COURT OF APPEAL FOR ONTARIO

CITATION: Minotar Holdings Inc. v. Ontario (Municipal Affairs and Housing), 2026 ONCA 606
DATE: 20260828
DOCKET: COA-25-CV-0425

Miller, Zarnett and Monahan JJ.A.

BETWEEN

Minotar Holdings Inc.

Applicant (Appellant)

and

His Majesty the King in Right of Ontario as Represented by
The Minister of Municipal Affairs and Housing

Respondent (Respondent)

Jonathan C. Lisus, Paul Fruitman, and John Carlo Mastrangelo, for the appellant

S. Zachary Green and Hera Evans, for the respondent

Heard: January 12, 2026, with additional written submissions received on August 18, 2026

On appeal from the order of Justice William S. Chalmers of the Superior Court of Justice, dated March 11, 2025, with reasons reported at 2025 ONSC 1791.

B.W. Miller J.A.:

[1] An Ontario regulation mistakenly designated the appellant's land as falling within a land reserve known as the Greenbelt. The designation blocked commercial development of the land. Although the appellant was told by the

Ministry of Municipal Affairs and Housing that the mistake would be fixed at a ten-year review, when the time came the Ministry had a change of heart and refused. The appellant brought an action against the responsible Minister, the respondent, and the parties reached a settlement removing most of the land from the Greenbelt. The settlement contemplated that the appellant could renew its action if the settlement was breached. But the next year the legislature enacted legislation that not only returned the appellant's land to the Greenbelt, but extinguished the causes of action the appellant could have brought against the Ministry and its officials. The appellant contends that the legislation is unconstitutional. More specifically, the legislation is said to violate the core jurisdiction of the superior courts guaranteed by s. 96 of the *Constitution Act, 1867*. The appellant argued in the court below that the legislation interferes with the court's adjudicative role – a core function of superior courts – by directing what the outcome of the pending litigation would be.

[2] The application judge dismissed the application, ruling that s. 96 does not bar the legislature from changing planning rules or repealing causes of action.

[3] The appellant renews its s. 96 argument on appeal, and adds the argument that the application judge's interpretation of s. 96 is inconsistent with the unwritten constitutional principle of the rule of law. The appellant submits that if the rule of law is used as an aid to interpret s. 96, a court should conclude that s. 96 bars

legislation that retroactively extinguishes a specific party's pending claims for bad faith official conduct.

[4] The appeal cannot succeed. Section 96 – whether considered alone or in conjunction with unwritten constitutional principles – is not a source of personal rights against government. Section 96 is an institutional, structural provision. It establishes the judicial branch of government. What the appellant is seeking to do, effectively, is transform s. 96 from a guarantee of the superior court's inherent procedural powers and subject-matter jurisdictions, to a guarantee of substantive individual rights. The submission invites the court to reimagine s. 96 as a source of judicial authority to invalidate legislation on the basis of legislative non-compliance with an open-ended set of unenumerated rights. It is a subtle rebranding of the invitation – rejected emphatically and repeatedly over the past 20 years – to invalidate legislation on the basis of unwritten constitutional principles. The proposal would do real harm to the balance of the Constitution and must be rejected.

Background

[5] In 2003, the appellant, an Ontario corporation, acquired land in Markham. The purchase included 60 acres that lacked features of ecological significance ("natural features"). But the land was valuable for development purposes.

[6] Two years later, the legislature enacted the *Greenbelt Act, 2005*, S.O. 2005, c. 1. The Act authorized the Lieutenant Governor in Council to define the Greenbelt by regulation and to establish a plan regulating its use. Development would be restricted on lands included in the Greenbelt.

[7] The officials of the respondent, the provincial Minister of Municipal Affairs and Housing, had told the appellant previously that its featureless lands would be excluded from the Greenbelt. But the Lieutenant Governor in Council subsequently issued a regulation designating the featureless lands as part of the Greenbelt: *Designation of Greenbelt Area*, O. Reg. 59/05. When the appellant objected, the respondent's staff advised that a mistake had been made; the featureless lands were inadvertently included in the Greenbelt and would be removed during the plan's ten-year review in 2015.

[8] That was not done. In 2017, the appellant commenced an action against the respondent. The claim alleged negligence, misrepresentation, and misfeasance in public office, seeking both damages and a declaration that the featureless lands were wrongfully included in the Greenbelt.

