

**Affidavit #1 of Robert S. McLean  
Affirmed the 29<sup>th</sup> day of January, 2018**

File No.: T-1882-17

**FEDERAL COURT**

**BETWEEN:**

**WELLS GRAY GATEWAY PROTECTION SOCIETY**

**Applicant**

**and**

**THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and  
ATTORNEY GENERAL OF CANADA**

**Respondents**

**AFFIDAVIT #1 OF ROBERT S. MCLEAN**

I, Robert S. McLean, public servant with Environment and Climate Change Canada ("ECCC"), located at 351 St. Joseph Boulevard, Gatineau in the Province of Quebec, AFFIRM THAT:

1. I am the Director General of the Assessment and Regulatory Affairs Directorate of ECCC's Canadian Wildlife Service, which position I have held since April 2016. As such, I have personal knowledge of the facts and matters deposed to in this affidavit except where the same are stated to be based on information and belief, and where so stated I verily believe them to be true.
2. After outlining my current role and background, I address in this affidavit the following:
  - a) Canada's national strategy for the protection of species at risk;

- b) the framework of the *Species at Risk Act*, S.C. 2002, c. 29 (“SARA”);  
and
- c) re-assessment of the Southern Mountain caribou.

### **My Role and Background**

3. Since April 2016, I have been serving as Director General of the Assessment and Regulatory Affairs Directorate of ECCC’s Canadian Wildlife Service, handling responsibility for policy and programs under the *SARA*.

4. More specifically, I oversee the Secretariat to the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”), the independent expert Committee which assesses and reports on: the status of species; the development of regulations to list assessed species under the *SARA*; the national recovery planning process, including approval and publication of recovery documents; the approval of permits pursuant to the *SARA* requirements; the assessment of protection to individuals and residences of listed species and their critical habitat; governance mechanisms for the *SARA*; and reporting on the implementation of the *SARA*.

5. I have worked in the field of wildlife and biodiversity policy and programs for more than 40 years, almost entirely with the ECCC’s Canadian Wildlife Service, as Program Officer, Manager and, for the last 20 years, Director or Director General. I have held a variety of positions during my career that has included direct responsibility over the full range of ECCC’s wildlife and biodiversity policy and programs, including those for species at risk.

6. In the late 1990s and early 2000s, when Parliament was considering federal species at risk legislation, I served, among others, as the Canadian Wildlife Service’s National Director for habitat stewardship incentive programs. In this capacity, I was responsible for developing and implementing the *Habitat Stewardship Program* for Species at Risk (“*Habitat Stewardship Program*”).

7. From February 2007 to July 2012, I served as the Executive Director, Habitat and Ecosystem Conservation, with responsibility for, among others, the development and coordination of species at risk recovery policy, and programming including recovery plans under the *SARA* such as the recovery strategy for boreal caribou.

8. From August 2012 to April 2016, I served as the Executive Director at the Canadian Wildlife Service, with responsibility for the development and coordination of programs, policy and guidance on protected areas, habitat stewardship, conservation, and species at risk.

9. With respect to the Southern Mountain caribou, I have been involved in the review, advice, and approval of both the proposed and final recovery strategies as well as in the subsequent work on its protection and recovery.

10. Attached hereto and marked as **Exhibit "A"** to this my affidavit is a true copy of my *curriculum vitae*.

**Canada's National Strategy for the Protection of Species at Risk**

11. The three pillars in Canada's national strategy for the protection of species at risk are: the Accord for the Protection of Species at Risk; the *SARA*; and the grants and contribution programs that support habitat stewardship, such as the *Habitat Stewardship Program* and *Aboriginal Fund for Species at Risk*. These three components reflect the multipronged approach to the protection and recovery of species at risk, which recognizes the importance of jurisdictional co-operation, contribution of stewardship, and availability of a variety of tools that can be employed to achieve the best outcomes for species at risk.

