Court File No. 544/17

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

ANIMAL JUSTICE CANADA

APPLICANT

- and -

MINISTER OF NATURAL RESOURCES AND FORESTRY

RESPONDENT

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION for Judicial Review will come on for a hearing before the Divisional Court on a date to be fixed by the Registrar at the place of hearing requested by the Applicants. The Applicants request that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: 19 September 2017

Issued By Jasmine Judah
Local Registrar

Divisional Court
Superior Court of Justice
Osgoode Hall
130 Queen Street West
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TO: MINISTER OF NATURAL RESOURCES AND FORESTRY
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AND TO: ATTORNEY GENERAL OF ONTARIO
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THE APPLICANT, ANIMAL JUSTICE CANADA, MAKES APPLICATION FOR:

1. A declaration that the failure of the Respondent, the Minister of Natural Resources and Forestry **(the "Minister")**, to prepare and make available to the public recovery strategies as required under section 11 of the *Endangered Species Act, 2007,* SO 2007, c 6 **(the "*ESA*")** for the following species listed as either "endangered" or "threatened" is unlawful:

    i. The Mountain Lion;

    ii. The Black Redhorse;

    iii. The Cerulean Warbler;

    iv. The Northern Bobwhite;

    v. The Whip-Poor-Will; and

    vi. The Pugnose Minnow **(collectively, the "Lead Species");**

2. An order in the nature of *mandamus* to compel the Minister to prepare and make available to the public recovery strategies for the Lead Species, within one year for listed endangered species and two years for listed threatened species;

3. An order directing that, by 45 days post-judgment, the Minister file an affidavit listing any and all additional species that, at that date, are in arrears of receiving recovery strategies **(the "Balance Species")**, having regard to the reasons of the Court;

4. An order directing that, every quarter post-judgment, the Minister file an affidavit containing a progress report and time estimate for issuing recovery strategies for the Balance Species;

5. An order that the Court will remain seized post-judgment, such that the parties may bring forward any dispute that may arise over the Minister's implementation of the Court's orders by case conference or notice of motion;

6. Costs of this Application, or in the alternative, an order that the Parties bear their own costs; and
7. Such further and other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS OF THE APPLICATION ARE:

The Parties

1) The Applicant, Animal Justice Canada ("**Animal Justice**"), is a non-profit, charitable organization with a proven history of advocating for and protecting animals in Canada through legal processes. It is a public interest litigant that has no commercial, proprietary, or pecuniary interest in the outcome of this litigation.
2) Animal Justice has participated in litigation before, including at the Supreme Court of Canada, and has advocated for species protection under the *ESA* directly to the Minister of Natural Resources and Forestry. On 12 April 2017, Nick Wright, a representative of Animal Justice, attended a meeting with the Minister at which the issue of unlawfully delayed recovery strategies was discussed. This meeting was scheduled following the Minister's receipt of a letter sent by Animal Justice's lawyers on 23 August 2016 on behalf of two other environmental organizations. The meeting was a joint effort by the three organizations to express their concern that recovery strategies for numerous species at risk in Ontario were years overdue, in contravention of the *ESA*.
3) At the 12 April 2017 meeting, the Minister committed to producing a substantive response to the shared concerns of Animal Justice. This commitment was reiterated in an email sent by the Policy Advisor to the Minister, on 2 May 2017, in which he noted that Ministry staff would have a response prepared within the month. Contrary to this promise, Animal Justice has yet to receive the Ministry's response.

4) Animal Justice brings this Application because it has a legitimate stake in the serious, justiciable issue of timely species protection under the *ESA*, and because there is no other practical way to bring that issue to Court. Since the Minister and her staff have not delivered their promised response to Animal Justice following their meeting, the Applicant believes that judicial intervention is necessary to ensure that the Minister issues timely recovery strategies as is her duty under the *ESA*.

5) The Respondent, the Minister of Natural Resources and Forestry, has administrative responsibility for the *ESA*. This responsibility includes the fulfillment of mandatory duties as outlined in the *ESA*.

