

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

B E T W E E N:

FRIENDS OF SIMCOE FORESTS INC.

Applicant

- and -

MINISTER OF MUNICIPAL AFFAIRS AND HOUSING, LOCAL PLANNING APPEAL  
TRIBUNAL, CORPORATION OF THE COUNTY OF SIMCOE, TOWNSHIP OF  
SPRINGWATER, NICHOLYN FARMS INC.,  
EDWARD KRAJCIR and SCARLETT GRAHAM KRAJCIR

Respondents

**FACTUM OF THE APPLICANT**

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## PART I - OVERVIEW

1. This case is about a Minister acting beyond the limits of his executive power. The Minister of Municipal Affairs and Housing (“Minister”) enacted subsection 4(4) of Ontario Regulation 305/19 (“Regulation” or “Minister’s Regulation”) purportedly as a transitional regulation under section 19(1)(d) of the *Places to Grow Act, 2005* (“PGA”). In enacting s. 4(4), the Minister failed to meet a condition precedent under s. 19(1)(d) that a transitional regulation must provide for a “transitional matter.” Subsection 4(4) is *ultra vires* because it does not transition anything.
2. The discretion provided by s. 19(1)(d) of the *PGA* cannot be stretched so far as to allow the Minister to use the power for a purpose unrelated to transitional matters. In this case, the Minister used the power to facilitate the County of Simcoe’s (“County”) proposal to build a waste processing complex in the Freele County Forest.
3. The County’s proposal is being challenged by the Friends of Simcoe Forests Inc. (“Applicant” or “FSF”) at the Local Planning Appeal Tribunal (“Tribunal”) based on its failure to conform with the natural heritage policies of the Growth Plan, a provincial plan, issued under the *PGA*. The Applicant filed an Issues List with the Tribunal to this effect.
4. The Minister and the County brought a motion to strike all Growth Plan related issues from the Applicant’s Issues List on the basis of subsection 4(4) of the Regulation.

5. The Tribunal struck out all the Growth Plan related issues from the Applicant’s Issues List. The Tribunal’s decision was unreasonable because it relied on subsection 4(4) of the Regulation which was *ultra vires* its enabling statute.

## PART II - STATEMENT OF FACTS

6. The Applicant is an incorporated non-profit citizens group with a mandate to protect and conserve the forests of Simcoe County, and to preserve and extend parks and greenbelts.<sup>1</sup>
7. The Respondent County prepared and adopted Simcoe Official Plan Amendment 2 (“OPA 2”) to permit the establishment of a waste processing complex at 2976 Horseshoe Valley Road West in the Freele County Forest (“the proposed site”).<sup>2</sup>
8. The Respondent Minister issued a Notice of Decision approving OPA 2.<sup>3</sup>
9. The Applicant filed a notice of appeal with the Tribunal under section 17(36) of the *Planning Act* to challenge the Minister’s approval of OPA 2.<sup>4</sup> The Greater Golden

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<sup>1</sup> **Tribunal Record (“TR”), Tab 11:** Motion Record of Friends of Simcoe Forests Inc. (“**FSF Motion Record**”), Affidavit of Amanda Polley Montgomery affirmed January 6, 2020 (the “**Montgomery Affidavit**”), para 2, p. 693.

<sup>2</sup> **TR, Tab 11:** FSF Motion Record, Montgomery Affidavit, para 3, p. 694.

<sup>3</sup> **TR, Tab 11:** FSF Motion Record, Montgomery Affidavit, Exhibit “E”: Joint Case Synopsis of the County of Simcoe and the Minister of Municipal Affairs and Housing (the “**Joint Case Synopsis**”), para 64, p. 907.

<sup>4</sup> **TR, Tab 11:** FSF Motion Record, Montgomery Affidavit, paras 3-4, p. 694; **Tab 2:** Notice of Appeal Friends of Simcoe Forests Inc., pp. 18-22.

Horseshoe Plan, 2017 (“2017 Growth Plan”) was in force at that time.<sup>5</sup> In its appeal, the Applicant noted that the proposed site was a “significant wildlife habitat” and a “significant woodland.”<sup>6</sup> The Growth Plan deems such areas to be ecologically important. Significant wildlife habitats and significant woodlands are considered key natural heritage features and are protected from development by the natural heritage policies in subsections 4.2.2, 4.2.3 and 4.2.4 of the Growth Plan.<sup>7</sup>

10. In accordance with the Tribunal’s rules at that time, the Applicant filed its written legal argument and appeal record, including expert affidavits from a registered professional planner and three ecologists, with the Tribunal.<sup>8</sup>
  
11. The Applicant made two arguments relying on the Growth Plan in its written legal argument, supported by its expert affidavits. The first argument was that OPA 2 was not permitted because subsection 4.2.3(1)(c) of the 2017 Growth Plan does not allow infrastructure in key natural heritage features outside of settlement areas unless it has been authorized by an environmental assessment. The Applicant argued that this requirement

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<sup>5</sup> **TR, Tab 7:** Joint Motion Record of the Minister of Municipal Affairs and Housing and the Corporation of the County of Simcoe (the “**Joint Motion Record**”), para 29, p. 122; **Application Record of the Applicant (“APAR”), Tab 1:** Amended Notice of Application for Judicial Review of Friends of Simcoe Forests Inc., para 19, p. 9.

<sup>6</sup> **TR, Tab 2:** Notice of Appeal of Friends of Simcoe Forests Inc., p. 18.

<sup>7</sup> **Book of Authorities of the Applicant (“BAAP”), Tab 1:** Growth Plan for the Greater Golden Horseshoe (2017) (“**2017 Growth Plan**”), pp. 1-8; and **Tab 2:** A Place to Grow: Growth Plan for the Greater Golden Horseshoe (“**2019 Growth Plan**”), pp. 9-18.

<sup>8</sup> **TR, Tab 11:** FSF Motion Record, Montgomery Affidavit, paras 3-4, p. 694.

was not met because the site had not been the subject of an environmental assessment and accordingly the waste processing complex could not be placed in the Freele County Forest.<sup>9</sup>

12. The Applicant's second argument was that the project should not be allowed to proceed because the evidence did not demonstrate that there would be no negative impacts on key natural heritage features as required by subsection 4.2.2 of the 2017 Growth Plan.<sup>10</sup>
13. The Minister and the County filed a joint responding record including written legal argument and expert affidavits with the Tribunal.<sup>11</sup>
14. Subsequently, the Ministry of Municipal Affairs and Housing ("MMAH") posted notice of a regulation pursuant to the *Environmental Bill of Rights, 1993* on the Environmental Registry of Ontario ("ERO"). The ERO is an electronic registry through which government ministries are required to give public notice about changes to legislation, regulation, policies and instruments that affect the environment and provide the public an opportunity for comment.<sup>12</sup> The notice indicates that the Minister intended to modify O. Reg 311/06 to exempt OPA 2 from subsections 4.2.2, 4.2.3 and 4.2.4 of the 2019 Growth Plan.<sup>13</sup> The

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<sup>9</sup> **TR, Tab 11:** FSF Motion Record, Montgomery Affidavit, Exhibit "B": Case Synopsis of Friends of Simcoe Forests Inc. ("**FSF Case Synopsis**"), paras 64-72, pp. 717-719.

<sup>10</sup> **TR, Tab 11:** FSF Motion Record, Montgomery Affidavit, Exhibit "B": FSF Case Synopsis, paras 73-111, pp. 719-727.

<sup>11</sup> **TR, Tab 11:** FSF Motion Record, Montgomery Affidavit, Exhibit "E": Joint Case Synopsis, pp. 895-934.

<sup>12</sup> **APAR, Tab 5:** Affidavit of Amanda Montgomery affirmed October 29, 2020 (the "**Montgomery Affidavit**"), para 3, p. 31.