12. In December 1992, Canada became the sixth country to ratify the United Nations *Convention on Biological Diversity* (the "*Convention*"), whose objectives include conservation of biodiversity and sustainable use of biological resources.

13. Because of the shared responsibility for conservation of biodiversity, including the protection and conservation of wildlife species and their habitat, federal,

provincial, and territorial governments must collaborate and co-operate in the implementation of the *Convention*.

14. In 1995, federal, provincial, and territorial ministers adopted the *Canadian Biodiversity Strategy, Canada's Response to the Convention on Biological Diversity, 1995* (the "*Canadian Biodiversity Strategy*"), a true copy of which is attached as **Exhibit "B"** to this my affidavit.

15. The *Canadian Biodiversity Strategy* called on federal, provincial, and territorial governments to review their current legislation to determine if improvements were required in order to protect species at risk and their habitats, including harmonization of legislative and programmatic approaches to species at risk conservation and recovery.

16. In 1996, the federal, provincial, and territorial governments, except Quebec, signed the *Accord for the Protection of Species at Risk* (the "*Accord*"), a true copy of which is attached as **Exhibit "C"** to this my affidavit.

17. The *Accord* committed the signatory federal, provincial, and territorial ministers to a national approach for the protection of species at risk. Acknowledging that species do not recognize jurisdictional boundaries and that co-operation is crucial to the conservation and protection of species at risk, governments agreed, among others, to develop complementary legislation, regulations, policies, and programs to identify and protect threatened and endangered species and their critical habitats.

18. In 2000, the Government of Canada established the *Habitat Stewardship Program*, which seeks to contribute to the recovery of species at risk and to prevent other species from becoming a conservation concern, by engaging Canadians from all walks of life in conservation actions to benefit wildlife. The *Habitat Stewardship Program* is a funding program that emphasizes the need for federal, provincial, and territorial governments to work co-operatively with landowners and land managers, and seeks to foster and encourage voluntary actions for the conservation of species at risk.

19. The *Habitat Stewardship Program* was augmented with the establishment of the *Aboriginal Fund for Species at Risk* in 2004. The *Aboriginal Fund for Species at Risk* aims at supporting the participation of Indigenous groups in species at risk recovery through capacity and project funding, in recognition of the fact that protection of species at risk in Canada depends upon a meaningful collaboration with Indigenous peoples and organizations.

20. In addition, the *Natural Areas Conservation Program* was established in 2007 to support the conservation of private lands with important wildlife values. All of the *Habitat Stewardship Program*, the *Aboriginal Fund for Species at Risk*, and the *Natural Areas Conservation Program* have contributed to the protection and recovery of the Southern Mountain caribou, as is explained in more detail in the affidavit of Blair Hammond, which affidavit I have read.

21. The *SARA* – the federal legislative response to the strategic direction set out in the *Canadian Biodiversity Strategy* and the *Accord* – received Royal Assent on December 12, 2002.

22. The *SARA* seeks to foster a national effort to protect and recover species at risk and prevent other species from becoming at risk, while taking into account provincial and territorial management responsibilities, Aboriginal and treaty rights, and the need to work co-operatively with landowners and others to effect stewardship of key habitats and species at risk.

23. With some exceptions, provinces and territories have primary responsibility for the management of lands, natural resources, and wildlife within their borders. In addition, Indigenous peoples, land owners, and managers make important decisions about lands for which they are responsible. Thus, co-operation with provinces and territories, Indigenous organizations and individuals, and landowners is important if the *SARA* is to succeed in achieving the survival and recovery of species at risk. All of them may have information important to the survival and recovery of these species and exercise authorities or make decisions that have a direct effect on species at risk and their habitat, and therefore can affect the survival and recovery of these species.

