Court File No. 400/13

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(Divisional Court)**

BETWEEN:

**WILDLANDS LEAGUE and**
**FEDERATION OF ONTARIO NATURALISTS**

APPLICANTS

- and -

**LIEUTENANT GOVERNOR IN COUNCIL and**
**MINISTER OF NATURAL RESOURCES**

RESPONDENTS

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# REPLY FACTUM OF THE APPLICANTS

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September 18, 2014

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**TAB**

**REPLY FACTUM SUBMISSIONS**

1. In their factum, the Respondents Minister of Natural Resources and Lieutenant Governor in Council (the "Respondents") seek to strike portions of the affidavits supporting this application, and paragraphs 12-28 of the Applicants' factum summarizing this evidence,[1] on the sole ground of relevance.

2. Respectfully, this attack is meritless. In arguing that the Applicants' fact evidence is irrelevant, the Respondents mischaracterize the two grounds in this Application. On the first ground, that the Minister failed to perform his duties under s. 57(1) of the *Endangered Species Act, 2007* ("*ESA*"),[2] the evidence is relevant to, in the words of s. 57(1), the "proposal for a regulation" that was "under consideration in the Ministry." On the second ground, the evidence is relevant to the purpose of the regulation later made by Cabinet – including showing how the regulation was proposed shortly after the Legislature rejected the Government's desired legislative amendments aimed at precisely the same outcome.

3. Not only is this evidence relevant, it is uncontroversial, reliable and helpful. It includes Hansard debates, the Ministry's own legally-required notices of its proposal,[3] and a Parliamentary watchdog's published reports – information often subject to judicial notice. Similar evidence has been relied on by the Supreme Court and Divisional Court in judicial review applications regarding ministerial decision-making or the *vires* of regulations.[4]

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[1] A copy of paras 12-28 of the Applicants' factum is appended hereto as Schedule B.
[2] SO 2007, c 6
[3] Notices of a proposed regulation that could have a significant effect on the environment are required to be publically posted for a minimum of 30 days under s. 16(1) of the *Environmental Bill of Rights, 1993*, SO 1993, c 28.
[4] See generally *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 3-21. Also see *Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, 2014 ONSC 2826 (Div Ct) at paras 3-9; *The Cash Store Financial Services Inc v Ontario (Consumer Services)*, 2013 ONSC 6440 (Div Ct) at paras 6-20; *Hanna v Ontario (Attorney General)*, 2011 ONSC 609 (Div Ct) at paras 16-24, 27.

### A. The Respondents' attack is premised upon erroneous characterizations of the Applicants' two separate grounds of review and the *Katz* decision

4. At paragraph 51 of their factum, the Respondents submit that the relevance of the Applicants' evidence "is intimately tied to the scope of this Application." Then, at paragraphs 55-66, the Respondents seek to persuade this Court to narrow the "scope" of the application – by arguing that ministerial determinations under s. 57(1) are "not subject to judicial review." In other words, the Respondents' evidentiary challenge is intimately tied to their argument that the Applicants' first ground of review is not justiciable.[5]

5. In reply, as the Respondents' position that s. 57(1) is not justiciable must fail, so should their evidentiary challenge. The Respondents allege that the Minister's performance of his duties under s. 57(1) of the *ESA* is immune from judicial scrutiny. Such a position, if adopted, would deny species at risk the benefit of judicial supervision of mandatory duties imposed by the Legislature. Relatedly, at paragraphs 55-58, the Respondents ask the Court to extend *Katz Group Canada Inc v Ontario*[6] to apply to *ministerial* decision-making. To so limit judicial review of a minister's compliance with his mandatory duties under s. 57(1), which are in no way "legislative" in nature, would be unprecedented.

6. Moreover, when properly understood, *Katz* is actually of no assistance to the Respondents' effort to strike the Applicants' evidence. The Respondents read *Katz* as holding that almost all evidence beyond the Minister's Determination[7] is irrelevant in a

[5] The Respondents have likewise characterized the Minister's s. 57(1) determination as non-justiciable in correspondence. See Schultz Affidavit, AR Vol 2, Ex FF.
[6] *Supra*, note 4.
[7] The form of the "decision document" will differ with the type of decision at issue. Here, the "decision document" is the "Minister's Explanatory Note" regarding his s. 57(1) determination.

review of a regulation for *vires*. This characterization of *Katz* is incorrect for the following three reasons.

