SUPREME COURT OF NOVA SCOTIA

Citation: *Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175

Date: 20200529
Docket: HFX 484556
Registry: Halifax

Between:

Robert Bancroft, Federation of Nova Scotia Naturalists, Blomidon Naturalists Society and The Halifax Field Naturalists

Applicants

v.

Nova Scotia Minister of Lands and Forestry and The Attorney General of Nova Scotia Representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

v.

East Coast Environmental Law Association (2007)

Intervenor

Judge:	The Honourable Justice Christa M. Brothers
Heard:	September 23 and October 1, 2019, in Halifax, Nova Scotia
Additional Submissions:	February 14, 2020
Final Decision:	May 29, 2020
Counsel:	Jamie Simpson, for the Applicants Jeremy Smith, for the Defendants James Gunvaldsen Klaassen and Sarah McDonald, for the Intervenor

> UNLESS someone like you cares a whole awful lot, nothing is going to get better. It's not.
>
> [Dr. Seuss – The Lorax, 1971]

Introduction

[1] When government is entrusted, through legislation, with duties and responsibilities, but fails to discharge them, there must be recourse. This is such a case. The Notice of Judicial Review alleges a suite of failures by government, specifically, long-term, systemic failures to fulfill legal obligations under the *Endangered Species Act*, SNS 1998, c 11 (the *ESA*). Then, after this Judicial Review was commenced, the government undertook a flurry of activity in an inadequate and transparent attempt to correct its failures *ex post facto*. While the court cannot interfere if government conduct is reasonable, if it is not, this court must and will require government to fulfill its legislative duties.

Background

[2] This is an application for judicial review of Ministerial decisions under the *ESA*. The Applicants are Robert Bancroft, a wildlife biologist; the Federation of Nova Scotia Naturalists; the Blomidon Naturalists Society; and the Halifax Field Naturalists. The Intervenor, the East Coast Environmental Law Association (2007), is a registered charity concerned with the development and implementation of environmental laws in Atlantic Canada.

[3] The Minister of Lands and Forestry (the Minister) is responsible for implementing the *ESA*. The Applicants say the Minister has failed to implement the *ESA* as it pertains to six representative species: Mainland Moose, Ram's-head Lady Slipper, Canada Warbler, Black Ash, Wood Turtle, and Eastern Wood Pewee. Each of these species is native to Nova Scotia and is listed as endangered, threatened, or vulnerable under the *ESA*. The Applicants seek a declaration that the Minister's failure to implement the *ESA*, specifically section 15, is unlawful and unreasonable; an order of *mandamus*; and a supervisory order by which the court would retain jurisdiction and require the Minister to produce status reports on the implementation of section 15.

[4] As I will explain in these reasons, I have concluded that the Minister has failed to meet certain statutory duties under the ESA, and that remedies are required to correct this situation.

The Nova Scotia *Endangered Species Act*

[5] The *ESA* codifies aspects of the *National Accord for the Protection of Species at Risk*, which Nova Scotia endorsed in 1996. Under the Accord, the provincial and federal governments agreed to share responsibility for the protection of wildlife in Canada, particularly species at risk of extinction or extirpation. The purpose of the *ESA* is set forth at section 2:

> 2 (1) The purpose of this Act is to provide for the protection, designation, recovery and other relevant aspects of conservation of species at risk in the Province, including habitat protection, while recognizing the following:
>
> (a) the goal of preventing any species in the Province from becoming extirpated or extinct as a consequence of human activities;
>
> (b) the conservation of species at risk is a key component of a broader strategy to maintain biodiversity and to use biological resources in a sustainable manner;
>
> (c) the commitment of Government to a national co-operative approach for the conservation of species at risk, as agreed to in the National Accord for the Protection of Species at Risk;
>
> (d) all Nova Scotians share responsibility for the conservation of species at risk and governments have a leadership role to play in this regard;
>
> (e) Nova Scotians be provided with the opportunity for meaningful participation in relation to conservation of species at risk;
>
> (f) the aboriginal peoples of the Province have an important role in conserving species at risk;
>
> (g) the importance of promoting the purposes of this Act primarily through non-regulatory means such as co-operation, stewardship, education and partnerships instead of punitive measures, including such preventative actions as education, incentives, sustainable management practices and integrated resource management; and
>
> (h) the precautionary principle that a lack of full scientific certainty must not be used as a reason for postponing measures to avoid or minimize the threat of a species at risk in the Province.

[6] Section 3 of the *ESA* defines three categories of species listing under the *ESA* relevant to this application: endangered, threatened, and vulnerable species:

> (d) "endangered species" means a species that faces imminent extinction or extirpation and is listed as an endangered species pursuant to Section 12;
>
> ...

> (r) "threatened species" means a species that is likely to become endangered if the factors affecting its vulnerability are not reversed and is listed as a threatened species pursuant to Section 12;
>
> (s) "vulnerable species" means a species of special concern due to characteristics that make it particularly sensitive to human activities or natural events and that is listed as a vulnerable species pursuant to Section 12.

[7] The *ESA* creates a Species-at-risk Working Group of six "recognized scientific experts in the status and population biology of plants, animals, other organisms and their habitats or in the conservation biology, ecology and geography of plants, animals and other organisms", appointed by the Minister (s. 9(4)). The Working Group advises the Minister on Species at Risk, as described at s. 10:

> Functions of Group
>
> 10 (1) The Group shall
>
> (a) provide the Minister with a categorized list of the species at risk in the Province, which list shall include those species native to the Province that are listed nationally as species at risk;
>
> (b) advise the Minister annually of any addition or deletion of a species to or from the list referred to in clause (a) or of any changes in the status of a listed species;
>
> (c) provide the Minister with a written summary of the rationale for listing, adding, deleting or changing the status of a species;
>
> (d) make recommendations to the Minister regarding the content and implementation of recovery plans; and
>
> (e) provide advice respecting the conservation and management of species at risk, and their habitats, in the Province.
>
> (2) The Group shall base its decisions to list species pursuant to clause (1)(a) and to add or delete species or to change the status of a listed species pursuant to clause (1)(b) upon scientific information and traditional knowledge as documented in peer reviewed status reports.

[8] The Minister has the power to list an "endangered or threatened species where, in the opinion of the Minister, there is threat to the survival of the species" (s. 11(1)), notwithstanding s. 10. In either case, the species listed are deemed to be at risk, pursuant to s. 12(1):

> 12 (1) Where the Group provides the Minister with a categorized list of species at risk in the Province, with any additions to or deletions from the list or with any changes in the status of a listed species or where the Minister lists endangered or

> threatened species pursuant to Section 11, the species listed from time to time are deemed to be the listed species at risk for the purpose of this Act.

[9] When this Judicial Review was commenced, more than 60 species were listed as endangered, threatened, or vulnerable. Of the species with which this application is specifically concerned, the Canada Warbler, Mainland Moose, and Ram's-head Lady Slipper are listed as endangered; the Black Ash and Wood Turtle as threatened; and the Eastern Wood Pewee as vulnerable.

[10] Where a species is listed as endangered or threatened, the Minister is required, pursuant to s. 15 of the *ESA*, to appoint a recovery team and prepare a recovery plan. Section 15 addresses the Minister's duties where a species has been listed as endangered or threatened under section 12:

> 15 (1) The Minister shall
>
> (a) within one year of the listing of an endangered species; and
>
> (b) within two years of the listing of a threatened species,
>
> appoint a recovery team and prepare a recovery plan for the species.
>
> (2) The Minister may appoint to a recovery team any person whom the Minister considers to be interested in the recovery of the particular species for which the recovery team is appointed and the team shall include an appropriate diversity of expertise.
>
> (3) The recovery team shall assist the Minister in developing and implementing the recovery plan.

[11] A recovery plan is "a statement of needs and actions to be undertaken for the recovery of an endangered or threatened species" (s. 3(n)). The content and objectives of a recovery plan – and the Minister's duties in that respect – are set out at ss. 15(4)-(9):

> 15 ... (4) A recovery plan prepared pursuant to subsection (1) shall
>
> (a) identify the needs of and threats to an endangered or threatened species;
>
> (b) identify the viable status needed for recovery;
>
> (c) identify options for the recovery of the endangered or threatened species;

(d) identify the costs and benefits of the options referred to in clause (c);

(e) recommend a course of action or a combination of actions for the recovery of an endangered or threatened species;

(f) recommend a schedule for implementation of the recovery plan including a prioritized listing of recommended actions;

(g) identify habitat of the endangered or threatened species; and

(h) identify areas to be considered for designation as core habitat.

(5) A recovery plan may include provisions respecting one or more endangered or threatened species and may, where the Minister considers it appropriate, include ecosystem management in the recovery plan.

(6) The Minister may determine the feasibility of implementing any recovery plan or any portion of a recovery plan.

(7) With the advice of the Group, the Minister may, in determining the feasibility of implementing a recovery plan or any portion of a recovery plan, take the following factors into consideration:

(a) whether scientific evidence indicates that the species referred to in the recovery plan is naturally becoming extinct;

(b) biological, technical and economic factors affecting the recovery of the species; and

(c) the status of the species elsewhere.

(8) The Minister may, to the extent possible, prepare a recovery plan in co-operation with other jurisdictions where the endangered or threatened species is also found.

(9) Where a recovery plan is in existence before the coming into force of this Act or where a recovery plan has been prepared in another jurisdiction for the endangered or threatened species, the Minister may adopt that recovery plan in lieu of the requirements of subsection (1).

[12] In summary, the Minister is required to appoint a recovery team for a species listed as endangered (within one year) or threatened (within two years). Within the applicable timeframe, the Minister and the recovery team shall also prepare a recovery plan. Where another jurisdiction has prepared a recovery plan, the Minister may decide to adopt it. No consequences are specified for failing to

appoint a recovery team or produce a recovery plan within the specified timeframes.

[13] Certain provisions of the *ESA* give the Minister discretion, notably s. 15(6), which provides that the Minister "may determine the feasibility of implementing any recovery plan or any portion of a recovery plan." Specific factors that the Minister must consider when determining feasibility include scientific evidence, technical or economic factors, and the status of the species elsewhere (s. 15(7)). The Minister is not obliged to implement a plan that, in his or her opinion, is not feasible.

[14] Section 15 also contemplates the preparation of a management plan for a vulnerable species, defined at s. 3(j) as "a statement of needs and actions to be undertaken to keep a vulnerable species from becoming at increased risk..." Subsection 15(10) states that the Minister "may appoint a management team and shall, within three years of the listing of a vulnerable species, prepare a management plan for the species."

[15] Pursuant to s. 15(10), then, the Minister may appoint a management team for a vulnerable species, and shall, within three years of the listing, prepare a management plan. By contrast, for endangered and threatened species, the Minister shall appoint a recovery team within the relevant timeframe (s. 15(1)).

[16] Finally, ss. 15(11) and (12) address the ongoing review of recovery plans and management plans, and the scope of the Minister's implementation duties:

> (11) Recovery plans and management plans shall be reviewed every five years to determine the progress of the recovery of the species and whether any changes or modifications are required.
>
> (12) The Minister shall ensure the implementation of the portions of the recovery or management plan which are provincial responsibilities and which, in the Minister's discretion, are considered feasible.

Issues

[17] The Applicants raise several issues, summarized as follows:

> (1) Whether the Minister's failure to appoint a recovery team for Canada Warbler, or to appoint a recovery team and prepare a recovery plan within the required timeframe for the Ram's-head Lady Slipper, was reasonable (s. 15(1));

> (2) Whether the Minister's interpretation of "core habitat" in the recovery plans for Black Ash and Mainland Moose was reasonable (s. 15(4)(h));
>
> (3) Whether the Mainland Moose "review" published by the Minister was a reasonable under s. 15(11); and
>
> (4) Whether the Minister's "adoption" of federal recovery plans for the Eastern Wood Pewee and the Wood Turtle was reasonable under s. 15(9).

Standard of review

[18] Before embarking on the substantive issues, I must determine the applicable standard (or standards) of review. The parties did not agree on the standard of review, and were given the opportunity to provide post-hearing submissions in view of the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which they did.

[19] I conclude that the applicable standard of review for the Ministerial decisions in this case is reasonableness. The majority in *Vavilov* held that there is "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (para. 16). The presumption may be rebutted in two circumstances: first, where the legislature indicates that "a different standard or set of standards to apply" or where a statutory appeal is provided, and second, where "the rule of law requires that the standard of correctness be applied." This will be the case for "constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies" (para. 17).

[20] The Applicants argue that the interpretation of *ESA* terms such as "shall" and "adopt" as applied to ministerial duties is a question of central importance to the legal system, so that the standard is correctness. This mischaracterizes the reach of this proceeding. Nothing before the court suggests that the outcome as it relates to these two terms in the context of the *ESA* will have implications for constitutional or general law beyond the relevant legislation.

