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November 7, 2021

SUBMITTED ONLINE through the Environmental Registry

Species Conservation Policy Branch  
300 Water Street  
Floor 5N  
Peterborough, ON  
K9J 3C7

**Re: ERO # 019-4278 Minister's Order for temporary suspension of protection upon the listing of Black Ash under the Endangered Species Act**

Dear David Piccini,

On behalf of the Osgoode Hall Law School's Environmental Justice and Sustainability Clinic, we are writing to provide comments on the proposed Minister's regulation to temporarily pause the protections for Black Ash under the Endangered Species Act.<sup>1</sup> The proposed pause is for two years from when it is added to the Species at Risk in Ontario List regulation, posted to the Environmental Registry on September 23, 2021 ("the Proposal").

In our view, the proposed pause on the protections for Black Ash should be rejected for three reasons.

1. **The high percentage of the world's population of Black Ash trees in Ontario and the current threat posed by the Emerald Ash Borer creates a high conservation obligation for Ontario.** Although the Black Ash tree is currently highly populous in Ontario, the primary threat to it is from the invasive Emerald Ash Borer beetle (EAB),

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<sup>1</sup> Dr Estair Van Wagner is an Associate Professor at Osgoode Hall Law School and the co-director of the Environmental Justice and Sustainability Clinic. She teaches and researches in the areas of Natural Resource Law, Aboriginal and Indigenous law, and Property Law. Rebecca Murray is a JD student at Osgoode Hall Law School currently enrolled in the Environmental Justice and Sustainability Clinic.

which has spread across much of North America and is increasing its spread west and north in the Province.

The EAB's current range is as far west and north as Thunder Bay and Winnipeg, Manitoba. Ontario has roughly 25% of the world's Black Ash range, 70% of which experts expect to be infected within 100 years, 99% of which will be dead within 3-6 years of infection. Current climate change trends will exponentially speed up the spread as the only limiting factor is currently the EAB's inability to deal with northern winter temperatures. However, with a rise in temperature between 1-4 degrees it is estimated that the entire Ontario range of Black Ash will become susceptible to the EAB.

2. **There is already more than two decades of research on Emerald Ash Borer management & economic impact**

**analysis in the Great Lakes Region.** The EAB has been in Ontario since at least 2002 and in North America since the early 90s. Extensive ecological and forestry management-specific research has been conducted on how best to address the issue while mitigating negative economic and cultural impacts. While the proposal states the two-year pause is required to evaluate management while considering economic impacts, the majority of the research and analysis required has been completed, published, and confirmed in practice within Canada for decades.

3. **The pause heightens the risk of infringing constitutionally protected treaty and Aboriginal rights due to the cumulative negative impacts of resource harvesting and lack of protection for the Black Ash tree in the face of an established and escalating threat from the EAB and climate change.** The current area experiencing infestation by the Emerald Ash Borer includes up to 23 different treaties, each with their own specific rights regarding harvesting timber and stewardship of tree species. In *R v Sappier*, the Supreme Court of Canada (SCC) confirmed that Indigenous Nations and persons retain the Aboriginal right to harvest timber on Crown lands in accordance with their legal traditions and economies. The cumulative impacts of the EAB, the Provinces proposed pause on protection, and active forestry operations in Ontario directly threaten these constitutionally protected rights. A recent decision in British Columbia held that the honour of the Crown governments to protect treaty rights from cumulative impacts of development and environmental degradation, including insufficient regulation and government inaction.

As detailed below, we recommend that the proposal to postpone Black Ash protection under the ESA be rejected and immediate province-wide mitigation efforts begin in partnership with impacted Indigenous communities and nations.

**Analysis:**

**The high percentage of the world's population of Black Ash trees in Ontario and the current threat posed by the Emerald Ash Borer creates a high conservation obligation for Ontario**

The Emerald Ash Borer (EAB) is the primary reason Black Ash is under threat of extirpation. Although Black Ash is currently plentiful in Ontario, its designation as endangered comes from the extremely high mortality of trees infested by the EAB. In long-ranging studies at the epicentre of the infestation (Michigan), 99 to 99.8% of the Black Ash trees in infected stands died within 3-6 years of infestation.<sup>2</sup> In addition, Black Ash is a slow-growing tree that takes up to 60 years to reach reproductive maturity, and the EAB has been found to favour larger and older trees, thus diminishing its reproductive capacity.<sup>3</sup> The EAB's preference for trees at or approaching reproductive maturity compounds the fact that studies of ash regeneration following EAB infestation showed that "new seedlings declined substantially in the years following overstorey mortality." Additionally, the EAB tends to reinfest "seedlings and sprouts as small as 2cm in diameter, suggesting that the EAB will kill most ash seedlings before they reach reproductive maturity."<sup>4</sup>