[9] In 2022, the parties reached a settlement. The appellant agreed to dismiss the action if 37 of the 60 featureless acres were removed from the Greenbelt, while reserving the right to "tak[e] any steps available" if those acres were later restored to the Greenbelt. Later that year, the Lieutenant Governor in Council issued a

regulation removing the appellant’s 37 acres and 14 other parcels of land from the Greenbelt: *Designation of Greenbelt Area*, O. Reg. 567/22.

[10] The next year, however, the government reversed course. The legislature enacted the *Greenbelt Statute Law Amendment Act, 2023*, S.O. 2023, c. 22 (the “*Amendment Act*”). That statute amended the *Greenbelt Act* by repealing one of the Lieutenant Governor in Council’s delegated powers – the authority to define the Greenbelt by regulation. That power would instead be exercised legislatively through the *Amendment Act*.

[11] Accordingly, the amendments incorporated the legislature’s land use planning decisions. Section 2(1)3 included the appellant’s land together with 14 other land parcels owned by parties unconnected to the appellant. Further, ss. 14.1(a)-(b) changed the Greenbelt plan by deeming the appellant’s land and some other parcels to be Protected Countryside or part of the Natural Heritage System.

[12] The amendments also added provisions shielding the Crown in right of Ontario and Executive Council from liability. Section 19(1) removes causes of action arising from the changes to the Greenbelt Area and Plan, specifically immunizing Ontario’s actions with respect to the appellant’s land and the settlement agreement it had concluded with the appellant. Sections 19(2)-(3) bar bringing and maintaining proceedings and seeking remedies for conduct

immunized by s. 19(1), including remedies for bad faith and misfeasance. These provisions apply retrospectively pursuant to s. 19(5). Section 19(4), however, preserves the right to apply for judicial review. Finally, s. 19.1 terminates the settlement agreement. These provisions, along with ss. 2(1)3 and 14.1(a)-(b), are reproduced in the attached appendix.

The proceedings below

[13] The appellant brought an application alleging that ss. 2(1)3, 14.1(a)-(b), 19(1)(b)(ii), (c), (e)-(f), and 19.1 of the *Greenbelt Act*, as enacted or amended by the *Amendment Act*, violated s. 96 of the *Constitution Act, 1867*. Section 96 provides:

> **96.** The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[14] Specifically, the appellant argued that the impugned provisions violated the core jurisdiction of the s. 96 courts by driving the result in pending or anticipated litigation. In support, the appellant relied on two appellate decisions from other provinces: *5185603 Manitoba Ltd v. Government of Manitoba*, 2023 MBCA 47, 483 D.L.R. (4th) 463 ("*518 Manitoba*"), and *Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General)*, 2024 BCCA 423, 503 D.L.R. (4th) 505.

[15] The application was dismissed. The application judge relied on this court's decision in *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172, 479 D.L.R. (4th) 469, leave to appeal refused, [2023] S.C.C.A. No. 188, and the Superior Court's ruling in *Ontario Place Protectors v. HMK in Right of Ontario*, 2024 ONSC 4194, 173 O.R. (3d) 586, since affirmed in *Ontario Place Protectors v. Ontario*, 2025 ONCA 183, 175 O.R. (3d) 561, leave to appeal granted, [2025] S.C.C.A. No. 386.[1] Following those cases, he ruled that the legislature's decision to repeal causes of action, create immunities, terminate contractual rights, and deny compensation does not violate the core jurisdiction of the superior courts.

[16] The application judge distinguished the authorities relied on by the appellant. He concluded that the impugned provisions, unlike the legislation in *518 Manitoba* and *Kitsilano*, neither dismissed proceedings nor deemed that a particular result should obtain in litigation notwithstanding existing legislation. Instead, what the legislature accomplished through the amendments to the *Greenbelt Act* was to eliminate certain causes of action. The superior courts retained the authority to resolve litigation according to the law of the province, which included legislation that removed certain causes of action.

[1] All subsequent citations to *Ontario Place Protectors* refer to this court's decision.

Grounds of appeal

[17] On appeal, the appellant renewed its argument that the impugned legislation is inconsistent with s. 96, as interpreted in *518 Manitoba* and *Kitsilano*. It also advanced a new argument that the unwritten constitutional principle of the rule of law should be used to interpret s. 96 in a way that permits the court to invalidate the impugned provisions.

