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Court File No. _____

FEDERAL COURT

BETWEEN:

WESTERN CANADA WILDERNESS COMMITTEE

Applicant

- and -

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and ATTORNEY
GENERAL OF CANADA

Respondents

APPLICATION UNDER SECTION 18.1
of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicants. The relief claimed by the applicants appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the [Federal Courts Rules](#) and serve it on the applicants' solicitor or, if the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE
GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____

Issued by: _____
(Registry Officer)

Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
CANADA

AND TO: ATTORNEY GENERAL OF CANADA

c/o DEPARTMENT OF JUSTICE CANADA
British Columbia Regional Office
Department of Justice Canada
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

APPLICATION

This is an application for judicial review of the failure of the Minister of Environment and Climate Change Canada (**Minister**) to recommend that the Governor in Council issue an emergency order to provide for the protection of the endangered Northern Spotted Owl (*Strix occidentalis caurina*) (**Spotted Owl**) pursuant to s. 80 of the *Species at Risk Act*, SC 2002, c 29 (**SARA**). There is only one known Spotted Owl left in the wild in Canada.

In February 2023, the Minister determined that the Spotted Owl faces imminent threats to its survival and recovery from logging of its habitat that is likely to occur in 2023. Despite this finding, the Minister has not recommended an emergency order to the Governor in Council to protect the Spotted Owl and its habitat.

The Minister's delay is unlawful under s. 80(2) of *SARA*. Subsection 80(2) compels the Minister to recommend an emergency order to the Governor in Council once he forms the opinion that there is an imminent threat to the survival or recovery of a species. Furthermore, the delay is unreasonable given that the Spotted Owl's habitat is already being logged, creating an acute risk of jeopardy to one of Canada's most endangered species — a result contrary to the purposes and intent of *SARA*.

THE APPLICANT MAKES APPLICATION FOR:

1. An order in the nature of *mandamus* compelling the Minister, within 15 days of the Court's judgment, to comply with his duty under s. 80(2) of *SARA* to recommend that the Governor in Council issue an emergency order to provide for the protection of the Spotted Owl and its habitat from imminent threats identified by the Minister.
2. In addition or in the alternative to the relief sought in paragraph 1, an order declaring that the Minister's ongoing delay in recommending an emergency order, after forming his opinion that there is an imminent threat to the Spotted Owl, is unlawful under s. 80(2) of *SARA*.
3. In addition or in the alternative to the relief sought in paragraphs 1 and 2, an order declaring that the Minister has a mandatory duty under s. 80(2) of *SARA* to recommend an emergency order to the Governor in Council without delay after forming the opinion that there is an imminent threat to a *SARA*-listed species and consulting with any other competent minister.
4. An order for costs in favour of the applicant throughout.
5. An order that the applicant not be required to pay costs to the respondents in any event of the cause, pursuant to Rule 400 of the *Federal Courts Rules*.
6. In the alternative to paragraphs 4 and 5, an order that each party bears their own costs.
7. Such further and other relief as the applicant may request and this Honourable Court may see fit to order.

THE GROUNDS FOR THIS APPLICATION ARE:

The parties

1. The applicant Western Canada Wilderness Committee (“Wilderness Committee” or the “Applicant”) is a public interest litigant.
2. The Applicant is a federally registered charity and provincially incorporated society in British Columbia that works to protect wilderness, species at risk, and biodiversity through strategic research, grassroots public education, and advocacy work.
3. The Applicant has a genuine and long-standing interest in protecting the Spotted Owl. The Applicant has been working to protect the Spotted Owl and its habitat since the mid 1990s, including through grassroots public campaigns, lobbying the provincial and federal governments, and public interest litigation. Since 2019, the Applicant has been in regular communication with the federal government to advocate for the identification and protection of Spotted Owl and its habitat under *SARA*.
4. The Minister is the competent minister with respect to the Spotted Owl, pursuant to the definition of “competent minister” in s. 2 of *SARA*.
5. The Attorney General of Canada is responsible for the regulation and conduct of all litigation against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada, under s. 5(d) of the *Department of Justice Act*, RSC 1985, c J-2 and s. 18(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7. Further or in the alternative, the

Attorney General of Canada is named as a respondent under Rule 303(2) of the *Federal Courts Rules*, SOR/98-106.