[21] The Applicants have not rebutted the presumption of reasonableness. Therefore, the standard of review is reasonableness for all issues.

[22] The majority in *Vavilov* stated that review for reasonableness "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that

exercises of state power are subject to the rule of law" (para. 82). The majority continued:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem... Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[23] That is not to say administrative decision makers are immune from review. The court must determine whether the decision is internally coherent and has a rational chain of analysis that is justified in relation to the facts and law:

> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process... In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes"... Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"... In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
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> ....
>
> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error"... However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived"... Reasons that "simply repeat statutory

> language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment... [Emphasis in original; some citations omitted.]

[24] The majority in *Vavilov* noted that not only must the decision display logical reasoning, but it "must be justified in relation to the constellation of law and facts that are relevant to the decision" (para 105). Adhering to the relevant factual and legal constraints is a hallmark of a reasonable decision. Such constraints include

> the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached. [para. 106]

[25] Given that decision makers' powers derive from statute, "the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision" (para 108). When a decision maker interprets their own statute, they must remain within the scope authorized by the act:

> [110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

[26] The majority in *Vavilov* commented on the complications of applying a reasonableness standard to statutory interpretation. Courts are accustomed to dealing with statutory interpretation "at first instance or on appeal ... where they are expected to perform their own independent analysis and come to their own conclusions" (para. 114). Judicial review for reasonableness is different:

> [116] ... Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been"... Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.
>
> [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament":... Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations...
>
> [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context... Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.
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> ....
>
> [120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise... Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

> [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome. [Emphasis added. Citations omitted.]

[27] Though *Vavilov* provides some clarity for cases where the decision maker has interpreted a statutory provision, this is a balancing act. The reviewing court must avoid conducting a *de novo* statutory interpretation analysis and holding the decision maker to that standard. On the other hand, the court must be wary of a reverse-engineered analysis in favour of a desired outcome. The majority acknowledged that in some cases there will only be one reasonable construction:

> [124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker..., held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision... As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker. [Emphasis added.]

[28] In most cases, the starting position for a reasonableness review is the decision-maker's reasons, although reasons are not always required, depending on the level of procedural fairness owed (*Vavilov* at para. 77). In this case, reasons were not provided, but the Applicants do not allege a lack of procedural fairness. The majority in *Vavilov* noted the difficulty arising from absence of reasons:

> [137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote... However, even in such circumstances, the reasoning process

> that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision... For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw"... In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan... Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.
>
> [138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape. [Emphasis added]

[29] Therefore, even where there are no reasons, the decision must display a coherent basis that considers the relevant factual and legal constraints. Instead of reasons, the reviewing court will focus on the record and the outcome. A lack of reasons does not enable the reviewing court to speculate and invent reasons that cannot be supported. With all of this in mind, I will review the Minister's acts and omissions on the basis of the standard of reasonableness.

(1) Whether the Minister's failure to appoint a recovery team for Canada Warbler, or to appoint a recovery team and prepare a recovery plan within the required timeframe for the Ram's-head Lady Slipper, was reasonable (s. 15(1)).

[30] Section 15 of the *ESA* sets out the duties of the Minister when a species is listed as endangered or threatened. The Minister shall "appoint a recovery team and prepare a recovery plan" for an endangered species within one year (s. 15(1)(a)) and for a threatened species within two years (s. 15(1)(b)). A recovery plan states the "needs and actions to be undertaken for the recovery of an endangered or threatened species" (s. 3(n)), and its required contents are set out at s. 15(4). Section 15 also sets forth the Minister's powers and duties in determining the feasibility of implementing a recovery plan or a part thereof, and indicates implementation to the extent that they are feasible (ss. 15(6)-(7), (12)). The Minister is authorized to prepare a recovery plan in co-operation with another

jurisdiction "to the extent possible" (s. 15(8), and to adopt an existing plan from another jurisdiction (s. 15(9)). There are Ministerial duties for ongoing review of recovery plans and management plans (ss. 15(11)). Certain provisions of the *ESA* give the Minister discretion, such as s. 15(6), providing that the Minister "may determine the feasibility of implementing any recovery plan or any portion of a recovery plan". For endangered and threatened species, however, the Minister shall appoint a recovery team and prepare a recovery plan, within the required timelines.

[31] The Respondents say the federal *Species At Risk Act,* SC 2002, c. 29 (the *SARA*) affects *ESA* duties, since the *ESA* contemplates work in conjunction with other jurisdictions, creating efficiencies and assisting with interjurisdictional approaches to species at risk, as suggested by s. 2(c). This inter-governmental approach was discussed in *Centre québécois du droit de l'environnement c. Canada (Ministre de l'Environnement),* 2015 FC 773:

> 10 Parliament and the provincial or territorial legislatures are gambling that the governments and people concerned will step up before the decline of a species in Canada becomes irreversible, which is why it is important that the departments and ministries concerned adopt recovery strategies and action plans as soon as possible. … [Emphasis added]

[32] The purpose of the co-operative approach is to ensure the speedy recovery of Canadian species, which do not respect borders. The habitats that the species rely on also do not respect borders.

[33] Not all equivalent legislation contains the firm timelines found in the *ESA*. Some statutes have no timeline provisions, or use more permissive language (i.e. "may"). The Newfoundland and Labrador *Endangered Species Act*, S.N. 2001, c E-10.1 is similar to the *ESA*, in that it says the Minister "shall" release a recovery plan within two years of a species being designated as threatened or endangered (s. 14(2)). Unlike the *ESA*, however, it qualifies the Minister's duty to ensure that a plan is published within the timeline:

> 14(3) If the minister cannot release the recovery plan within the time specified in subsection (2), he or she may delay the release of the recovery plan for up to 6 months in the case of an endangered species and one year in the case of a threatened species and shall notify the public of the reason for the delay.

[34] There is no such exception in the *ESA*. Notably, the Newfoundland exception only grants the Minister six months for endangered species, not an indefinite period. The Ontario *Endangered Species Act, 2007*, S.O. 2007, c 6, allows the Minister to delay publishing a strategy indefinitely, but the Minister

must, within the time limit, publish an estimate of when the strategy will be prepared, along with the reasons for the delay (s. 11(5)). The Nova Scotia *ESA* contains no equivalent provision.

[35] The issue is whether the Minister's failure to appoint a recovery team within the required timeframe for Canada Warbler, or to appoint a recovery team and prepare a recovery plan within the required timeframe for the Ram's-head Lady Slipper, was reasonable under s. 15(1)(a) of the *ESA*.

[36] The Canada Warbler, a bird, was listed as endangered in 2013. The Minister had one year to appoint a recovery team pursuant to section 15(1)(a). No recovery team was appointed until March 2019, shortly after the Applicants filed this judicial review in January 2019. This appointment was some five years after the timeframe contemplated by the *ESA*. The Respondents say the Minister adopted a federal Recovery Action Plan for the Canada Warbler in 2016.

[37] The Ram's-head Lady Slipper, a flower, was listed as endangered in 2007. As with the Canada Warbler, the Minister had one year to appoint a recovery team and publish a recovery plan. The Minister neither appointed a recovery team nor prepared a plan in 2008. According to the Record, a draft recovery plan was created in 2009. There is nothing in either the Record or submissions to explain why this plan was never finalized.

[38] The Minister appointed a "Plants Recovery Team" in May 2019, whose mandate includes several species of flora, including the Lady Slipper. This appointment is more than 11 years outside the *ESA* timelines. Still, no recovery plan has been prepared for the Ram's-head Lady Slipper. The Respondents say a recovery plan is pending from the recovery team. What of the 11 years that elapsed between the designation of the species and the appointment of the team?

[39] The legislature used the word "shall" in s. 15(1) of the *ESA* to impose the relevant timelines on the Minister. Subsection 9(3) of the *Interpretation Act*, R.S.N.S. 1989, c 235, states that, "[i]n an enactment, "shall" is imperative and "may" is permissive." It is clear that s. 15(1) does not grant discretion to the Minister as to whether or not to comply with his or her obligations. The Federal Court said in *David Suzuki Foundation v. Canada (Fisheries and Oceans)*, 2010 FC 1233, varied on other grounds, 2012 FCA 40, referring to the federal SARA, that "critical habitat protection under SARA must be mandatory and not discretionary. Parliament did not intend to allow ministers to "choose" whether to

protect critical habitat" (para. 299). The same can be said about the Legislature's intentions in the *ESA*.

[40] The Respondents argue, however, that "shall" can be either "mandatory" or "directory". If the provision was mandatory, the Minister would lose jurisdiction upon failure to comply. The Minister's apparent interpretation is that "imperative" in the *Interpretation Act* may also be mandatory or directory. *British Columbia (Attorney General) v Canada (Attorney General)*, [1994] 2 S.C.R. 41, sheds some light on this distinction. In that case, Iacobucci J., for the majority, cited (at 122-124) *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, where the court stated that the "doctrinal basis of the mandatory/directory distinction is difficult to ascertain" but appeared to lie in "serious general inconvenience or injustice", as described in *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.). Justice Iacobucci concluded:

> In other words, courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?
>
> There can be no doubt about the character of the present inquiry. The "mandatory" and "directory" labels themselves offer no magical assistance as one defines the nature of a statutory direction. Rather, the inquiry itself is blatantly result-oriented..
>
> Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from *Reference re Manitoba Language Rights*, *supra*, the principle is "vague and expedient" (p. 742). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result. [Emphasis added]

[41] In *Waterman v. Waterman*, 2014 NSCA 110, the majority of the Nova Scotia Court of Appeal considered the mandatory/directory distinction, emphasizing the importance of a contextual view as required by the modern principle of statutory interpretation (paras. 28-34). Speaking for the majority, Beveridge J.A. quoted the Supreme Court of Canada decision in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, where the majority confirmed that "the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory" (para. 42, cited in *Waterman* at para. 34).

[42] The distinction between "mandatory" and "directory" has the following implication in this context: if, for example, including "core habitat" in a recovery plan is mandatory, and the Minister publishes a recovery plan that does not set out any core habitat, then arguably the rest of the recovery plan for that species is *ultra vires* and therefore invalid. If the provision is directory, the Minister does not lose jurisdiction and the rest of the plan may stand. The analysis is outcome-oriented because the main distinction between mandatory and directory is whether the result is "inconvenient." I infer that the Minister, through assessment of the statutory framework and relevant case law, concluded that adhering to the *ESA* timelines was directory, not mandatory. The parties agree that the Minister does not lose jurisdiction. But this does not end the analysis on this issue.

[43] In *Western Canada Wilderness Committee v Minister of Fisheries and Oceans and Minister of the Environment*, 2014 FC 148, it was unnecessary to decide whether "shall" was directory or mandatory, as the parties agreed that the ministers did not lose jurisdiction with expiry of the *SARA* time periods, and could continue developing recovery strategies after their expiry. The court held that neither outcome rendered the timelines optional:

> 100 Given the parties' agreement on this point, I do not need to decide whether the timelines contained in sections 42 and 132 of *SARA* are mandatory or directory. However, the fact that the timelines may be directory rather than "mandatory" (in the legal sense) does not mean that they are optional, or that the responsible Ministers do not have to comply with them. Indeed, counsel for the Ministers acknowledged that the Ministers are indeed required to comply with the statute in this regard.
>
> 101 To state the obvious, the *Species at Risk Act* was enacted because some wildlife species in Canada *are at risk*. As the applicants note, many are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake.
>
> 102 The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk. [underlining added; italics in original]

[44] While not necessary to decide given the parties' acknowledgement, I conclude that "shall" in the *ESA* is directory. This does not mean the Minister has discretion not to comply. The Respondents concede that the legislature's use of

"shall" leaves no such discretion. Counsel agreed that it was imperative for the Minister to meet the deadlines, that the Minister failed to meet them, that this failure was unlawful, and that if it was found to be unreasonable, a declaration should result. The parties agree, and I conclude, that the Minister does not lose jurisdiction over the protection of species by failing to comply with this imperative obligation. It was clearly not the legislature's intention (as manifested, for instance, in the purpose provisions of the *ESA* as considered through the modern principle of statutory interpretation) that the Minister would lose jurisdiction under the *ESA* by failing to meet timelines. I note here as well that the above interpretation of "shall" will apply throughout the discussion of the ESA in this decision.

[45] The Minister's interpretation of "shall" as directory is reasonable. However, it does not follow that the failure to meet directory timelines without explanation – such as lack of resources – is reasonable. Counsel for the Respondents cited several somewhat vague suggestions of limited departmental resources in the Record as justification for the delay. Counsel was unable to point to anything in the Record that could specifically relate the failure to comply with the timelines in respect of any of the named species to resource issues. Unlike in *Western Canada Wilderness Committee*, the Minister did not provide affidavits from departmental staff offering evidence of limited resources. Furthermore, this submission is contrary to the agreed facts. The Ram's-head Lady Slipper waited 11 years for a recovery team until resources were suddenly made available shortly after this judicial review was filed.