Presently, most of Ontario's Black Ash is not infected by the EAB; however, 53% of the range is actively susceptible to infestation.<sup>5</sup> EAB's have been found in several places in Southern Ontario and as far north and west as Thunder Bay and Winnipeg. Due to the notorious difficulty in finding an infestation before it reaches its late stages, significant amounts of Ontario's Black Ash could be experiencing active infestation. Without immediate mitigation actions, large percentages of the population could become infested before habitat protection begins under this proposal.<sup>6</sup> Currently, the primary protection afforded to the remaining 47% of Ontario's Black Ash population is the EAB's cold intolerance, but assuming a 1 - 4 degree rise in average winter temperature caused by climate change, up to 99.9% of Ontario's Black Ash could be susceptible to the EAB by 2100.<sup>7</sup> Due to the rapid and extreme mortality experienced by Black Ash infested by the EAB, Black Ash may be entirely extinct in Ontario within 80 - 100 years. Although Black Ash is not listed as endangered by COSEWIC across Canada, according to COSSARO, Ontario represents at least 25% of the global range for Black Ash trees. As such, Ontario's conservation responsibility is deemed to be significant based on the fact that the species is globally at risk.<sup>8</sup>

### **There are already more than two decades of research on Emerald Ash Borer management and economic impact analysis in the Great Lakes Region.**

The primary justification provided for postponing protections for Black Ash under the ESA is that it will "allow time to develop an approach to support Black Ash protection and recovery that considers social and economic impacts." This research has already been occurring in Ontario and Michigan (two of the first jurisdictions to find EAB's in North America) since at

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<sup>2</sup> Kathleen S Knight, John P Brown, and Robert P Long. "Factors Affecting the Survival of Ash (*Fraxinus* Spp.) Trees Infested by Emerald Ash Borer (*Agilus Planipennis*)." *Biological invasions* (2012) 15: 2 p 376.

<sup>3</sup> United States Department Of Agriculture Forest Service "Biology of the Emerald Ash Borer" [https://www.nrs.fs.fed.us/disturbance/invasive\\_species/eab/biology\\_ecology/planipennis/](https://www.nrs.fs.fed.us/disturbance/invasive_species/eab/biology_ecology/planipennis/)

<sup>4</sup> Ontario, Committee on the Status of Species at Risk in Ontario (COSSARO), *Ontario Species at Risk Evaluation Report for Black Ash*, October 2020. P 6-7.

<sup>5</sup> Ibid p6.

<sup>6</sup> Deborah G. McCullough and Nathan W. Siegert and John Bedford. "Slowing Ash Mortality: A Potential Strategy to SLAM Emerald Ash Borer in Outlier Sites" 20th U.S. Department of Agriculture interagency research forum on invasive species (2009) P 44.

<sup>7</sup> Ontario, Committee on the Status of Species at Risk in Ontario (COSSARO), *Ontario Species at Risk Evaluation Report for Black Ash*, October 2020. P6.

<sup>8</sup> Ibid P3.

least 2002.<sup>9</sup> This research has proven the benefits of the SLOWing Ash Mortality (SLAM) approach which was developed in 2008 and subsequently adopted in several jurisdictions.<sup>10</sup> The Government of Ontario and the Ministry of Environment, Conservation, and Parks have access to decades of research on the best practices for managing the EAB and corresponding Ash Mortality, which has explicitly addressed economic and social impacts of both management and Ash loss.