24. In some cases Canada has entered into administrative agreements with a province or territory to help implement the *SARA* in a coordinated manner, including collaborative development of recovery documents. In April 2005, Canada and British Columbia entered into the *Canada – British Columbia Agreement on Species at Risk* (the “*Bilateral Agreement*”) under which Canada and British Columbia agreed to administrative and operational procedures for implementing the *SARA* and other species at risk conservation measures in British Columbia. On its terms, the agreement terminated ten years after its execution in April 2015 and has not yet been renewed. However, the relationship has been functioning based on the expired agreement and discussions have affirmed expectations that the agreement will be renewed following the processes under that agreement. Attached hereto and marked as Exhibit “D” to this my affidavit is a true copy of the *Bilateral Agreement*.

25. Where existing federal, provincial or territorial laws and measures prove insufficient for the survival and recovery of a species at risk, the *SARA* provides for the making of certain orders, so as to prevent the extinction of a species or its extirpation from Canada. This is explained in further detail below.

#### **SARA Framework**

26. The Minister of Environment and Climate Change (the “Minister”) has an overarching role in the administration of the *SARA* for all elements not explicitly assigned to another minister. ECCC’s Canadian Wildlife Service fulfills this role on behalf of the Minister.

27. The other competent ministers under the *SARA* are the Minister of Fisheries and Oceans with respect to aquatic species, and the Minister responsible for the Parks Canada Agency (currently the same Minister as the Minister of the Environment and Climate Change) with respect to individuals in or on federal lands under the administration of that minister.

28. Section 6 of the *SARA* indicates the purposes of the Act are “[...] to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery

of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened”.

29. These purposes are achieved by a number of mechanisms in the *SARA* that involve assessing a species to determine if it is at risk and then listing it on a schedule to the *SARA*. Listing of a species in turn triggers a series of obligations, including planning for the species’ recovery and protection of individuals of the species, their residences, and habitat critical to the survival and recovery of the species. For the purpose of this affidavit, I focus and provide context on the following:

- a) assessment by COSEWIC of the status of a given species, leading to a decision by the Governor in Council on whether it should be added in Schedule 1, setting out the list of wildlife species at risk under the *SARA* (the “List”);
- b) production and implementation of recovery documents, i.e. recovery strategies, action plans or management plans, for a species at risk appearing in the List;
- c) protection of critical habitat; and
- d) emergency protection under section 80 of the *SARA*.

30. As noted in its preamble, the interpretation and application of the provisions of the *SARA* are guided by the “precautionary principle”. This principle recognizes that where 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. Given that species on the List are by definition at risk of serious or irreversible harm, a precautionary approach is warranted.

31. The *SARA* requires a number of documents or other materials to be posted to a public registry. The Species at Risk Public Registry was established under section 120 of the *SARA* for the purpose of facilitating access to documents relating to matters

under the *SARA*. It can be consulted by the public at: <https://www.registrelep-sararegistry.gc.ca>.

#### **A. Assessment and Listing of Species at Risk**

32. COSEWIC is the independent committee of experts that assesses the status of wildlife species in Canada. COSEWIC provides to the Minister a status report and assessment for each species it assesses.

33. COSEWIC can conclude that the species is extinct, extirpated, endangered, threatened, or of special concern. COSEWIC may also determine that it does not have sufficient information to assess a species, or indicate that the species is not currently at risk.

34. Receipt of an assessment by COSEWIC triggers the obligation of the Minister under subsection 25(3) of the *SARA* to indicate how she will respond. Subsection 27(1.1) of the *SARA* requires the Minister to make one of three recommendations to the Governor in Council:

- a) to list the species;
- b) to not list the species; or
- c) to refer the matter back to COSEWIC for further information or consideration.

35. In accordance with section 27 of the *SARA*, a species is included on the List if the Governor in Council accepts a recommendation from the Minister for the listing of that species. Alternatively, the Minister is required to add the species by order to the List if the Governor in Council does not act within nine months of receiving COSEWIC's assessment. I should add here that some species were added to the List at the same time as the *SARA* was proclaimed, including the Southern Mountain caribou, which is described in more detail in Mr. Hammond's affidavit.