[46] The Minister and the Department must uphold the law, all the more so when their duties are as plain as they are in this case. If they conduct themselves unlawfully without good reason, the court must hold them to account. As the Supreme Court of Canada said in *Inuit Tapirisat of Canada v Canada (Attorney General)*, [1980] 2 SCR 735, at 752:

> … in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

[47] There is nothing in either the Record or submissions to explain the failure to meet the Minister's statutory duty on this issue. Without an explanation, the court

is left with nothing. I cannot speculate and consequently, I conclude that this failure to take action under the statute was unreasonable.

(2) Whether the Minister's interpretation of "core habitat" in the recovery plans for Black Ash and Mainland Moose was reasonable (s. 15(4)(h)).

[48] Section 15(4)(h) of the *ESA* states that a recovery plan pursuant to s. 15(1) shall "identify areas to be considered for designation as core habitat". The term "core habitat" is defined at s. 3(b) to mean "specific areas of habitat essential for the long-term survival and recovery of endangered or threatened species and that are designated as core habitat pursuant to Section 16 or identified in an order made pursuant to Section 18".

[49] From a plain reading of the above sections, it is apparent that the Minister must ensure that recovery plans identify areas that may later be considered for designation as core habitat. The core habitat for a species is the specific area essential for its survival that has been designated under the *ESA*. Subsection 16(2) allows the Minister to designate "specific physical areas or landforms of the Province as core habitat" and to enter into agreements with landowners over these areas. Subsection 16(3) adds that core habitat "shall not include the entire geographical range that can be occupied by the threatened or endangered species unless inclusion is considered essential for the survival of the species." Section 18 allows the Minister to designate core habitat where the species is only provisionally listed as endangered or threatened. Sections 16 and 18 are discretionary. According to the Applicants' oral submissions, no land, public or private, has ever been designated as "core habitat" for any species in Nova Scotia.

[50] Due to the cooperative nature of the national statutory regime for endangered species, cases interpreting the federal *SARA* will be of guidance in reviewing the Minister's decision. The *SARA* defines "critical habitat" as "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species" (s. 2(1)). Both statutes require the minister to ensure that core or critical habitat is identified in recovery plans or strategies. The *SARA* goes further in addressing how critical habitat is identified:

> 41 (1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include

…

> (c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;
>
> (c.1) a schedule of studies to identify critical habitat, where available information is inadequate...

[51] The federal Minister has no discretion not to include critical habitat despite a lack of adequate information. "Critical habitat" was discussed in *Centre québécois du droit de l'environnement*, *supra*:

> [10] Parliament and the provincial or territorial legislatures are gambling that the governments and people concerned will step up before the decline of a species in Canada becomes irreversible, which is why it is important that the departments and ministries concerned adopt recovery strategies and action plans as soon as possible. That being said, before going any further, it is important not to confuse the residence of an individual with the critical habitat of a species. Under the federal Act, the concept of "residence" refers to "a dwelling‑place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating"... By contrast, the concept of "critical habitat" is much broader: it refers to "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan"... [Emphasis in original.]

[52] While the federal Act is relevant to our analysis, the two regimes have substantive differences. Under *SARA*, the federal minister has several positive duties once a recovery strategy or action plan that identifies critical habitat is published. The minister has 180 days to ensure that critical habitat areas on Crown lands receive federal protection (s. 58(5)). If any portion of the critical habitat remains unprotected after 180 days, the minister must publish a report every 180 days on the steps taken to protect the species (s. 63). The purpose of this is to ensure all critical habitat is protected in some way (s. 57).

[53] Unlike the *SARA*, there are no direct consequences to identifying some areas of core habitat in a recovery plan under the *ESA*. Doing so does not further compel the Minister to act in any way. The Minister retains discretion to designate specific physical areas as core habitat in s. 16. In Nova Scotia, the areas to be identified in a recovery plan are not yet designated as core habitat.

[54] The purpose section of the *ESA* recognizes “the precautionary principle that a lack of full scientific certainty must not be used as a reason for postponing measures to avoid or minimize the threat of a species at risk in the Province” (s. 2(h)). The Intervenors submit that the “precautionary principle” is a “fundamental and widely recognized principle of Canadian environmental law.” They cite *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, where L’Heureux-Dubé J. said, for the majority (citations omitted):

> 32 Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment"... As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law"...

[55] In *Wilderness Committee, supra*, the court held that waiting for consensus among stakeholders and improved scientific data is not an excuse to avoid provisions of the *SARA*:

> 71 Insofar as the scientific basis for the proposed recovery strategies is concerned, I agree with the applicants that "the perfect should not become the enemy of the good" in these cases. Section 38 of *SARA* (which incorporates the "precautionary principle" into the Act) is very clear: the preparation of a recovery strategy for a species at risk "should not be postponed for a lack of full scientific certainty".
>
> 72 The precautionary principle was discussed by the Supreme Court of Canada in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.). Citing the Bergen Ministerial Declaration on Sustainable Development (1990), the Court noted that "[e]nvironmental measures must anticipate, prevent and attack the causes of environmental degradation". As a result, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation": at para. 31
>
> 73 Indeed, as Justice Russell observed in his decision in the *Orca* case, "[e]ndangered species do not have time to wait for [the competent minister] to 'get it right'": at para. 66. [Emphasis added]

[56] The precautionary principle is a legislative tool that prevents governments from pointing to imperfect data as an excuse for failing to implement a statutory duty. Protecting habitat is a key component of the legislation, which has as its aim the protection and management of vulnerable species in Nova Scotia. The Minister

must ensure that recovery plans identify areas that may later be designated as core habitat. A lack of full scientific certainty may not be used as an excuse for failing to meet the *ESA*'s purposes.

[57] The Applicants say the Minister breached the statute by failing to ensure that "core habitat" is clearly delineated in the recovery plans for Black Ash and Mainland Moose. While the recovery plan for Black Ash "provides a partial definition" of core habitat, they say, it "does not identify areas to be considered for designation as core habitat for the species." As for the Mainland Moose, the recovery plans do not set out any core habitat, which the Minister concedes. The Applicants argue that because section 15 uses the word "shall", the inclusion of core habitat in a recovery plan is imperative, and the Minister had no discretion to omit core habitat from the recovery plans. They rely on the precautionary principle for the proposition that a lack of scientific certainty may not be used to avoid the duty of including core habitat in a recovery plan.

Black Ash

[58] In 2013, the Black Ash tree was designated as threatened under the *ESA*. In 2015, the Minister published a recovery plan and action plan for Black Ash. In its discussion of core habitat, the plan does not refer to any specific area, location, or landform, but explains over several paragraphs why identifying specific areas of core habitat is not feasible. The main issue raised is a lack of data. The report states that "[t]hese factors, plus a lack of clear understanding as to what is necessary to recover the species suggest that there is currently insufficient information to provide a complete definition of core habitat, although a more complete definition may be possible in the future."

[59] The Respondents say the 2015 recovery plan for Black Ash satisfies the requirements of the *ESA*, but say that identifying specific areas in Nova Scotia as core habitat for the Black Ash is not feasible. They concede that "shall" is imperative and not discretionary. However, they argue that the Applicants' interpretation of the Minister's duty under these provisions would "mandate action where there is no scientific basis for the action."

[60] The Respondents say a lack of full scientific certainty "does not encapsulate situations in which there is a complete lack of scientific support for something." Other sections of the *ESA*, specifically sections 11 and 18, could allow a zealous Minister to take steps to protect a species with no scientific basis to do so, but these sections have safeguards – for example, if the Minister lists a species as

endangered without scientific evidence, that listing expires in one year. There are no such safeguards in section 15.

[61] Finally, the Respondents say that when a species is at risk, its habitat is already protected by section 13, which prohibits harming endangered and threatened species and their dwelling places. The Respondents say the decision not to identify specific "core habitat" is reasonable in light of the Record.

[62] As discussed above, the meaning of "shall" is imperative. The Minister has no discretion to avoid this duty. Therefore, the Minister must ensure that published recovery plans identify areas which the Minister may later consider for designation as core habitat. To do otherwise is not a reasonable interpretation of the Minister's statutory duty. The areas identified must be specific enough to put the Minister in a position to designate core habitat. Therefore, to comply with s. 15(4)(h), recovery plans must identify "specific physical areas and landforms" consistent with s. 16.

[63] The Respondents point to the interim recommendations in the recovery plan as satisfying s. 15(4)(h), specifically the following:

> On an interim basis, the definition of core habitat needs to balance the immediate need for Emerald ash borer management and the long-term need for core habitat to support species recovery. To this end, it is recommended that individual seed-bearing trees be protected with a 150m buffer from forest harvest and industrial activity that may harm the tree or its surrounding habitat. Long distance dispersal distances for ashes is up to 150 m in the direction of the prevailing winds (e.g., Schmiedel et al. 2013), so the buffered area should support recruitment if it occurs and maintain localized habitat conditions. Given the proximity of some of these trees to streams and wetlands, some consideration should be also given to the maintenance of watercourses near seed trees.
>
> To prevent net loss of individual Black ash trees (non-seed-bearing trees), activities that may result in mortality (e.g. forestry, road construction, infilling of swamps) should plant replacement trees in suitable relatively undisturbed habitat. Replacement rates should be related to seedling survival (e.g. transplant 5 seedlings to 1 lost tree). Benedict (2003) suggests that the desired plant density at emergence in 30 to 45 plants/m^2 or 10 to 15 seedlings/ft^2. Seedlings should be planted 3 to 4.5 m (10 to 15 ft) apart for reforestation and basket materials projects. [Emphasis added.]

[64] This, the Respondents say, shows that the recovery team was working to compile essential information, even though "it was not possible to provide a final definition of core habitat."

[65] Under s. 15(4)(h), a recovery plan must "identify areas to be considered for designation as core habitat." Pursuant to s. 16(2), "where the Minister considers it necessary for the purpose of implementing a recovery plan, the Minister may designate specific physical areas or landforms of the Province as core habitat." When ss. 15(4)(h) and 16(2) are read together with the definition of "core habitat" at s. 3(b) ("specific areas of habitat..."), it is clear that the recovery plan must identify specific physical areas or landforms. Without that information, the Minister is not in a position to determine whether to exercise his or her discretion under s. 16(2) to designate a land area as core habitat for the purpose of implementing the recovery plan.

[66] Nothing else in the Black Ash recovery plan sets out specific areas or landforms that could be used for designation. In the recovery plan, under the status column for "Identify native seed-bearing Black ash and maintain them through stewardship programs", it says, "Not yet underway". The recovery plan notes that "Black ash habitat has not been described in a Nova Scotia context and the preferred habitat is unclear". It outlines the various threats to the species' survival, including habitat loss, forestry, climate change, and invasive beetles.

[67] One of the four key conditions for recovery of the species is ensuring the viability of seed-bearing trees. Therefore, protecting these seed-bearing trees is essential. The plan notes (p. 5) that although "Black ash is known from 35-40 sites in 11 counties of Nova Scotia[,] mature individuals are rare and only 12 are known to occur. Total number of known trees in Nova Scotia is approximately 1000". Those twelve trees are the only seed-bearing trees verified in the province (p. 6). At page 7, there is a map of Nova Scotia with dots that show the known distribution of Black Ash according to the records for which coordinates were available, but it does not provide the locations of known seed-bearing trees.

[68] The recovery plan's authors suggest that prospective Wildlife Habitat and Watercourse Regulations "may provide some protection to trees found within 20m of streams greater than 50 cm in width" but would not protect "trees along smaller streams or shrug swamps" (pp. 10-11). The plan appears to contemplate that some areas where trees are known to occur will be protected by future regulations. Five years later, however, those regulations do not exist.

[69] Counsel for the Respondents was asked where the Court could find the Minister's justification for this decision. Counsel pointed to the Record. The information contained therein will weigh heavily in this Court's analysis.

[70] The lack of available information is reflected throughout the recovery plan. There are, however, a passages that could contradict the conclusion that it is impossible to identify any areas to be considered for core habitat. At page 6, the plan indicates, "only 12 seed-bearing trees are known to occur (i.e., verified)". At page 23, it states, "Locations and ownership of properties with seed-bearing trees are mostly known". Given the "interim recommendation" that seed-bearing trees receive a 150m buffer of protection, this suggests that it would be possible to identify the locations of some of these trees, but those locations are not identified in this plan. Consequently, the Minister could not use the information provided to later designate any areas as core habitat. There is nothing in the Record to explain why these specific areas were not identified in the recovery plan.

[71] There is no apparent support in the Record for the claim that institutional restraints, such as lack of resources, are at fault for this failure to observe statutory requirements. No affidavits were provided by the Respondents to support the assertion that resources are scant, unlike in *Western Canada Wilderness Committee*. In view of this lack of explanation, I cannot conclude that the Minister's failure to include areas to be considered for core habitat designation in the recovery plans for Black Ash was reasonable.