<sup>13</sup> **APAR, Tab 5:** Montgomery Affidavit, para 4, p. 31.



notice further claimed that the Minister would make the modification “such as to not unduly disrupt planning matters that may be impacted by the policy changes in the new Plan.”<sup>14</sup>

15. Following the posting of the notice of a regulation, on May 16, 2019, the Lieutenant Governor in Council revoked the 2017 Growth Plan and replaced it with the *Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2019* (“2019 Growth Plan”).<sup>15</sup> Subsections 4.2.2, 4.2.3 and 4.2.4 of the two versions of the Growth Plan, as relied upon by the Applicant, are identical as they apply to the proposed site (see **Appendix “A”**).
16. A few weeks later, on June 3, 2019, the Applicant sent a request pursuant to the *Freedom of Information and Protection of Privacy Act* (“FOI”) to MMAH for access to all records in its possession about the proposed modification to the Transitional Regulation as it related to OPA 2.<sup>16</sup>
17. On September 6, 2019, the Minister amended Ontario Regulation 311/06 – Transitional Matters – Growth Plans, under the Places to Grow Act, 2005 by adding subsection 4(4) which states that the County’s OPA 2 “shall be continued and disposed on in accordance with the 2019 Growth Plan, except for subsection 4.2.2, 4.2.3 and 4.2.4.”<sup>17</sup> Subsection 4(4) of the Regulation was passed pursuant to s. 19(1)(d) of the PGA, which states:

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<sup>14</sup> **APAR, Tab 5:** Montgomery Affidavit, “Exhibit “A”, p. 2.

<sup>15</sup> **TR, Tab 7:** Joint Motion Record, Affidavit of Tiffany Thompson sworn December 27, 2019, Exhibit “E”: OIC 641/2019, p. 221.

<sup>16</sup> **APAR, Tab 5:** Montgomery Affidavit, para 8, p. 32.

<sup>17</sup> **APAR, Tab 5:** Montgomery Affidavit, para 8, p. 32.

19(1) The Minister may make regulations,

(d) providing for transitional matters which, in the opinion of the Minister, are necessary or desirable to facilitate the implementation of this Act, a provision of this Act or a growth plan.<sup>18</sup>

18. The MMAH posted a notice of decision on the ERO after the Minister’s Regulation was enacted. The notice of decision confirmed that OPA 2 would not be subject to subsections 4.2.2, 4.2.3. and 4.2.4 of the 2019 Growth Plan. Under the heading “Impacts on the Environment” the notice states [t]here are no changes to existing A Place to Grow policies that protect the environment and health and safety of Ontarians.”<sup>19</sup>
19. Following the enactment of the Minister’s Regulation, the Tribunal ordered all parties to provide an Issues List indicating the matters that would be addressed at the hearing.<sup>20</sup>
20. As set out above, the Applicant listed its two Growth Plan-related issues: the lack of an environmental assessment authorization and the County’s failure to demonstrate that the establishment of the waste processing complex would result in no negative impacts on key natural heritage features.<sup>21</sup>
21. The Minister and the County brought a joint motion to the Tribunal to strike all Growth Plan related issues from the Applicant’s Issues List relying on subsection 4(4) of the

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<sup>18</sup> **BAAP, Tab 5:** *Places to Grow Act, 2005*, SO 2005, c 13, s 19(1)(d) (“*PGA*”), p. 32.

<sup>19</sup> **APAR, Tab 5:** Montgomery Affidavit, Exhibi “B”, p. 50.

<sup>20</sup> **TR, Tab 6:** Tribunal Decision with Notice of Third CMC (Dated December 11, 2019), para 15, p. 108.

<sup>21</sup> **TR, Tab 11:** FSF Motion Record, Montgomery Affidavit, Exhibit “H”: Friends of Simcoe Forests Inc. Issues List, Issue 2 and Issue 7, pp. 951-952.

Regulation.<sup>22</sup> The Minister and the County asserted that the 2017 Growth Plan did not apply because it had been revoked and replaced by the 2019 Growth Plan, and the natural heritage policies did not apply to OPA 2 because of the newly enacted subsection 4(4) of the Regulation.

22. At the December 13, 2019, case management conference the Applicant's counsel advised the Tribunal that the FOI documents requested of MMAH may be relevant to the joint motion and that it would be prejudicial for FSF if the motion to strike was heard prior to receiving these documents. However, the Tribunal ordered the responding parties, including the Applicant, to file their responses to the joint motion.<sup>23</sup> The Applicant received the FOI documents from MMAH after its response on the motion had been filed.<sup>24</sup>
23. On September 18, 2020, the Tribunal granted the motion to strike.<sup>25</sup>
24. In this application for judicial review, the Applicant is challenging the validity of subsection 4(4) of the Regulation and the Tribunal's decision to strike out the Applicant's issues which relate to the 2019 Growth Plan.<sup>26</sup>

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<sup>22</sup> **TR, Tab 7:** Joint Motion Record, paras 3(a), 28-40, pp. 112-124.

<sup>23</sup> **APAR, Tab 5:** Montgomery Affidavit, paras 12-13, pp. 33-34 and Exhibit "I".

<sup>24</sup> **APAR, Tab 5:** Montgomery Affidavit, para 20, p. 35.

<sup>25</sup> **TR, Tab 13:** Tribunal Decision on Motion (Dated September 18, 2020), para 4, p. 1002.

<sup>26</sup> **TR, Tab 13:** Tribunal Decision on Motion (Dated September 18, 2020), paras 4, 20-23, pp. 1002, 1004-1005.

## PART III – STATEMENT OF ISSUES AND LAW

### A. POINTS IN ISSUE

25. The issues before the Court are:

- (1) Is subsection 4(4) of the Regulation *ultra vires*? This overarching question breaks down into the following three sub-issues:
  - i. Did the Minister fail to meet a condition precedent in s. 19(1)(d) of the *PGA* that subsection 4(4) of the Regulation must provide for a transitional matter?
  - ii. Is subsection 4(4) of the Regulation *ultra vires* because it was inconsistent with the objects and purposes of the *PGA*?
  - iii. Did the Minister consider extraneous and irrelevant matters in enacting subsection 4(4) of the Regulation thereby exceeding his jurisdiction under s. 19(1)(d) of the *PGA*?
- (2) Is the Tribunal's decision to strike Issue 2 and Issue 7 from the Applicant's Issues List based on subsection 4(4) of the Regulation unreasonable?

### B. THE STANDARD OF REVIEW

26. The Minister's Regulation and the Tribunal's decision should both be reviewed on a standard of reasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, the Supreme Court of Canada held that a determination of the standard of review begins with the presumption that reasonableness is the applicable standard in all cases, subject to listed exceptions.<sup>27</sup> None of the exceptions outlined in *Vavilov* apply in this case.<sup>28</sup>

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<sup>27</sup> **BAAP, Tab 6:** [Canada \(Minister of Citizenship and Immigration\) v Vavilov](#), 2019 SCC 65 at paras 16-17, 23, 68-70, pp. 92-93, 96, 124-126 .

<sup>28</sup> **BAAP, Tab 6:** [Canada \(Minister of Citizenship and Immigration\) v Vavilov](#), 2019 SCC 65 at paras 16-17, 23, 68-70, pp. 92-93, 96, 124-126 ; and **Tab 7:** [Innovative Medicines Canada v Canada \(Attorney General\)](#), 2020 FC 725 at

## C. SUBSECTION 4(4) OF THE REGULATION IS *ULTRA VIRES*

### 1) Subsection 4(4) is ultra vires because it does not address a transitional matter

27. Section 19(1)(d) of the *PGA* allows the Minister to “make regulations providing for transitional matters.”<sup>29</sup> Section 19(2)(a) further affirms that a regulation under s. 19(1)(d) may provide for “transitional matters” with respect to proceedings that were commenced before or after a growth plan comes into effect.<sup>30</sup>
28. The Supreme Court of Canada held in *Katz Group Canada Inc v Ontario* that although regulations benefit from a presumption of validity, they will be ruled *ultra vires* if they fail to comply with a condition precedent in the enabling statute.<sup>31</sup> Subsection 4(4) does not meet that requirement of the *Katz* test because it does not address a transitional matter as required by s. 19(1)(d).
29. Discretionary decisions by Ministers of the Crown generally receive the highest standard of deference from a court.<sup>32</sup> But where there is a condition precedent to the exercise of

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paras 61-62, pp. 291-292; and **Tab 8:** [Canadian Council for Refugees v Canada \(Immigration, Refugees and Citizenship\)](#), 2020 FC 770 at para 51, p. 371.