7. First, in *Katz* the applicants did not argue that any minister had failed to comply with a statutory condition precedent. The only issue from a *vires* perspective was whether the regulation was inconsistent with the objects and purposes of its authorizing legislation. Following on from this, the Supreme Court's insistence that the policy merits or efficacy of the regulation were irrelevant to the "purposes" analysis was only meant to emphasize that government has no burden to show a regulation will achieve its stated purpose. Third, the Supreme Court in fact *did* rely on evidence of the government's policy goals to provide background for its analysis,[8] despite Ontario's submissions urging that such evidence was irrelevant; the Court wholly ignored Ontario's submissions on this point.[9]

8. Indeed the Divisional Court has refused to strike evidence going toward compliance with a statutory duty in a challenge to a regulation, as evidence irrelevant to a regulation's policy merits may be relevant to non-compliance with a statutory condition precedent.[10]

### B. The impugned evidence gives crucial context to the Minister's Determination

9. The Respondents seek to strike a wide array of documentary evidence including:

- Hansard transcripts and presentations made to the Standing Committee on Finance and Economic Affairs regarding proposed legislative amendments to the *ESA*;[11]

[8] *Katz*, at paras 3-16.
[9] *Katz*, Factum of the Respondents, Minister of Health and Long-Term Care, Lieutenant Governor-in-Council of Ontario and Attorney General of Ontario, at paras 74-78, appended hereto as Schedule C.
[10] *Hanna v. Attorney General for Ontario*, 2010 ONSC 4058 (Div Ct) at paras 8-9 (interlocutory decision, per Swinton J) and *Hanna*, *supra* note 4, at para 35 (decision on the merits, per Aston J).
[11] See Baggio Affidavit, AR Vol 1, Exs D and G (legislative debate on exemption amendments to the *ESA* proposed in Bill 55, Schedule 19); Exs H and I (testimony on the proposed exemption amendments

- Public notice of, and comments relating to, the regulatory proposals that were the subject of the Minister's Determination;[12]
- A report from the Environmental Commissioner of Ontario ("ECO") – an officer of the Ontario Legislature – finding that the Regulation achieved, in part, what the government could not achieve through legislative amendments;[13]
- Letters between the Applicants and the Minister, the Premier, and Cabinet regarding the regulatory proposals that were the subject of the Minister's Determination.[14]

10. Elaborating on the above, the impugned Hansard transcripts are relevant to the Government's unsuccessful attempt in the spring of 2012 to insert broad exemptions into the *ESA* regime through legislative amendment, and the Government's intention to re-introduce those legislative amendments in a standalone bill (which never occurred).

11. The Respondents also seek to strike evidence showing that s. 57(1) was triggered, namely that a "proposal for a regulation" that was "under consideration in the Ministry" in early 2013.[15] Moreover, the Ministry postings and public consultation process were statutorily

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before the Standing Committee on Finance and Economic Affairs); Ex M (the Government's statement that the defeated amendments would be reintroduced as a standalone bill in the fall of 2012); and Ex Y (the legislative intention to create a "presumption of protection" with the introduction of the *ESA* in 2007). Also see Schultz Affidavit, AR Vol 2, Ex H (testimony on the proposed exemptions before the Standing Committee). These exhibits are relied on in the Applicants' factum at paras 12-16.

[12] See Schultz Affidavit, AR Vol 2, Exs J, K, M and N (public notice of the MNR's "Modernization of Approvals" policy agenda in the fall of 2012 and public comments in response); Exs O, P, Q, V and CC (the initial and then more detailed versions of the Ministry's regulatory proposals and public comments on these proposals). These exhibits are relied on in the Applicants' factum at paras 19-21.

[13] See Baggio Affidavit, AR Vol 1, Exs DD, EE and FF (ECO's analysis of the new regulatory exemptions). The ECO's 2012/13 Annual Report is relied on in the Applicants' factum at para 28.

[14] See Schultz Affidavit, AR Vol 2, Exs Y, Z, AA and BB (letters to the Finance Minister, the Premier and Cabinet regarding the exemptions in the regulatory proposals). Also see Baggio Affidavit, AR Vol 1, Exs T and U (an April 30, 2013 letter to the Minister regarding the regulatory proposals and the Minister's September 12, 2013 response). These letters are relied on in the Applicants' factum at paras 22-23.

