geographic areas specified by COSSARO shall be deemed to be classifications made by or geographic areas

specified by COSSARO, but nothing in subsection (7) or this subsection prevents COSSARO from submitting a report to the Minister under this Act that reclassifies a species listed in the regulation under subsection (7). 2007, c. 6, s. 7 (8).

**Same**

(9) If, on or after March 20, 2007 and before this section comes into force, COSSARO reported the classification or reclassification of a species to the Minister, the Ministry official shall,

- (a) if the species is not set out in any of Schedules 1 to 5 and is classified by COSSARO as an extirpated, endangered, threatened or special concern species, include COSSARO's classification of the species in the regulation made under subsection (7);
- (b) if the species is set out in any of Schedules 1 to 5 and is reclassified by COSSARO as an extirpated, endangered, threatened or special concern species, include COSSARO's reclassification of the species in the regulation made under subsection (7), instead of the classification that would otherwise apply under subsection (7); and
- (c) if the species is set out in any of Schedules 1 to 5 and clause (b) does not apply, not include the species in the regulation made under subsection (7), despite that subsection. 2007, c. 6, s. 7 (9).

**Same**

(10) Despite subsection (5), if a regulation is made under subsection (7) before this section comes into force, the regulation comes into force on the day this section comes into force. 2007, c. 6, s. 7 (10).

**Ministerial requirements**

**Risk of imminent extinction or extirpation**

8. (1) If a species is not listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species but the Minister is of the opinion that the species may be facing imminent extinction or extirpation, the Minister may require COSSARO to assess and classify the species and, not later than the date specified by the Minister, to submit a report to the Minister under section 6. 2007, c. 6, s. 8 (1).

**Reconsideration**

(2) If a species is listed on the Species at Risk in Ontario List and the Minister is of the opinion that credible scientific information indicates that the classification on the List is not appropriate, the Minister may require COSSARO to reconsider the classification and, not later than the date specified by the Minister, to submit a report to the Minister under section 6 indicating whether COSSARO confirms the classification or reclassifies the species. 2007, c. 6, s. 8 (2).



**Same**

(3) Subsection (2) applies, with necessary modifications, if COSSARO has reported to the Minister its classification of a species as an extirpated, endangered, threatened or special concern species but the Species at Risk in Ontario List has not yet been amended in accordance with subsection 7 (4) to reflect the classification. 2007, c. 6, s. 8 (3).

**Same**

(4) A requirement imposed by the Minister under subsection (3) does not delay or otherwise affect the obligation to comply with subsection 7 (4) or the application of this Act to the species. 2007, c. 6, s. 8 (4).

**Consultation with chair of COSSARO**

(5) The Minister shall not require COSSARO to do anything under this section unless he or she has consulted with the chair of COSSARO. 2007, c. 6, s. 8 (5).

## PROTECTION AND RECOVERY OF SPECIES

**Prohibition on killing, etc.**

9. (1) No person shall,

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

**Possession, etc., of species originating outside Ontario**

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

**Specified geographic area**

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

**Possession by Crown**

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

**Transfer for certain purposes**

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

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

**Interpretation**

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

**Prohibition on damage to habitat, etc.**

- 10. (1) No person shall damage or destroy the habitat of,
  - (a) a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species; or
  - (b) a species that is listed on the Species at Risk in Ontario List as an extirpated species, if the species is prescribed by the regulations for the purpose of this clause. 2007, c. 6, s. 10 (1).

**Specified geographic area**

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

**Transition**

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

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

### **Recovery strategies**

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

### **Contents**

(2) A strategy prepared for a species under subsection (1) shall include the following:

1. An identification of the habitat needs of the species.
2. A description of the threats to the survival and recovery of the species.
3. Recommendations to the Minister and other persons on,
  - i. objectives for the protection and recovery of the species,
  - ii. approaches to achieve the objectives recommended under subparagraph i, and
  - iii. the area that should be considered in developing a regulation under clause 55 (1) (a) that prescribes an area as the habitat of the species.
4. Such other information as is prescribed by the regulations. 2007, c. 6, s. 11 (2).

### **Precautionary principle**

(3) In preparing a strategy under subsection (1), the persons who are preparing the strategy shall consider the principle that, where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat. 2007, c. 6, s. 11 (3).

### **Time limit**

(4) The Minister shall ensure that a strategy prepared under subsection (1) is made available to the public under section 51 not later than,

- (a) the first anniversary of the date the species is listed on the Species at Risk in Ontario List as an endangered species;
- (b) the second anniversary of the date the species is listed on the Species at Risk in Ontario List as a threatened species; or
- (c) despite clauses (a) and (b), the fifth anniversary of the date section 7 comes into force, if the species is listed on the Species at Risk in

Ontario List as an endangered or threatened species under clause 7 (7) (a), (c) or (d). 2007, c. 6, s. 11 (4).