Protections for species at risk under the ESA

6) A dominant purpose of the *ESA*, as stated in s 1, is "[t]o protect species that are at risk and their habitats, and to promote the recovery of species that are at risk." The fundamental importance of this goal is further emphasized in the *ESA's* preamble, which notes the ecological, social, economic, cultural and intrinsic value of biological diversity and calls on the present generation of Ontarians to protect species at risk for future generations.

7) The *ESA's* scheme for identifying and protecting Ontario's species at risk is based on the assessment and classification of species by the Committee on the Status of Species at Risk in Ontario (**"COSSARO"**). COSSARO is an independent committee of specialists who are experts in scientific disciplines such as conservation biology, or in aboriginal traditional knowledge. Under *ESA* ss 4 and 5, COSSARO is tasked with assessing the status of native Ontario species and, when necessary, classifying species according to the following five categories in descending order of severity: (1) extinct; (2) extirpated; (3) endangered; (4) threatened; or (5) special concern. Under *ESA* s 5(1),

an **extinct** species "no longer lives anywhere in the world"; an **extirpated** species lives somewhere in the world, but "no longer lives in the wild in Ontario"; an **endangered** species lives in the wild in Ontario but "is facing imminent extinction or extirpation"; a **threatened** species is "likely to become endangered" if protective actions are not taken; and a **special concern** species is one that "may become threatened or endangered because of a combination of biological characteristics and identified threats".

8) Species classified by COSSARO as extirpated, endangered, threatened, or of special concern are listed on the *Species at Risk in Ontario List,* O Reg 230/08, and are subject to the protections contained in the *ESA* (which vary depending on the severity of the classification). For example, s 9(1) prohibits any person from killing, harming, harassing, capturing, or taking a living member of a species listed as extirpated, endangered or threatened. Likewise, s 10(1) forbids any person from damaging or destroying the habitat of extirpated, endangered or threatened species.

Recovery Strategies

9) In addition to the prohibitions noted above, the listing of a species as endangered or threatened triggers the Minister's duty under *ESA* s 11(1) to ensure the preparation of a recovery strategy for that species. Among other things, a recovery strategy is intended to identify the existing threats to the survival and recovery of the species, and to recommend approaches to achieve protection and recovery objectives.

10) Recovery strategies must be prepared within explicitly mandated time limits. Section 11(4) of the *ESA* provides that the Minister "shall ensure" that recovery strategies are prepared and issued to the public within one year for endangered species, and two years for threatened species.

11) The Minister may extend the mandatory deadlines set out in s 11(4) of the *ESA* by taking a time extension under s 11(5), but to do so she must satisfy all four of the following statutory conditions precedent:

(i) she triggers the time extension and publishes it in the environmental registry under the *Environmental Bill of Rights* before the current time limit is reached;

(ii) she provides a time estimate for when the preparation of the recovery strategy will be completed;

(iii) she bases the time extension on one or more of these three specified grounds: (a) the complexity of the issues; (b) the desire to prepare the strategy in cooperation with another jurisdiction; or (c) the desire to prioritize recovery strategies for other species; and

(iv) she gives reasons that justify her opinion on the basis of the aforesaid grounds.

12) Further, s 11(3) of the *ESA* enunciates the "precautionary principle" that the Minister should not delay issuing a recovery strategy merely because there is a lack of full scientific certainty. Instead of waiting for full scientific certainty, it is expected that the Minister issue the recovery strategy promptly and revise it later as new knowledge comes to light. Existing recovery strategies affirm this iterative approach in words such as these: *"The goals, objectives and recovery approaches identified in the strategy are based on the best available knowledge and are subject to revision as new information becomes available."*

13) The Legislative Assembly bound the Minister to mandatory deadlines, highly restrictive conditions precedent, and the precautionary principle because these constraints on her discretion are necessary to realize the purposes of the *ESA*. Particularly for those species which COSSARO assesses as threatened and endangered, and which in the

words of *ESA* s 5(1) face "likely" or even "imminent" extinction or extirpation, time is of the essence to survival. A failure to issue recovery strategies swiftly as the Legislative Assembly intended may cause these species to disappear from Ontario or our planet.