[15] See Schultz Affidavit, AR Vol 2, Exs O, P, Q, V and CC (the initial and more detailed versions of the Ministry's regulatory proposals and public comments thereon). These exhibits are relied on in the Applicants' factum at paras 19-21.

required.[16] Affidavits describing similar postings and consultation have been relied on by this Court, including where tendered by a government affiant.[17]

12. In addition to being relevant, the challenged evidence is "helpful, general background information" of the sort that courts have relied on in endangered species litigation.[18] Furthermore, the Respondents do not allege that any of the evidence is prejudicial.

13. Finally, the Respondents' challenge to the evidence is unprincipled, as shown by several inconsistencies. For example, they seek to blind this Court to the ECO's 2012/13 Annual Report.[19] However, they take no objection to the Applicants' reliance on the ECO's 2006/07 Annual Report.[20] Likewise, they seek to strike the Applicants' letters to the Premier and Cabinet regarding the regulatory proposals and enclosing their earlier letters to the Minister, yet they do not challenge those same letters as sent to the Minister.[21]

14. Contrary to the Respondent's submission at paragraph 54 of their factum, the Applicants do rely on their expert affidavits in their factum. This expert evidence is relevant to the Applicants' strictly alternative submission that the Minister's Determination was unreasonable.[22]

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[16] See note 3.
[17] See in particular *Hanna*, *supra* note 4, at paras 17-18. See also *Animal Alliance*, *supra* note 4 at para 7; *Cash Store Financial*, *supra* note 4 at paras 16-20.
[18] *Alberta Wilderness Association v. Canada (Environment)*, 2009 FC 710, at para 30.
[19] See Baggio Affidavit, AR Vol 1, Ex EE and relied on at para 28 of the Applicants' factum.
[20] See para 10 of the Applicants' factum where an ECO Report is cited as an authority without challenge by the Respondents.
[21] See Schultz Affidavit, AR Vol 2, Exs X, Y, Z, AA and BB.
[22] See reliance on the Expert Reports of Robert MacGregor and Dr. Justin Congdon at para 89 of the Applicants' Factum.

All of which is respectfully submitted this 18th day of September, 2014 by:

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**SCHEDULE "A"**

**LIST OF AUTHORITIES**

**Jurisprudence**

*Alberta Wilderness Association v Canada (Environment)*, 2009 FC 710

*Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, 2014 ONSC 2826 (Div Ct)

*Dunsmuir v. New Brunswick*, 2008 SCC 9

*Hanna v. Attorney General for Ontario*, 2010 ONSC 4058 (Div Ct)

*Hanna v Ontario (Attorney General)*, 2011 ONSC 609 (Div Ct)

*Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64

*The Cash Store Financial Services Inc v Ontario (Consumer Services)*, 2013 ONSC 6440 (Div Ct)

**SCHEDULE "B"**

Excerpt of the Applicants' Factum, paragraphs 12-28

9. The ESA was enacted to remedy the major shortcomings in the then-extant *Endangered Species Act*,[5] which was recognized to be ineffective legislation.

10. On June 30, 2008, the ESA came into force. In contrast to the old Act, which offered limited protection for only 42 of 176 species designated at risk, the ESA extended some immediate protection to all species listed in Ontario.[6] In the words of then-Minister of Natural Resources David Ramsay, the ESA created a "presumption of protection" for all listed species.[7]

11. Important to the events following is the fact that when the ESA came into force, the government deferred general protection for habitat of "transition" species for the maximum five year period. This deferral would expire by law on June 30, 2013.[8]

### B. In spring of 2012, the Government tried—and failed—to weaken the ESA by legislative amendment under Bill 55

12. On March 27, 2012—with the legal expiration of the five-year deferral of habitat protection only a year away—the government introduced an "omnibus" bill entitled *Bill 55, Strong Action for Ontario Act (Budget Measures)*, 2012 ("the Bill") in the Legislature.[9] In addition to the budget, the Bill proposed many substantive amendments to various statutes.