#### History of research:

Intensive research into the EAB and how to manage it in North American Ash populations began as soon as it was detected in Michigan in 2002; three months later, it was detected in Windsor, Ontario.<sup>11</sup> Initially, little was known about the EAB because it usually only colonizes stressed or weakened trees in Asia and, in its natural range, is not considered a threat to the healthy tree population. However, in North American Ash species, it was discovered to be attacking healthy, mature trees, and by 2003 it had killed 5 million trees in Michigan.<sup>12</sup> Within the first year of discovery, researchers were aware of the seriousness of this invasive insect. In October 2003, USDA APHIS convened a science advisory panel to recommend programs to contain and eradicate the EAB. Unfortunately, initial eradication attempts were terminated as the technological constraints and economic impact made eradication impossible.<sup>13</sup>

When eradication efforts were abandoned, researchers began intensively studying classical biocontrol techniques, including cultivating and releasing EAB parasitoids;<sup>14</sup> several of these studies began in the late 2000s and are ongoing.<sup>15</sup> Additionally, researchers have studied the use of systemic insecticides, which, although initially inconsistent, in recent years, new products and application methods have led to significant advancements.<sup>16</sup> According to a peer-reviewed paper published in the *Annual Review of Entomology* in 2014,

"these advances have dramatically increased the likelihood that ash trees can be protected successfully throughout the EAB invasion wave. Moreover, analyses have shown that costs of protecting trees are substantially lower than costs of removal, especially when the value of ecosystem services provided by trees, such as stormwater capture, is considered."<sup>17</sup>

The date of the abovementioned paper shows us that by at least 2014, there was significant research, analysis, and understanding of promising management techniques for the EAB and their relative cultural and economic benefits and disadvantages.

<sup>9</sup> Emerald Ash Borer Information Network: Distribution Timeline,

<http://www.emeraldashborer.info/timeline.php>

<sup>10</sup> Deborah McCullough and Rodrigo J Mercader. "Evaluation of Potential Strategies to SLOW Ash Mortality (SLAM) Caused by Emerald Ash Borer (*Agrilus Planipennis*): SLAM in an Urban Forest." (2012) 58:1 *International journal of pest management* p 9–23.

<sup>11</sup> Emerald Ash Borer Information Network: Distribution Timeline,

<http://www.emeraldashborer.info/timeline.php>

<sup>12</sup> Daniel A Herms and Deborah G McCullough, "Emerald Ash Borer Invasion of North America: History, Biology, Ecology, Impacts, and Management." (2014) 59:1 *Annual review of entomology* P 14.

<sup>13</sup> Ibid P 14-15.

<sup>14</sup> A common example of this is using Ladybugs to control Aphid infestations in gardens.

<sup>15</sup> Daniel A Herms and Deborah G McCullough, "Emerald Ash Borer Invasion of North America: History, Biology, Ecology, Impacts, and Management." (2014) 59:1 *Annual review of entomology* P 21.

<sup>16</sup> Ibid P 22.

<sup>17</sup> Ibid P 22.

### SLAM Approach:

In 2007 and 2008, researchers in Michigan and Pennsylvania began developing the SLOWing Ash Mortality or SLAM approach to managing the EAB and Ash die-off. The ultimate goal of SLAM is not to eradicate the EAB but to slow the progression of Ash mortality by reducing the rate that EAB populations could build and expand.<sup>18</sup> This approach involves a mix of "girdling" trees (cutting strips of bark off) and treating "bait" trees with insecticide to attract a significant amount of the EAB's in the area to those specific trees. Researchers then felled the bait trees while the EAB's were in their larval stage to reduce their population in the stand dramatically. The SLAM approach was designed to be flexible and to be tailored to the specific needs of each infestation site. One of the earliest studies on the SLAM approach found that selectively harvesting only the large ash trees, which make up only 5 to 6 percent of all the ash stems, could reduce the potential EAB production in a site by at least 50 percent.<sup>19</sup> A 2016 paper found that sites with SLAM protocols introduced saw the spread of the EAB decline from 3.8-12.9 km per year to 1.2-1.7 km per year.<sup>20</sup> A 2011 study found that adopting SLAM techniques in urban and suburban areas to slow the progression of ash mortality and the establishment of new infestations yielded substantial economic benefits.<sup>21</sup>

Finally, a more recent 2017 US Forestry study carried out in non-urban forests at the northern research station in Madison, WI found the following:

"While a very small proportion of ash trees in the 150-square-mile project area were treated with insecticide or girdled, both tactics reduced EAB densities and protected ash trees in areas surrounding the treatments. Model results indicate that EAB spread rates are reduced from areas with girdled trees. Trees treated with the systemic insecticide also reduced larval abundance in subsequent years."<sup>22</sup>

These findings show us that the SLAM method has economic and ecological benefits in both urban, suburban, and non-urban forests and Ash stands.