<sup>29</sup> **BAAP, Tab 5:** *PGA*, s 19(1)(d), p. 32.

<sup>30</sup> **BAAP, Tab 5:** *PGA*, s 19(2)(a), p. 32.

<sup>31</sup> **BAAP, Tab 9:** [Katz Group Canada Inc v Ontario \(Health and Long-Term Care\)](#), 2013 SCC 64 at para 27, p. 428, citing [Ontario Federation of Anglers & Hunters v Ontario \(Ministry of Natural Resources\)](#), (2002), 211 DLR (4th) 741 at para 41.

<sup>32</sup> **BAAP, Tab 10:** [Suresh v Canada \(Minister of Citizenship and Immigration\)](#), 2002 SCC 1 at paras 29-41, pp. 459-465; and **Tab 11:** [Mount Sinai Hospital Centre v Quebec \(Minister of Health and Social Services\)](#), 2001 SCC 41 at para 58, p. 544.

discretion, that condition must be fulfilled for the exercise of discretion to be held lawful.<sup>33</sup>

The failure to comply with a condition precedent in passing a regulation deprives the Minister of jurisdiction and constitutes a fatal jurisdictional flaw.<sup>34</sup>

30. Contrary to the County and the Minister’s joint submission to the Tribunal, the Minister does not have a *carte blanche* power under s. 19(1)(d) of the *PGA* to enact a transitional regulation each time a new growth plan comes into effect.<sup>35</sup> Rather, the Minister’s power to enact a regulation under this power is circumscribed by the term “transitional.” In other words, the existence of a “transitional matter” is a mandatory statutory precondition that must be met before the Minister can exercise his power to make a regulation.

**(a) What is a transitional matter?**

31. The term “transition” is defined as “the process or a period of changing from one state to another”.<sup>36</sup>

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<sup>33</sup> **BAAP, Tab 12:** [Greenpeace v Minister of the Environment \(Ontario\)](#), 2019 ONSC 5629 at para 34, p. 581.

<sup>34</sup> **BAAP, Tab 13:** [Thorne's Hardware Ltd v The Queen](#), [1983] 1 SCR 106 at 111, p. 608; and **Tab 9:** [Katz Group Canada Inc v Ontario \(Health and Long-Term Care\)](#), 2013 SCC 64 at para 27, p. 428; and **Tab 14:** [Ontario Federation of Anglers & Hunters v Ontario \(Ministry of Natural Resources\)](#), (2002), 211 DLR (4th) 741 at para 41, p. 629, citing Donald JM Brown & John Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Carswell, 1998) (loose-leaf), ch 12 at paras 12:4441-12:4443; and **Tab 15:** [Animal Alliance of Canada v Ontario \(Minister of Natural Resources\)](#), 2014 ONSC 2826 at para 11, p. 639; and **Tab 16:** [Hanna v Ontario \(Attorney General\)](#), 2011 ONSC 609 at paras 11-12, p. 655.

<sup>35</sup> **TR, Tab 12:** Joint Reply of the Minister of Municipal Affairs and Housing and the Corporation of the County of Simcoe to Responses on Motion (Dated January 10, 2020), paras 13-16, pp. 988-989.

<sup>36</sup> **BAAP, Tab 17:** *Concise Oxford English Dictionary*, 12th ed (New York, United States: Oxford University Press), *sub verbo* “transition”, p. 666 [emphasis added].

32. In *Ontario v Miller*, the Ontario Superior Court of Justice reflected upon the circumstances in which a transitional regulation was appropriate and held that the purpose of a transitional regulation under the *PGA* is to “grandfather persons who have been “in the mill” [...] and, out of a sense of equity, to protect them from the unfairness of changing rules within a planning system that is, and must be, dynamic.”<sup>37</sup> [emphasis added]
33. The Local Planning Appeal Tribunal reiterated in *Bolton North Hill Landowners Group Inc v Peel (Region)* that the purpose of a transitional regulation under the *PGA* “is to protect against the unfairness of changing the ‘rules’ [...]”<sup>38</sup>
34. The Applicant submits that the purpose of s. 19(1)(d) of the *PGA* is to allow the Minister to ensure predictability and stability in planning matters and proceedings where the Growth Plan rules change mid-stream. Where there are no modifications to the applicable provisions in a new Growth Plan, the Minister does not have the authority to enact a regulation under s.19(1)(d) for another purpose, in this case, to remove natural heritage protections from the proposed site.
35. A significant concern with transitional regulations is that changing rules that relate to an ongoing matter may risk violating the principles of fairness and the rule of law. As Professor Sullivan states:

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<sup>37</sup>BAAP, Tab 18: [Her Majesty the Queen in Right of Ontario v Miller et al](#), 2014 ONSC 6131 at para 19, p. 670.

<sup>38</sup>BAAP, Tab 19: [Bolton North Hill Landowners Group Inc v Peel \(Region\)](#), 2020 CanLII 89024 (ON LPAT) at para 57, p. 687.

The most compelling concern underlying transitional law is the rule of law and the values served by the rule of law – certainty, predictability, stability, rationality and formal equality. One of the great virtues of the law is that it provides a stable framework within which people can carry on their activities. Law that changes too frequently or quickly or in unexpected ways undermines the sense of security of citizens and their willingness to participate in relationships and activities on which a stable society and economy depend. Principles of fairness are also important.<sup>39</sup>

36. The Minister’s Regulation fundamentally undermines the values which Professor Sullivan identifies as informing the rule of law. It eviscerated the Applicant’s main grounds of appeal at the Tribunal and did so after the Applicant had retained ecological experts and filed their affidavit with the Tribunal. The Minister’s Regulation, therefore, creates unfairness to the Applicant and brings unpredictability into the planning process – the very conditions that a transitional regulation is intended to safeguard against.

**(b) There is no matter to transition because the natural heritage protections in both Growth Plans are identical**

37. The natural heritage provisions in the 2017 and 2019 Growth Plans are identical as they apply to OPA 2 (see **Appendix “A”**).<sup>40</sup>
38. The only difference between the natural heritage provisions in the two plans is that the 2017 Growth Plan states that the province will undertake mapping of the Natural Heritage System of the Growth Plan<sup>41</sup> whereas the 2019 Growth Plan confirms that provincial

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<sup>39</sup> **BAAP, Tab 20:** Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2008), pp. 691-692.

<sup>40</sup> **BAAP, Tab 1:** 2017 Growth Plan, pp. 2-7; and **Tab 2:** 2019 Growth Plan, pp. 11-16.

<sup>41</sup> **BAAP, Tab 1:** 2017 Growth Plan, Policy 4.2.2.1, p. 2.



mapping was completed.<sup>42</sup> However, the completion of provincial mapping in the growth plan areas has no bearing on this case. It is undisputed that the natural heritage protections in both versions of the Growth Plan apply to this site.<sup>43</sup> The County's experts confirmed that the site for the proposed waste processing complex is comprised of "significant woodlands and significant wildlife habitat" and thus falls within the definition of key natural heritage features.<sup>44</sup>

**(c) Internal staff emails reveal that the Ministry was not addressing a transitional matter**

39. The internal emails the Applicant obtained through its FOI request confirm that s. 4(4) of the Regulation was unrelated to any transitional matter. Instead, the emails establish that its real purpose was to facilitate the establishment of the County's waste processing complex in the Freele County Forest.
40. On May 30, 2019, Allyson Switzman of MMAH wrote an email to Mirrun Zaveri, also of MMAH, that a reporter was inquiring about the proposed transitional provision related to OPA 2. She noted that the matter had been flagged as "contentious" for the Deputy Minister and Minister and that the Assistant Deputy Minister would approve the response:

"I've just received a voicemail from a reporter in Barrie about a specific matter proposed for transition in the current EBR posting that we have out there on the transition regulation. For context we anticipated (and flagged for DM and MO) that this aspect of the proposal might be somewhat contentious, and... we received several submissions from members of the

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<sup>42</sup> **BAAP, Tab 2:** 2019 Growth Plan Policy 4.2.2.1, p. 11.

