

Legislative  
Assembly  
of Ontario



Assemblée  
législative  
de l'Ontario

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# **STANDING COMMITTEE ON REGULATIONS AND PRIVATE BILLS**

**FIRST REPORT 2017**

2<sup>nd</sup> Session, 41<sup>st</sup> Parliament  
66 Elizabeth II

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The Honourable Dave Levac, MPP  
Speaker of the Legislative Assembly

Sir,

Your Standing Committee on Regulations and Private Bills has the honour to present its Report entitled "First Report 2017" and commends it to the House.

Ted McMeekin, MPP  
Chair of the Committee

Queen's Park  
April 2017



**STANDING COMMITTEE ON REGULATIONS AND PRIVATE BILLS  
MEMBERSHIP LIST**

2<sup>nd</sup> Session, 41<sup>st</sup> Parliament

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DAIENE VERNILE regularly served as a substitute member of the Committee.

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CHRISTOPHER TYRELL  
Clerk of the Committee

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## CONTENTS

ACKNOWLEDGEMENTS	ii
INTRODUCTION: SCOPE OF THIS REPORT AND THE COMMITTEE'S MANDATE	1
STATISTICS	1
REGULATIONS REPORTED	1
Ministry of Education	2
Ministry of Municipal Affairs	3
UPDATE ON RESPONSES TO REGULATIONS PREVIOUSLY REPORTED BY THE STANDING COMMITTEE	4
COURT OF APPEAL RULING IN <i>WILDLANDS LEAGUE V. ONTARIO (NATURAL RESOURCES AND FORESTRY)</i>	4
Background	4
Issue 1: Condition Precedent	4
Issue 2: Purpose of the Regulation	5
APPENDIX A	6
Section 33 of the <i>Legislation Act, 2006</i>	6
APPENDIX B	7
Standing Order 108(i)	7
APPENDIX C	8
Committee's Process for the Review of Regulations	8

## ACKNOWLEDGEMENTS

The Committee wishes to express its appreciation to all of the legislative staff who assisted us in our work. In particular, we wish to thank

- Christopher Tyrell, the Committee's Clerk, who performed the procedural and administrative duties necessary for the carrying out of our regulations mandate; and
- Monica Cop, Erin Fowler, Tamara Hauerstock, Andrew McNaught and Heather Webb of the Legislative Research Service who acted as Counsel to the Committee and who performed the examination of the regulations covered in this report. Ms. Hauerstock prepared a draft report for the Committee's consideration; Mr. McNaught oversaw the regulations review.



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## **INTRODUCTION: SCOPE OF THIS REPORT AND THE COMMITTEE'S MANDATE**

The Committee presents this report on regulations filed under Ontario statutes during the period January to June 2016 (O. Regs. 1/16 – 251/16), in accordance with its terms of reference, as set out in the *Legislation Act, 2006* and the Standing Orders of the Legislative Assembly.

Section 33 of the Act (Appendix A) requires the Committee to examine the regulations made under Ontario statutes, and provides that all regulations stand permanently referred to the Committee. In conducting its examination, the Committee is directed to consider “the scope and method of the exercise of delegated legislative power,” but not “the merits of the policy or objectives to be effected by the regulations or enabling Acts.” The Committee is required, from time to time, to report its observations, opinions and recommendations to the Assembly.

Standing Order 108(i) (Appendix B) sets out nine guidelines the Committee is to apply when conducting its review. Guideline 2, for example, provides that there should be statutory authority to make a regulation. The Standing Order also stipulates that the Committee may not report a regulation to the Assembly without first affording the ministry or agency concerned “an opportunity to furnish orally or in writing to the Committee such explanation as the ministry or agency sees fit.”

The Committee’s process for reviewing regulations and preparing its Report is set out in Appendix C.

## **STATISTICS**

The Standing Committee’s reports usually contain end-of-year statistical information on regulations, including a graph showing the number of regulations made annually over the past 20 years and tables showing the number of regulations made by type (new, amending or revoking). Full-year statistics will be provided in the Standing Committee’s report on regulations made in the last six months of 2016.

## **REGULATIONS REPORTED**

Following our initial review of the 251 regulations filed in the first six months of 2016, we wrote to seven ministries to inquire about 11 regulations. After considering the responses to our inquiries, we have decided to report two regulations under the Committee’s second guideline, which reads:

Regulations should be in strict accord with the statute conferring of power, particularly concerning personal liberties.

In our reports, regulations are reported under the Ministry responsible for the regulation being reported. It should be noted that our comments and recommendations relate to specific provisions of a regulation, rather than to the regulation as a whole.

## Ministry of Education

*O. Reg. 226/16 amending O. Reg. 138/15 (Funding, Cost Sharing and Financial Assistance) made under the Child Care and Early Years Act, 2014*

### Issue

The *Child Care and Early Years Act, 2014* requires public consultation before making a regulation, or public notice instead of consultation in certain circumstances. Was notice of the regulation given as required?