[72] Although the Respondents say the *ESA*'s definition of "core habitat" necessarily means that it must also be designated as such (unlike the *SARA* definition of "critical habitat"), that does not mean that s. 15(4)(h) is rendered meaningless. The issue is not whether specific areas have been designated, but whether specific areas have been *identified*. Having reviewed other sections in the *ESA* dealing with core habitat, it is clear that the information in the recovery plan must be sufficient to allow the Minister to designate specific physical areas or landforms in the province. That is not possible if no specific areas have been identified. Given the above discussion regarding ensuring government actors comply with the rule of law, and the precautionary principle, it cannot be said that the Minister's actions here were a reasonable interpretation of the statutory duties, particularly where the recovery plan itself suggests that more specific information is available.

Mainland Moose

[73] The Mainland Moose was listed as endangered in 2003. A recovery team was appointed in 2004 and a recovery plan was prepared in 2007, but not approved until 2012. While this population once thrived in the province, it "has experienced significant and continuous decline over the past thirty years". As of 2003, the

population was around 1,000-1,200, and that number has not been revised. According to the 2003 data, Moose distribution has remained largely the same since aerial surveys were taken in the 1960s. Localized groups occupy "the northern Cobequid Hills and Pictou-Antigonish Highlands, the southwestern interior in and around the Tobeatic Wildlife Management Area, and scattered pockets along the eastern shores of Guysborough, Halifax, Shelburne, Queens and Yarmouth counties". A map sets out population estimates by area. Threats are complex and poorly understood, but appear to include disease, parasites, poaching, road access to moose habitat, development, forest practices, and climate change. Throughout the plan, lack of data is cited frequently (see, e.g., pp. 219-220).

[74] The Nova Scotia government made efforts to help the struggling Moose population for several decades, with few positive results. Moose hunting was closed in 1937 in recognition of the decline in population. Efforts to monitor and protect the population are cited from the 1960s and 1970s. Key information regarding habitat is still lacking, however, and no core habitat has been identified. Under the heading for "core habitat", the recovery plan refers to the *ESA* definition, and says:

> ... Under the NSESA, the province of Nova Scotia may identify "core habitat" for provincially endangered species.
>
> Insufficient qualitative, quantitative, spatial and temporal information exists at this time necessary to identify core habitat for mainland moose. Moose use a broad array of habitat types that are variable in space and time. Significant information gaps surrounding the life history, landscape ecology and biology of mainland moose will need to be addressed before core habitat can be defined.

[75] The wording of the plan (i.e. using "may" when the *ESA* says "shall") indicates a non-imperative interpretation by the drafters of the report regarding setting out core habitat for the Mainland Moose.

[76] The recovery plan states that a portion of the land used by Mainland Moose is protected by other legislation, including the *Wildlife Act*, R.S.N.S. 1989, c 504, the *Forests Act*, R.S.N.S 1989, c. 179 (or the *Forest Enhancement Act*, R.S.N.S. 1989, c. 178), the *Off-highway Vehicles Act*, R.S.N.S. 1989, c. 323, and the *Wilderness Areas Protection Act*, S.N.S 1998, c. 27. Neither the plan nor counsel's submissions explain how these statutes specifically help Moose or their habitat.

[77] Outside of this report, other instances of studying Moose include a two-page 2012 document entitled "Endangered Mainland Moose Special Management Practices", showing a map of Nova Scotia with large coloured patches to mark

"Significant Mainland Moose Concentration Areas". There is a short comment above the map, stating, in part:

> Moose population concentration areas were identified using a scientifically-based geographic model, expert review, and the best available data. The model included an estimate of total occupied range, relative population density, and significant population concentration areas. It was developed using 3272 moose observational records compiled between 1999 and 2011.

[78] The document includes several preservation recommendations, such as ensuring a 250m buffer of trees at the edge of any forest harvest for Moose habitat.

[79] There is also an "Action Plan" for the Moose, dated for 2014-2018. According to the Respondent, this document reviews the 2007 plan for species recovery. The plan indicates that progress was made on understanding the distribution, but getting reliable data on the Moose population remains a top priority. Field surveys were ongoing. There was otherwise no further update on "core habitat" in the 2014-2018 plan.

[80] Counsel for the Respondents concedes that it was not possible to identify specific core habitat for Mainland Moose "due to the ecology of the species." The Respondents say it is not proper for the court to question the expertise of the scientists who drafted the report. It is not clear, though, how this comports with the precautionary principle or the overall aims of the *ESA*. As noted in *Wilderness Committee*, *supra*, perfection should not become the enemy of the good. Even where there is a lack of useful information, it is the Minister's duty to ensure this information is gathered before the expiry of the timeframe. There is likely no entity better situated to get this information than the Minister and his appointed teams. If the Minister is simply unable or unwilling to ensure some core habitat is set out in a recovery or management plan, then he will be in breach of the *ESA*.

[81] The Record provides no explanation for why, despite efforts to support the population from the 1930s, comprehensive data around Moose population has not been generated. There is no specific evidence of a lack of resources that affected the ability to obtain or develop data. Recognizing that collecting data on a small roving population of Moose has inherent difficulties, no explanation has been provided as to why there is still, in the Respondent's words, "a complete lack of scientific basis for designating any geographic area as core habitat for the Mainland Moose".

[82] In short, there is no explanation for the breach of s. 15(4)(h) as it relates to the Mainland Moose. With no explanation from the Minister, I conclude that omitting core habitat decision was unreasonable in view of the Minister's statutory duties.

(3) Whether the Mainland Moose "review" published by the Minister was reasonable under s. 15(11).

[83] Subsection 15(11) of the *ESA* requires that "[r]ecovery plans and management plans shall be reviewed every five years to determine the progress of the recovery of the species and whether any changes or modifications are required". The *ESA* does not define "review", nor does the term appear in this context anywhere else in the *ESA*. The purpose of the review is to determine the progress of species recovery and whether any changes are necessary. Given the above analysis, review of the recovery and management plans is imperative after five years. If no review occurs, the Minister is in breach of this section.

[84] The Mainland Moose recovery plan was prepared in 2007, meaning a review was due in 2012. There are two documents in the Record that the Respondents suggest meet this requirement. With respect to the 2012 "Endangered Mainland Moose Special Management Practices", counsel submits that "while perhaps not explicitly a full review," it shows that "facets of the 2007 Recovery Plan were being reviewed, considered, and applied." This would be five years after the 2007 plan was released, though counsel also concedes that this 2007 plan was not formally approved until 2012. The Respondents also point to the "Action Plan for the Recovery of the Eastern Moose (*Alces alces americana*) in Mainland Nova Scotia," dated 2014-2018. The Action Plan purports to "complement" the 2007 recovery plan "by reporting on progress achieved to date on the actions identified in the Recovery Plan and by identifying the specific tasks and actions required to move forward and achieve the recovery objectives". The report includes a table of action items with status updates. The Respondents also point out that a new recovery team was appointed for the Mainland Moose in August 2019, with updates pending. The Respondent submits that this "is logical given that there would be new information on Mainland Moose in the intervening time, making it more logical to revise a status report than simply review a recovery plan."

[85] The Applicants say no meaningful review has occurred. They say the 2014-2018 plan is not a review of the 2007 plan, but only an extension. It does not address whether actions taken under the 2007 plan were appropriate or out of date. The new report does not review population estimates, which are based on 2003

data (although the 2012 document relies on Moose observations from 1999-2011). The Applicants also cite the 2018 Departmental Report on Recommendations of the Auditor General which states that the Moose plan is "out of date" and is "to be revised" by June 2018 (p. 543). It appears that the Department is implementing actions based on a 12-year-old plan with 16-year-old population data.

[86] Under the *SARA*, the federal minister must report on the implementation and progress of every recovery strategy within five years of it being published, and that report must be published (s. 46). A *SARA* recovery strategy sets out essential features of the species, and an action plan sets out specific actions in relation to a recovery strategy. The minister must prepare one or more action plans per recovery strategy (s. 47). Action plans must also be reported on every five years. Therefore, the *SARA* contemplates publication of a report on each species' review, dealing with implementation of the recovery strategy or action plan and discussing its progress towards the objectives. The review report must also discuss any ecological and socio-economic impacts incurred as a result of the plan being implemented (s. 55).

[87] Unlike the *SARA* system, there is no requirement to create an action plan for a recovery plan under the *ESA*. In 2016, the Minister published an action plan, which appears to align with the definition of action plan under the *SARA*. In considering whether the 2016 action plan may be deemed a "review" under the *ESA*, a review of other provincial endangered species legislation is helpful. While some statutes require the minister to review a plan or strategy after five years (e.g. the Ontario *Endangered Species Act* at s. 12.2), only the federal *SARA* requires the minister to produce a published report or document.

[88] *Vavilov* indicates that the decision maker's task is to "interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue" (para. 121). There is little authority on the meaning of "review" in the context of endangered species legislation that would provide guidance on whether the Respondents' proposed interpretation is reasonable. The term has, however, been considered in other areas. In *Saskatoon (City) v Plaxton* (1989), 33 C.P.C. (2d) 238, 1989 CarswellSask 235 (Sask. C.A.), a personal injury settlement provided that payment of the solicitor/client account would be subject to review and approval by a public trustee. Cameron J.A., for the majority, discussed the term "review" outside of an adjudicative context:

> 26 The words, too, are not altogether free of ambiguity. "Review" is occasionally taken in popular use as meaning little more than a first instance "looking over" or "examination". In its legal sense, of course, it usually means more than that, as implying a formal, second instance "re-examination" or "reconsideration", with a view to revision or redetermination if something be found wrong or lacking...

[89] I also consider other definitions of "review." For instance, *The Concise Oxford Dictionary of Current English*, 8th ed., defines "review" as a transitive verb as follows:

1. Survey or look back on
2. Reconsider or revise
3. Hold a review of (troops etc.)
4. Write a review (of a book, play, etc.)
5. View again

[90] Definition (2) is most instructive here, suggesting a two-pronged understanding of "review", similar to the discussion in *Plaxton*: it can mean looking something over again (i.e. reconsidering), and may also mean actual revision. I conclude that a reasonable interpretation of "review" under the *ESA* is more than "looking over", but also requires reconsideration and, if necessary, revision to address changing circumstances. This interpretation comports with the purpose of the *ESA*, which is to ensure the protection of species in a timely manner.

[91] Unlike the *SARA*, the *ESA* does not expressly require the Minister to produce a report or document as a result of statutory review. Although, there is some qualifying language in s. 15(11), the form of the review is open to interpretation by the Minister, though transparency and public accountability would suggest that there should be some public indication that a review occurred. Otherwise, there is little guidance regarding what "review" looks like under the *ESA*, suggesting the legislature intended to give the Minister a degree of discretion.

[92] The Respondents rely on the 2012 "Special Management Practices" document and the 2014-2018 Action Plan as documents constituting a "review". I also have regard to the Departmental Report on Recommendations of the Auditor General, which updates the status of Moose recovery, and the 2011 Memo from the recovery team to Bob Petrie, which refers to the 2007 plan and indicates that different population census methodology is needed.

[93] Based on the principles of statutory interpretation and taking into account the applicable standard of review, I conclude it was open to the Minister to interpret the term "review" as something less substantive than what the Applicants call for. Considering the various documents put forward by the Respondents to demonstrate review of the Mainland Moose plan, it is reasonable to conclude that a review occurred with the 2014-2018 action plan. Although that document does not expressly deal with whether changes or modifications of the 2007 plan are required, it can be inferred that the recovery team concluded that no major changes were necessary. The Applicants have not provided any authority for their assertion that a review must be critical of the original plan. The Minister's broader interpretation of "review" is not precluded by the *ESA* or by any relevant factual or legal constraints. The Minister's conclusion that the documents provided, specifically the 2014-2018 action plan, constitute a "review" as required by s. 15(11) of the *ESA* is reasonable.

[94] That being said, the Respondents' brief confirms that the 2012 document is not a "full review." I would agree. It is a two-page document that makes no reference to the 2007 plan and that uses different population data, from observations in 1999-2011 as opposed to the 2003 data relied on in the 2007 recovery plan. Because this document does not address developments since 2007, it does not fall within a reasonable interpretation of a "review" under the *ESA*.

[95] As a result of this characterization of the 2012 document, the review did not occur until 2013, when the 2014-2018 Action Plan was published. Therefore, the review was late by one year under the five-year timeline. There being no explanation for this failure to comply with the statute, I must conclude that the failure to complete the review within the statutory timeline was unreasonable.

(4) Whether the Minister's "adoption" of federal recovery plans for the Eastern Wood Pewee and the Wood Turtle was reasonable under s. 15(9).