13. Specifically, controversial amendments were proposed to the ESA, found in Schedule 19 to the Bill. Schedule 19 proposed, among other things, to exempt certain activities from the Act's prohibitions against harming species and their habitat. Activities proposed for exemption included maintaining, repairing or replacing infrastructure like electric power

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[5] *Endangered Species Act*, RSO 1990 c E.15 (repealed 30 June 2008).
[6] Environmental Commissioner of Ontario, *Reconciling our Priorities: Annual Report 2006-2007*, submitted to Legislative Assembly of Ontario November 2007 (Toronto: ECO, 2007) at p 96.
[7] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 148, (28 March 2007) at 1530 (Hon David Ramsay, Minister of Natural Resources).
[8] ESA, s 10(3).
[9] Baggio Affidavit, para 13 and Ex D [AR Vol 1, Tab 3, pp 160 and Tab 3.D, pp 218-20].

systems, oil or gas pipelines, energy systems, transportation corridors and drainage works. Schedule 19 also sought to alter the statutory requirement that an overall benefit to a species be shown before authorizations may issue for activities otherwise prohibited by the Act.[10]

14. The government's proposed amendments to weaken the ESA sparked intense, widespread criticism, including from opposition members of the Legislature and stakeholder groups. The Applicants and others advocated against the amendments, including by appearing before the Standing Committee tasked with reviewing Schedule 19 to voice concern over the adverse impact the changes would have on Ontario's species at risk.[11]

15. As a result of the democratic process, on June 18, 2012, the Standing Committee voted against Schedule 19, with the support of its government members.[12] The Legislature subsequently enacted Bill 55, without any changes to the ESA.

16. Instead, then-Premier Dalton McGuinty indicated that the Schedule 19 amendments would be reintroduced in another legislative bill, in the fall of 2012.[13] Government members of the Standing Committee stressed that these amendments to the ESA were still needed in order to "bring about much-needed cost savings that will contribute to eliminating the deficit."[14]

17. However, the government never did reintroduce Schedule 19 or other amendments to the ESA in the fall 2012 session of the Legislature, and the ESA remained intact.

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[10] Bill 55, *Strong Action for Ontario Act (Budget Measures)*, 1st Sess, 40th Parl, Ontario, 2012, Schedule 19 (see Schultz Affidavit, Ex C [AR Vol 2, Tab 2.C, pp 587-92]); Baggio Affidavit, para 14 [AR Vol 1, Tab 3, pp 160-61]. See also Baggio Affidavit, Ex G [AR Vol 1, Tab 3.G, pp 229-40]; Schultz Affidavit, para 20 and Ex I at pp 5-6 [AR Vol 2, Tab 4, p 560 and Tab 4.I, pp 626-27].

[11] Baggio Affidavit, paras 12-29, 68 and Exs E-K [AR Vol 1, Tab 3, pp 160-66, 176-77 and Tabs 3.E-3.K, pp 221-91]; Schultz Affidavit, paras 19-31 and Exs C-I [AR Vol 1, Tab 4, pp 559-63 and Tabs 4.C-4.I, pp 587-641].

[12] Baggio Affidavit, para 24 and Ex M [AR Vol 1, Tab 3, p 164 and Tab 3.M, p 294].

[13] Baggio Affidavit, paras 23-25 and Ex L [AR Vol 1, Tab 3, pp 163-65 and Tab 3.L, pp 292-93].

[14] Baggio Affidavit, para 25 and Ex M [AR Vol 1, Tab 3, pp 164 and Tab 3.M, p 304].

### C. In December 2012, the MNR proposed to achieve through regulatory exemptions what it had failed to achieve through legislative amendment

18. By late 2012, it became clear that the government had not given up on its desire to change the ESA. However, the MNR would no longer try to persuade the Legislature to do this.