36. In the case of a re-assessment of the status of a species from COSEWIC, the Minister could also recommend that the Listed wildlife species be reclassified or removed from the List in accordance with subsection 27 (1) of the *SARA*.

37. Once an extirpated, endangered or threatened wildlife species is included on the List, the general prohibitions set out in sections 32 and 33 of the *SARA*, which protect respectively individuals or residences of a listed wildlife species, apply subject to limitations described in sections 34 and 35 of the *SARA*.

#### **B. Recovery Documents**

38. The *SARA* requires the posting of a recovery strategy for listed extirpated, endangered and threatened wildlife species within the timelines set out in section 42 (or section 132) of the *SARA*.

39. A recovery strategy is a planning document that identifies what needs to be done at a strategic level over the long-term to either recover a species or ensure its survival in the wild.

40. Subsection 41(1) of the *SARA* indicates that a recovery strategy must address the threats to the survival of a species identified by COSEWIC and include:

- a) a description of the species and its needs consistent with information provided by COSEWIC;
- b) an identification of threats to the species' survival and threats to its habitat consistent with information provided by COSEWIC, and a description of the broad strategy to address those threats;
- c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including information provided by COSEWIC, and examples of activities likely to result in its destruction;

- d) a schedule of studies to identify critical habitat, where available information is inadequate;
- e) a statement of the population and distribution objectives that will assist in the recovery and survival of the species, and a general description of the research and management activities needed to meet those objectives;
- f) any other matter prescribed by regulations;
- g) a statement about whether any other information is required about the species; and
- h) a statement of when one or more action plans in relation to the strategy will be completed.

41. Section 39 of the *SARA* requires a recovery strategy to be prepared, to the extent possible, in co-operation with:

- a) the appropriate provincial and territorial ministers responsible for the *SARA*-listed wildlife species in their jurisdiction;
- b) other federal ministers who have authority over federal lands or other areas on which the wildlife species is found;
- c) any appropriate wildlife management board authorized by a land claim agreement to perform functions in respect of the wildlife species;
- d) every Aboriginal organization that the competent minister considers will be directly affected by the recovery strategy; and
- e) any other person or organization that the competent minister considers appropriate.

42. To the extent possible, the recovery strategy must also be prepared in consultation with any landowners and other persons whom the competent minister considers to be directly affected by the strategy, including the government of any other country in which the species is found.

43. Following the completion of a recovery strategy, the *SARA* requires that one or more action plans be prepared for the species at risk. An action plan is a planning document that describes in more detail those actions needed to implement a recovery strategy and identifies critical habitat not identified in a recovery strategy.

44. Section 49 of the *SARA* provides that an action plan must include:

- a) an identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities likely to result in the destruction of critical habitat;
- b) a statement of measures proposed to be taken to protect the species' critical habitat, including entering into agreements under section 11;
- c) an identification of any portions of the species' critical habitat that have not been protected;
- d) a statement of measures that are to be taken to implement the recovery strategy, including those that address the threats to the species and those that help to achieve the population and distribution objectives, as well as an indication as to when these measures are to take place;
- e) the methods to be used to monitor the recovery of the species and its long-term viability; and
- f) an evaluation of the socio-economic costs of the action plan and the benefits to be derived from its implementation.

45. Section 48 of the *SARA* sets out for action plans the same co-operation and consultation requirements as described in paragraphs 41 and 42 above of my affidavit for recovery strategies.

### **C. Protection of Critical Habitat**

46. A key element of the *SARA* is the requirement to protect critical habitat identified in final recovery strategies or action plans. Critical habitat is the habitat needed for the survival or recovery of a wildlife species.

47. Section 58 of the *SARA* requires that critical habitat identified on federal lands be legally protected within 180 days of the posting of the recovery strategy or action plan that identifies the critical habitat. If provisions in or measures under the *SARA*, or any other Act of Parliament do not protect critical habitat on federal lands, the competent minister must make an order to protect the critical habitat.