Analysis

[18] The application judge made no error in dismissing the appellant's argument based on s. 96. As a structural provision of the *Constitution Act, 1867*, s. 96 continued the existence and operation of the superior courts. Those courts pre-existed Confederation, having been established in the colonies that became the Dominion of Canada. Section 96 – as the jurisprudence of the Supreme Court and this court has long held – preserves the independence and core jurisdiction of these courts. It does not confer constitutional rights on individuals to seek redress against government or other individuals. Accordingly, and as explained below, s. 96 does not block legislatures from retrospectively or retroactively targeting a specific party's pending claims by repealing causes of action, even where claims alleging bad faith executive branch conduct have been extinguished for undisclosed reasons. Absent a violation of the division of powers or a right under the *Charter of Rights and Freedoms*, or an absence of clear and unambiguous language, none of which is alleged here – such legislation is valid if it does not

impair the protected inherent powers or subject matter jurisdictions of the superior courts. And because the impugned provisions do neither, this appeal must be dismissed.

[19] In what follows, I survey the jurisprudence on the core jurisdiction of the superior courts before turning specifically to the appellant's s. 96 and rule of law arguments.

The core jurisdiction of the superior courts

[20] The interpretation of s. 96, like other constitutional provisions, is "constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies" of our system of government: *Alford v. Canada (Attorney General)*, 2026 SCC 14, 513 D.L.R. (4th) 191, at para. 49, quoting *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 394.

[21] Drawing on these interpretive sources, the jurisprudence on s. 96 has "clarified those features of the judicial branch of government which are constitutionally guaranteed": *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, at para. 66. These sources all establish s. 96 as a structural provision that, as the Supreme Court has held, recognizes the importance of the superior courts to Canada's constitutional structure: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 1, 9.

[22] The function of s. 96's constitutional home, Part VII of the *Constitution Act, 1867*, is to establish the judicial branch of government. Within that structural part, s. 96's specific role is to establish the superior courts at the centre of Canada's unitary judicial system and to preserve their historical role as the continuation of the English Royal Courts of Justice. Section 96 grants the federal government the exclusive authority to appoint the judges of those courts: *Poorkid*, at paras. 20, 23-24, 31, citing *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 S.C.R. 291, at paras. 1-2, 4 ("*Quebec Reference*"); *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 17-18.

[23] This structural provision, from a structural part of the Constitution, provides structural protection. It forestalls legislation that would usurp the court's jurisdiction: *Poorkid*, at paras. 24, 27-28, 31, citing *Quebec Reference*, at para. 4; see also *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, 482 D.L.R. (4th) 20, at para. 193.

[24] Accordingly, the Supreme Court has adopted a structural conception of the core jurisdiction of the superior courts. This protected core is "very narrow" – it "includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system": *Criminal Lawyers' Association*, at para. 19, quoting *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1

S.C.R. 186, at para. 56, *per* Lamer C.J. (concurring); see also *Democracy Watch*, at paras. 39-40, citing *Quebec Reference*, at para. 63.

[25] In keeping with this structural conception, the narrow core is limited to certain inherent procedural powers and subject-matter jurisdictions. The core includes, for instance, the superior courts' power to control their own process and the subject-matter jurisdiction, recognized in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, to judicially review administrative action: *Quebec Reference*, at paras. 51, 63, 68, *per* Côté & Martin JJ., and at paras. 234-235, *per* Wagner C.J. (dissenting, but not on this point); *Democracy Watch*, at paras. 40-41. That subject-matter jurisdiction "is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority": *Democracy Watch*, at para. 3, quoting *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 28.

[26] Because core jurisdiction is structural, it does not provide an individual right of access to adjudication about any particular claim. Expanding the narrow core in that manner would overstep s. 96's role in protecting the superior courts' special status: *Poorkid*, at paras. 31-32, citing *Quebec Reference*, at para. 69; *Le*, at para. 193.

[27] Neither can the concept of core jurisdiction be used to challenge the legislature's authority to make legislative changes to substantive law. To hold

otherwise would be to use s. 96 to violate the separation of powers that this provision was meant to preserve. The *Constitution Act, 1867*, in Part VI, distributes legislative powers to the federal Parliament and the provincial legislatures – not to the superior court judiciary, whose role under Part VII is instead to interpret and apply the law: *Poorkid*, at paras. 31, 48; *Ontario Place Protectors*, at para. 41; see also *Criminal Lawyers' Association*, at paras. 24-30; *Democracy Watch*, at paras. 58, 69.