The Minister unlawfully fails to issue recovery strategies

14) As of August 2017, there are 37 species for which the Minister is in arrears of issuing a recovery strategy. In other words, the delay in issuing a strategy does not comply with the provisions of s 11(5) of the *ESA*. The number of delayed recovery strategies is constantly in flux as COSSARO changes the list of species, or the Minister issues additional recovery strategies.

15) There are two broad categories of *ESA* s 11(5) violations, referred to herein as "timeline problems" and "cooperation problems". The pure cooperation violations are those in which the breach occurs in relation to the Minister's desire to prepare a recovery strategy in cooperation with another jurisdiction (typically the Government of Canada) under s 11(5)(a)(ii). The pure timeline violations are those in which the breach occurs in relation to the Minister's other decisions under s 11(5). Species may be affected by a timeline problem, a cooperation problem, or in some cases both.

16) The six Lead Species are canonical of the various kinds of timeline problems or cooperation problems:

- **Mountain Lion (Cougar)** (pure timeline problem: Minister gave no time estimate for completion): This majestic cat was assessed as endangered when the *ESA* came into force in 2008. The Minister validly took a time extension on 31 May 2013 to prioritize other species, at which time she "estimated that recovery strategies … will be finalized … within the next three years". That extension expired without the Minister issuing a

recovery strategy. After that lapse, on 2 June 2016 the Minister purported to take a further, indefinite time extension, this time without any time estimate for issuing the recovery strategy as required by s 11(5)(c).

- **Black Redhorse** (pure cooperation problem: federal listing declined): This curiously named fish (not especially red or black, and not equine) was assessed as endangered when the *ESA* came into force in 2008. About a month before the time limit to issue a recovery strategy, the Minister took a time extension on May 31 2013 for the stated reason of cooperating with federal government, which she alleged was "leading the development of recovery strategies" under the federal *Species at Risk Act* (SC 2002, c 29, or "***SARA***"). The Minister took a second time extension to facilitate such cooperation on 14 June 2016. However, the stated reasons for these decisions overlook that cooperation with the federal government became futile about a decade earlier. The federal Governor in Council formally decided not to list and protect the Black Redhorse under *SARA* on 13 December 2007, meaning that no federal recovery strategy is forthcoming—or even legally possible.
- **Cerulean Warbler** (pure cooperation problem: federal listing not triggering federal recovery strategy): This songbird was designated threatened under the *ESA* on 8 June 2011. About a week before the time limit to issue a recovery strategy, the Minister took a time extension on 31 May 2013 for the stated reason of cooperating with federal government, which she alleged was "leading the development of recovery strategies" under *SARA*. The Minister took a second time extension to facilitate such cooperation on 14 June 2016. However, these decisions again overlook that the federal government finalized the status of the Cerulean Warbler over a decade ago. On 12 January 2005 it

was designated as a "special concern" species under *SARA*, for which no federal recovery strategy is legally possible as *SARA* only provides for a "management plan" for special concern species. The Cerulean Warbler's management plan was finalized over six years ago, on 22 March 2011.

- **Northern Bobwhite** (pure cooperation problem: federal recovery strategy illegally omitted): This quail-like bird was assessed as endangered when the *ESA* came into force in 2008. About a week before the time limit to issue a recovery strategy, the Minister took a time extension on 31 May 2013 for the stated reason of cooperating with federal government, which she alleged was "leading the development of recovery strategies" under *SARA*. The Minister took a second time extension to facilitate such cooperation on 14 June 2016. However, the federal government, although legally obligated by s 37 of *SARA* to issue a recovery strategy for the northern bobwhite, has omitted to do so since listing it as "Endangered" under *SARA* over twelve years ago on 14 July 2005. The Federal Court has already ruled that this egregious delay is illegal.
- **Eastern Whip-Poor-Will** (pure cooperation problem: federal recovery strategy illegally late): This songbird was designated threatened under the *ESA* on 10 September 2009. Shortly before the time limit to issue a recovery strategy, the Minister took a time extension on 13 May 2011 for the stated reason of preparing the recovery strategy cooperatively with the federal government. However, the federal government illegally breached its statutory deadlines—twice—under ss 42(1) and 43(2) of *SARA*: first when it belatedly proposed a federal recovery strategy on 30 March 2015, and second when it failed to finalize that federal recovery strategy by 28 June 2015. Despite the federal

government's *SARA* violations, the Minister took a second time extension on 14 June 2016, ostensibly to cooperate with the federal government on the recovery strategy.