19. Rather, on December 5, 2012, the MNR first made public its intention to change the ESA outside of the legislative process. In a formal posting to the Environmental Bill of Rights ("EBR") Registry, the MNR proposed to make changes to the administration of the ESA so as to be "consistent" with the MNR's ongoing "Modernization of Approvals" process.[15] Modernization of Approvals (or "MAP") is an MNR policy framework aimed, in essence, at simplifying permit approvals so as to introduce cost savings and administrative efficiencies.[16]

20. A subsequent posting to the EBR Registry, on January 24, 2013, made clear that the MNR was in fact contemplating significant regulatory exemptions. The regulatory proposals that the MNR posted for public comment focused not on specific species, but rather on exempting entire industrial sectors and activities from various ESA prohibitions.[17]

21. These proposals provoked major public concern. The MNR received over 10,000 public comments on its December 2012 EBR Registry posting.[18] The Applicants' exhaustive efforts to share their concerns included meeting with MNR officials, writing to Minister David Orazietti and Premier Kathleen Wynne, and commenting on EBR Registry notices.[19]

22. In addition, through counsel and with other environmental groups, the Applicant Ontario Nature wrote twice to Minister Orazietti, in February and April 2013. These letters noted

[15] Schultz Affidavit, para 40 and Ex O [AR Vol 2, Tab 4, p 567-68 and Tab 4.O, pp 717-20].
[16] See MNR EBR Registry posting of 27 Sept 2012, Schultz Affidavit, Ex J [AR, Vol 2, Tab 4.J, pp 645-68].
[17] Schultz Affidavit, para 41 and Ex P [AR Vol 2, Tab 4, p 568 and Tab 4.P, pp 722-31].
[18] Schultz Affidavit, para 55 [AR Vol 2, Tab 4, pp 573].
[19] Baggio Affidavit, paras 47-53 and Ex T [AR Vol 1, Tab 3, pp 170-72 and Tab 3.T, pp 350-52]; Schultz Affidavit at paras 43, 48-54 and Exs Q, X, Y, Z, AA, & BB [AR Vol. 2, Tab 4, pp 569-73 and Tabs 4.Q, 4.X-4.BB, pp 732-40, 777-98].

concern that the Minister may not have met his duties under s. 57(1) of the ESA. Ontario Nature explained its view that s. 57(1) obliged the Minister to determine whether the MNR's regulatory proposal was likely to jeopardize the survival of, or have any other significant adverse effect on, *each* of the listed endangered and threatened species to which the regulation would apply.[20] Ontario Nature's correspondence also requested that, if the Minister *had* made a determination, that he provide the record before him when he made it.[21]

23. The Minister did not respond to Ontario Nature until July 18, 2013, after the Regulation had been made. His response asserted that he had formed an opinion under s. 57(1). He declined to provide the opinion and the record before him in reaching it, as had been requested.[22]

### D. In May 2013, the Minister purported to make a statutory determination under s. 57(1) of the ESA, and Cabinet purported to make the Regulation

24. As the Applicants learned after initiating this litigation, on May 1, 2013, Minister Orazietti signed the Minister's Determination, purportedly meeting his obligations under s. 57(1).[23]

25. Uncontroverted evidence suggests that Minister Orazietti signed his Determination *after* the regulation had been proposed to Cabinet, which appears to have occurred on April 24, 2013.[24]

26. In any event, Cabinet made the Regulation on May 15, 2013. It came to public attention on May 31, 2013, when it was published. It largely came into effect on July 1, 2013—one day after the expiration of the five-year period during which habitat protection was postponed.[25]

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[20] Schultz Affidavit, para 50 [AR Vol 2, Tab 4, p 571]. In addition, Ontario Nature alerted the Premier and Cabinet members to its concerns that the Minister may not have performed his s 57(1) duty. See Schultz Affidavit, para 53 and Exs AA, W, X and Y [AR Vol 2, Tab 4, p 572 and Tab 4.AA, 4.W-4.Y, pp 797-98, 772-91].
[21] Schultz Affidavit, para 50 [AR Vol 2, Tab 4, p 571].
[22] Schultz Affidavit, para 60 [AR Vol 2, Tab 4, p 575].
[23] Schultz Affidavit, paras 64-68 [AR Vol 2, Tab 4, pp 576-78].
[24] Schultz Affidavit, paras 71-73 [AR Vol 2, Tab 4, pp 578-79].
[25] O Reg 176/13, s 16 ["the Regulation"] [AR Vol 1, Tab 2.B, pp 62-154]. See also Schultz Affidavit at para 56 [AR Vol 2, Tab 3, p 573].