[96] The Applicants allege that the Minister unreasonably failed to produce a recovery plan for the Wood Turtle within the required timeframe (s. 15(1)(b)) and to produce a management plan for the Eastern Wood Pewee within the required timeframe (s. 15(10)) was unreasonable. The Respondents assert that the Minister adopted a federal plans in respect of these two species. Subsection 15(9) of the ESA states, in part, that "where a recovery plan has been prepared in another jurisdiction for the endangered or threatened species, the Minister may adopt that recovery plan in lieu of the requirements of subsection (1)."

Eastern Wood Pewee

[97] The Eastern Wood Pewee is a migratory songbird found in several provinces. It was listed as vulnerable in 2013. Under s. 15(10) the Minister had three years to prepare a management plan (i.e. by 2016). There is no plan or other document, federal or otherwise, dedicated to the recovery of the Eastern Wood Pewee in the Record, nor is there any information about the habitat or threats faced by the species. In oral submissions, the Respondents conceded that the court could infer that no report exists for the Eastern Wood Pewee.

[98] The Respondents say waiting for federal cooperation on this species is reasonable, as due to the national presence of the species, a management strategy requires coordination with the still-incomplete federal plan. They refer to a 2012 Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") report on the Eastern Wood Pewee, but this report does not appear in the Record. The Applicants also cite the 2018 Departmental Report on Recommendations of the Auditor General, which acknowledges that a management plan and team for the Eastern Wood Pewee is not yet in place in Nova Scotia.

[99] Subsection 15(9) allows the Minister to adopt a recovery plan for an endangered or threatened species "in lieu of" appointing a recovery team and preparing a recovery plan under s. 15(1). It does not address management plans for vulnerable species, a matter addressed in s. 15(10), and which has no equivalent of s. 15(9). I conclude that this omission precludes an interpretation of the ESA allowing the Minister to adopt a federal plan (under s. 15(9)) for a species listed as vulnerable.

[100] When the legislature intends to refer to both recovery plans and management plans in the *ESA*, it does so (see, e.g., s. 15(11), regarding reviews of both recovery and management plans). To accept the Respondent's position that the Minister adopted (or will adopt) a federal management plan for the Eastern Wood Pewee requires re-writing the plain language of the statute. As such, the Minister has failed to prepare a management plan in the allotted time for the Eastern Wood Pewee, and has provided no explanation for this failure. This failure is therefore unreasonable in view of s. 15(10).

[101] I also note that the Eastern Wood Pewee was assessed as "special concern" (the federal equivalent of vulnerable) in 2012, but was not actually listed as such under the *SARA* until 2017. The federal minister has three years from the date the species was listed to publish a proposed management plan. The provincial

management strategy was due in 2016. I note this because, even by the Respondents' reasoning, the federal minister's obligation to begin preparing its management plan did not commence until after the provincial equivalent was due.

Wood Turtle

[102] The Wood Turtle was listed as vulnerable in 2000, and re-listed as threatened in 2013, giving the Minister until 2015 to prepare a recovery plan. The Minister did not prepare a management plan, or appoint a recovery team and prepare a recovery plan, within these timelines. The Respondents say the Department adopted the 2016 federal "Proposed Recovery Strategy for Wood Turtle (*Glypytemys insculpta*)" by participating in its drafting and implementation.

[103] No formal means of adoption is indicated in the *ESA*. Questions arose during oral submissions as to how the Minister, or the public for that matter, can know when time for the five-year review starts to run if there is no formal indication of approval or adoption. The Respondents said the time begins when the federal report is published. This suggests that "adoption" is automatic.

[104] The Applicants say there is no evidence that the Minister adopted the federal strategy for Wood Turtle. Although the Respondents did not refer to it in submissions, in their Notice of Participation, they cite a 2014 e-mail from the provincial Director of Wildlife to an official involved on the federal plan as apparent evidence of adoption. The Applicants say a private e-mail from 2014 cannot constitute formal "adoption" of a plan that did not exist until 2016. They also submit that "adopting" requires some positive act to bring the plan into the provincial regime and begin its implementation. As such, they argue, the recovery plan for the Wood Turtle was four years late at the time of filing.

[105] In the 2018 Departmental Report, a chart entry indicates that a plan exists for the Wood Turtle, dated 2012, to be revised in 2017. The same chart, under "planned action", states "federal plan developed in collaboration with the provinces, to be completed and approved." This suggests that the Department did not consider the federal plan to be "completed" at that time. The Applicants also say this shows no intention to "adopt" the plan as the Minister's own.

[106] As noted earlier, the federal plan was not published until 2016, so that the federal government was late by the *SARA* timelines, since the Wood Turtle was listed as threatened under *SARA* in 2010. Pursuant to s. 42(1), the federal minister had two years (until 2012) from the species listing to publish a proposed recovery

strategy, but it was not published until 2016. Section 43 of the *SARA* provides that the public has 60 days to file written comments on the proposed strategy, after which the minister has 30 days to consider comments and finalize the strategy by publishing it in the registry. That period has long expired. The Intervenor argues that it cannot be reasonable for the Minister to await federal action when the federal authorities are not complying with timelines under their own statute.

[107] It is unnecessary to interpret "adopt" in this case, because s. 15(9) permits adoption of a recovery plan that is "in existence before the coming into force of this Act" or that "has been prepared in another jurisdiction for the endangered or threatened species..." The phrase "has been prepared" is in the past tense, indicating, based on the plain language, that the plan must already be prepared or completed before it can be adopted in lieu of the requirements of s. 15(1). According to the 2018 Departmental Report, the Nova Scotia team believed the federal plan was waiting "to be completed and approved." This implies that at that time, the federal plan for the Wood Turtle was *being* prepared, but had not *been* prepared.

[108] By comparison, s. 15(8) states that the Minister "may, to the extent possible, prepare a recovery plan in co-operation with other jurisdictions where the endangered or threatened species is also found". This contemplates a situation where the Minister prepares a recovery plan together with another jurisdiction. It is limited by the phrase "to the extent possible", suggesting there are occasions where this option is not available to the Minister – such as where doing so would result in failing to adhere to a statutory deadline. On a plain reading, s. 15(9) does not indicate an intention to permit the Minister to avoid the duties under s. 15(1) by "adopting" a plan that will not be complete until the s. 15(1) deadline passes.

[109] Moreover, the federal deadline to create a recovery plan for the Wood Turtle after it was re-listed as threatened was 2015. Even by passively "adopting" the 2016 proposed federal plan, the Minister was late by one year. The 2016 proposed federal plan for the Wood Turtle was not complete at the time a plan became due under the *ESA*. The Minister may not adopt a plan pursuant to s. 15(9), which then satisfies the requirements of s. 15(1), that is incomplete. To do so ignores the clear language of s. 15(9), and is therefore unreasonable.

[110] In the alternative, I will review the interpretation of "adopt". A plain reading of s. 15(9) indicates that "adopt" is not qualified by any surrounding language. The word does not appear anywhere else in the *ESA*. Generally speaking, collaborating on or adopting another jurisdiction's plan comports with the purpose of the *ESA*.

Paragraph 2(1)(c) emphasizes a "national co-operative approach to the conservation of species at risk." The imperative timelines throughout the *ESA*, however, also indicate a legislative intent that time is of the essence.

[111] The *Concise Oxford Dictionary* defines "adopt" as follows:

1. Take (a person) into a relationship, esp. another's child as one's own.
2. Choose to follow (a course of action etc.).
3. Take over (an idea etc.) from another person.
4. Choose as a candidate for office.
5. *Brit*. (of a local authority) accept responsibility for the maintenance of (a road etc.).
6. Accept; formally approve (a report, accounts, etc.).

[112] *Black's Law Dictionary*, 10th ed., like the *Concise Oxford*, refers to "adopt" in the Parliamentary context: "[a] deliberative assembly's act of agreeing to a motion or the text of a resolution, order, rule, or other paper or proposal, or of endorsing as its own statement the complete contents of a report." The *Dictionary of Canadian Law* provides the following:

> 1. To accept a contract as binding; to select; to choose. 2. A witness may adopt a videotaped statement … 3. To take on responsibility for a child as if the child were one's own biological child. 4. A local government adopts a bylaw where it approves or accepts the bylaw.

[113] The equivalent *SARA* section in the federal statute is more detailed:

> 44 (1) If the competent minister is of the opinion that an existing plan relating to a wildlife species meets the requirements of subsection 41(1) or (2), and the plan is adopted by the competent minister as the proposed recovery strategy, he or she must include it in the public registry as the proposed recovery strategy in relation to the species.
>
> (2) The competent minister may incorporate any part of an existing plan relating to a wildlife species into a proposed recovery strategy for the species.

[114] Under the *SARA*, the adopted plan must conform to the federal requirements for recovery plans. From this section, it appears that to "adopt" means taking on an entire existing plan as the federal government's own, while to "incorporate" refers to parts of an existing plan. Notably, if the federal minister wishes to adopt another

jurisdiction's plan as the federal plan, the plan must be published in the public registry. There is therefore no doubt when the five-year review period begins.

[115] The Respondents' argument that "adopt" includes passive acceptance by virtue of collaborating with another jurisdiction is not persuasive. One problem with this interpretation is that the Minister is not obligated to adopt another jurisdiction's plan simply because Nova Scotia collaborated on it. Subsection 15(9) is permissive – the Minister "may" adopt the other jurisdiction's plan. It cannot be assumed that just because another jurisdiction has published a plan that Nova Scotia assisted with, Nova Scotia has adopted that plan as its own.

[116] The scheme of the *ESA* requires transparency and cooperation amongst all interested actors. The purpose section emphasizes this, committing Nova Scotia to a "national co-operative approach" (s. 2(c)) and declaring that "all Nova Scotians share responsibility for the conservation of species at risk" (s. 2(d)). Nova Scotians, including indigenous populations, must have an opportunity for "meaningful participation" regarding species at risk (ss. 2(e) and (f)). Further, s. 16 provides that the Minister may enter into agreements with landowners if their land is implicated in a recovery plan. However, with no reporting requirements, it is possible that private lands could be implicated in another jurisdiction's plan without the owners' knowledge or consent (see ss. 17 and 19). While s. 21 ensures that a copy of any recovery plan is provided upon request, a member of the public who has no notice that another jurisdiction's plan has been adopted cannot request something they do not know exists. Therefore, to interpret "adopt" under the *ESA* as purely passive is not a reasonable interpretation of the provision. There must be some affirmative act or notice that another jurisdiction's plan has been adopted. Any interpretation of "adopt" under the *ESA* must incorporate the requirement that the Minister accepts responsibility for another jurisdiction's existing plan and implements it in Nova Scotia in lieu of a plan prepared under s. 15(1), with some method for interested persons to receive notice.

[117] The issue here is not the precise definition of "adopt" for the purposes of s. 15(9) of the *ESA*, but only whether the decision made, or the position taken, by the Minister is reasonable in light of the relevant factual and legal constraints. Given all the circumstances, I conclude it is not. An interpretation of "adopt" in s. 15(9) that does not include some form of positive approval or action, allowing interested members of the public to be made aware that another jurisdiction's plan has now become Nova Scotia's plan, is unreasonable. Further, nothing in the relevant provisions suggests that the Minister can forego provincial deadlines in favour of a late, but collaborative, recovery plan. Collaboration is contemplated "to the extent

possible" in preparing a plan with another jurisdiction under s. 15(8), but there is no such language in relation to adopting an already-prepared plan under s. 15(9). As such, I conclude the failure to observe the deadline is unreasonable.

Remedy

[118] The applicants seek multiple remedies, including declarations, *mandamus*, and ongoing supervision by the court. For the reasons which follow, I am prepared to order certain declarations and *mandamus* in relation to some relief sought, but not ongoing supervision by the Court.

Declarations

[119] The Applicants say declarations will "ensure that the Minister fulfils his duties under the *ESA* to species at risk, and avoid the need to launch fresh judicial reviews for those species beyond the six Representative Species and for those species that may be designated as at-risk in the future." The Applicants seek the following declarations:

> (1) failure to prepare a recovery plan for the Wood Turtle within the statutory deadline at s. 15(1);
>
> (2) failure to appoint a recovery team for Canada Warbler within the statutory deadline at s. 15(1);
>
> (3) failure to appoint a recovery team for the Ram's-head Lady Slipper within statutory deadline at s. 15(1);
>
> (4) failure to prepare a recovery plan for the Ram's-head Lady Slipper within statutory deadline at s.15(1);
>
> (5) failure to prepare a management plan for the Eastern Wood Pewee within the statutory deadline at s. 15(10);
>
> (6) failure to set out core habitat for Black Ash in its recovery plan per s. 15(4)(h);
>
> (7) failure to set out core habitat for the Mainland Moose in its recovery plan per s. 15(4)(h); and
>
> (8) failure to review the Mainland Moose recovery plan within the statutory deadline per s. 15(12);

[120] The Respondents do not dispute that where an imperative deadline under the *ESA* is missed, a declaration should result. However, they argue that several of the proposed declarations are moot, because the Minister appointed recovery teams for various species in 2019, after the judicial review was filed. Specifically, the Respondents say the following issues are moot:

> (1) the appointment of a recovery team for the Canada Warbler;
>
> (2) review of the Mainland Moose recovery plan;
>
> (3) the appointment of a recovery team for Ram's-head Lady Slipper; and
>
> (4) creation of a recovery plan for Ram's-head Lady Slipper.