- **Pugnose Minnow** (initially a timeline problem, followed later by a cooperation problem: Minister missed her deadline to take a time extension, then federal listing not triggering federal recovery strategy): This petite fish was assessed as a special concern species when the *ESA* came into force in 2008, but escalating dangers to its survival led to it be reassessed as threatened on 24 January 2013. The Minister did not produce a timely recovery strategy, and failed to take a time extension before the expiry of her statutory time limit on 24 January 2015, as required by the chapeau of s 11(5). Although out of time, the Minister purported to take a first time extension on 25 June 2015. She then took a second time extension on 14 June 2016 for the stated reason that "the federal government is leading the development of recovery strategies". However, the federal government finalized the status of the Silver Chub nearly fifteen years ago, when *SARA* received Royal Assent on 12 December 2002. The Silver Chub is designated as a "special concern" species, for which no federal recovery strategy is legally possible under *SARA* (as discussed in the context of the Cerulean Warbler, above). The Silver Chub's *SARA*-mandated "management plan" was finalized over seven years ago, on 19 October 2009.

17) For each of the Lead Species, the Minister's reasons for the decisions she took under s 11(5)(a) of the *ESA* were either obscure or entirely absent, contrary to the express provision in s 11(5)(b) requiring her to set out the "reasons for the opinion referred to in clause (a)".

18) Many of Ontario's species are in dire straits; 16 of them have already been listed as extirpated. The Minister's ongoing delays in issuing recovery strategies, which in

many cases have stretched on for years, are contrary to a literal and purposive interpretation of the *ESA* and may cause significant damage to species at risk. The Minister has failed to remedy these unlawful delays despite the Applicant's efforts to bring the urgency of the situation to her attention. Since the *ESA* offers no alternative remedy, the Applicant requests that the Court intervene to ensure the protection and recovery of Ontario's most vulnerable species.

Remedies

19) Animal Justice has structured its requested remedies in two phases: first, *mandamus* for six "Lead Species" (analogous to lead plaintiffs in a class action), which between them are canonical of the Minister's various failures to apply s 11 of the *ESA* lawfully; and second, for the Court to remain seized post-judgment to ensure that the Minister makes timely progress in issuing recovery strategies for the "Balance Species" that are similarly in arrears, in a manner consistent with the Court's reasons for the Lead Species.

20) Animal Justice's structured request promotes judicial economy in two ways. At the outset, by focusing only on the Lead Species, the Court is spared an unnecessarily complex, unwieldy Application covering each and every species in arrears (at last count 37 of them). Further, by remaining seized and giving the Minister guidance in its reasons, the Court avoids the need for a second Application to be filed and heard for all of the Balance Species. Only if a disagreement arises over the Minister's handling of the Balance Species would the matter ever come back to the Court for clarification, by the far more expeditious method of a notice of motion or case conference. This streamlined procedure is fitting given the heavy caseload of the Court, and the imminent existential danger faced by Ontario's species at risk.

21) The Applicant also relies on the following:

(a) *Endangered Species Act*, 2007 (SO 2007, c 6);

(b) *Species at Risk in Ontario List* (O Reg 230/08, as amended from time to time);

(c) *Species at Risk Act* (SC 2002, c 29);

(d) *Canada-Ontario Agreement on Species at Risk* (2010);

(e) *Judicial Review Procedure Act* (RSO 1990, c J.1);

(f) *Courts of Justice Act* (RSO 1990, c C.43);

(g) *Rules of Civil Procedure* (RRO 1990, Reg 194);

(h) Such further grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THIS APPLICATION:

(i) The affidavit of Camille Labchuk, dated September 13, 2017;

(j) The affidavit of Matthew Lakatos-Hayward, dated September 15, 2017;

(k) Such further and other evidence as counsel may advise and this Honourable Court may permit.

September 19, 2017

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Applicant

-and-

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Respondent

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ONTARIO
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Proceedings commenced in Toronto

NOTICE OF APPLICATION

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