48. With respect to critical habitat identified on non-federal lands, pursuant to section 61 of the *SARA*, the Minister must recommend that the Governor in Council make an order to protect critical habitat if the Minister is of the opinion that there are no provisions in or measures under the *SARA* or any other Act of Parliament that protect the critical habitat, and the laws of the relevant Province or Territory do not effectively protect the critical habitat. This latter provision is referred to as part of the "safety-net".

### **D. Emergency Protection of a Wildlife Species**

49. Section 80 of the *SARA* authorizes the Governor in Council to make, on the recommendation of the competent minister, an emergency order providing for the protection of a listed wildlife species. The minister "must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery".

50. Before making a recommendation, the Minister is required to consult every other competent minister. The minister is not required to make a recommendation if

he or she "is of the opinion that equivalent measures have been taken under another Act or Parliament to protect the wildlife species".

51. The contents of an emergency order vary depending on whether the species is an aquatic species, a migratory bird or "any other species".

52. For the protection of "any other species" on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada, the order may:

- a) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates; and
- b) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat.

53. For the protection of "any other species" on any other lands, the order may:

- a) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates; and
- b) include provisions prohibiting activities that may adversely affect the species and that habitat.

54. The competent minister is required to make a recommendation to the Governor in Council that the emergency order be repealed if he or she is of the opinion that "the species to which the emergency order relates would no longer face imminent threats to its survival or recover even if the order were repealed".

#### **Re-assessment of the Southern Mountain Caribou**

55. In May 2000, COSEWIC assessed what it then called the Western Mountain population of caribou as threatened. This population became known as the Woodland Caribou, Southern Mountain population when its status was re-examined and confirmed in May 2002. COSEWIC concluded that the Southern Mountain

population was threatened because the populations had decreased throughout most of the range, and were being threatened from habitat loss and increased predation. Attached hereto and marked as **Exhibit "E"** to this my affidavit is a true copy of the *COSEWIC Assessment and Update Status Report on the Woodland Caribou Rangifer tarandus caribou, Atlantic-Gaspésie Population, Boreal Population, Southern Mountain Population, Northern Mountain Population, Newfoundland Population*, from 2002.

56. Based on COSEWIC's 2002 assessment, the Southern Mountain population was listed as threatened in Schedule 1 of the *SARA*, which came into effect in June 2003, upon proclamation.

57. COSEWIC is required to re-assess the status of species listed under the *SARA* at least once every ten years. In 2011, in preparation for the re-assessment of caribou, COSEWIC updated the populations or "designatable units" under the *SARA* for all caribou in Canada. COSEWIC divided the Woodland Caribou, Southern Mountain population into three new designatable units: Caribou, Southern Mountain population; Caribou, Central Mountain population; and, Caribou, Northern population. In COSEWIC's re-assessment, the Caribou, Northern population now consists of part of the current Woodland Caribou, Southern Mountain population and all of the current Woodland Caribou, Northern Mountain population.

58. The Wells Gray – Thompson local population unit, which is currently included on the *SARA* List in the Woodland Caribou, Southern Mountain population, would be included in the new Caribou, Southern Mountain population should the Governor in Council decide to proceed with the new listing based on the updated "designatable units" and the 2014 COSEWIC re-assessment described in the following paragraph. Attached hereto and marked as **Exhibit "F"** to this my affidavit is a true copy of a chart titled *Caribou – new and old Designatable Units summarized*, summarizing the changes to the designatable units for Southern Mountain caribou.

59. In 2014, COSEWIC re-assessed caribou based on the revised groupings or “designatable units” described in the preceding paragraph. The re-assessment assessed the Caribou, Southern Mountain Population (including the Wells Gray – Thompson local population unit) and Caribou, Central Mountain population as endangered and the Caribou, Northern Mountain population as special concern. Attached hereto and marked as **Exhibit “G”** to this my affidavit is a true copy of the *COSEWIC Assessment and Status Report on the Caribou Rangifer tarandus, Northern Mountain population, Central Mountain population, Southern Mountain population* (the “*May 2014 Assessment and Status Report*”).