The Minister has a public legal duty to recommend emergency orders once he forms the opinion that there is an imminent threat to a species at risk

6. *SARA* was introduced to meet Canada's commitments under the United Nations *Convention on Biological Diversity*, which includes recent commitments under the Kunming-Montreal Global Biodiversity Framework to halt species extinction.
7. The legislated purposes of *SARA* include preventing the extinction of and providing for the recovery of listed species. A listed species is a species that has been added to Schedule 1 of *SARA* as extirpated (meaning extinct in Canada), endangered, threatened, or of special concern.
8. An emergency order is a temporary measure under s. 80 of *SARA* to prevent extinction and safeguard recovery by addressing imminent threats to the survival or recovery of a listed species.
9. Subsection 80(1) of *SARA* authorizes the Governor in Council to make an emergency order to provide for the protection of a listed species on recommendation of a competent minister. Through this power the Governor in Council can identify habitat necessary for the survival or recovery of the species and prohibit activities that may adversely affect the species and that habitat. However, the Governor in Council can only exercise this power on the competent minister's recommendation under s. 80(2).

10. Pursuant to s. 80(2) of *SARA*, the competent minister must recommend that the Governor in Council issue an emergency order if the minister is of the opinion that a species at risk faces imminent threats to its survival or recovery. The competent minister is only exempt from his duty to make a recommendation if he is of the opinion under s. 81 of *SARA* that measures have already been taken under another federal law to protect the species from these imminent threats.

The Spotted Owl is a *SARA*-listed endangered species without identified and mapped critical habitat

11. In 2003, the Spotted Owl was listed and protected as an endangered species under Schedule 1 of *SARA*.
12. In 2006, Environment Canada published the “Recovery Strategy for the Northern Spotted Owl (*Strix occidentalis caurina*) in British Columbia” (**2006 Recovery Strategy**).
13. Under s. 41 of *SARA*, a recovery strategy must identify the threats to a species’ survival and recovery as well as its “critical habitat” — the habitat “necessary for the survival or recovery” of the species — to the extent possible. The 2006 Recovery Strategy identified loss and fragmentation of habitat as a primary threat to the Spotted Owl but only partially defined and did not map the Spotted Owl’s critical habitat.
14. In 2021, Environment and Climate Change Canada circulated a draft Amended Recovery Strategy for the Spotted Owl for consultation with First Nations (**2021 Draft Recovery Strategy**). The 2021 Draft Recovery

Strategy identified and mapped approximately 416,000 hectares of critical habitat for the Spotted Owl.

15. In January 2023, Environment and Climate Change Canada published a proposed Amended Recovery Strategy on the *SARA* Registry for public comment (**2023 Proposed Recovery Strategy**). The 2023 Proposed Recovery Strategy included a revised critical habitat definition and mapping from the 2021 Draft Recovery Strategy.
16. As of the date of this Notice of Application, the Minister has not published a final Amended Recovery Strategy for the Spotted Owl — i.e., despite being listed as endangered 20 years ago, the Spotted Owl still does not have identified, mapped and protected critical habitat.

The Applicant petitioned the Minister for an emergency order recommendation

17. On August 5, 2022, the Applicant wrote to Canadian Wildlife Service (**CWS**) and British Columbia (**BC**) government representatives raising the need to defer logging of over 400 approved or pending approval cutblocks that overlapped with Spotted Owl habitat, given the risks that logging these areas posed to the survival and recovery of the Spotted Owl. The letter warned that the Applicant would seek a *SARA* emergency order if further action was not taken.
18. On October 25, 2022, the Applicant sent a petition to the Minister demanding that he recommend an emergency order under s. 80(2) of *SARA* to protect Spotted Owl from imminent threats to its survival and recovery as

a result of the pending and approved cutblocks (**Emergency Order Petition**).