<sup>43</sup> **TR, Tab 11:** Montgomery Affidavit, Exhibit "C": Affidavit of Jennifer Lawrence, paras 32-33, pp. 746-747; and Exhibit "E": Joint Case Synopsis, paras 119-135, pp. 916-918.

<sup>44</sup> **TR, Tab 11:** Affidavit of Jennifer Lawrence, paras 32-33, pp. 746-747; **BAAP, Tab 1:** 2017 Growth Plan, p. 8; and **Tab 2:** 2019 Growth Plan, p. 17.

public about this specific matter. I have flagged the request for comms (see below) and we've quickly drafted the following brief response. If you are ok with this I'll move it forward for ADM approval."<sup>45</sup>

41. Mirrum Zaveri responded to Allyson Switzman's email: "Hi – will the journalist understand what we mean by transition?"<sup>46</sup>
42. In response, Allyson Switzman states: "... I agree that the meaning of the word 'transition' as a verb is not always clear, so I've suggested some minor clarifying edits highlighted below."<sup>47</sup>
43. Allyson Switzman proceeded to delete the word "transition" in the proposed explanation of subsection 4(4) for the journalist, replacing it with the terms "facilitate" and "address" [highlights and strike through in original]:
  - Through consultation on Proposed Amendment 1 and the proposed technical and housekeeping changes to the transition regulation, the Ministry received requests to use the regulation to help facilitate ~~transition~~ specific planning matters that are far along in their approvals.
  - One of the matters raised through this process was County of Simcoe Official Plan Amendment 2.
  - The government is now consulting on a proposal to use the regulation to address ~~transition~~ this matter and several others so that they can continue without needing to apply the policy changes in this new Plan. It is anticipated that this will support timely resolution of these matters.<sup>48</sup>

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<sup>45</sup> APAR, Tab 5: Montgomery Affidavit, para 28(v), p. 40; and Tab 5, Exhibit "X": Email from Allyson Switzman (Dated May 30, 2019) p. 119.

<sup>46</sup> APAR, Tab 5, Exhibit "Y": Email from Allyson Switzman (Dated May 30, 2019), pp. 120-121.

<sup>47</sup> APAR, Tab 5: Montgomery Affidavit, para 28(vi), pp. 41-42; and Tab 5, Exhibit "Y": Email from Allyson Switzman (Dated May 30, 2019), pp. 120-121.

<sup>48</sup> APAR, Tab 5, Exhibit "W": Email from Allyson Switzman (Dated May 30, 2019), p. 118.

44. The Concise Oxford English Dictionary defines “facilitate” as to “make an (action or process) possible or easier.”<sup>49</sup> In contrast to the term “transition”, which is “the process or a period of changing from one state to another”<sup>50</sup>, to “facilitate” a planning matter does not involve addressing changing circumstances. Rather, as Allyson Switzman clarifies in her response to the journalist, the real purpose of subsection 4(4) of the Regulation was to support the “timely resolution” of the matter.<sup>51</sup>
45. The Assistant Deputy Minister of the Ontario Growth Secretariat at MMAH approved Allyson Switzman’s revised response to the media inquiry.<sup>52</sup> All references to the term “transition” were deleted.
46. The emails between MMAH staff demonstrate that they erroneously assumed that expediting the establishment of the waste processing complex met the requirement for a transitional matter under s. 19(1)(d) of the *PGA*.

**(d) The Environmental Registry of Ontario Notice demonstrates there was no transitional matter**

47. In addition, the notice of decision about the Minister’s Regulation establishes that there were no changes to the level of environmental protection afforded by the natural heritage

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<sup>49</sup> **BAAP, Tab 17:** *Concise Oxford English Dictionary*, 12th ed (New York, United States: Oxford University Press), *sub verbo* “facilitate”, p. 665.

<sup>50</sup> **BAAP, Tab 17:** *Concise Oxford English Dictionary*, 12th ed (New York, United States: Oxford University Press), *sub verbo* “transition”, p. 666.

<sup>51</sup> **APAR, Tab 5, Exhibit “W”:** Email from Allyson Switzman (Dated May 30, 2019), p. 118.

<sup>52</sup> **APAR, Tab 5:** Montgomery Affidavit, para 28(vii), pp. 42-43; and **Tab 5, Exhibit “Z”:** Email from Christina Thomas, Ministry of Municipal Affairs and Housing to Rachel Widakdo et al, Ministry of Municipal Affairs and Housing (Dated May 31, 2019), p. 122.

provisions when the 2019 Growth Plan came into effect.<sup>53</sup> Consequently, there were no transitional matters that needed to be addressed in relation to OPA 2.

48. In summary, the emails between MMAH staff and the notice of decision establish that subsection 4(4) was not intended to address a transitional matter. The Minister, therefore, failed to comply with a mandatory precondition in s.19(1)(d) and subsection 4(4) of the Regulation is *ultra vires*.

**2) The Transitional Regulation is inconsistent with the purpose and objectives of the PGA**

49. It is well established that subordinate legislation will be *ultra vires* if its purposes are inconsistent with the objectives of its enabling act or the scope of its statutory mandate.<sup>54</sup> A regulation must also be enacted “within the spirit” of the enabling statute and strictly in accordance with the regulation-making power.<sup>55</sup>
50. In *Katz*, the Supreme Court held that the “challenged regulation and the enabling statute should be interpreted using a broad and purposive approach...consistent with [the] Court’s approach to statutory interpretation generally.”<sup>56</sup> The regulation-making authority

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<sup>53</sup> **APAR, Tab 5:** Montgomery Affidavit, Exhibit “B”: ERO 019-0018, pp. 49-55.

<sup>54</sup> **BAAP, Tab 9:** [Katz Group Canada Inc v Ontario \(Health and Long-Term Care\)](#), 2013 SCC 64 at para 24, p. 427.

<sup>55</sup> **BAAP, Tab 21:** [Yu et al v The Attorney General of British Columbia](#), 2003 BCSC 1869 at para 67, p. 721, citing *R v National Fish Co Ltd*, [1931] Ex CR 73 at 81-82.

<sup>56</sup> **BAAP, Tab 9:** [Katz Group Canada Inc v Ontario \(Health and Long-Term Care\)](#), 2013 SCC 64 at para 26, pp. 427-428.

conferred on the Minister by s. 19(1)(d), thus, must be read in its entire context, and harmoniously with the legislative scheme and the objects of the *PGA*.<sup>57</sup>

**(a) The object and purpose of the *PGA* is to direct and control urban growth whilst protecting the natural environment**

51. The *PGA* was enacted to direct urban growth away from important natural heritage areas. The *PGA* directs where and how urban growth can occur while ensuring protection of the natural environment. Section 1 of the *PGA* sets out the following four purposes:

(a) to enable decisions about growth to be made in ways that sustain a robust economy, build strong communities and promote a healthy environment and a culture of conservation;

(b) to promote a rational and balanced approach to decisions about growth that builds on community priorities, strengths and opportunities and makes efficient use of infrastructure;

(c) to enable planning for growth in a manner that reflects a broad geographic perspective and is integrated across natural and municipal boundaries;

(d) to ensure that a long-term vision and long-term goals guide decision-making about growth and provide for the co-ordination of growth policies among all levels of government.<sup>58</sup>

52. Section 1 must be read in a manner consistent with the preamble of the *PGA*. In particular, the Preamble states that “building complete and strong communities, making efficient use of existing infrastructure and preserving natural and agricultural resources will contribute to maximizing the benefits, and minimizing the costs, of growth.”<sup>59</sup> The Preamble further

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<sup>57</sup> BAAP, Tab 7: *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725 at paras 180, 183, pp. 327-328.

<sup>58</sup> BAAP, Tab 5: *PGA*, ss 1(a)-(d), pp. 25-26.