O. Reg. 226/16 amended O. Reg. 138/15 (Funding, Cost Sharing and Financial Assistance) by removing reference to the Canada Child Tax Benefit Notice.

The *Child Care and Early Years Act, 2014* generally requires public consultation before making a regulation. However, the Minister may decide that public consultation is not required in urgent situations or if a proposed regulation is of a minor or technical nature. In such a case, s. 84(6) of the Act requires the Minister to give notice to the public as soon as is reasonably possible after making the decision.

We did not locate either notice of a proposed regulation or notice of a decision not to consult with respect to O. Reg. 226/16.

In response to our letter, the Ministry explained that

this amendment relied on subsection 84(6) of the CCEYA, as it was a technical amendment only. . . . However . . . there was no corresponding notice of the change posted as required by subsection 84(6). This oversight has been brought to the attention of the Ministry and will be corrected as soon as possible.

As the Ministry has committed to correcting this oversight, the Standing Committee is not making a recommendation with respect to O. Reg. 226/16.

## Ministry of Municipal Affairs

*O. Reg. 114/16 (Zoning Order – Protection of Public Health and Safety – Toronto Hospital Heliports) made under the Planning Act*

### Issue

The *Planning Act* requires the Minister to provide public notice after making an order. Was public notice given as required?

O. Reg. 114/16 is a Zoning Order made by the Minister pursuant to s. 47(1) of the *Planning Act*. Section 47(5) of the Act requires the Minister to give notice within 30 days following the making of the order in such manner as the Minister considers proper. The Act also requires that the notice contain certain information about amendment or revocation.

We located notice of O. Reg. 114/16 in the Regulatory Registry and the Environmental Registry, but it did not contain the mandated information.

In response to our inquiry, the Ministry said that it

did voluntarily post a notice of O. Reg. 114/16 on the Environmental Registry under the *Environmental Bill of Rights, 1993*, but this notice was not the notice required by the *Planning Act*.

It appears that through inadvertence, notice as required by s. 47(5) of the *Planning Act* was not given in respect of O. Reg. 114/16.

Internal processes are currently being put into place in order to ensure that notice of future orders are given in accordance with the requirements of s. 47(5) of the *Planning Act*.

In addition, steps are being taken to give proper notice in respect of O. Reg. 114/16 in a newspaper of general circulation located in the geographic area to which the order applies.

The notice will be in the required form and will include the provisions of ss. 47(8), (9) and (10).

In light of the corrective steps the Ministry is taking, the Standing Committee is not making a recommendation with respect to O. Reg. 114/16.

## **UPDATE ON RESPONSES TO REGULATIONS PREVIOUSLY REPORTED BY THE STANDING COMMITTEE**

The Standing Committee's reports usually contain an update on responses to regulations flagged in previous reports. This information will be provided in the Standing Committee's report on regulations made in the last six months of 2016.

## **COURT OF APPEAL RULING IN *WILDLANDS LEAGUE V. ONTARIO (NATURAL RESOURCES AND FORESTRY)***

### **Background**

The Standing Committee occasionally reports on significant court decisions relating to regulations. *Wildlands League v. Ontario (Natural Resources and Forestry)* is a recent Ontario Court of Appeal decision concerning a regulation under the *Endangered Species Act* (ESA).<sup>1</sup>

The ESA sets out prohibitions for activities affecting identified species at risk (SAR) and their habitats. It allows for exceptions to the prohibitions to be made in several ways; one of these is through regulations. At issue before the Court of Appeal was a regulation providing 19 exemptions, subject to compliance with prescribed conditions. The Wildlands League and the Federation of Ontario Naturalists argued that the regulation was *ultra vires* — in other words, it did not fall within the authority of the ESA.

In rendering its decision, the Court of Appeal relied on the 2013 Supreme Court of Canada decision in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, in which the Supreme Court made clear that a challenge to the validity of a regulation is limited to two grounds:

1. that the legislation is inconsistent with the purpose of the parent statute; or
2. that a decision maker failed to comply with a statutory condition precedent.<sup>2</sup>

### ***Issue 1: Condition Precedent***

The ESA requires that if the Minister is of the opinion that the regulation is likely to jeopardize the survival of a species in Ontario or have any other significant adverse effect on the species, the Minister is required to consult with an expert.

The Wildlands League and the Federation of Ontario Naturalists argued that the Minister was required to consider the effect of the proposed regulation on each SAR, failed to do so and, therefore, did not satisfy the condition.

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<sup>1</sup> 2016 ONCA 74 (CanLII) [hereafter, "*Wildlands League*"]. The regulation in question was O. Reg. 176/13, which amended O. Reg. 242/08 (General). O. Reg. 176/13 was made on May 15, 2013 and came into effect on July 1, 2013.