19. Within the Emergency Order Petition, the Applicant provided maps of 452 approved or pending cutblocks overlapping fully or partially with areas identified as suitable Spotted Owl habitat.
20. At the time the Emergency Order Petition was sent to the Minister:
 - a. A single female owl living in the Spuzzum Watershed was the only known wild-born Spotted Owl left in Canada;
 - b. The two known remaining wild-born males in the Spuzzum and Utzlius Watersheds, one of which was part of the breeding pair with the last wild-born female owl, had disappeared; and,
 - c. Three captive bred male Spotted Owls had been released into the Spuzzum Watershed in the summer of 2022.
21. In 2021, the Spuzzum and Utzlius Watersheds were protected by logging deferrals put in place by BC. These deferrals were renewed in February 2022 and 2023.
22. The Emergency Order Petition requested that the Minister recommend an emergency order under s. 80(2) of SARA by November 24, 2022.
23. On November 14, 2022, the CWS sent out a notice seeking feedback from First Nations regarding the Applicant's Emergency Order Petition.
24. On November 17, 2022, the Applicant received a letter from the Minister confirming that CWS was gathering relevant information from BC regarding

logging in Spotted Owl habitat and intended to engage First Nations communities regarding issues raised in the Emergency Order Petition.

25. On November 29, 2022, the Applicant wrote to the Minister stating that the Applicant expected the Minister to recommend an emergency order by February 28, 2023, given that the logging season within the Spotted Owl's range starts in the spring.

The Minister determined that there are imminent threats to the recovery of the Spotted Owl, which triggers a public legal duty to make a recommendation for an emergency order

26. On February 21, 2023, the Director General of CWS sent the Applicant a letter detailing the Minister's imminent threat opinion made pursuant to s. 80(2) of *SARA* in response to the Emergency Order Petition.
27. The letter stated that the Minister had formed the opinion that the Spotted Owl faces imminent threats to its survival and recovery. According to the letter, the Minister had concluded that "any resumption of logging activities in Spotted Owl habitat in the Spuzzum Creek and Utzlius Creek watersheds poses an imminent threat to the survival of the species." Further, the letter stated that the Minister had determined that:

... there are over 2500 hectares across [Spotted Owl] habitat that have a high potential to be harvested over the next year. The complete or partial logging of these areas, distributed over a patchwork of Spotted Owl habitat, would alter the amount and configuration of their habitat, making the achievement of its recovery objectives highly unlikely.

28. The letter also stated that the Minister would be making an emergency order recommendation to the Governor in Council to protect the Spotted Owl from

threats to its survival and recovery, which could be made “in early 2023”, subject to Cabinet agendas.

29. On March 6, 2023, the Applicant wrote to the Minister requesting notification by April 1, 2023 that the Minister had made the emergency order recommendation to the Governor in Council.
30. On April 25, 2023, the Assistant Deputy Minister of CWS wrote to the Applicant on the Minister’s behalf to inform the Applicant that, among other things:
 - a. The Minister would not meet the Applicant’s April 1, 2023 deadline for recommending an emergency order;
 - b. Environment and Climate Change Canada officials were engaging with Indigenous peoples and BC regarding measures to address imminent threats; and,
 - c. Given an announcement by BC that it would be extending the logging deferrals in Spuzzum and Utzlius Watersheds until February 25, 2025, the Minister had revised his opinion and determined that the Spotted Owl no longer faces imminent threats to its survival, but it continues to face imminent threats to recovery from logging in habitat outside of these watersheds. The letter confirmed that “[t]he Minister will fulfill his obligation to make a recommendation to the Governor in Council for an emergency order to protect the Spotted Owl from imminent threats to its recovery.”

31. The Assistant Deputy Minister did not state when the Minister would fulfill his *SARA* s. 80(2) obligation to recommend an emergency order for the Spotted Owl.
32. Given that the Minister has formed his opinion that there are imminent threats to the recovery of Spotted Owl due to pending and approved cutblocks in at least 2500 hectares of Spotted Owl habitat, and the Minister has not identified any federal laws that protect this habitat, the Minister has a public legal duty under s. 80(2) of *SARA* to recommend to the Governor in Council that it make an emergency order.