<sup>59</sup> BAAP, Tab 5: *PGA*, preamble, p. 25.

states that “identifying where and how growth should occur will support improved global competitiveness, sustain the natural environment and provide clarity for the purpose of determining priority of infrastructure investments.”<sup>60</sup>

53. The Hansard debates from the first and second reading of the *PGA* reflect the considerations identified in the Preamble. When it was introduced in the Legislature in 2004, the Hon. David Caplan, Minister of Public Infrastructure Renewal, made the following statements:

This proposed legislation would ensure that whatever we do, we would always ensure the protection of our environment, our agricultural lands and our natural resources (emphasis added).<sup>61</sup>

By the year 2031, we estimate that more than four million additional residents will call Ontario home. We must plan now for that growth. We must build in a way that integrates and brings together all the elements required to build strong communities and a robust economy, while at the same time protecting the environment and other valuable natural resources (emphasis added).<sup>62</sup>

[...]

By showing where growth should occur, it will help us to develop the public infrastructure needed to support that growth, while at the same time protecting for future generations the green spaces so much a part of the kind of quality of life that we want; and support the agricultural lands that we’re going to need to support our population and the natural systems that we desperately need to preserve. Those are the places where growth should not occur (emphasis added).<sup>63</sup>

[...]

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<sup>60</sup> **BAAP, Tab 5:** *PGA*, preamble, p. 25.

<sup>61</sup> **BAAP, Tab 22:** Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 80A (28 October 2004), p. 759.

<sup>62</sup> **BAAP, Tab 22:** Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 80A (28 October 2004), p. 759.

<sup>63</sup> **BAAP, Tab 23:** Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 114 (2 March 2005), p. 817.

So in some parts of Ontario we got sprawl, gridlock, air pollution, inefficient use of infrastructure and lost green spaces... That is not a pattern we are willing to repeat (emphasis added).<sup>64</sup>

54. The *PGA* achieves its objectives by designating certain geographic areas of the province as growth plan areas.<sup>65</sup> The Minister is required to develop a growth plan for a designated “growth plan area.”<sup>66</sup> A growth plan can contain specific policies, goals and criteria to protect sensitive and significant lands, like the natural heritage protections in subsections 4.2.2, 4.2.3 and 4.2.4.<sup>67</sup>
55. A decision under the *Planning Act* made by a municipal council, minister, government ministry, or an administrative body, including the Tribunal, must conform with a Growth Plan as it relates to a growth plan area.<sup>68</sup>
56. In the event of a conflict between the growth plan and an official plan, a zoning by-law, or a policy statement issued under section 3 of the *Planning Act*, the growth plan prevails.<sup>69</sup>

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<sup>64</sup> **BAAP, Tab 23:** Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 114 (2 March 2005), p. 818

<sup>65</sup> **BAAP, Tab 5:** *PGA*, s 3(a), p. 26.

<sup>66</sup> **BAAP, Tab 5:** *PGA*, s 4, p. 26.

<sup>67</sup> **BAAP, Tab 5:** *PGA*, s 6(d)(i)-(v), pp. 26-27.

<sup>68</sup> **BAAP, Tab 5:** *PGA*, s 14(1), p. 30.

<sup>69</sup> **BAAP, Tab 5:** *PGA*, s 14(2), p. 30.

57. The growth plan is, thus, the instrument through which *PGA* achieves its objectives, including that urban growth and infrastructure is directed away from important natural heritage features and systems.

**(b) The Regulation is inconsistent with the PGA**

58. Courts will find a regulation to be *ultra vires* on the basis of inconsistency with its parent statute in egregious cases.<sup>70</sup> This involves circumstances where the subordinate legislation is “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose of the enabling statute.<sup>71</sup>
59. In *Tesla Motors Canada ULS v Ontario (Ministry of Transport)*, this Court quashed the Minister of Transportation’s decision to exclude Tesla from the two-month extension of government subsidies for electric car buyers because it was based on irrelevant considerations.<sup>72</sup> In that case, the government cancelled a subsidy program aimed at promoting the purchase of electric vehicles under the *Public Transportation and Highway Improvement Act*. There was a two-month transition period before the program came to an end, but Tesla was singled out and excluded because it was not a “franchised automobile dealer” in Ontario.<sup>73</sup> In quashing the Minister’s decision, the Court noted that the

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<sup>70</sup> BAAP, Tab 9: [Katz Group Canada Inc v Ontario \(Health and Long-Term Care\)](#), 2013 SCC 64 at 28, p. 428; and Tab 24: *Re Doctors Hospital and the Minister of Health et al* (1976), 12 OR (2d) 164 at 8-9, pp. 854-855.

<sup>71</sup> BAAP, Tab 9: [Katz Group Canada Inc v Ontario \(Health and Long-Term Care\)](#), 2013 SCC 64 at 28, p. 428.

<sup>72</sup> BAAP, Tab 25: [Tesla Motors Canada ULC v Ontario \(Ministry of Transportation\)](#), 2018 ONSC 5062 at para 61, pp. 876-877.

<sup>73</sup> BAAP, Tab 25: [Tesla Motors Canada ULC v Ontario \(Ministry of Transportation\)](#), 2018 ONSC 5062 at paras 15-17, pp. 860-861.



Minister's discretionary decision was not related to any of the conservationist purposes of the electric car subsidy program, nor was it related to any purpose under the *Public Transportation and Highway Improvement Act*.<sup>74</sup> Therefore, it could not stand.

60. The reasoning from *Tesla* applies equally to the facts in this case. There is no rational connection between subsection 4(4) of the Regulation and the object and purpose of the *PGA*, which is to direct urban growth away from natural heritage features and systems. The sole reason the Minister enacted subsection 4(4) was to facilitate the establishment of a waste processing complex in an area that had been protected from development by the natural heritage provisions in the 2017 Growth Plan and the 2019 Growth Plan. As such subsection 4(4) is wholly unrelated, extraneous and contrary to the purpose of the *PGA*.

**(c) The Regulation was made for a purpose not authorized by the PGA**

61. Discretionary powers granted to a Minister must be exercised reasonably and according to law and cannot be exercised for a collateral object or an extraneous or irrelevant purpose.<sup>75</sup> As Justice Rand stated in *Roncarelli v Duplessis*, “there is no such thing as absolute or untrammelled “discretion.””<sup>76</sup> In other words, “[d]ecision-makers cannot simply do as they

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<sup>74</sup> BAAP, Tab 25: [Tesla Motors Canada ULC v Ontario \(Ministry of Transportation\)](#), 2018 ONSC 5062 at para 61, pp. 876-877.

<sup>75</sup> BAAP, Tab 26: [Roncarelli v Duplessis](#), [1959] SCR 121 at 140, p. 900; and Tab 25: [Tesla Motors Canada ULC v Ontario \(Ministry of Transportation\)](#), 2018 ONSC 5062 at paras 50-53, pp. 871-873.

<sup>76</sup> BAAP, Tab 26: [Roncarelli v Duplessis](#), [1959] SCR 121 at 140, p. 900.

please.”<sup>77</sup> Rather, regulatory discretion must be exercised within a specific, legal framework.<sup>78</sup>

62. A discretionary decision by a public authority “may be quashed if the decision-maker has considered irrelevant grounds in the decision-making process or made the decision for a purpose other than that stipulated in its enabling statute. An irrelevant ground is one that is wholly outside the policy or intention of the enabling statute.”<sup>79</sup>
63. Section 19(1)(d) grants the Minister discretion to make a transitional regulation if, in the Minister’s opinion, it will “facilitate the implementation of the *PGA*, a provision of the *PGA* or a growth plan.”<sup>80</sup> The Applicant submits that there is absolutely no evidence that the Minister turned his mind to these requirements, prior to enacting subsection 4(4) of the Regulation.
64. In *Re Multi-Malls Inc v Ontario (Minister of Transportation and Communications)* the Ontario Court of Appeal quashed the Minister of Transportation and Communication’s refusal to issue certain permits because it was based on irrelevant considerations. In that case, the Minister had refused to issue the permits under a law regulating highways as a means to prevent Multi-Malls from developing a shopping centre. The Court held that the denial of the permits had to be exercised in relation to traffic matters as opposed to land

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<sup>77</sup> BAAP, Tab 27: Sara Blake, *Administrative Law in Canada*, 5th ed (LexisNexis: Toronto, 2011) at pp. 950-951.