**Same**

(5) Subsection (4) does not apply to a strategy if, before the time limit set out in subsection (4) expires, the Minister publishes a notice on the environmental registry established under the *Environmental Bill of Rights, 1993* that,

- (a) states that the Minister is of the opinion that additional time is required to prepare the strategy because of,
  - (i) the complexity of the issues,
  - (ii) the desire to prepare the strategy in co-operation with one or more other jurisdictions, or
  - (iii) the desire to give priority to the preparation of recovery strategies for other species;
- (b) sets out the Minister's reasons for the opinion referred to in clause (a); and
- (c) provides an estimate of when the preparation of the strategy will be completed. 2007, c. 6, s. 11 (5).

**Same**

(6) The Minister shall not publish a notice under subsection (5) in respect of a species if he or she is of the opinion that a delay in the preparation of the strategy will jeopardize the survival or recovery of the species in Ontario. 2007, c. 6, s. 11 (6).

**Extirpated species**

(7) The Minister shall ensure that a strategy is prepared for the recovery of a species that is listed on the Species at Risk in Ontario List as an extirpated species if the Minister is of the opinion that reintroduction of the species into Ontario is feasible. 2007, c. 6, s. 11 (7).

**Response to recovery strategy**

(8) Within nine months after a recovery strategy is prepared under this section, the Minister shall publish a statement that summarizes the actions that the Government of Ontario intends to take in response to the recovery strategy and the Government's priorities with respect to taking those actions. 2007, c. 6, s. 11 (8).

**Implementation**

(9) The Minister shall ensure the implementation of the actions referred to in a statement published under subsection (8) that, in the opinion of the Minister, are feasible and are within the responsibilities of the Minister. 2007, c. 6, s. 11 (9).

### **Priorities**

(10) If statements have been published under subsection (8) in respect of more than one species, subsection (9) is subject to the right of the Minister to determine the relative priority to be given to the implementation of actions referred to in those statements. 2007, c. 6, s. 11 (10).

### **Five-year review of progress**

(11) Not later than five years after a statement is published under subsection (8), the Minister shall ensure that a review is conducted of progress towards the protection and recovery of the species. 2007, c. 6, s. 11 (11).

### **Feasibility**

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

### **Management plans for special concern species**

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

### **Application**

(2) Subsection (1) does not apply to a species for which the preparation of a recovery strategy or management plan is required under section 37 or 65 of the *Species at Risk Act* (Canada). 2007, c. 6, s. 12 (2).

### **Time limit**

(3) The Minister shall ensure that a management plan prepared under subsection (1) is made available to the public under section 51 not later than the fifth anniversary of the date the species is listed on the Species at Risk in Ontario List as a special concern species. 2007, c. 6, s. 12 (3).

### **Same**

(4) Subsection (3) does not apply to a management plan if, before the time limit set out in subsection (3) expires, the Minister publishes a notice on the environmental registry established under the *Environmental Bill of Rights, 1993* that,

- (a) states that the Minister is of the opinion that additional time is required to prepare the management plan because of,
  - (i) the complexity of the issues,
  - (ii) the desire to prepare the management plan in co-operation with one or more other jurisdictions, or
  - (iii) the desire to give priority to the preparation of recovery strategies or management plans for other species;

(b) sets out the Minister's reasons for the opinion referred to in clause (a); and

(c) provides an estimate of when the preparation of the management plan will be completed. 2007, c. 6, s. 12 (4).

### **Response to management plan**

(5) Within nine months after a management plan is prepared under this section, the Minister shall publish a statement that summarizes the actions that the Government of Ontario intends to take in response to the management plan and the Government's priorities with respect to taking those actions. 2007, c. 6, s. 12 (5).

### **Implementation**

(6) The Minister shall ensure the implementation of the actions referred to in a statement published under subsection (5) that, in the opinion of the Minister, are feasible and are within the responsibilities of the Minister. 2007, c. 6, s. 12 (6).

### **Priorities**

(7) If statements have been published under subsection (5) or 11 (8) in respect of more than one species, subsection (5) is subject to the right of the Minister to determine the relative priority to be given to the implementation of actions referred to in those statements. 2007, c. 6, s. 12 (7).

### **Feasibility**

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

### **Ecosystem approach**

13. A recovery strategy or management plan may be prepared under section 11 or 12 using an ecosystem approach. 2007, c. 6, s. 13.

### **Recovery strategies and management plans for more than one species**

14. A recovery strategy or management plan may be prepared under section 11 or 12 for more than one species, whether or not the species are part of the same ecosystem. 2007, c. 6, s. 14.

### **Incorporation of existing plan**

15. A recovery strategy or management plan prepared under section 11 or 12 may incorporate all or part of an existing plan that relates to the species. 2007, c. 6, s. 15.

## **AGREEMENTS, PERMITS AND OTHER INSTRUMENTS**

### **Stewardship agreements**

16. (1) The Minister may enter into agreements for the purpose of assisting in the protection or recovery of a species specified in the agreement that is listed on the Species at Risk in Ontario List. 2007, c. 6, s. 16 (1).

### **Response to recovery strategy**

(2) Before entering into an agreement under this section, the Minister shall consider any statement that has been published under subsection 11 (8) with respect to a recovery strategy for the species specified in the agreement. 2007, c. 6, s. 16 (2).