[28] Even where legislation affects protected procedural powers or subject-matter jurisdictions, the threshold to establish a violation of core jurisdiction is high. The claimant must show that the law effectively destroys the superior court's ability to perform its constitutional role: *Quebec Reference*, at para. 63, citing *MacMillan Bloedel*, at para. 37.

[29] This high threshold recognizes that legislation validly constrains the exercise of inherent powers because the superior courts are themselves subject to the rule of law: *Criminal Lawyers Association*, at paras. 23, 26, citing *MacMillan Bloedel*, at para. 78, *per* McLachlin J. (dissenting, but not on this point); *Democracy Watch*, at paras. 69, 75. Legislation that does not substantially depart from settled limits on judicial power is unlikely to violate core jurisdiction: *Babcock v. Canada*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 60; *Abou-Elmaati v. Canada (Attorney General)*, 2011 ONCA 95, 104 O.R. (3d) 81, at paras. 31-33.

The impugned provisions do not violate s. 96

[30] As explained below, the impugned provisions do not violate the core jurisdiction of the superior courts. They do not remove inherent procedural powers or subject-matter jurisdictions. Instead, the legislative amendments alter the legal rights of persons through changes to substantive law. These are not constraints on inherent judicial powers; they fall within well-established modes of regulation.

Changing substantive law to predetermine outcomes

[31] The appellant's principal submission is that s. 96 prohibits the legislature from changing substantive law with retrospective effect in a manner that predetermines the outcome of pending litigation. The impugned provisions, the appellant maintains, do so by stipulating that the featureless lands come within Greenbelt land use planning rules, and by extinguishing pending claims.

[32] The application judge made no error in rejecting this submission. As explained above, it is settled law that core jurisdiction is structural. That jurisdiction neither guarantees substantive outcomes to litigants nor immunizes legislation against substantive change: *Poorkid*, at paras. 31, 48.

[33] *Ontario Place Protectors* similarly rejected a s. 96 challenge to legislation that predetermined the outcome of litigation by changing substantive law. The *Rebuilding Ontario Place Act, 2023*, S.O. 2023, c. 25, Sched. 2 ("*ROPA*"), retroactively abolished causes of action and exempted a project from legislative

requirements which otherwise could be the basis for litigation. Those changes to substantive law, this court ruled, did not violate core jurisdiction because they nevertheless preserved the inherent procedural powers and protected subject-matter jurisdictions of the superior courts, including the power to conduct judicial review. The court retained its adjudicative authority to interpret *ROPA* and apply it to the facts: at paras. 40-42.

[34] The law articulated in *Ontario Place Protectors* is dispositive of this appeal. Like *ROPA*, ss. 2(1)3 and 14.1(a)-(b) of the *Greenbelt Act*, retroactively changed the substantive law by placing the appellant's land within the Greenbelt and its land use planning categories, extinguishing the legal rights that were the basis for the appellant's pending claims. Similar to *ROPA*, ss. 19(1)-(2) of the *Greenbelt Act* retroactively extinguishes causes of action and remedies. As in *Ontario Place Protectors*, those changes to substantive law alter the legal rights of persons but do not violate the core jurisdiction of the superior courts. Core jurisdiction is a matter of inherent procedural powers and subject-matter jurisdiction. The core jurisdiction of a superior court may include the power of the court to adjudicate claims of property rights, but core jurisdiction – conceptually – is not concerned with the content or substance of property rights. As with *ROPA*, the impugned provisions do not impact the court's ability to interpret the law and apply it to the facts, which falls within its core jurisdiction.

[35] As the application judge noted, *Kitsilano* and *518 Manitoba* did not hold otherwise. Rather, both cases accepted that changes to substantive law which extinguish pending actions do not violate s. 96 if they preserve the court's ability to interpret legislation and apply it to the facts: *Kitsilano*, at paras. 61, 68-71; *518 Manitoba*, at paras. 41, 57.

Specific forms of predetermination

[36] In addition to this overarching argument, the appellant advances the narrower argument that s. 96 bars specific types of substantive laws that retroactively predetermine the outcome of pending litigation by immunizing government actions taken in bad faith or by targeting the legal rights of specific parties. Sections 19(1)-(2) and 19.1 of the *Greenbelt Act*, as amended, the appellant maintains, violate that prohibition by extinguishing causes of action and remedies for actions taken in bad faith, and also by specifically targeting the appellant's pending court action and settlement agreement.