<sup>78</sup> BAAP, Tab 28: *Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at para 33, p. 971.

<sup>79</sup> BAAP, Tab 29: Guy Régimbald, *Canadian Administrative Law*, 2nd ed (LexisNexis: Toronto, 2015) at p. 982.

<sup>80</sup> BAAP, Tab 5: *PGA*, s 19(1)(d), p. 32.

use planning concerns, which were within the mandate of a different government ministry.<sup>81</sup>

65. Here, the correspondence from the County to the MMAH obtained through the Applicant's FOI request reveals that the County's request for subsection 4(4) was made to further the goals and objectives of the *Waste-Free Ontario Act, 2016*<sup>82</sup>, *Resource Recovery and Circular Economy Act, 2016* and *Ontario's Food and Organic Waste Policy Statement, 2018*, all of which fall within the mandate of the Ministry of Environment, Conservation and Parks, a different government ministry.<sup>83</sup>

66. This was set out in a letter from Mr. David Parks, Director of Planning, Economic Development and Planning, County of Simcoe, dated February 28, 2019, to the MMAH's Ontario Growth Secretariat. In his letter requesting a transitional regulation, Mr. Parks states that the waste processing complex is "fundamental to furthering the goals and objectives of the Province's *Waste Free Ontario Act, 2016, Resource Recovery and Circular Economy Act, 2016* and *Ontario's Food and Organics Waste Policy Statement, 2018*."<sup>84</sup>

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<sup>81</sup> **BAAP, Tab 30:** [\*Re Multi-Malls Inc et al and Minister of Transportation and Communications et al\*](#), (1977), 14 OR (2d) 49 at 35-36, p. 992.

<sup>82</sup> The *Waste-Free Ontario Act, 2016*, SO 2016, c 12 has been repealed.

<sup>83</sup> **APAR, Tab 5:** Montgomery Affidavit, paras 26-27, pp. 36-37; and **Tab 5, Exhibit "R":** Letter from David Parks (Dated February 28, 2019), p. 101; and **Tab 5, Exhibit "S":** Letter from David Parks (Dated May 29, 2019), p. 102.

<sup>84</sup> **APAR, Tab 5:** Montgomery Affidavit, para 26, pp. 36-37; and **Tab 5, Exhibit "R":** Letter from David Parks (Dated February 28, 2019), p. 101.

67. Mr. Parks sent another letter to the Ontario Growth Secretariat dated May 29, 2019, reiterating his earlier comment that the waste processing complex is “fundamental to furthering the goals and objectives of the Province’s *Waste Free Ontario Act, 2016, Resource Recovery and Circular Economy Act, 2016* and *Ontario’s Food and Organics Waste Policy Statement, 2018*.”<sup>85</sup>
68. On March 21, 2019, Darryl Lyons of MMAH sent an email requesting MMAH staff create “fact-based” one-pager notes on stakeholder requests for transition. With respect to OPA 2, the email states that the County “requests that the Secretariat consider introducing transitional policies or regulations to address the approval that was recently given by the Ministry.”<sup>86</sup>
69. In MMAH’s one-page note dated March 26, 2019, which Allyson Switzman described in her cover email as including the Assistant Deputy Minister’s request for additional facts, a section titled “anticipated outcome of transition” was left blank. To the left of the page is the comment: “Is there anything we can say based on rationale provided in County’s submission?”<sup>87</sup>

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<sup>85</sup> **APAR, Tab 5:** Montgomery Affidavit, para 27, p. 37; and **Tab 5, Exhibit “S”:** Letter from David Parks (Dated May 29, 2019), p. 102.

<sup>86</sup> **APAR, Tab 5, Exhibit “T”:** Email from Darryl Lyons, Ministry of Municipal Affairs and Housing, to Michael Elms et al, Ministry of Municipal Affairs and Housing (Dated March 21, 2019), pp. 103-104.

<sup>87</sup> **APAR, Tab 5:** Montgomery Affidavit, para 28(ii), pp. 38-39; and **Tab 5, Exhibit “U”:** Email from Allyson Switzman (Dated March 26, 2019), p. 111.

70. A subsequent version of the one-page note dated April 17, 2019 adopted the County's submission: "[t]he County requested the Ministry consider introducing transitional policies or regulations to address the approval that was recently given by the Ministry."<sup>88</sup>
71. The Applicant submits that the only valid basis for a regulation under s. 19(1)(d) is to provide for transitional matters that, in the Minister's opinion, are necessary or desirable to facilitate the implementation of the *PGA*, a provision in the *PGA* or a growth plan. However, in this case, MMAH staff initially were unable to identify a rationale for enacting a transitional regulation for OPA 2 that fits within those constraints. Subsequently, the MMAH staff recommended that subsection 4(4) of the Regulation be enacted simply to support the County's request that the waste processing complex be developed in a timely manner. In support of its request, the County claimed the proposed facility was necessary to advance the goals and objectives of the *Waste Free Ontario Act, 2016*<sup>89</sup>, *Resource Recovery and Circular Economy Act, 2016* and Ontario's *Food and Organic Waste Policy Statement, 2018*. However, these statutes and policy are not mentioned in the *PGA* or the 2019 Growth Plan. Instead, like in *Multi-Malls*, they are matters within the mandate of a different government ministry and beyond the scope of the Minister's regulation-making authority under s. 19(1)(d) of the *PGA*. The Minister allowed himself to be influenced by extraneous, irrelevant considerations and enacted subsection 4(4) for an improper purpose. Consequently, subsection 4(4) of the Regulation is *ultra vires*.

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<sup>88</sup> **APAR, Tab 5:** Montgomery Affidavit, para 28(iii), p. 40; and **Tab 5, Exhibit "V":** Email from Aly Alibhai (Dated April 17, 2019), p. 116.

<sup>89</sup> The *Waste-Free Ontario Act, 2016*, SO 2016, c 12 has been repealed.

## D. THE TRIBUNAL'S DECISION SHOULD BE QUASHED

### 3) The Tribunal's decision is a final determination of the core issues in the applicant's appeal

72. The Tribunal's decision to strike Growth Plan-related issues from the Applicant's Issues List is a final determination with respect to its two key arguments.<sup>90</sup> An order is considered final where it disposes of a substantive right within a proceeding.<sup>91</sup> The Ontario Municipal Board explained in *840966 Ontario Ltd v Peel (Region)*, [2007] OMBD No 342 that a motion to strike an issue from an Appellant's Issues List is akin to a motion to dismiss and that a Tribunal decision to strike issues would remove the rights of a party.<sup>92</sup>
73. It is irrelevant that there are other issues still to be determined in the Tribunal proceeding. In *Stoiantsis v Spirou*, 2008 ONCA 553 (CanLII), the Ontario Court of Appeal confirmed that the question is whether the order in issue deprives the party of a substantive right that could be determinative of the proceeding.<sup>93</sup>

### 4) The Tribunal's decision is unreasonable

74. The Tribunal's decision to strike Issue 2 and Issue 7 from the Applicant's Issues List is unreasonable. The Applicant raised the issue of the invalidity of the Minister's Regulation to the Tribunal in response to the County and Minister's motion to strike.<sup>94</sup> The Tribunal

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<sup>90</sup> BAAP, Tab 31: [Hendrickson v Kallio](#), [1932] OR 675 at 5, p. 1003.

<sup>91</sup> BAAP, Tab 31: [Hendrickson v Kallio](#), [1932] OR 675 at 5, p. 1003; and Tab 32: [Suresh v Canada](#), [1998] OJ No 5275 at para 11, p. 1007.

<sup>92</sup> BAAP, Tab 33: *840966 Ontario Ltd v Peel (Region)*, [2007] OMBD No 342, para 8, p. 1011.

<sup>93</sup> BAAP, Tab 34: [Stoiantsis v Spirou](#), 2008 ONCA 553, paras 19-22, 26, pp. 1018-1019.

<sup>94</sup> TR, Tab 20: Factum of Friends of Simcoe Forests Inc., paras 35-51, pp. 676-68.

did not address the Applicant's argument and struck out the issues on the basis of the Regulation.<sup>95</sup> For the reasons discussed above, the Regulation is *ultra vires*. The Court should quash the Tribunal's decision as unreasonable because it relies on an invalid regulation.