[121] The Respondents further say that if (2) and (4) are not moot, then they are premature, because new recovery teams have been appointed and recovery plans are in progress for these species.

[122] Declaratory relief is generally issued "to clarify the law on a particular point…": Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis Canada, 2017) at 255. A declaration may only issue where there is a live controversy. In *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12, Abella J. stated:

> 11 ... The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. R.* (1979), [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. [Emphasis added.]

[123] The Respondents do not dispute the court's jurisdiction or the justiciability of the issues. However, they take issue with the "live controversy" requirement. They argue it would be a waste of judicial resources to decide issues that are "hypothetical" or "academic."

[124] A declaration may be appropriate where a government actor has refused to uphold its statutory duties, or in order to clarify a point of law. In *Daniels*, *supra*, the applicants sought a declaration that Metis and non-status Indians were "Indians" under the *Constitution Act, 1867*. Neither federal nor provincial governments would take responsibility for their governance, though the federal government had conceded that non-status Indians were "Indians" for some purposes. The court held that a "declaration would guarantee both certainty and accountability thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute" (para 15).

[125] Like the present case, *Sequence Bioinformatics Inc v Health Research Ethics Authority for Newfoundland and Labrador*, 2019 NLSC 21, involved a statutory timeline. The applicant company applied for approval of certain research. Despite a

legislated 30-day timeline, more than a year later, the applicant had no answer. It obtained an order for *mandamus* compelling the respondent to process its application. The respondent subsequently rejected the application. The applicants then sought a declaration that the legislation required the application to be processed within 30 days. Although the application had been rejected, the court held that a live dispute remained regarding interpretation of the timeline:

> [28] The legislation provides no means for the Applicants to have the issue of the timelines appropriate for the review of their Application resolved. They could satisfy themselves with the Respondent's interpretation, but that would not resolve the disagreement.
>
> [29] A declaration would settle the difference of opinion between the parties and, additionally, would provide guidance to all other proponents of projects involving health research with human subjects. To that extent, it is desirable that the Court undertake the requested analysis of section 9(4) of the Act and make a declaration as to its scope and application.

[126] The court issued a declaration requiring the board to consider applications under the legislation within 30 days of receipt, even though the underlying issue – the applicant's application – had already been decided.

[127] In *Western Canada Wilderness Committee*, *supra*, Mactavish J. held that declaratory relief may address past conduct despite subsequent rectification:

> [63] The Ministers submit that declaratory relief should not be granted in this case. According to the Ministers, the fact that they have conceded that they were legally required to meet the statutory timelines for the posting of proposed recovery strategies and that they failed to do so means that declarations would serve no practical utility.
>
> [64] In support of this contention, the respondents rely on the decision of the Supreme Court of Canada in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 14, where the Court stated that "Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation"...
>
> [65] While this is unquestionably true as a general proposition, the Court has a broad discretionary power in relation to the granting of declaratory relief, and there are cases where the granting of such relief may nevertheless be appropriate... This is just such a case.
>
> [66] Declaratory relief may address the legality of government action, both prospectively and retrospectively: *Reece v. Edmonton (City)*, 2011 ABCA 238, 335 DLR (4th) 600, at para. 163, per Chief Justice Fraser, dissenting, but not on

> this point. Moreover, public officials are not above the law. If an official acts contrary to a statute, the Courts are entitled to so declare: see *Singh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 757, 372 F.T.R. 40, at para. 40, citing *Canada v. Kelso*, [1981] 1 S.C.R. 199 at 210. [Emphasis added.]

[128] The Respondents raise the question of mootness. The leading case on the doctrine of mootness continues to be *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. By the time the matter reached the Supreme Court of Canada, the impugned *Criminal Code* sections had been struck down. Addressing the question of whether this rendered the instant appeal moot, Sopinka J. said, for the court, at 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant. [Emphasis added.]

[129] If a dispute has effectively been resolved the court has discretion to declare the matter moot and refuse to hear it on its merits. *Borowski* provides guidelines for exercising this discretion. Sopinka J. said, at 358-362:

> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system

> and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context...
>
> ...
>
> The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. ... It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
>
> ...
>
> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.
>
> ...
>
> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

[130] Is there a live dispute in this case? Some measures were taken in 2019, including creation of recovery teams for Canada Warbler and Ram's-head Lady Slipper, and progress on review of the Mainland Moose recovery plan and a recovery plan for Ram's-head Lady Slipper. Consequently, some discrete issues no longer require the court's attention to bring about Ministerial action. However, these steps do not cancel the failure to observe statutory timelines arising from the Minister's apparent interpretation of the *ESA*. Declarations may result where there is a dispute over unsettled law, or where a government actor fails to comply with its statutory mandate. In this case, given all of the information contained in the Record, the Minister has exhibited a chronic and systemic failure to implement action required under the *ESA*. This systemic failure is verified in the Record: see, for instance, the 2016 Auditor General's Report; the 2018 Departmental Report on

Recommendations of Auditor General; and the 2018 Lahey Report. These failures are apparent in the Auditor General's Report, which included the following conclusions:

> **Overall conclusions:**
>
> • Species at risk need to be a greater priority for Natural Resources
>
> • Department not fully managing conservation and recovery of species at risk
>
> • Department is not carrying out planning and completing species recovery activities satisfactorily
>
> • Some success in achieving biodiversity goals; more work needed
>
> **What we found in our audit:**
>
> • Eight of 14 plans for species at risk were not done; some plans were more than seven years late
>
> • Four plans due for review are one to four years late. This means actions taken may not be the most effective.
>
> • Natural Resources coordination and communication with species recovery teams needs improvement...

[131] This situation is similar to *Western Canada Wilderness Committee*, *supra*, where the court said:

> 92 It is simply not acceptable for the responsible Ministers to continue to miss the mandatory deadlines that have been established by Parliament. In the circumstances of these cases, it is therefore both necessary and appropriate to grant the applicants the declaratory relief that they are seeking, both as an expression of judicial disapproval of the current situation and to encourage future compliance with the statute by the competent ministers.

[132] Similarly, in this case, the controversy regarding the meaning and application of section 15 is still a live one.

[133] Alternatively, if there is no live issue and the matter is moot, I conclude that this is an appropriate case to exercise the court's discretion to decide the issues. There are collateral consequences to a finding that the Minister failed to meet his statutory obligations at the time of filing. For example, while the Minister has appointed some new teams for the named species, there are still no recovery and

management plans in place for these species, as a direct consequence of the dispute that has not been resolved, other species remain unaddressed. In *Western Canada Wilderness Committee*, *supra*, the court said:

> 93 Indeed, the issues that were originally raised by these applications are "genuine, not moot or hypothetical" insofar as there remain numerous species at risk for which the posting of proposed recovery strategies is long overdue: *Danada Enterprises Ltd. v. Canada (Attorney General)*, 2012 FC 403, 407 F.T.R. 268 at para. 67. I am, moreover, satisfied that a declaration will serve a useful purpose and will have a "practical effect" in resolving the problems identified by these cases: see *Solosky*, above, at 832-833.

[134] The Applicants' concerns are not tied to the species specifically selected, but to all species at risk in the province, towards which the Minister has the same duties. A decision on the merits will enable future litigants to challenge any future failure to uphold the timelines again. I am not convinced that deciding these issues now will unduly tax court resources. In the event of a future failure to observe timelines, an existing decision interpreting the Minister's duties, and interpreting the ESA generally, will reduce the likelihood of litigation. Furthermore, issuing declarations here does not conflict with necessary deference to the administrative decision maker. This judicial review involves upholding the rule of law by ensuring the Minister adheres to the statutory mandate.

[135] I am satisfied that the declarations requested by the Applicants should issue. For clarity, the Court declares that the following unreasonable failures exist:

> (1) failure to prepare a recovery plan for the Wood Turtle within the statutory deadline at s. 15(1);
>
> (2) failure to appoint a recovery team for Canada Warbler within the statutory deadline at s. 15(1);
>
> (3) failure to appoint a recovery team for the Ram's-head Lady Slipper within the statutory deadline at s. 15(1);
>
> (4) failure to prepare a recovery plan for the Ram's-head Lady Slipper within the statutory deadline at s.15(1);
>
> (5) failure to prepare a management plan for the Eastern Wood Pewee within the statutory deadline at s. 15(10);
>
> (6) failure to set out core habitat for Black Ash in its recovery plan per s. 15(4)(h);
>
> (7) failure to set out core habitat for the Mainland Moose in its recovery plan per s. 15(4)(h); and

(8) failure to review the Mainland Moose recovery plan within the statutory deadline per s. 15(12);

Mandamus

[136] The Applicants seek *mandamus* in the following terms:

(1) the Minister must ensure the Black Ash recovery plan is revised within six months of this judgment to include the identification of core habitat;

(2) the Minister must prepare a management plan for the Eastern Wood Pewee within one year of this judgment;

(3) the Minister must ensure the recovery plan for the Mainland Moose is properly reviewed within six months of this judgment;

(4) the Minister must ensure the Mainland Moose recovery plan is revised within six months of this judgment to include the identification of core habitat;

(5) the Minister must prepare a recovery plan for the Ram's-head Lady Slipper within six months of this judgment; and

(6) the Minister must prepare a recovery plan for the Wood Turtle or properly adopt the federal strategy within six months of this judgment.

[137] An order of *Mandamus* compels the performance of a public duty. The governing principles were summarized in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (Fed. C.A.), at para. 45, affirmed at [1994] 3 S.C.R. 1100. In Nova Scotia, Murphy J. summarized the governing principles in *Sand, Surf & Sea Ltd v Nova Scotia (Minister of Transportation & Public Works)*, 2005 NSSC 233:

> [22] The Nova Scotia Court of Appeal in *Smith's Field Manor Development Ltd. v. Halifax*, [1988] N.S.J. No. 56, and in *Armoyan Group Ltd. v. Halifax*, [1994] N.S.J. No. 68, adopted the summary of the elements required to issue a mandamus order which was set out as follows in *Rawdon Realities Limited v. Rent Review Commission* (1983), 56 N.S.R. (2d) 403 (N.S.S.C.):
>
> > In order for mandamus to lie, or an order in the nature of mandamus to lie, there must be, first of all, standing, a sufficient legal interest in the parties making the application. There must also be no other legal remedy, equally convenient, beneficial and appropriate. Thirdly, there must be a duty to the applicant by the parties sought to be coerced to do the act requested. Fourthly, the duty owed must not be one of a discretionary nature, but may be established either at common law, or by statute. Fifthly, the act requested to be done must be required at the time of the application, not at some future date. Sixthly, there must be a request to do the act and that request must have been refused.

> [23] The requirements for mandamus to issue may be summarized as: (1) a clear legal right at the time of the application; (2) a corresponding duty that is public and specific; (3) there must be no discretion open to the official; and (4) there must have been demand and refusal...
>
> [24] Where a tribunal refuses to exercise its discretion, a Court may order it to do so by mandamus, but will not direct which way to decide...
>
> [25] As with all prerogative remedies, mandamus may be denied in the exercise of the Court's discretion.

[138] The *mandamus* dispute here centres on the questions of whether a duty was owed (standing); whether there was a prior demand and refusal; and whether there is any practical benefit to the order.

[139] The Applicants concede that two issues are moot for *mandamus* purposes. In 2019 the Minister appointed recovery teams for the Canada Warbler (March 22) and the Ram's-head Lady Slipper (May 15). The Respondents argue that *mandamus* is also moot with respect to the review of the Mainland Moose recovery plan and the recovery plan for the Ram's-head Lady Slipper. Alternatively, they say, *mandamus* would be premature on those issues due to the recent steps. For example, they say the Ram's-head Lady Slipper recovery plan is not yet prepared because the recovery team was only appointed in May 2019.

[140] I am not satisfied that there is a principled basis to distinguish between the issues on which the Minister took action after the judicial review application was filed, and those where no action has been taken. To find otherwise would implicitly suggest that a decision-maker can cure a serious failure to observe statutory duties by taking action after a *mandamus* application is filed, essentially placing the onus on the interested parties to take legal action before the Minister is required to comply with his or her duties. As such, I regard the scope of the prospective *mandamus* order to be the items listed above, excluding the two items conceded by the Applicants.