[37] Again, the argument is inconsistent with the jurisprudence of this court. To begin with, s. 96 does not bar the legislature from extinguishing bad faith and misfeasance claims against public officials. As *Poorkid* held, making it more difficult to bring such claims does not violate the core jurisdiction of the superior courts: at paras. 45, 47-48. *Ontario Place Protectors* addressed a "no remedy" provision, s. 17(2) of *ROPA*, which barred all remedies and liabilities for those claims. This court ruled that s. 17(2)'s extinguishment of those claims did not

infringe core jurisdiction: *Ontario Place Protectors*, at paras. 38-42. The *Greenbelt Act*'s "no remedy" provision, s. 19(2), is identically worded[2] and *Ontario Place Protectors* governs.

[38] Moreover, s. 96 does not require legislation that extinguishes private rights to be general in character. This court has long rejected the argument that legislation targeting and extinguishing specific private rights during a pending action usurps the judicial function of the superior courts: *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275 (C.A.), at pp. 292-293, aff'd (1910), 43 O.L.R. 474 (P.C.). The Supreme Court and Privy Council have similarly affirmed that the Constitution does not block legislatures from enacting such statutes: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 73-75; *Abitibi Power and Paper Co. v. Montreal Trust Co.*, [1943] A.C. 536 (P.C.), at pp. 547-548. Because the impugned provisions do not depart from this practice, they do not violate s. 96 on that basis: *Babcock*, at para. 60; *Abou-Elmaati*, at paras. 31-33.

Bars on maintaining proceedings

[39] The appellant also submits that s. 19(3) violates core jurisdiction by usurping the court's authority to control its own process. That provision does so, the

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[2] Like s. 17(2) of *ROPA*, s. 19(2) of the *Greenbelt Act* provides that "No costs, compensation or damages, including for loss of revenues or loss of profit, are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, any equitable remedy or any remedy under any statute, is available to any person in connection with anything referred to" by the provision removing causes of action.

appellant maintains, by barring litigants from maintaining proceedings "based on or related to" claims extinguished by s. 19(1).

[40] I disagree. Section 19(3) does not destroy or impair the superior courts' inherent power to control their own process. The application judge properly distinguished *518 Manitoba* because, unlike the provision considered in that case, s. 19(3) does not legislatively dismiss a pending proceeding. Rather, like the legislation addressed in *Poorkid*, it preserves the court's ability to interpret the statute, apply the law to the facts, and determine whether a proceeding should be dismissed on the basis that it advances claims for legal rights that have been extinguished legislatively: *Poorkid*, at paras. 37, 48. Although, from the perspective of the disappointed plaintiff, the practical result may be the same, there is a significant difference between a statute that dismisses a proceeding that is before the courts, and one that merely changes the law that the court is required to apply.

[41] Additionally, the legislature has the power not only to extinguish causes of action, but to direct that civil claims not be brought or maintained in the first place, as long as it does so by language that is clear and unambiguous. The Supreme Court ruled in *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, that a statute unambiguously providing that "[n]o claim shall be made" with respect to funds owed by the federal Crown to veterans and which had not been paid in breach of the Crown's fiduciary duties complied with the *Canadian Bill of Rights*, S.C. 1960, c. 44. Similar "no action" provisions have long been used

to enforce immunities and have repeatedly been applied by the Supreme Court: see, e.g., *Johnston v. Canadian Credit Men's Trust Association*, [1932] S.C.R. 219; *Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716, at pp. 734-736; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 60. It is inconceivable that such a longstanding exercise of legislative authority would now be determined to violate s. 96: *Babcock*, at para. 60; *Abou-Elmaati*, at paras. 31-33.

[42] There is no need to address the distinct question raised but not decided in *518 Manitoba* – whether legislation that dismisses pending court proceedings violates s. 96. That question does not arise on these facts. Ruling on constitutional issues unnecessarily (absent exceptional circumstances) is unwise. I would respect that counsel of restraint here: *R. v. McGregor*, 2023 SCC 4, [2023] 1 S.C.R. 198, at para. 24; *Abou-Elmaati*, at para. 39.

Judicial review and deeming provisions

[43] Finally, the appellant submits that ss. 2(1)3 and 14.1(a)-(b) violate s. 96 by rendering judicial review of administrative action illusory and blocking adjudication through the improper use of deeming provisions.