#### **PART IV – ORDER SOUGHT**

75. The Applicant requests:

- (a) An order declaring that subsection 4(4) of the Transitional Regulation is *ultra vires* the *PGA*;
- (b) An order declaring that subsection 4(4) of the Transitional Regulation constitutes an improper exercise of statutory power by the Minister and that the Minister exceeded his jurisdiction under section 19(1)(d) of the *PGA*;
- (c) An order quashing the decision of the Tribunal dated September 18, 2020, finding that subsections 4.2.2, 4.2.3 and 4.2.4 of the 2019 Growth Plan do not apply to OPA 2;
- (d) An order quashing the decision of the Tribunal dated September 18, 2020, striking Issue 2 insofar as it relates to the 2019 Growth Plan and Issue 7 from the Applicant's Issues List;
- (e) An order remitting the matter back to the Tribunal with the direction that subsections 4.2.2, 4.2.3 and 4.2.4 of the 2019 Growth Plan apply to the Tribunal's review of OPA 2;
- (f) An order remitting the matter back to the Tribunal with the direction that the Tribunal restore Issue 2 insofar as it relates to the 2019 Growth Plan and Issue 7 to the Applicant's Issues List;
- (g) An order requiring the Respondents to pay the Applicant's costs of this application for judicial review, or in the alternative, an order that all parties bear their own costs.

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<sup>95</sup> **TR, Tab 13:** Tribunal Decision on Motion (Dated September 18, 2020, paras 20 -22, pp. 1004-1005.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



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Ramani Nadarajah



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Jacqueline Wilson

Counsel for the Applicant

Dated at Toronto this 12<sup>th</sup> day of  
February 2021.

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Simcoe Forests Inc.**



**SCHEDULE “A” - LIST OF AUTHORITIES****JURISPRUDENCE**

1. *840966 Ontario Ltd v Peel (Region)*, [2007] OMBD No 342
2. *Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, 2014 2826
3. *Bolton North Hill Landowners Group Inc v Peel (Region)*, 2020 CanLII 89024  
(ON LPAT)
4. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
5. *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770
6. *Greenpeace v Minister of the Environment (Ontario)*, 2019 ONSC 5629
7. *Hanna v Ontario (Attorney General)*, 2011 ONSC 609
8. *Hendrickson v Kallio*, [1932] OR 675
9. *Her Majesty the Queen in Right of Ontario v Miller et al*, 2014 ONSC 6131
10. *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725
11. *Katz Group Canada Inc v Ontario (Health and Long Term Care)*, 2013 SCC 64
12. *Montréal (City) v Montreal Port Authority*, 2010 SCC 14
13. *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)*, 2001 SCC 41
14. *Ontario Federation of Anglers & Hunters v Ontario (Ministry of Natural Resources)*, (2002), 211 DLR (4th) 741
15. *Re Doctors Hospital and the Minister of Health et al* (1976) 12 OR (2d) 164

16. *Re Multi-Malls Inc et al and Minister of Transportation and Communications et al*, (1977), 14 OR (2d) 49
17. *Roncarelli v Duplessis*, [1959] SCR 121
18. *Stoiantsis v Spirou*, 2008 ONCA 553
19. *Suresh v Canada*, [1998] OJ No 5275
20. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1
21. *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062
22. *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106
23. *Yu et al v The Attorney General of British Columbia*, 2003 BCSC 1869

#### **SECONDARY SOURCES**

1. *Concise Oxford English Dictionary*, 12th ed (New York, United States: Oxford University Press)
2. Guy Régimbald, *Canadian Administrative Law*, 2nd ed (LexisNexis: Toronto, 2015)
3. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2008)
4. Sara Blake, *Administrative Law in Canada*, 5th ed (LexisNexis: Toronto, 2011)

#### **LEGISLATION**

1. O Reg 305/19
2. O Reg 311/06
3. *Places to Grow Act, 2005*, SO 2005, c 13

#### **OTHER SOURCES**

1. A Place to Grow: Growth Plan for the Greater Golden Horseshoe (2019)
2. Growth Plan for the Greater Golden Horseshoe (2017)

3. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 80A (28 October 2004)
4. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 114 (2 March 2005)

## SCHEDULE “B” – TEXT OF STATUTES, REGULATIONS & BY-LAWS

### 1. *A Place to Grow: Growth Plan for the Greater Golden Horseshoe (2019)*

#### 7 **Definitions**

##### **Natural heritage system**

A system made up of natural heritage features and areas, and linkages intended to provide connectivity (at the regional or site level) and support natural processes which are necessary to maintain biological and geological diversity, natural functions, viable populations of indigenous species, and ecosystems. The system can include key natural heritage features, key hydrologic features, federal and provincial parks and conservation reserves, other natural heritage features and areas, lands that have been restored or have the potential to be restored to a natural state, associated areas that support hydrologic functions, and working landscapes that enable ecological functions to continue. (Based on PPS, 2020 and modified for this Plan)

### 2. *Growth Plan for the Greater Golden Horseshoe (2017)*

#### 7 **Definitions**

##### **Natural Heritage System**

The system mapped and issued by the Province in accordance with this Plan, comprised of natural heritage features and areas, and linkages intended to provide connectivity (at the regional or site level) and support natural processes which are necessary to maintain biological and geological diversity, natural functions, viable populations of indigenous species, and ecosystems. The system can include key natural heritage features, key hydrologic features, federal and provincial parks and conservation reserves, other natural heritage features and areas, lands that have been restored or have the potential to be restored to a natural state, associated areas that support hydrologic functions, and working landscapes that enable ecological functions to continue. (Based on PPS, 2014 and modified for this Plan)

### 3. **O Reg 305/19: Transitional Matters – Growth Plans**

#### **Transition rules, specific matters**

4. (4) Despite section 3, Amendment No. 2 to the Official Plan for the County of Simcoe shall be continued and disposed of in accordance with the 2019 Growth Plan, except subsections 4.2.2, 4.2.3 and 4.2.4 of the Plan.

#### 4. O Reg 311/06: Transitional Matters – Growth Plans

##### Transition rules, specific matters

4. (4) Despite section 3, Amendment No. 2 to the Official Plan for the County of Simcoe shall be continued and disposed of in accordance with the 2019 Growth Plan, except subsections 4.2.2, 4.2.3 and 4.2.4 of the Plan.

#### 5. *Places to Grow Act, 2005, SO 2005, c 13*

##### Preamble

The Government of Ontario recognizes that in order to accommodate future population growth, support economic prosperity and achieve a high quality of life for all Ontarians, planning must occur in a rational and strategic way.

The Government of Ontario recognizes that building complete and strong communities, making efficient use of existing infrastructure and preserving natural and agricultural resources will contribute to maximizing the benefits, and minimizing the costs, of growth.

The Government of Ontario recognizes that identifying where and how growth should occur will support improved global competitiveness, sustain the natural environment and provide clarity for the purpose of determining priority of infrastructure investments.

The Government of Ontario recognizes that an integrated and co-ordinated approach to making decisions about growth across all levels of government will contribute to maximizing the value of public investments.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

##### Purposes

1 The purposes of the Act are,

- (a) to enable decisions about growth to be made in ways that sustain a robust economy, build strong communities and promote a healthy environment and a culture of conservation;
- (b) to promote a rational and balanced approach to decisions about growth that builds on community priorities, strengths and opportunities and makes efficient use of infrastructure;
- (c) to enable planning for growth in a manner that reflects a broad geographical perspective and is integrated across natural and municipal boundaries;
- (d) to ensure that a long-term vision and long-term goals guide decision-making about growth and provide for the co-ordination of growth policies among all levels of government. 2005, c. 13, s. 1.

### **Designation of area**

**3** The Lieutenant Governor in Council may, by regulation,

- (a) designate an area of land as a growth plan area; and

### **Growth plan**

**4** The Minister shall prepare a proposed growth plan for all or part of an area designated under clause 3 (a). 2005, c. 13, s. 4.