### Canadian Approaches:

As early as 2014, the Ministry of Northern Development, Mines and Natural Resources had published materials on its website regarding information on identifying and managing EAB populations,<sup>23</sup> and in 2016 the Ministry of Agriculture and Rural Affairs published its

<sup>18</sup> Deborah G. McCullough and Nathan W. Siegert and John Bedford. "Slowing Ash Mortality: A Potential Strategy to SLAM Emerald Ash Borer in Outlier Sites" 20th U.S. Department of Agriculture interagency research forum on invasive species (2009) P 44.

<sup>19</sup> Ibid P 45.

<sup>20</sup> Rodrigo Mercader et al, "Estimating Local Spread of Recently Established Emerald Ash Borer, *Agrilus Planipennis*, Infestations and the Potential to Influence It with a Systemic Insecticide and Girdled Ash Trees." (2016) 366:1 *Forest Ecology and Management*, P 93.

<sup>21</sup> Deborah McCullough and Rodrigo J Mercader. "Evaluation of Potential Strategies to SLOW Ash Mortality (SLAM) Caused by Emerald Ash Borer (*Agrilus Planipennis*): SLAM in an Urban Forest." (2012) 58:1 *International journal of pest management* P 18.

<sup>22</sup> United States Department of Agriculture and US Forest Service: Research & Development "Slow ash mortality approach reduces emerald ash borer numbers" (2017)

[https://www.fs.fed.us/research/highlights/highlights\\_display.php?in\\_high\\_id=1211](https://www.fs.fed.us/research/highlights/highlights_display.php?in_high_id=1211)

<sup>23</sup> Ministry of Northern Development, Mines, Natural Resources and Forestry: Wildlife and Nature "Emerald ash borer: Information about emerald ash borer (*Agrilus planipennis* Fairmaire), a wood-boring insect found in Ontario" (2014) <https://www.ontario.ca/page/emerald-ash-borer>



management guide.<sup>24</sup> However, management of the EAB has primarily been left to the Federal Government and municipalities to address quarantines and local solutions respectively. The upside to municipal responsibility for the EAB over the last several decades means there is sufficient data and understanding that is Ontario specific to implement a provincial strategy without waiting another two years. Since the first infested stand was discovered in Windsor, several other municipalities in Ontario and Canada have implemented their own EAB management programs as infestations are found. These cities include Winnipeg, Hamilton, Toronto, Thunder Bay, and Oakville.

The EAB was discovered in Winnipeg in 2017,<sup>25</sup> and they have adopted the SLAM approach, which has been adopted by most Canadian cities.<sup>26</sup> Oakville Ontario is notable in the international acclaim and interest it has gathered for having the most aggressive EAB management programs in the country. In 2015 they hosted several forestry professionals from Canada, the United States and Europe as part of an International Advanced Practitioner Workshop organized by U of T.<sup>27</sup> Ontario has already had ample time to formulate a cohesive provincial response to the threat of the EAB to our local Ash stock. Instead of leaving the management of a fast-spreading invasive species to a patchwork of federal and municipal laws and approaches Ontario should take this opportunity to be a global leader in Black Ash conservation.

**The pause heightens the risk of infringing constitutionally protected treaty and Aboriginal rights due to the cumulative negative impacts of resource harvesting and lack of protection for the Black Ash tree in the face of an established and escalating threat from the EAB and climate change.**

Black Ash and Its Cultural Importance:

Black Ash is culturally and socially important to several First Nations within its growth range and the primary use of the tree is for basket weaving which has been occurring in Indigenous communities for centuries prior to contact and colonization. This includes the Missisaukas of the Credit First Nation and other Anishinaabe First Nations, the Omàmiwininiwag (Algonquin), the Haudenosaunee, among others whose territory extends over the Black Ash range in Ontario.<sup>28</sup> Across Canada Indigenous Peoples who produce Black Ash Baskets include the Abenaki, Maliseet, Micmac, Passamaquoddy, Penobscot and notably the Kanienkehaka/Mohawk. These groups see these baskets as especially significant to their historical and cultural identity.<sup>29</sup> The spiritual practice of basket making has been passed from generation to generation and is a meaningful way to preserve cultural values and teachings. In basket weaving families, multiple generations will come together to cut,