[44] The argument must be rejected. Sections 2(1)3 and 14.1(a)-(b) are the product of particular land use planning decisions made by the legislature. As explained below, that the legislature makes law in this way rather than delegating

decisions to administrative actors does not frustrate judicial review of administrative action nor the courts' adjudicative function.

[45] The appellant's judicial review submission goes well beyond the law articulated in *Crevier*. That case protects the superior courts' ability to judicially review administrative action. By expressly preserving that core jurisdiction, s. 19(4) of the *Greenbelt Act* safeguards "the means by which the courts supervise those who exercise statutory powers": *Democracy Watch*, at para. 3, quoting *Dunsmuir*, at para. 28.

[46] But this power of judicial review emphatically does not authorize the superior courts to judicially review legislation: *S.E.I.U. Local 204 v. Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 225 (C.A.), at p. 233, leave to appeal refused (1985), 8 O.A.C. 320n (S.C.C.). As the application judge recognized, neither does it bar legislatures from implementing decisions through legislation rather than delegating decision-making power to administrative bodies. And the choice to reclaim once-delegated power is a "matter[] for the legislature, not the courts": *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175, at para. 85.

[47] There is no deeming-based s. 96 violation either. As the application judge recognized, s. 92 of the *Constitution Act, 1867*, provides the provincial legislature with jurisdiction over property and civil rights and matters of a local or private

nature, empowering it to designate the appellant's land as falling within the Greenbelt land use planning categories. Deeming is simply one of multiple drafting techniques available to achieve that valid goal: *R. v. Verrette*, [1978] 2 S.C.R. 838, at pp. 845-846. Thus, nothing turns on the legislature's use of deeming language in ss. 14.1(a)-(b) in place of the designation technique s. 2(1)3 employs because both provisions effect the same type of valid change – subjecting the featureless lands to land use planning regimes.

[48] The appellant cannot avoid this conclusion by characterizing deeming as a fiction. A land use planning regime is a legislative construct. There is nothing fictional about the legislature deciding to place the appellant's land within it. Regardless, using legal fictions as a drafting technique does not render legislation unconstitutional. A sovereign legislature "can declare that for legal purposes reality is to be considered different from what it was or is" in the eyes of some: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022), at § 4.05[23]; see also *Verrette*, at pp. 845-847.

[49] *Kitsilano* and *518 Manitoba* did not hold otherwise. Those cases challenged a particular use to which this legislative drafting technique was put: in the case of *Kitsilano*, directing the outcome of a court proceeding notwithstanding the governing legislation; and in *518 Manitoba*, dismissing a pending action. Sections 2(1)3 and 14.1(a)-(b) do neither. Rather, as the application judge recognized, they change the parties' legal rights in the way that the court in

Kitsilano ruled was proper – by amending the legislation the court is required to apply: at paras. 68-69.

Unwritten constitutional principles cannot change the meaning of s. 96

[50] The appellant advances the further argument on appeal that the impugned provisions are inconsistent with the unwritten constitutional principle of the rule of law, because the provisions are not advanced for a "proper legislative purpose".

[51] Unwritten constitutional principles, including the rule of law, do not provide an independent basis to invalidate legislation – even legislation that retroactively extinguishes pending claims, targets specific litigants, and immunizes official bad faith acts for undisclosed reasons: *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845 ("*Toronto (City) (SCC)*"); *Imperial Tobacco*, at paras. 73-75, citing *Authorson* and *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161. This proposition is well established and the appellant does not challenge it.

[52] Neither does the appellant argue that there is a "gap" in the Constitution for unwritten constitutional principles to fill: *Toronto (City) v. Ontario (Attorney General)* 2019 ONCA 732, 146 O.R. (3d) 705, at para. 94 ("*Toronto (City) (ONCA)*"), aff'd ("*Toronto (City) (SCC)*"). There is none. Like municipal elections, the vulnerability of property rights and causes of action to legislative restriction instead reflects an intentional exclusion: *Toronto (City) (SCC)*, at paras. 81-82. Since Confederation, s. 92(13) of the *Constitution Act, 1867* has empowered

provincial legislatures to modify or extinguish those very rights: *Authorson*, at para. 53, citing *Florence Mining*. During patriation, constitutionalizing property rights was proposed, debated, and ultimately rejected in response to the opposition of the provinces, who sought to preserve their s. 92(13) powers: Dwight Newman and Lorelle Binnion, "The Exclusion of Property Rights from the *Charter*: Correcting the Historical Record" (2015) 52 Alta. L. Rev. 543, at pp. 550-556. To respect this deliberate choice, constitutional provisions that, like s. 96, are designed to protect other interests cannot be reverse-engineered to achieve through "interpretation" the amendment rejected by the framers: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1003; *Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708, at para. 52.