Standing

[141] The first element of *mandamus* is standing, that is, the applicant must have "a sufficient legal interest" (see *Sand, Surf & Sea* at para. 22, and the cases cited there). The Respondents did not raise any preliminary challenge to the Applicants' standing (for instance, by way of summary judgment), but the burden is on the Applicants to show they have met the test for *mandamus*, which has a standing component. The Respondents argued in oral submissions that because those who

are directly affected by the decision are non-humans, *mandamus* is not available, because no person has standing; although the Applicants may have standing to advance the claim (which is not disputed), the Respondents argue, they are not owed a duty and cannot make out the standing requirement for *mandamus*.

[142] In *Apotex*, supra, addressing the requirement that the duty must be owed to the applicant (para. 45), the court noted that "[h]istorically, this issue has been framed as one concerning standing to bring a mandamus application. The Supreme Court has considerably loosened the requirements for standing over the decades..." (fn. 6).

[143] The Appellants rely on public interest standing as the basis for their entitlement to *mandamus*. Public interest standing is concerned with "maintaining the rule of law", as Bryson J.A. wrote, for the court, in *Canadian Elevator Industry Education Program (Trustees of) v Nova Scotia (Elevators and Lifts Act)*, 2016 NSCA 80, at para 13. He cited *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138, where the majority said, at 145, that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication." The test for public interest standing was set forth in *Canadian Council of Churches v. R.*, [1992] 1 SCR 236 at 253:

> It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

[144] In summary, there must be a serious issue to be tried; the Applicant must show a "genuine interest" in the subject matter; and there must be no other reasonable and effective manner for the case to come before the Courts. In *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45, at para 2, Cromwell J., for the Court, said the three factors should not be assessed like a checklist, but rather seen as "interrelated considerations to be weighed cumulatively… in light of their purposes" (para 36). The factors should be "applied purposively and flexibly" (para 37).

[145] The Applicants rely on *Great Lakes United v. Canada (Minister of the Environment)*, 2009 FC 408, for the proposition that if they meet the test for public interest standing, they also meet the threshold for standing in the *Apotex*

mandamus test. In *Great Lakes United*, the applicants sought *mandamus* compelling the federal Minister of the Environment to require reporting of certain pollutants for mining facilities under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33. The minister did not dispute standing. The court commented on public interest standing:

> 68 The Applicants cite and rely upon *Distribution Canada Inc. v. Minister of National Revenue*, [1993] 2 F.C. 26 (Fed. C.A.), at paragraph 24 for the requirements of when a duty is owed to an applicant:
>
> > ...the matter raised by the appellant is one of strong public interest and there may be no other way such an issue could be brought to the attention of the court, were it not for the efforts of the appellant.
>
> 69 The Applicants submit that this finding has been interpreted by the Federal Court of Appeal to permit public interest standing where "the matter raised...is one of strong public interest and there may be no other way such an issue could be brought to the attention of the Court, were it not for the efforts of the [public interest litigant]": *Harris v. R.*, [2000] 4 F.C. 37 (Fed. C.A.) at paragraph 53 and *Apotex* at paragraph 45. In the current case, this aspect of the *Apotex* test is conflated with the test for public interest. The Applicants submit that in cases where environmental protection has been at issue, public interest groups have regularly been granted standing to seek *mandamus*: *Friends of the Old Man River Society* and *Sierra Club of Canada* at paragraph 32. [Emphasis added.]

[146] While *Apotex* does not address standing in detail as a free-standing issue, the court did suggest that a relaxed threshold for standing may be incorporated into the "balance of convenience" aspect of the *mandamus* test (para. 45):

> 107 The jurisprudence reveals three factual patterns in which the balance of convenience test has been implicitly acknowledged. First, there are those cases where the administrative cost or chaos that would follow upon the order's issue is obvious and unacceptable... It is noteworthy that in most of these cases the duty in question was owed to the public at large rather than the individual applicant. In this sense, the law of mandamus and the law of standing may be said to intersect. This relationship was implicitly acknowledged by Desjardins J.A. in *Distribution Canada v. M.N.R.*, *supra*, at page 39:
>
> > I am, for my part, inclined to think that with the addition of the *Finlay* case, the jurisprudence does not clearly exclude the possibility of extending standing to a proceeding in *mandamus* where there is public interest to be expressed and there is no other reasonable way for it to be brought to court.
>
> Whether the "balance of convenience" test may be employed as an ostensive vehicle by which standing requirements may be further relaxed I leave for another day.

[147] The Court in *Apotex* left the door open for the conclusion drawn in *Great Lakes United*. Other cases have suggested that meeting the test for public interest standing is sufficient for *mandamus* purposes. In *Finlay v Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at para 35, the court held that previous case law did not "clearly exclude such recognition" for persons with public interest standing to bring a non-constitutional challenge by way of declaration. Courts have subsequently held that because *mandamus* was not excluded by *Finlay*, this reasoning should apply to that remedy as well.

[148] A summary of the development of the law of public interest standing in relation to *mandamus* appeared in *Gauchier v Cunningham*, 2013 ABQB 713:

> 75 In *Distribution Canada Inc. v. Minister of National Revenue*, [1993] 2 F.C. 26 (Fed. C.A.), the court noted at para 23 that the notion of public interest was enlarged in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.), due to the court's concern that "it should have discretion to recognize public interest standing to bring an action for a declaration when there was no other reasonable way the matter could be brought to Court." The court further commented in *obiter* at para 23 that *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.); *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.); *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.) and *Finlay* had not clearly excluded "the possibility of extending standing to a proceeding in *mandamus* where there is a public interest to be expressed and there is no other reasonable way for it to be brought to court."
>
> 76 In my view, standing can be extended to a third party if they have a genuine interest in the resolution of the issue and there is no other reasonable and effective manner in which the issue may be brought before the court.

[149] Whether public interest standing overlays the second part of the *Apotex* test or instead is considered at the "balance of convenience" stage is somewhat ambiguous, as each of the above-cited decisions were decided before *Apotex*. However, the caselaw supports the view that if there is a legally enforceable duty, the applicants have made out the common law test for public interest standing, and there is no alternative recourse, *mandamus* may be appropriate, even where the duty is not owed directly to the applicants. The court still retains discretion not to order *mandamus* even where the test is made out. This view of the law appears to reflect a general expansion of public interest standing in administrative law cases, particularly where there is no other reasonable way to bring a matter to court.

[150] Returning to the test for public interest standing, the Applicants have established a serious issue to be tried. This is not a high bar. The question must be

important or "far from frivolous" (see *Downtown Eastside* at para. 42). It cannot be disputed that the issues raised here meet that standard, being integral to the Minister's duties under the *ESA*.

[151] I am satisfied that the Applicants have also established they have a "genuine interest" in the matter. The Applicants include local non-profit naturalist groups, as well as Mr. Bancroft, a naturalist and a former employee of the Department of Lands and Forests. While the Applicants conceded there may be other groups in Nova Scotia with similar interests, that does not preclude their interest as public litigants.

[152] As to the third factor, no one suggests the species themselves are capable of bringing an application, and the *ESA* does not provide for penalties or other consequences against the Minister where deadlines have been breached. There are no alternative routes to compel the Minister to meet his duties under the *ESA*. The species need people like Mr. Bancroft and organizations like the other Applicants and the Intervenor to take such action and speak for them. It would be absurd if no person or interested entity could bring such reviews under the *ESA* to hold government to account. How else would the Mainland Moose, Ram's- head Lady Slipper, Canada Warbler, Black Ash, Wood Turtle or Eastern Wood Pewee find protection when and if a government failed to reasonably execute its duties and responsibilities?

[153] I am satisfied that the Applicants have met the threshold to be considered public interest litigants for the purpose of *mandamus*.

Demand and refusal

[154] The Respondents deny that there was a demand that the Minister comply with the *ESA*, and subsequent refusal. The Applicants say there have been demands directed to the Minister since 2012 in letters and reports, and the Minister has "constructively" refused to meet these demands by failing to fulfill his legal duties over a long period of time.

[155] The caselaw regarding what constitutes a "demand" suggests a fairly low threshold. The applicants in *Great Lakes United*, *supra*, relied on letters to the Minister requesting that he fulfill his statutory duties, though there was no analysis of the issue. In *Armoyan Group Ltd v. Halifax (County)* (1994), 129 N.S.R. (2d) 83, [1994] N.S.J. No. 68 (C.A.), the city failed to either approve or reject the applicant's proposal within the 30-day window allotted by the governing statute. A

letter requesting that the proposal be either approved or rejected satisfied the "demand" requirement.

[156] Additional case law discusses what constitutes a refusal. Whether delay can constitute refusal has been considered in immigration cases. In *Bhatnager v Canada (Minister of Employment & Immigration)*, [1985] 2 FC 315, the court said:

> 4 The decision to be taken by a visa officer pursuant to section 6 of the Regulations with respect to issuing an immigrant visa to a sponsored member of the family class is an administrative one and the Court cannot direct what that decision should be. But *mandamus* can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation... [Emphasis added.]

[157] There is caselaw discussing whether *mandamus* is appropriate where the respondent has taken steps to respond to the demand. In *Nautica Motors Inc v. Canada (Minister of National Revenue)*, 2002 FCT 422, the minister issued an interim HST assessment in response to the applicant's demand, but not a final assessment that would confirm whether a refund was payable. The court considered this an effective refusal to process the returns (para. 47).

[158] Similarly, in *Armoyan*, *supra*, after the applicant wrote to the respondent asking for its proposal be approved or rejected, the respondent replied that it was awaiting a response from a municipal department, which required further steps be taken before responding. No final approval or rejection was issued, despite the statutory timeline. Matthews J.A. said, for the court:

> 27 The appellant clearly indicated that it was seeking endorsed approval of Morris Lake Estates. Equally clear were its reasons for that request. DEW fully understood the appellant's position as did the development officer. Unfortunately the option of an appeal to the Board was not open to the appellant until the development officer pursuant to s. 105(3)(c) of the Act notified the appellant of her refusal. The appellant is effectively stymied. It obviously disagrees with the position taken by DEW. As matters stand it must bend to the will of DEW or the application is simply in limbo. It can resubmit its application but it is obvious: the same result will follow. The "final approval" granted by the development officer by letter of July 13, 1993 is not sufficient for the needs of the appellant and was so recognized by that officer as is evident from the final two paragraphs of that letter earlier quoted. As matters now stand the development officer would never be required to decide whether to approve or refuse the application for endorsed approval and the appellant has no recourse.

[159] The Court of Appeal held that *mandamus* was justified. This further supports the conclusion that inaction without adequate explanation amounts to refusal in some circumstances.

[160] In some circumstances, action taken may be sufficient to establish that no refusal occurred. In *Goose Bay Outfitters Ltd v Newfoundland and Labrador (Minister of Tourism, Culture & Recreation)* (2002), 214 Nfld. & P.E.I.R. 326, [2002] N.J. No. 153 (Nfld. T.D.), the applicant fishing lodge sought *mandamus* requiring enforcement of regulations prohibiting the operation of unlicensed tourist establishments. The court discussed refusal:

> 24 On the evidence it cannot be said that, in response to Goose Bay Outfitters Limited position, the Minister took no action, or that he refused to act on the demand of the Applicant. In order to succeed on this issue the Applicant would have to show that the Respondent refused to perform the act which it is sought to have performed by legal remedy and which the Respondent had a duty to perform and over which the Respondent had no discretion. In *Northern Lights Fitness Products Inc. v. Canada (Minister of National Health & Welfare)* (1994), 75 F.T.R. 111 (Fed. T.D.) at page 115 Tremblay-Lamer, J. sated at paragraph 16:
>
> > "The nature of the duty owed is to enforce the law, and only complete inaction in this respect may give rise to a judicial remedy. An important distinction must be drawn between requiring a government body to take some enforcement action, which the court can do, and determining the manner of enforcement, which the court cannot do."
>
> The court held there was no legal duty to act. The manner of enforcement was discretionary, and there was no statutory deadline, so there was no benchmark that the court could use to say whether the delay was justified.

[161] The caselaw, then, suggests that whether a particular response, action, or delay constitutes a refusal is fact-specific. It will depend on what is being asked for and the specific provisions of the statute involved. The more discretion the minister has, the more likely that some action will suffice. However, where there is a clear legal duty to act, and such action does not take place, saying that the work is in progress is likely insufficient (see *Distribution Canada Inc., supra*, at para 9).

[162] The Applicants identify several instances where they say a demand was made for the Minister's duty to be carried out. The Respondent says these alleged demands are "for the most part, vague" and are insufficient for *mandamus*."

[163] As early as 2012, in a letter to the Minister, regarding the Mainland Moose, the Intervenor pointed out that core habitat had not been identified and asked that,

if the recovery plan for the Moose were not amended, an explanation by provided. The Minister replied, reiterating the information in the existing recovery plan.

[164] The next alleged demand is a memorandum dated March 16, 2015, from Dr. Boates, manager for biodiversity at the Department of Natural Resources, to the Minister. Dr. Boates has no direct interest in this judicial review. His memorandum refers to a report by the Intervenor which "raised concerns about the low number of recovery plans in place, the lack of critical habitat protection and in particular, lack of progress on the recovery of Mainland Moose." (The Intervenor's report itself was found inadmissible in this matter: *Bancroft v Nova Scotia (Lands and Forestry)*, 2019 NSSC 205).