<sup>24</sup> Ontario, Ministry of Agriculture, Food and Rural Affairs “Management Strategy for Emerald Ash Borer and Bronze Birch Borer - Insect Pests of Landscape Trees in Ontario” (2016)

<http://www.omafra.gov.on.ca/english/crops/insects/eab-bbb-manage.htm>  
<sup>25</sup> Trees Winnipeg, “Emerald Ash Borer” <https://www.treeswinnipeg.org/our-urban-forest/urban-forest-threats/emerald-ash-borer>

<sup>26</sup> City of Winnipeg, Department of Parks and Open Space “Emerald Ash Borer” <https://www.winnipeg.ca/publicworks/parksopenspace/UrbanForestry/EmeraldAsh.stm#7>

<sup>27</sup> City of Oakville, “Oakville’s EAB management program receives international recognition” (2015) <https://www.oakville.ca/townhall/nr-15jun29.html>

<sup>28</sup> Native Land Digital: Territory Map <https://native-land.ca/>

<sup>29</sup> Anna J Willow, “Indigenizing Invasive Species Management: Native North Americans and the Emerald Ash Borer (EAB) Beetle.” *Culture, agriculture, food and the environment* (2011) 33:2 P 71.

prepare, and weave baskets, some of which are used for practical uses while others are considered art.<sup>30</sup>

For example, the Saint Regis Mohawks in Akwesasne territory, whose traditional territory straddles New York and Ontario, have a long history of harvesting Black Ash for basket weaving. The specific qualities of Black Ash make it a preferred wood source for the baskets. This community additionally places particular spiritual weight on the tree, including its significance in cultural teachings and creation stories.<sup>31</sup> Mary Kawennatakie Adams of the Saint Regis Mohawks has become known for her baskets which are on display at several art galleries in North America. She learned how to weave baskets from her mother when she was six.<sup>32</sup> Further North, artist Dora Bebamash of M'Chigeeng has been keeping the practice alive in the Manitoulin Island region. Notably, her knowledge sharing about the traditional baskets includes an intentionally sobering reminder of the impact that the EAB is having on Anishinaabe harvesting of Black Ash trees for basket weaving.<sup>33</sup>

In addition to centring Black Ash as a resource of spiritual importance, several First Nation's traditional practices in harvesting have been included in EAB management programs. For example, several stands managed by First Nations have been set up to promote early detection. This management includes harvesting the larger, more EAB-prone trees at first detection to reduce EAB population densities in accordance with SLAM protocols.<sup>34</sup> Through their research, these communities have found that lightly infested trees remain suitable for basket making but degrade quickly as infestation increases to the point where the logs become unusable.<sup>35</sup>

Another study done in partnership with impacted First Nations involved studying the practice of log submergence in water. This is a traditional preservation technique used to "hold" logs until they are ready to be processed into splints for weaving. This study showed that submerging the logs for at least one month effectively killed Jewel beetle larvae. Additionally, by submerging the logs for 3-6 months (depending on water temperature and flow rate), researchers working with the Match-e-be-nash-she-wish Band in Gun Lake, Michigan, found that all EAB larvae could be killed while still maintaining the quality of wood required for basket weaving. This allowed for the preservation of trees cut as part of management protocols to be later transported for processing if necessary without worrying about contributing to the spread of the beetle.<sup>36</sup>

#### Aboriginal Rights in the absence of explicit treaty rights:

<sup>30</sup> Daniel A Herms and Deborah G McCullough, "Emerald Ash Borer Invasion of North America: History, Biology, Ecology, Impacts, and Management." (2014) 59:1 *Annual review of entomology* P 18.

<sup>31</sup> Kara K.L. Costanza et al, "The Precarious State of a Cultural Keystone Species: Tribal and Biological Assessments of the Role and Future of Black Ash" (2017) 115:5 *Journal of Forestry*, P 436.

<sup>32</sup> Smithsonian American Art Museum: Artist Profiles "Mary Kawennatakie Adams"  
<https://americanart.si.edu/artist/mary-kawennatakie-adams-26>

<sup>33</sup> The Manitoulin Expositor "Dora Bebamash keeps basket weaving tradition alive" (2015)  
<https://www.manitoulin.com/dora-bebamash-keeps-basket-weaving-tradition-alive/>

<sup>34</sup> Kara K.L. Costanza et al, "The Precarious State of a Cultural Keystone Species: Tribal and Biological Assessments of the Role and Future of Black Ash" (2017) 115:5 *Journal of Forestry*, P 441.