[53] Instead, what the appellant appeals to is the *interpretive* function of unwritten constitutional principles – that is, the use of unwritten constitutional principles as "an aid to resolve genuinely open questions of constitutional and statutory interpretation": *Toronto (City) (ONCA)*, para. 91, aff'd *Toronto (City) (SCC)*, at paras. 81, 84.

[54] The appellant's argument fails because there is no genuinely open question of constitutional interpretation before the court. The legal meaning of s. 96 has been long settled and has received careful and recent attention from this court in *Poorkid* and *Ontario Place Protectors*. The use of unwritten constitutional principles as interpretative aids must respect textual constraints as well as the

provision's purpose and historical origins. Disregarding those constraints treats the Constitution as "an empty vessel to be filled with whatever meaning we might wish from time": *Toronto (City) (SCC)*, at paras. 54-55, 57, 65, 72 (citation omitted); see also *Poorkid*, at paras. 54-57, 61-64.

[55] The appellant's submission would use an expansive conception of the rule of law to reauthor the constitutional settlement. It would destabilize the structure of the *Constitution Act, 1867*, and be inconsistent with its purpose and history. As I have explained, the purpose of s. 96 is to protect the special status of the superior courts at the centre of the judicial branch. It does not provide a basis for scrutinizing the legitimacy of legislative reasons for acting. Nor do s. 96's historical origins in the Royal Courts of Justice, which at the time of Confederation, upheld immunity statutes barring claims as "perfectly valid": *Smith v. City of London* (1909), 20 O.L.R. 133 (H.C.), at p. 139, *per* Riddell J., citing *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, at pp. 17-18.

[56] The appellant's submission, were it to be accepted, would transform s. 96 from a shield for the superior courts into a sword of judicial governance. Because "the rule of law is not the rule of courts" (*Democracy Watch*, at para. 69), the "legislatures can set the law as they see fit" within the Constitution's broad confines: *Imperial Tobacco*, at para. 52. The role of the s. 96 courts is to interpret and apply those laws, not to scrutinize the merits of legislation by questioning political judgments: *Quebec Reference*, at para. 205, citing *OPSEU v. Ontario*

(Attorney General), [1987] 2 S.C.R. 2, at p. 56, *per* Beetz J.; see also *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 720; *Poorkid*, at para. 62.

Questions not addressed

[57] Because the appellant's challenge to the impugned provisions fails, it is unnecessary to address other constitutional issues. The appellant has not identified any exceptional circumstances to justify doing so: *McGregor*, at para. 24.

[58] Thus, I would not decide whether the impugned provisions might violate s. 96 if they immunized post-*Amendment Act* bad faith official actions concerning non-Greenbelt lands. Those questions do not arise in this case. The appellant did not advance claims or adduce evidence concerning those matters. Nor did the appellant submit that the impugned provisions are so sweeping as to prevent the superior courts from performing their institutional role of stating and developing private law. Instead of objecting to the provisions' breadth and prospectivity, the appellant argued that they were unconstitutional for the opposite reasons – because they specifically sought to retroactively extinguish the appellant's claims concerning the inclusion of its land within the Greenbelt.

[59] It would be unwise to decide these constitutional questions in the abstract. As Wagner C.J. cautioned in the *Quebec Reference*, whether legislative changes prevent the court from stating and developing the private law is a fact-intensive

question that may require extensive and comprehensive evidence: at paras. 249-250; see also at paras. 88, 102, 125, *per* Côté & Martin JJ. The prospective application of the impugned provisions to immunize conduct unrelated to the Greenbelt may also raise unforeseen implications which are best resolved in a future case on a concrete record. Determining these questions now risks injustice and prejudice: *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at para. 9; *Abou-Elmaati*, at paras. 38-42.

[60] The link between those constitutional questions and statutory interpretation confirms the need for restraint. Statutory provisions must be interpreted to determine their scope before evaluating their constitutionality: *R. v. Kloubakov*, 2025 SCC 25, 505 D.L.R. (4th) 197, at paras. 59-60. That exercise, like constitutional analysis, is best done in a concrete case with the benefit of a full record: *Dean v. Mister Transmission (International) Limited*, 2010 ONCA 443, 267 O.A.C. 67, at para. 18.