<sup>2</sup> *Wildlands League*, at para 41, citing *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII), [2013] 3 S.C.R. 810 ["*Katz Group*"].

In considering this issue, the Court of Appeal examined the Explanatory Note to the regulation that was issued by the Minister. The Court concluded that the Explanatory Note is evidence that the Minister considered the effect of the regulation on the survival of each SAR and that the statutory condition precedent was met.

### *Issue 2: Purpose of the Regulation*

The Wildlands League and the Federation of Ontario Naturalists also argued that the real purpose of the regulation was to save government and industry time and money and as such was inconsistent with the purpose of the ESA.

Citing the Supreme Court's decision in *Katz Group*, the Court of Appeal noted that to strike down a regulation as being inconsistent with a statutory purpose, it must be established that the regulation is "irrelevant," "extraneous," or "completely unrelated to" the purpose of the statute.<sup>3</sup>

The Court also noted that, as articulated in *Katz Group*, the courts favour an interpretive approach that "reconciles an impugned regulation with its enabling statute."<sup>4</sup>

Although the Court of Appeal agreed with the appellants that the fundamental purpose of the ESA is to protect species at risk, it found that the protection afforded to species and their habitats is not absolute, and that the scheme of the ESA has regard to human activities. In support of this finding, the court cited the preamble to the ESA, which states that protecting species at risk includes "appropriate regard to social, economic and cultural considerations," and noted that the ESA provides for exemptions to its prohibitions.

In rejecting the appellants' claim that the regulation was made for an improper purpose, the Court of Appeal concluded that

the issue is not whether the Act and regulation have identical purposes or objectives, but as *Katz Group* directs, whether the regulation is "irrelevant", "extraneous" or "completely unrelated to" the legislative purpose. . . While the motive for the regulation may well have been a concern for administrative efficiency and cost savings, the limitations, conditions, exceptions and scoping of the exemptions contained in the regulation are directed toward the protection of SAR. The regulation is therefore not "irrelevant", "extraneous" or "completely unrelated to" the purpose of the ESA and its scheme.<sup>5</sup>

In December 2016, the Wildlands League and the Federation of Ontario Naturalists filed an application for leave to appeal in the Supreme Court of Canada.

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<sup>3</sup> *Katz Group*, *supra* note 2, at para 28, as cited in *Wildlands League* at para 85.

<sup>4</sup> *Ibid.* at para 25.

<sup>5</sup> *Wildlands League*, at para 98.

**APPENDIX A**Section 33 of the *Legislation Act, 2006*

**33(1)** At the commencement of each session of the Legislature, a standing committee of the Assembly shall be appointed under this section with authority to sit during the session.

**(2)** Every regulation stands permanently referred to the standing committee for the purposes of subsection (3).

**(3)** The standing committee shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling Acts, and shall deal with such other matters as are referred to it by the Assembly.

**(4)** The standing committee may examine any member of the Executive Council or any public servant designated by the member respecting any regulation made under an Act that is under his or her administration.

**(5)** The standing committee shall, from time to time, report to the Assembly its observations, opinions and recommendations.

## APPENDIX B

### Standing Order 108(i)

**108** Within the first 10 Sessional days following the commencement of a Parliament, the membership of the following Standing Committees shall be appointed, on motion with notice, for the duration of the Parliament:

- i. Standing Committee on Regulations and Private Bills . . . to be the Committee provided for by section 33 of Part III (Regulations) of the *Legislation Act, 2006*, and having the terms of reference as set out in that section, namely: to be the Committee to which all regulations stand permanently referred; and to examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power without reference to the merits of the policy or objectives to be effected by the regulations or enabling statutes, but in so doing regard shall be had to the following guidelines:
  - (i) Regulations should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute;
  - (ii) Regulations should be in strict accord with the statute conferring of power, particularly concerning personal liberties;
  - (iii) Regulations should be expressed in precise and unambiguous language;
  - (iv) Regulations should not have retrospective effect unless clearly authorized by statute;
  - (v) Regulations should not exclude the jurisdiction of the courts;
  - (vi) Regulations should not impose a fine, imprisonment or other penalty;
  - (vii) Regulations should not shift the onus of proof of innocence to a person accused of an offence;
  - (viii) Regulations should not impose anything in the way of a tax (as distinct from fixing the amount of a licence fee, or the like); and
  - (ix) General powers should not be used to establish a judicial tribunal or an administrative tribunal,

and, the Committee shall from time to time report to the House its observations, opinions and recommendations as required by section 33 of Part III (Regulations) of the *Legislation Act, 2006*, but before drawing the attention of the House to a regulation or other statutory instrument the Committee shall afford the ministry or agency concerned an opportunity to furnish orally or in writing to the Committee such explanation as the ministry or agency thinks fit.

### APPENDIX C

#### Committee's Process for the Review of Regulations