<sup>35</sup> Ibid P 441.

<sup>36</sup> Therese M. Poland et al, "Submergence of black ash logs to control emerald ash borer and preserve wood for American Indian basket making" (2015)17:1 *Agricultural and Forest Entomology* p 413.

As mentioned above, the current EAB and Black Ash range impact at least 23 separate Treaties with First Nations in Ontario. Thus, aside from the potential for direct treaty violation for a failure to protect a significant cultural resource, there is a high likelihood that a broader Aboriginal right to harvesting Black Ash exists outside of explicit treaties rights to harvest timber.

For example, in *R v Sappier*<sup>37</sup>, a 2006 case from the Supreme Court of Canada, several Mi'kmaq individuals were charged with violating New Brunswick's *Crown Lands and Forests Act*<sup>38</sup> by harvesting wood from Crown land. The individuals charged claimed they had an Aboriginal right protected by s. 35 of *The Constitution Act 1867* to harvest wood as it was a culturally significant resource.<sup>39</sup> Ultimately they were found to have precisely such a right, and the court clarified the test for determining the scope of an Aboriginal right under s. 35.

The test states that the right in question must be an element of a practice or custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right. This practice is expected to be grounded in pre-contact traditions with some flexibility available to adapt it to modern culture and life.<sup>40</sup> In *Sappier*, the court characterized the claim as a "right to harvest wood for domestic uses as a member of the Aboriginal community."<sup>41</sup> In that case, it was limited to strictly personal uses, i.e. non-commercial. Nevertheless, some First Nations in the Black Ash growth range will have evidence of baskets being traded for food and resources, so the scope of the right, in their case, may be broader than the one found in *Sappier*.<sup>42</sup>

In examining whether the practice was integral to the distinctive culture, the court found that wood was critical to the Maliseet and Mi'kmaq pre-contact as it was used in almost every facet of their daily life. Several impacted First Nations have a well-documented practice and tradition of weaving baskets from Black Ash wood. Moreover, many will be able to provide the necessary evidence of the tree's cultural and spiritual significance.<sup>43</sup> Their ability to show that harvesting and weaving Black Ash is an element of a practice and tradition integral to their distinctive cultures firmly grounded in pre-contact traditions is indicative of a strong claim to an Aboriginal right protected by s. 35 of *The Constitution* to harvest and access Black Ash wood.

The existence of this right may be coupled with a new ruling out of BC that has found that a government's failure to appropriately regulate natural resources with an eye to cumulative impacts may lead to a finding of infringement of treaty rights against the government.

#### The Duty to consult and accommodate:

In instances where the Crown has actual or constructive knowledge of a potential Aboriginal claim, or Aboriginal or treaty right that might be adversely affected by Crown conduct, the

<sup>37</sup> *R v Sappier* 2006 SCC 54

<sup>38</sup> *Crown Lands and Forests Act* SNB 1980, c C-38.1

<sup>39</sup> *R v Sappier* 2006 SCC 54 paras 1-3.

<sup>40</sup> *Ibid* Para 20.

<sup>41</sup> *Ibid* Para 24.

<sup>42</sup> Anna J Willow, "Indigenizing Invasive Species Management: Native North Americans and the Emerald Ash Borer (EAB) Beetle." *Culture, agriculture, food and the environment* (2011) 33:2 P 71.

<sup>43</sup> Anna J Willow, "Indigenizing Invasive Species Management: Native North Americans and the Emerald Ash Borer (EAB) Beetle." *Culture, agriculture, food and the environment* (2011) 33:2 P 71.



duty to consult and accommodate is triggered.<sup>44</sup> This duty has a constitutional quality and is grounded in the honour of the Crown.<sup>45</sup> In instances of inadequate consultation where a decision affects Aboriginal or treaty rights, the SCC has found those decisions should be quashed on review.<sup>46</sup> In *Clyde River* the Supreme Court stated (regarding the duty to consult) “The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible.”<sup>47</sup>

The proposal to delay protecting an endangered species which holds significant cultural and spiritual value to area First Nations is very likely to adversely impact potential and established Aboriginal and treaty rights to harvest Black Ash trees. As such, the duty to consult is triggered. This duty requires the Ministry of Environment, Conservation and Parks to meaningfully and actively consult with impacted First Nations and seek to identify, minimize and address adverse impacts caused by this proposal.<sup>48</sup> Posting an EBR notice that does not meet the standard of consultation required by the honour of the Crown.