27. The Regulation amends Ontario Regulation 242/08 by purporting to introduce a broad suite of exemptions, for identified industrial activities, from the ESA's prohibitions. It does this primarily through the "Exemptions Requiring Notice to be Given on Registry" provisions. As with Bill 55, the Regulation exempts infrastructure-related activities, but also extends exemptions to industrial sectors including forestry and mining. The Regulation also echoes Bill 55 by exempting activities from criteria that must be met under ss. 17 and 18 to obtain authorization for those activities, including by significantly narrowing or eliminating the requirement that the activities ensure an "overall benefit" to the affected species.[26]

28. In his 2012/2013 Annual Report, the Environmental Commissioner of Ontario concluded that the Regulation accomplished, in part, what government had tried to do through Bill 55.[27]

### E. The Minister's Determination fails to assess 150 of the 155 endangered and threatened species to which the proposed regulation would apply

29. After initiating this litigation, the Applicants obtained the Minister's Determination from the Respondents.[28] At page 36, Minister Orazietti concurred with the recommended decision.

30. At the time of the Minister's Determination, 155 species were listed on the Species at Risk in Ontario List[29] as endangered or threatened.[30] These species–lichens, mosses, vascular plants, molluscs, insects, fishes, reptiles, birds and mammals–are noted in Schedule A to this factum.

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[26] See e.g., the Regulation, *ibid*, s 14, adding by amendment ss 23.4(4), 23.9(4), 23.10(2), 23.11(4), 23.12(1), 23.13(5)-(6), 23.14(3), 23.17(4), 23.20(2) to O Reg 242/08, each of which exempts the application of ss 9(1)(a) and 10(1) to certain activities, subject to conditions being met. See also the Regulation, s 10(1), adding by amendment s 22.1 to O Reg 242/08, which exempts forest operations approved under the *Crown Forest Sustainability Act, 1994* from the application of ss 9(1)(a) and 10(1).
[27] Baggio Affidavit, paras 68-69 and Ex DD, p 48 [AR Vol 1, Tab 3, pp 176-77 and Tab 3.DD, p 471].
[28] Schultz Affidavit, paras 64-68 [AR Vol 2, Tab 4, pp 576-78].
[29] ESA, s 7 compels a designated MNR official to create the Species at Risk in Ontario List through regulation. The List is prescribed in O Reg 230/08, which lists extirpated, endangered, threatened and special concern species in Schedules 1, 2, 3 and 4 respectively. As of the Minister's Determination on May 1, 2013, the List had last been amended on January 24, 2013 by O Reg 25/13.

**SCHEDULE "C"**

Excerpt of Ontario's Memorandum of Fact and Law,
*Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64

S.C.C. File No. 34649

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

**SHOPPERS DRUG MART INC., SHOPPERS DRUG MART (LONDON) LIMITED and SANIS HEALTH INC.**

Appellants

- and -

**MINISTER OF HEALTH AND LONG-TERM CARE, LIEUTENANT GOVERNOR-IN-COUNCIL OF ONTARIO and ATTORNEY GENERAL OF ONTARIO**

Respondents

S.C.C. File No. 34647

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

**KATZ GROUP CANADA INC., PHARMA PLUS DRUG MARTS LTD., and PHARMX REXALL DRUG STORES LTD.**

Appellants

- and -

**MINISTER OF HEALTH AND LONG-TERM CARE, LIEUTENANT GOVERNOR-IN-COUNCIL OF ONTARIO and ATTORNEY GENERAL OF ONTARIO**

Respondents

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# FACTUM OF THE RESPONDENTS, MINISTER OF HEALTH AND LONG-TERM CARE, LIEUTENANT GOVERNOR-IN-COUNCIL OF ONTARIO and ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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adopted."[85] However, this is the limit to the court's assessment of the regulation itself. In ascertaining what the regulation attempts to do, the court is not to assess the effectiveness of the regulation in achieving the objectives of the statute. The question for the court is not whether the regulation is the most effective way of achieving the goal, but whether it is authorized.

73. Ontario submits that the dissent in the Court of Appeal and the Divisional Court did not apply this approach, but rather, imposed a requirement on Ontario to demonstrate with evidence that the Private Label Regulations are valid because they are effective in achieving the purpose of the statutes. As correctly recognized by the majority, the court should be employing "genuine restraint" in reviewing regulations and "must be careful in evaluating government decisions" in "a major public policy domain involving the intersection of health care and public finance."[86] This means that "courts approach with great caution the review of regulations promulgated by the Governor (or Lieutenant-Governor) in Council"[87] because the making of regulations, as in this case, is an exercise of government policy-making that is not subject to review by the courts unless the regulations fall outside the scope of authority delegated by the parent statute. The courts should, therefore, construe the regulation-making authority broadly and strive to find an interpretation that renders the regulations at issue *intra vires*.