### **Contents of plan**

**6** A growth plan may contain,

- (d) policies, goals and criteria in relation to,
  - (i) intensification and density,
  - (ii) land supply for residential, employment and other uses,
  - (iii) expansions and amendments to the boundaries of areas of settlement,
  - (iv) the location of industry and commerce,
  - (v) the protection of sensitive and significant lands, including agricultural lands, and water resources,

### **Effect of growth plan**

**14 (1)** A decision under the Planning Act or the Condominium Act, 1998 or under such other Act or provision of an Act as may be prescribed, made by a municipal council, municipal planning authority, planning board, other local board, conservation authority, minister of the Crown or ministry, board, commission or agency of the Government of Ontario, including the Ontario Municipal Board, or made by such other persons or bodies as may be prescribed that relates to a growth plan area shall conform with a growth plan that applies to that growth plan area. 2005, c. 13, s. 14 (1).

### **Regulations by Minister**

**19 (1)** The Minister may make regulations,

- (a) modifying or replacing all or any part of the definition of “area of settlement” in section 2;
- (b) prescribing the manner in which a notice is to be given for the purpose of clauses 10 (3) (a) and 11 (1) (b) and the persons, public bodies and other bodies to whom notice shall be given under subsection 10 (3) and clause 11 (1) (b);

(c) prescribing anything that is referred to in this Act as being prescribed, other than those matters with respect to which the Lieutenant Governor in Council is authorized by section 3 or subsection 18 (1) to make regulations;

(d) providing for transitional matters which, in the opinion of the Minister, are necessary or desirable to facilitate the implementation of this Act, a provision of this Act or a growth plan. 2005, c. 13, s. 19 (1).

**Same**

**19 (2)** Without limiting clause (1) (d), a regulation under that clause may,

(a) provide for transitional matters respecting matters, applications and proceedings that were commenced before or after a growth plan comes into effect;

**APPENDIX “A” – COMPARISON CHART: NATURAL HERITAGE PROVISIONS OF THE 2017 AND 2019 GROWTH PLANS**

| <b>Growth Plan for the Greater Golden Horseshoe, 2017</b>   | <b>A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2019</b>  |
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| <p><b>4.2.2.1 The Province will map a Natural Heritage System for the GGH</b></p> <p>to support a comprehensive, integrated, and long-term approach to planning for the protection of the region’s natural heritage and biodiversity.</p> <p><b>The Natural Heritage System mapping will exclude</b></p> <p>lands within settlement area boundaries that were approved and in effect as of July 1, 2017.</p>              | <p><b>4.2.2.1 A Natural Heritage System for the Growth Plan has been mapped by the Province</b></p> <p>to support a comprehensive, integrated, and long-term approach to planning for the protection of the region’s natural heritage and biodiversity.</p> <p><b>The Natural Heritage System for the Growth Plan excludes</b></p> <p>lands within settlement area boundaries that were approved and in effect as of July 1, 2017.</p>        |
| <p><b>4.2.2.2 Municipalities will incorporate the Natural Heritage System</b></p> <p>as an overlay in official plans, and will apply appropriate policies to maintain, restore, or enhance the diversity and connectivity of the system and the long-term ecological or hydrologic functions of the features and areas as set out in the policies in this subsection and the policies in subsections 4.2.3 and 4.2.4.</p> | <p><b>4.2.2.2 Municipalities will incorporate the Natural Heritage System for the Growth Plan</b></p> <p>as an overlay in official plans, and will apply appropriate policies to maintain, restore, or enhance the diversity and connectivity of the system and the long-term ecological or hydrologic functions of the features and areas as set out in the policies in this subsection and the policies in subsections 4.2.3 and 4.2.4.</p> |



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| <p><b>4.2.2.3</b> Within the Natural Heritage System</p> <p>a) new development or site alteration will demonstrate that:</p> <p>i. there are no negative impacts on key natural heritage features or key hydrologic features or their functions;</p> <p>ii. connectivity along the system and between key natural heritage features and key hydrologic features located within 240 metres of each other will be maintained or, where possible, enhanced for the movement of native plants and animals across the landscape;</p> <p>iii. the removal of other natural features not identified as key natural heritage features and key hydrologic features is avoided, where possible. Such features should be incorporated into the planning and design of the proposed use wherever possible;</p> <p>...</p> | <p><b>4.2.2.3</b> Within the Natural Heritage System <b>for the Growth Plan:</b></p> <p>a) new development or site alteration will demonstrate that:</p> <p>i. there are no negative impacts on key natural heritage features or key hydrologic features or their functions;</p> <p>ii. connectivity along the system and between key natural heritage features and key hydrologic features located within 240 metres of each other will be maintained or, where possible, enhanced for the movement of native plants and animals across the landscape;</p> <p>iii. the removal of other natural features not identified as key natural heritage features and key hydrologic features is avoided, where possible. Such features should be incorporated into the planning and design of the proposed use wherever possible;</p> <p>...</p> |
| <p><b>4.2.2.4</b> The natural heritage systems identified in official plans that are approved and in effect as of July 1, 2017 will continue to be protected in accordance with the relevant official plan until the Natural Heritage System has been issued.</p>   | <p><b>4.2.2.4</b> Provincial mapping of the Natural Heritage System for the Growth Plan does not apply until it has been implemented in the applicable upper- or single-tier official plan. Until that time, the policies in this Plan that refer to the Natural Heritage System for the Growth Plan will apply outside settlement areas to the natural heritage systems identified in official plans that were approved and in effect as of July 1, 2017.</p>  |

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| <p><b>4.2.2.5 In implementing the Natural Heritage System, upper- and single-tier municipalities may, through a municipal comprehensive review, refine provincial mapping with greater precision in a manner that is consistent with this Plan.</b></p>  | <p><b>4.2.2.5 Upper- and single-tier municipalities may refine provincial mapping of the Natural Heritage System for the Growth Plan at the time of initial implementation in their official plans.</b></p> <p>For upper-tier municipalities, the initial implementation of provincial mapping may be done separately for each lower-tier municipality.</p> <p>After the Natural Heritage System for the Growth Plan has been implemented in official plans, further refinements may only occur through a municipal comprehensive review.</p> |
| <p><b>4.2.3.1</b> Outside of settlement areas, development or site alteration is not permitted in key natural heritage features that are part of the Natural Heritage System or in key hydrologic features, except for:</p> <p>...</p> <p>c) activities that create or maintain infrastructure authorized under an environmental assessment process;</p> | <p><b>4.2.3.1</b> Outside of settlement areas, development or site alteration is not permitted in key natural heritage features that are part of the Natural Heritage System <b>for the Growth Plan</b> or in key hydrologic features, except for:</p> <p>...</p> <p>c) activities that create or maintain infrastructure authorized under an environmental assessment process;</p>   |

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| <p><b>4.2.4.1</b> Outside settlement areas, a proposal for new development or site alteration within 120 metres of a key natural heritage feature within the Natural Heritage System</p> <p>or a key hydrologic feature will require a natural heritage evaluation or hydrologic evaluation that identifies a vegetation protection zone, which:</p> <p>a) is of sufficient width to protect the key natural heritage feature or key hydrologic feature and its functions from the impacts of the proposed change</p> | <p><b>4.2.4.1</b> Outside settlement areas, a proposal for new development or site alteration within 120 metres of a key natural heritage feature within the Natural Heritage System <b>for the Growth Plan</b></p> <p>or a key hydrologic feature will require a natural heritage evaluation or hydrologic evaluation that identifies a vegetation protection zone, which:</p> <p>a) is of sufficient width to protect the key natural heritage feature or key hydrologic feature and its functions from the impacts of the proposed change;</p> |
| <p><b>4.2.4.2</b> Evaluations undertaken in accordance with policy 4.2.4.1 will identify any additional restrictions to be applied before, during, and after development to protect the hydrologic functions and ecological functions of the feature.</p>   | <p><b>4.2.4.2</b> Evaluations undertaken in accordance with policy 4.2.4.1 will identify any additional restrictions to be applied before, during, and after development to protect the hydrologic functions and ecological functions of the feature.</p>   |