[165] The Applicants also refer to a 2016 Audit in which the Office of the Auditor General noted various failures of the Department of Natural Resources to meet its duties under the *ESA*. The Audit found that numerous plans were not completed while others were late. Some species received attention by the Department while others received little to none. The Audit recommended, *inter alia*, that the Department "establish recovery teams, and develop and review recovery and management plans for species at risk, as required under the *Endangered Species Act*" and that plans for all listed species should be reviewed to "amend or develop appropriate practices, as guided by recovery plans, to protect their habitat."

[166] A 2018 Departmental report addressed the 2016 audit recommendations. The report indicated the Department's agreement with the recommendation to "develop and review recovery and management plans for species at risk, as required under the *Endangered Species Act*", and stated that it had shifted resources to address it. The recovery plan for the Ram's-head Lady Slipper was still "in progress", and data was being collected on the Mainland Moose, and its plan would be updated once the data had been assessed. Otherwise, the report does not refer to any of the other species named in this application. The Respondents say this report indicates that there was "*no* refusal" [emphasis theirs].

[167] The fourth alleged demand cited by the Applicants consists of sections of the *Independent Review of Forest Practices in Nova Scotia* by William Lahey (the Lahey Report). While this report dealt primarily with forestry practices, it also reviewed the *Endangered Species Act*, concluding that the *ESA* "must be fully and rigorously implemented in respect to forests on both Crown and private land – as it currently is not" (p. iii). It also noted that there "are 46 species listed as threatened or endangered… but there are no regulations respecting core habitat" (para. 53). Finally, another alleged demand for adherence to the Act appeared in Dr. Lahey's

recommendation for the Department to "ensure, as an immediate priority, that the [*ESA*] is fully implemented on Crown land, including the completion of recovery plans that identify and make provision for protection of core habitat for species at risk located on Crown lands" (para. 18).

[168] Finally, the Applicants point to a 2018 letter from the Applicant Mr. Bancroft to the Department, referring to both Mainland Moose and Canada Warblers. Mr. Bancroft wrote, "[w]e respectfully ask that you and your department abide by the mandatory obligations in the *Endangered Species Act*."

[169] I conclude that the memo from Dr. Boates does not assist the Applicants, but the other instances of demands are valid. The Record establishes that by 2012 the Department had notice of claims that it was failing to perform mandatory duties under the *ESA*. The Intervenor's 2012 letter specifically calls on the Department to identify core habitat for the Mainland Moose. The 2016 audit and the Lahey Report are more general, stating repeatedly that the Department was failing to meet its mandatory duties under the *ESA*, particularly regarding recovery and management plans. The Lahey Report refers to inadequate efforts at identifying core habitat under the *ESA*. Both documents recommend that the Department comply with the *ESA*. Lastly, Mr. Bancroft expressly requested action on the Minister's obligations.

[170] The Respondents offer no authority for their position that the Applicants show that specific demands were made in respect of every specific point. I conclude that this would be too high a threshold in these circumstances. There is likewise no authority suggesting that demands made by persons other than the Applicants cannot support *mandamus*. Ample time passed after each demand, but compliance did not occur. Therefore, this is not a case where the Respondents can rely on ongoing efforts or communication to show there was no refusal. The delay is sufficient to constitute refusal in these circumstances.

[171] Accordingly, I conclude that *mandamus* lies on the issues identified above.

Mandamus **timelines**

[172] The Applicants request specific timelines on the orders for *mandamus*, of varying lengths depending on the status of the species. During submissions, I inquired into the rationale behind the requested timelines, and specifically the basis for the proposed timelines of six months and one year on the various specific items.

[173] *Mandamus* orders with timelines have been issued in immigration cases where there has been unreasonable delay (see *Douze v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1337, at paras 31-34; *Thomas v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164, at paras 29-33). The justification for these timelines was a chronic failure by the minister to proceed in a timely fashion, and sufficient passage of time that there was no reason to further delay compliance with the relevant statute.

[174] Where timelines are imposed on *mandamus* orders, the amount of time must be responsive to the legal and factual context of each case. The Applicants submit that for Black Ash, there is ample information available in the existing recovery plan to address core habitat, and any new studies could be completed in six months. The Eastern Wood Pewee is the only species for which the Applicants seek a timeframe of one year. For that species there is no existing plan, and more time is necessary despite the management plan already being three years late at the time of filing.

[175] I am not persuaded that the requested timelines are appropriate here. It does not follow from the caselaw that a deadline will necessarily be attached to a *mandamus* order, and I am not convinced that such deadlines would be helpful. Accordingly, the Applicants shall have an order for *mandamus* in the terms set out above, with the exception of the timelines.

Supervision

[176] The Applicants seek an order for supervision by the court of the Minister's compliance with the order, in the following terms:

> The Minister shall, within 45 days of the date of this judgment, file an affidavit with this court and provide a copy to the Applicants that identifies all species at risk listed under the Act, including those addressed in this Application, for which, as of that date, the Minister has failed to undertake any of the mandatory requirements under s. 15 of the Act and which identifies the outstanding requirements; and
>
> The Minister shall, within six months after the date of this judgment and then every three months thereafter, file an affidavit with this court and provide a copy to the Applicants containing a progress report on achieving the mandatory requirements under s. 15 of the Act for the species at risk listed under the Act.

[177] These requests for relief essentially ask the court to monitor the Minister's implementation of section 15 regarding all species at risk in Nova Scotia, including

those not named in this Application. The relief requested is onerous, requiring the Minister to compile progress reports and deliver them to the court every three months, indefinitely.

[178] The *Civil Procedure Rules* do not preclude the remedy of supervision (or "reporting"). Rule 7.11 uses open-ended language, permitting the court to grant "any order in the court's jurisdiction", including, at Rule 7.11(e), "an order providing anything formerly provided by prerogative writ..." In *Nova Scotia (Minister of Agriculture) v. Rocky Top Farm*, 2017 NSCA 2, Saunders J.A. said, "[Rule 7.11] does not lessen, modify or abrogate the Supreme Court's inherent jurisdiction, as expressly provided for in s. 41(g) of the *Judicature Act*" (para 95). Therefore, if supervision is a remedy available to this Court, through inherent jurisdiction or otherwise, then it is available on judicial review.

[179] Inherent jurisdiction is a procedural concept that should not be used to effect changes in substantive law (*Goodwin v Rodgerson*, 2002 NSCA 137, at para. 17). In *Ocean v Economical Mutual Assurance Co*, 2009 NSCA 81, the Court of Appeal noted at para 77 that inherent jurisdiction "does not bestow an unfettered right to do what, in the judge's opinion, is fair as between the parties. A court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matter in issue" (para. 77).

[180] The Applicants point to two cases in support of this Court retaining jurisdiction to supervise: *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62. and *Western Canada Wilderness Committee, supra*. The majority in *Doucet-Boudreau* confirmed that supervisory relief is a remedy available to a superior court:

> 71 Although it may not be common in the context of *Charter* remedies, the reporting order issued by LeBlanc J. was judicial in the sense that it called on the functions and powers known to courts. In several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties... Superior courts, which under the Judicature Acts possess the powers of common law courts and courts of equity, have "assumed active and even managerial roles in the exercise of their traditional equitable powers" (K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 13.60). A panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes...

[181] Supervision is therefore not purely a *Charter* remedy and is available to superior courts in other contexts. In *Doucet-Boudreau*, the respondents argued that retaining jurisdiction would offend the *functus officio* doctrine. The majority

rejected this argument, stating that "nothing in the *Judicature Act* appears to remove from a trial judge the power to hear reports on the implementation of his or her order" (para. 82).

[182] Although *Doucet-Boudreau* dealt with section 24 of the *Charter*, much of the discussion is transferable to the administrative law framework. Both areas of law deal with judicial oversight of the legislature and those to whom it delegates power. Like section 24 of the *Charter*, Rule 7.11 is permissive in terms of the remedies it allows. This is not an unlimited power; the remedy must be responsive to the complaint and not go further than necessary to give effect to the court's decision. Supervision was necessary in *Doucet-Boudreau* because of the risk that declarations would not be followed by the government:

> 66 LeBlanc J. obviously considered that, given the Province's failure to give due priority to the s. 23 rights of its minority Francophone populations in the five districts despite being well aware of them, there was a significant risk that such a declaration would be an ineffective remedy. Parents such as the appellants should not be forced continually to seek declarations that are essentially restatements of the declaration in *Mahe*. Where governments have failed to comply with their well understood constitutional obligations to take positive action in support of the right in s. 23, the assumption underlying a preference for declarations may be undermined. [Emphasis added.] In *Mahe*, *supra*, at p. 393, Dickson C.J. recognized this possibility:
>
> > As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s. 23. [Emphasis in *Doucet-Boudreau*.]
>
> This Court's judgment in *Mahe* speaks to all provincial and territorial governments. LeBlanc J. was entitled to conclude that he was not limited to declaring the appellant parents' rights and could take into consideration that the case before him was different from those in which declarations had been considered appropriate and just.
>
> 67 Our colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases. The threat of contempt proceedings is not, in our view, inherently more respectful of the

> executive than simple reporting hearings in which a linguistic minority could discover in a timely way what progress was being made towards the fulfilment of their s. 23 rights. More importantly, given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. Viewed in this light, LeBlanc J. selected a remedy that reduced the risk that the minority language education rights would be smothered in additional procedural delay. [Emphasis added.]

[183] While LeBlanc J. could rely on *Mahe v. Alberta*, [1990] 1 S.C.R. 342, a case ordering virtually the same declarations sought by the applicants before him, when he made his order, there is no such precedent for section 15 of the *ESA*. This case raises novel issues, interpreting language that has not been interpreted before. Consequently, it would be premature to order supervisory relief in this case. The government has not had a chance to respond to this decision, and I am not prepared to infer beforehand that there is a significant risk that the Minister will not comply.

[184] Furthermore, there is nothing before the court to establish why other species' plans were neither created nor implemented. In *Doucet-Boudreau* there was evidence that politics played a role in the delay, as it appeared that a successive government reneged on an earlier government's promise. There was also evidence that parents had been seeking French-language schools in Nova Scotia since 1984. There were very clear demands emanating from the Applicants regarding their assertion of rights under the *Charter*.

[185] Moreover, the Applicants seek supervision encompassing the entirety of section 15 of the *ESA*, which includes many subsections not dealt with in this judgment. Further disputes may arise that, in effect, turn the supervisory hearings into adversarial litigation.

[186] In *Western Canada Wilderness Committee*, *supra*, supervision was ordered by agreement of the parties, but the judge adjourned the *mandamus* requests. Several issues were premature: she could not order that a recovery strategy be posted by a certain date because the federal legislation required other steps first. Therefore, there was no duty to act established. The judge agreed it was appropriate to order supervisory relief in lieu of *mandamus* to ensure the minister eventually posted the recovery strategies:

> 125 I concur with the parties that it is appropriate for the Court to retain jurisdiction in this matter. This would obviate the need for the applicants to start over with fresh applications for *mandamus* to compel the performance of the Ministers' statutory duties in the event that final recovery strategies are not posted

> in the public registry in a timely manner. This would obviously be a more efficient use of the resources of all concerned.

[187] The court in *Western Canada Wilderness Committee*, *supra*, adjourned the *mandamus* applications *sine die*, with the court retaining jurisdiction over the applications. The scope of supervision was narrower than that sought here, relating to adjourned *mandamus* issues concerning named species. The Applicants' supervision request goes far beyond this, requesting indefinite court supervision of the implementation of section 15 in respect of all species at risk.

[188] Whether it is appropriate to invoke the court's power of supervision depends on the circumstances of each case. This case does not deal with any gaps in legislation. There is no procedural abuse to remedy. It is not necessary to invoke inherent jurisdiction to resolve injustice or inequity; the declaratory and *mandamus* relief should achieve justice here. It is not necessary to do more at this stage to give effect to the court's order. There is no evidentiary basis upon which to assume that the Minister will not comply with the *ESA* obligations under the order absent court supervision. This does not, of course, mean that supervision could never be appropriate in applications of this kind. Time will tell.

Conclusion

[189] In accordance with the foregoing reasons, the application for judicial review is allowed in part. The Minister's conduct in failing to observe non-discretionary, statutory duties imposed by section 15 of the *ESA* was unreasonable. The Respondents did not provide evidence that would explain the repeated failures to uphold the clear language of the statute, whether due to lack of resources or other reasons. The Minister's conduct is therefore unreasonable, as described above. The Applicants are entitled to declarations to that effect, and an order of *mandamus* as set out above.

[190] If the parties cannot agree on costs, they may provide written submissions within 30 days.

Brothers, J.