In *Adam v the Minister of the Environment*, the Federal Court affirmed the SCC’s finding in *Badger* which states that “that interpretations of treaties and statutory provisions which have an impact upon treaty or Aboriginal rights must be approached in a manner which maintains the integrity of the Crown.”<sup>49</sup> At issue was the Minister’s refusal to grant an emergency protection order for woodland Caribou under the *Species At Risk Act*<sup>50</sup> (SARA).<sup>51</sup> The court found the Minister in error in reaching his decision not to offer emergency protection for the Caribou because he failed to adequately take into account the Applicants treaty rights and the honour of the Crown. Such an error was warranted setting aside the decision and remitting it back to the Minister.<sup>52</sup>

Under Ontario’s *Endangered Species Act* section 8.1 allows the Minister to temporarily suspend the application of the sections of the Act which prohibit killing the species or damaging its habitat.<sup>53</sup> While this section includes several criteria the Minister must take into consideration when making an order under s. 8.01 none of these include assessing the impact that the suspension may have on treaty or Aboriginal rights protected by s. 35 of the *Constitution*.<sup>54</sup> As seen above, in *Adams*, the honour of the Crown nonetheless requires the Minister to take into account the potential that this order may have on Aboriginal or treaty rights.

#### Cumulative impacts as a route to treaty violation:

A recent decision from the Supreme Court of British Columbia provides additional routes for challenging a decision to postpone protection for the Black Ash as a violation of treaty or

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<sup>44</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc.* 2017 SCC 40 para 25.

<sup>45</sup> *Ibid* para 19.

<sup>46</sup> *Ibid* para 24.

<sup>47</sup> *Ibid* para 25.

<sup>48</sup> *Ibid* para 25.

<sup>49</sup> *Adam v Canada (Environment)*, 2011 FC 962 para 26.

<sup>50</sup> *Species at Risk Act* SC 2002, c 29

<sup>51</sup> *Adam v Canada (Environment)*, 2011 FC 962 para 27.

<sup>52</sup> *Ibid* para 35.

<sup>53</sup> *Endangered Species Act* SO 2007, c 6 s. 8.01(1)

<sup>54</sup> *Ibid* s. 8.01(3)

Aboriginal rights. In *Yahey v British Columbia*,<sup>55</sup> Blueberry River First Nation claimed that the Province had infringed their treaty right to hunt, fish, and trap by allowing for intense natural resource development in their territory. In that case, the treaty explicitly promised the ability to continue traditional activities like hunting, fishing, and trapping as though the treaty had never been entered into in their claim area. Of note is that the court took time to clarify the test for an infringement as an essential balancing of a province's right to "take up" lands with an Indigenous group's right to practice their rights on their traditional territory meaningfully.<sup>56</sup> Several of the historic treaties in Ontario contain similar clauses to those considered in *Yahey*.

In *Yahey*, meaningful practice of Treaty rights included broad protection of Blueberry River First Nation's way of life. The court the claimants' way of life is "connected to, dependant on, and respectful of the land and wildlife."<sup>57</sup> Importantly, the court noted that the protected rights are not mere hobbies or pastimes, they are a core aspect of identity and as such, impairing their practice significantly harms the wellbeing of the members of Blueberry River First Nation.<sup>58</sup> While the protection of hunting, trapping, and fishing rights did not require that the province completely restrict development or extraction in the claim area, Blueberry River First Nation's way of life does depend on "a relatively stable environment so that the knowledge held by community members about places to hunt, fish, and trap is relevant and applicable."<sup>59</sup> Ensuring this stability and meaningful practice required the Crown, by law, to act with "diligence and integrity to implement, uphold, and protect the purposes and promises of Treaty 8."<sup>60</sup>

The honour of the Crown in *Yahey* required the province to act diligently to fulfil the promises made by the Crown when entering Treaty 8.<sup>61</sup> Because the Treaty promised to protect a way of life and meaningful practice of Aboriginal Rights it meant the obligations created by the Honour of the Crown increased its responsibilities as development increased.<sup>62</sup> On this issue the court stated:

"It is precisely because the promise is difficult to keep as development increases that the Province ought to have worked diligently to ensure appropriate measures were in place to protect the exercise of treaty rights and to respect treaty rights *before* authorizing this level of industrial development in the Blueberry Claim Area"<sup>63</sup>

By failing to essentially "get out front" of the development they had sanctioned by proactively ensuring the promises made in Treaty 8 would be upheld, the court found that the Province had failed to uphold the obligations created by the honour of the Crown.