60. On January 13, 2015, the Minister released the response statement to the *May 2014 Assessment and Status Report* for the Southern Mountain population of caribou, stating that efforts would be undertaken to gather information from provincial and territorial governments, Indigenous peoples, stakeholders, and the public, prior to determining whether it would be appropriate to recommend to the Governor in Council to List the Caribou, Southern, Central, and Northern Mountain populations as recommended in the 2014 Assessment and Status Report. Attached hereto and marked as **Exhibit “H”** to this my affidavit is a true copy of the *Response Statement – Caribou, Southern Mountain population*.

61. As required under the *SARA*, the Minister must consider COSEWIC’s assessments in recommending whether the Governor in Council amend Schedule 1 of the *SARA*. COSEWIC assessments are based on the best available information, including scientific, community, and Aboriginal traditional knowledge to the extent that such information is available.

62. The Minister’s recommendation to the Governor in Council also takes into account other relevant considerations, further to the *Cabinet Directive on Regulatory Management*. This can include potential impacts on health and safety, security, the environment, and the social and economic well-being of Canadians. Consultation is also undertaken with affected parties, including Indigenous peoples and

provincial/territorial governments. Attached hereto and marked as **Exhibit "I"** to this my affidavit is a true copy of the *Cabinet Directive on Regulatory Management*.

63. The consultation referred to in the *Response Statement – Caribou, Southern Mountain population* began January 13, 2015, and ended on October 15, 2015. Comments received revealed concerns, including that the COSEWIC re-assessment did not adequately reflect or encapsulate Indigenous traditional knowledge of the species; that more comprehensive genetic information was needed to evaluate the structures and classifications of Southern, Central and Northern Mountain caribou populations; and that a change in the Southern Mountain caribou's *SARA* status would impact Indigenous harvesting rights.

64. Further consultation and work will be undertaken prior to bringing a recommendation to the Governor in Council.


#### **Measures Taken to Protect and Recover the Southern Mountain Caribou**

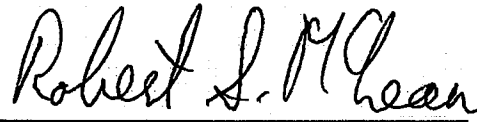
65. The Southern Mountain caribou became listed as threatened under the *SARA* in 2003 and its recovery strategy was published in 2014. Since 2014, the Canadian Wildlife Service has continued to work on the protection and recovery of the Southern Mountain caribou, including work to complete the identification of critical habitat; funding of two maternity pens and other stewardship activities; preparation of a detailed analysis of British Columbia's regulatory framework as it relates to the protection of the critical habitat for the Central Group; preparation of materials to inform the assessment under section 61 of the *SARA* as to whether or not those portions of the critical habitat that are on non-federal lands are effectively protected; negotiations on a section 11 agreements with British Columbia and First Nations; and preparation of materials to inform the assessment under section 80 of the *SARA* as to



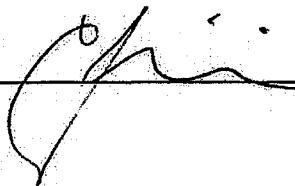
whether there is an imminent threat to the Southern Mountain caribou. These and other measures are discussed in Mr. Hammond's affidavit.

AFFIRMED before me at the City of Gatineau, in the Province of Quebec, this 29<sup>th</sup> day of January, 2018.

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
within Quebec 198382

  
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ROBERT S. MCLEAN

This is Exhibit "A" referred to in the  
affidavit of **Robert S. McLean** affirmed  
before me at **Gatineau, Quebec**  
this 28<sup>th</sup> day of January, 2018

  
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