The Minister's delay in making the emergency order recommendation is unreasonable

33. There is now only one Spotted Owl left in the wild in Canada. In the time since the Minister first formed his opinion that there are imminent threats to the species, logging of Spotted Owl habitat has begun. The Minister's opinion is that logging of such habitat makes recovery of the species "highly unlikely". A failure to make a recommendation under s. 80(2) to address jeopardy to the recovery of the Spotted Owl, or any other listed species, is contrary to this emergency response section and the intent and express purposes of *SARA*.
34. The Minister's delay is not authorized under *SARA*. Beyond consulting with other competent ministers under s. 80(3), which does not apply for Spotted Owl, there is nothing in the text or emergency purpose of s. 80(2) that allows

the Minister to delay making an emergency order recommendation once he has formed the opinion that there is an imminent threat to a listed species.

35. The Applicant provided the Minister reasonable time to assess and consult on whether planned logging in Spotted Owl habitat in 2023 posed an imminent threat to the species by alerting the Minister and CWS staff to this risk at least six months in advance of the logging season. Since then, the Applicant has repeatedly demanded that the Minister recommend an emergency order. By delaying his recommendation for months after determining that there is an imminent threat to the Spotted Owl, during which logging of the species' habitat is occurring, the Minister is impliedly and unjustifiably refusing to comply with s. 80(2) of SARA.

The Applicant is entitled to a *mandamus* order

36. The Applicant meets the requirements to seek *mandamus* to compel the Minister to recommend an emergency order for the Spotted Owl.
37. The Minister has a duty to recommend an emergency order under s. 80(2) of SARA once he forms the opinion that there is an imminent threat to the survival or recovery of a listed species.
38. The Minister has formed the opinion that there is an imminent threat to the recovery of the Spotted Owl. All conditions giving rise to the Minister's duty under s. 80(2) of SARA have thus been satisfied.
39. The duty is owed to the Applicant as a public interest litigant with a genuine and sustained interest in the survival and recovery of the Spotted Owl in Canada.

40. Over the course of several months, the Applicant has repeatedly demanded that the Minister recommend an emergency order and has given the Minister reasonable time to comply. The Minister has instead impliedly refused, through unreasonable delay, to execute his duty under s. 80(2).
41. No other adequate remedy is available to the Applicant.
42. The requested order would have practical effect. The order sought would compel the Minister to recommend an emergency order under s. 80(2) of SARA, which is a necessary precondition for the Governor in Council to exercise its authority under s. 80(1) to make an emergency order to provide for protection of the Spotted Owl.
43. There is no equitable bar to the order of *mandamus* sought in this application.
44. The balance of convenience favours the issuance of an order of *mandamus*.

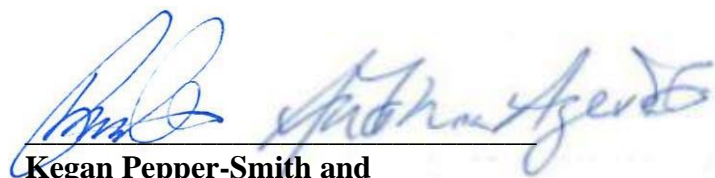
General grounds for the application

45. The Applicant relies on: ss. 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7; the *Federal Courts Rules*, SOR/98-106; the *Species at Risk Act*, SC 2002, c 29; the *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); the *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: Kunming-Montreal Global Biodiversity Framework*, CBD/COP Dec 15/4, UNEP/2002, 1 at 4; and such further and other grounds as counsel may advise the Court.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. Affidavit of Joe Foy, Protected Areas Campaigner, Wilderness Committee;
2. Affidavit of Geoff Senichenko, Research and Mapping Coordinator, Wilderness Committee; and,
3. Other affidavits and evidence that the Applicant may file and this Court may see fit to consider.

June 6, 2023



**Kegan Pepper-Smith and
Andhra Azevedo**

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