The court ultimately found that the Province had violated the promises made in the Treaty. It concluded the patchwork bureaucratic regulatory regime for managing natural resource development in the Province was unable to react appropriately or quickly enough to address

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<sup>55</sup> *Yahey v British Columbia*, 2021 BCSC 1287

<sup>56</sup> *Ibid* para 3.

<sup>57</sup> *Ibid* para 436.

<sup>58</sup> *Ibid* para 436.

<sup>59</sup> *Ibid* para 437.

<sup>60</sup> *Ibid* para 1724.

<sup>61</sup> *Ibid* para 1725.

<sup>62</sup> *Ibid* para 1728.

<sup>63</sup> *Ibid* para 1729.

Blueberry River's concerns and constituted a violation of the treaty.<sup>64</sup> It additionally noted that even if the duty to consult is discharged in each situation, none of the regulatory frameworks were set up to grapple with and address the cumulative impacts that these projects may have on the meaningful practice of treaty rights and thus failed to uphold the honour of the Crown.<sup>65</sup>

In the current situation the proposed pause on protecting Black Ash demonstrates a failure to proactively protect a key cultural species in the face of the cumulative impacts of the EAB and active forestry operations. Similar to the traditional hunting knowledge held by Blueberry River members, the knowledge of the best Ash stands for basket weaving are passed through generations of First Nations families in the Great Lakes Region. The meaningful practice of their harvesting rights require a generally stable population of Black Ash in both quantity, and quality for the knowledge and practice to remain meaningful.<sup>66</sup> Further, and as found in *Yahey*, as the pressure on a resource which is also integral to First Nations Aboriginal rights increases, so too does the obligation on the government to proactively ensure its protection.<sup>67</sup> In this case, intentionally delaying protection for Black Ash fails to proactively protect a cultural keystone resource and may in fact be found to be the "tipping point" at which the First Nations of the Great Lakes Region may lose the meaningful ability to practice their constitutionally protected Aboriginal and Treaty rights to harvest Black Ash trees

### **Conclusion:**

As outlined above, there are serious concerns about the advisability of utilizing s. 8.01 Of the *Endangered Species Act* to postpone the protection of Black Ash under ss 9 and 10. Overall, we believe that there is currently sufficient scientific and peer-reviewed information on the social and economic impacts of managing the extreme risk that the Emerald Ash Borer poses to the Province's Black Ash range.

Additionally, due to the cultural and spiritual significance of this species to several Indigenous Peoples across the province, this proposal very likely engages the honour of the Crown, the duty to consult and accommodate and moreover, may still be found to be a treaty violation due to the cumulative impacts that postponement of protection will have when considered alongside active forestry tracts, and the spread of the EAB.

This proposal claims a pause on protections is required to better understand mitigation and management best practices with an eye to cultural and economic impacts. This comment has clearly outlined that there is a long history of peer reviewed research addressing those issues within the province and the diverse range of the Black Ash. Therefore, the proposed suspension of protection is unlikely to increase our knowledge about species protection. Rather, it may perversely incentivize the active destruction of this tree and its habitat before protections can be put in place and enforced. The Environmental Justice and Sustainability Clinic of Osgoode Hall Law School urges the government to immediately take steps to protect the Black Ash tree and to reject the proposal.

Sincerely,

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<sup>64</sup> Ibid para 3.

<sup>65</sup> Ibid para 501-502.

<sup>66</sup> Kara K.L. Costanza et al, "The Precarious State of a Cultural Keystone Species: Tribal and Biological Assessments of the Role and Future of Black Ash" (2017) 115:5 *Journal of Forestry*, P 436.

<sup>67</sup> *Yahey v British Columbia*, 2021 BCSC 1287 paras 1728-1729.

A handwritten signature in black ink, appearing to read 'Estair Van Wagner'. The signature is fluid and cursive, with the first name 'Estair' being the most prominent part.

Estair Van Wagner  
Assistant Professor,  
Osgoode Hall Law School