## QUESTION 3: EXTRINSIC EVIDENCE IS NOT RELEVANT TO ASSESSING THE *VIRES* OF A REGULATION

74. As the assessment of the validity of a regulation is an exercise in statutory interpretation, extrinsic evidence is not generally required to answer this inquiry. The Divisional Court, the dissent and the appellants all faulted Ontario for **not** providing evidence to demonstrate that the regulations are authorized. Ontario submits that this approach is incorrect for three reasons:

(a) It is contrary to the principles of statutory interpretation that require that the scope and meaning of the impugned regulation be interpreted by reading the plain words in the context of the legislative scheme as a whole;

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[85] *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C.J. No. 556, para. 14 (C.A.), **RBA, Tab 14, p. 229**.
[86] Court of Appeal Reasons at paras. 46, 73, **AR, Vol. 1, Tab 11, pp. 58, 67**.
[87] *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655 (C.A.) at para. 26, leave to appeal to SCC refused [2006] S.C.C.A. No. 70, **ABA, Vol. II, Tab 27, pp. 672-673**.

(b) It reverses the onus by requiring the government to adduce evidence to show that the regulation is valid rather than requiring the party challenging the regulation to demonstrate its invalidity; and

(c) It presumes that extrinsic evidence is admissible with respect to whether a regulation is permitted by the parent statute.

75. Given the presumption of validity, there is no question that the burden is on the appellants to demonstrate that the regulations are invalid. This is a heavy burden given that the court is to strive to construe a regulation as *intra vires* and only declare it *ultra vires* where such a construction is not possible. Despite this well-established burden, both the Divisional Court and the dissent in the Court of Appeal pointed to the lack of evidence presented by Ontario to establish that the Private Label Regulations are consistent with or rationally connected to the purposes of the *ODBA* and the *DIDFA* to lower drug costs and control the compensation to each participant in the drug supply chain.[88] This constituted an error of law as well as a misreading of the record before the courts below which included some evidence about the purpose of the Private Label Regulations.[89]

76. Ontario submits that not only was it incorrect for the Divisional Court and the dissent to reverse the onus and impose a requirement that Ontario demonstrate that the Private Label Regulations are valid by showing that they will achieve the purpose of the *ODBA* and the *DIDFA*, but in doing so, they stepped outside the proper role of the court and improperly questioned the effectiveness of Private Label Regulations. In addition, as recognized by the majority, the evidence that the Divisional Court and dissent suggested was lacking could not have been provided because "the actual effect of private labels on the market is hard to

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[88] Court of Appeal Reasons at paras. 98, 100, 107, 114 and 142, **AR, Vol. I, Tab 11, pp. 75, 78, 80, 87**: "**there is nothing in the record** that supports the conclusion that the decision to make the Regulations had anything to do with a concern about a possible future increase in drug prices" … "While I agree that the Legislation creates a complex scheme governing compensation arising out of the sale of drugs at various levels of the drug supply chain, I fail to see how, again **without any evidentiary support**, vertical integration of this nature might affect that scheme."; Divisional Court Reasons at para. 68, **AR, Vol. 1, Tab 3, p. 23**: "Nothing in the documentation produced provides any insight into why banning private label products would advance the purpose of the legislation." These statements were factually incorrect as Ontario did provide fact evidence of the purpose of the Private Label Regulations in the form of a letter from the Executive Officer to Sanis (see para. 52 *infra*).

[89] Exhibit R to the Affidavit of Brent Fraser sworn September 10, 2010, **AR, Vol V, Tab R, pp. 350-351**.

predict."[90] Moreover, it is nonsensical to suggest that evidence could be presented to show that the regulation is effective in achieving a particular goal when such evidence does not always exist at the time the regulation is passed.