### **Authorization provided by agreement**

(3) An agreement under subsection (1) may authorize a party to the agreement to engage in an activity specified in the agreement that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 16 (3).

### **Same**

(4) An authorization described in subsection (3) does not apply unless the party to the agreement who seeks to rely on the authorization complies with any requirements imposed on the party by the agreement. 2007, c. 6, s. 16 (4).

### **Permits**

17. (1) The Minister may issue a permit to a person that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes the person to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 17 (1).

### **Limitation**

- (2) The Minister may issue a permit under this section only if,
- (a) the Minister is of the opinion that the activity authorized by the permit is necessary for the protection of human health or safety;
  - (b) the Minister is of the opinion that the main purpose of the activity authorized by the permit is to assist, and that the activity will assist, in the protection or recovery of the species specified in the permit;
  - (c) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,
    - (i) the Minister is of the opinion that an overall benefit to the species will be achieved within a reasonable time through requirements imposed by conditions of the permit,
    - (ii) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted, and
    - (iii) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit; or

- (d) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,
  - (i) the Minister is of the opinion that the activity will result in a significant social or economic benefit to Ontario,
  - (ii) the Minister has consulted with a person who is considered by the Minister to be an expert on the possible effects of the activity on the species and to be independent of the person who would be authorized by the permit to engage in the activity,
  - (iii) the person consulted under subclause (ii) has submitted a written report to the Minister on the possible effects of the activity on the species, including the person's opinion on whether the activity will jeopardize the survival or recovery of the species in Ontario,
  - (iv) the Minister is of the opinion that the activity will not jeopardize the survival or recovery of the species in Ontario,
  - (v) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted,
  - (vi) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit, and
  - (vii) the Lieutenant Governor in Council has approved the issuance of the permit. 2007, c. 6, s. 17 (2).

#### **Response to recovery strategy**

(3) Before issuing a permit under this section, the Minister shall consider any statement that has been published under subsection 11 (8) with respect to a recovery strategy for the species specified in the permit. 2007, c. 6, s. 17 (3).

#### **Conditions**

(4) A permit issued under this section may contain such conditions as the Minister considers appropriate. 2007, c. 6, s. 17 (4).

#### **Same**

(5) Without limiting the generality of subsection (4), conditions in a permit may,

- (a) limit the time during which the permit applies;
- (b) limit the circumstances in which the permit applies;
- (c) require the holder of the permit to take steps specified in the permit, and require that steps be taken before engaging in the activity authorized by the permit;



- (d) require the holder of the permit to furnish security in an amount sufficient to ensure compliance with the permit;
- (e) require the holder of the permit to ensure that the activity authorized by the permit, and the effects of the activity, are monitored in accordance with the permit;
- (f) require the holder of the permit to rehabilitate habitat damaged or destroyed by the activity authorized by the permit, or to enhance another area so that it could become habitat suitable for the species specified in the permit; or
- (g) require the holder of the permit to submit reports to the Minister. 2007, c. 6, s. 17 (5).

### **Compliance**

(6) An authorization described in subsection (1) does not apply unless the holder of the permit complies with any requirements imposed by the permit. 2007, c. 6, s. 17 (6).

### **Amendment or revocation**

(7) The Minister may,

- (a) with the consent of the holder of a permit issued under this section,
  - (i) amend the permit, if the permit was issued under clause (2) (a), (b) or (c) and the Minister is of the opinion that he or she would be authorized under the same clause to issue the permit in its amended form,
  - (ii) amend the permit, if,
    - (A) the permit was issued under clause (2) (d),
    - (B) the Minister has consulted with a person who is considered by the Minister to be an expert on the possible effects of the amendment on the species specified in the permit and to be independent of the person who would be authorized by the permit in its amended form to engage in an activity,
    - (C) the Lieutenant Governor in Council has approved the amendment, and
    - (D) the Minister is of the opinion that he or she would be authorized under clause (2) (d) to issue the permit in its amended form, or
  - (iii) revoke the permit; or
- (b) without the consent of the holder of the permit issued under this section, but subject to section 20, amend or revoke the permit, if,

**SIERRA CLUB CANADA**

Applicant

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

v.

Respondent

Court File No: M40606

**ONTARIO**

**COURT OF APPEAL**

Proceedings commenced in Toronto

**FACTUM OF THE RESPONDENT, HER  
MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO**

**MINISTRY OF THE ATTORNEY  
GENERAL**

Crown Law Office - Civil  
8th Floor, 720 Bay Street  
Toronto, ON M7A 2S9

**Bill Manuel – LSUC #164461F**  
Tel: (416) 325-9855  
Email: bill.manuel@ontario.ca

**Lise G. Favreau - LSUC #37800S**  
Tel: (416) 325-7078  
Email: lise.favreau@ontario.ca  
Fax: (416) 326-4181

Counsel for the Respondent,  
Her Majesty the Queen in right of Ontario as  
Representative of the Ministry of Natural  
Resources and the Ministry of  
Transportation