77. Even if evidence of the effectiveness of the Private Label Regulations in achieving the purpose of the statutes could have been filed, Ontario submits that extrinsic evidence is not relevant to assessing the *vires* of a regulation because determining whether the regulation is authorized by the statute is a matter of statutory construction. There is no dispute that in interpreting a statute the court may look at extrinsic evidence of legislative history, such as Hansard, to establish legislative intent and purpose.[91] Evidence can also be admitted where a party has alleged irrationality or bad faith in the passing of regulations, neither of which is alleged by the appellants.[92]

78. Ontario submits that only limited extrinsic evidence should be admitted to establish the scope of a regulation-making authority and the purpose of a statute and regulation. This should be limited to evidence of legislative history such as Hansard or other standard documents issued in the normal course of law-making, such as Regulatory Impact Analysis Statements (RIAS) that are common practice in respect of regulations made under federal statutes.[93] It may also include any publicly available statements made during the consultation process on draft regulations[94] or at the time the regulation is passed. To require any other extrinsic evidence, such as policy or Cabinet documents or empirical studies that seek to show the LGIC's reasons for passing the

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[90] Court of Appeal Reasons at para. 65, **AR, Vol. I, Tab 11, p. 65**.
[91] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 25, **ABA, Vol. III, Tab 55, p. 704**.
[92] *R. v. Valley Paper Cycle Ltd.*, [2005] B.C.J. No. 2345 (Prov. Ct.) at para. 146, aff'd *R. v. Ambrosi*, [2008] B.C.J. No. 1286 (S.C.), **RBA, Tab 30, p. 508**: "… the need for credible evidence in applications where Cabinet decisions are attacked on the grounds of bad faith."
[93] The Regulatory Impact Analysis Statements (RIAS) is a rare example of admissible extrinsic evidence in the context of the challenge to the validity of a regulation. The intent, purpose, and background analysis of a proposed regulation are laid out in the RIAS, which is published in advance of the finalization and promulgation of the regulation. Courts have now readily adopted the use of a RIAS when interpreting a regulation. See France Houle, *Regulatory History Material as an Extrinsic Aid to Interpretation: An Empirical Study on the Use of RIAS by the Federal Court of Canada*, (2006) 19 Canadian Journal of Administrative Law and Practice 151-189, **RBA, Tab 11, pp. 131-158**.
[94] See *ODBA*, s. 18(8), **ABL, Tab 6, p. 18**; *DIDFA*, s. 14(10), **ABL, Tab 4, pp. 8-9**.

regulation would put the court into the arena of Cabinet decision-making.[95]

## QUESTION 4: THE PRIVATE LABEL REGULATIONS ARE AUTHORIZED BY THE *ODBA* AND THE *DIDFA* REGULATION-MAKING POWERS

79. As set out above, the first step in determining if the Private Label Regulations are authorized is to determine the purpose of the *ODBA* and *DIDFA* and to then ask whether the regulations conform with the scope of authority and the purpose of the statutes. However, this does not include assessing the efficacy of the regulations or the impact of the regulations on the appellants.

### A. Purpose of the *ODBA* and the *DIDFA*

80. The modern approach to statutory interpretation requires a consideration of the words of the statute as well as contextual factors, the two most important for this case being the statutory scheme and the purpose of the statutes. Unlike the interpretation advanced by the appellants and accepted by the dissent and Divisional Court, which applied a strictly textual interpretation to the Private Label Regulations and ignored the entire context in which the regulations are enacted, the majority correctly applied a full contextual interpretation which is consistent with the preferred approach of this Court.

81. While the Divisional Court and the dissent accepted that one of the purposes of the *ODBA* and the *DIDFA*, as previously accepted by the Court of Appeal for Ontario, is to ensure that drugs are available to the government and the public at the lowest price possible, these lower court decisions narrowly interpreted the means by which this goal is achieved. In doing so, the dissent and the Divisional Court focused solely on the ability of the government to fix the price of drugs as the only way to achieve lower prices. The Divisional Court thereby failed to appreciate the entire scheme and context of the statutes, namely that under both legislative schemes, Ontario not only fixes the maximum price it pays and members of the public pay for generic prescription drugs, but tightly regulates the conditions that participants must meet in

[95] *David Suzuki Foundation v. British Columbia (Attorney General)*, 2004 BCSC 620 at paras. 21-22, **RBA, Tab 10, p. 129**; *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at p. 115, **RBA, Tab 38, p. 589**.