[61] Without prejudging such a case, I would simply note that statutory interpretation principles may constrain even seemingly broad language. As Rand J. famously observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, “there is always a perspective within which a statute is intended to operate”. Thus, a provision’s context, purpose, and surrounding historical circumstances may favour a narrower reading. So may the presumptions that the legislature does not intend to overstep constitutional limits on its jurisdiction, impose harsh

inequitable consequences, or nullify rights of action: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228, at para. 28; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at pp. 554-555, 559; *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275, at pp. 280, 284.

Epilogue

[62] I have had the benefit of reading the reasons of my colleague, Monahan J.A., which join in dismissing the appeal with respect to the constitutional challenge to ss. 2(1) and 14.1 of the *Greenbelt Act*, and in rejecting the argument that the unwritten constitutional principles can be used to invalidate legislation, but which dissent from my conclusion that the appeal should be dismissed in its entirety.

[63] My colleague's argument in favour of a judicial power to invalidate legislation that bars claims for misfeasance in public office is, it seems to me, entirely normative. That is, it seeks to confer a power on the judiciary on the basis that it would be good that the judiciary have such a power. It is not an argument based on precedent. More precisely, it is entirely contrary to precedent.

[64] Although my colleague takes the language of *Democracy Watch* as "guidance to resolve the question of whether s. 96 protects judicial oversight of the legality of state action outside the administrative law context", no such guidance was offered in *Democracy Watch*. Based on settled and binding precedent, there is no live question as to whether s. 96 grants judges oversight over legislation. It

does not, subject only to historical and discrete exceptions: legislation cannot oust the judicial review of administrative action and legislatures cannot replace the superior courts with other tribunals. To suggest that s. 96 grants judges power to invalidate legislation of the type here in issue is to ignore the contrary testimony of the entirety of our constitutional jurisprudence and to challenge the stability of our political constitution.

[65] As the Supreme Court reminded in *Democracy Watch*, “the rule of law is not the rule of courts”: at para. 69. Respect for the rule of law requires respect for the balance of institutional powers established by the Constitution.

Disposition

[66] I would dismiss the appeal. I would award the respondent costs of the appeal in the amount of $25,000, all-inclusive, as agreed by the parties.

J.A.

I agree B. Zarnett J.A.

Monahan J.A. (dissenting):

I. Overview

[67] I have had the benefit of reviewing my colleague Miller J.A.'s reasons dismissing the appeal. I agree that s. 96 of the *Constitution Act, 1867* does not bar the legislature from changing planning rules or extinguishing private causes of action in general. Where I respectfully part company with my colleague is with respect to the amended provisions of the *Greenbelt Act, 2005*, S.O. 2005, c. 1, which immunize public officials from liability for misfeasance in public office and conduct undertaken in bad faith.

[68] As the Supreme Court of Canada recently affirmed in *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, the effect of s. 96 is to "enshrine the superior courts as guardians of the rule of law and constitutionally guarantee the core aspects of their jurisdiction that are essential to their function": at para. 3. This core jurisdiction includes the ability to supervise the exercise of all public powers for legality. In my view, the provisions of the *Greenbelt Act* which purport to immunize public officials[3] from claims related to misfeasance and bad faith conduct are inconsistent with that core jurisdiction. These provisions purport to eliminate accountability for the deliberate abuse of public powers that is alleged to have intentionally caused harm to the appellant.

[3] In accordance with the language of s. 19 of the *Greenbelt Act*, public officials include current or former employees, officers, or agents of the Crown in right of Ontario, or current or former members of the Executive Council.

[69] Ensuring accountability for the abuse of public power is central to the constitutional role of the superior courts. I would therefore declare that, to the extent that provisions in the *Greenbelt Act* immunize public officials from the appellant's claims in misfeasance and for bad faith, they are inconsistent with s. 96 and are of no force and effect.

[70] My analysis proceeds in three parts.

[71] In the first part, I explain that s. 96 guarantees that the core jurisdiction of superior courts cannot be removed by either Parliament or provincial legislatures. This includes powers and jurisdiction essential to the superior courts' role as primary guardians of the rule of law.

[72] In the second part, I describe why legislation that immunizes public officials from claims for misfeasance and bad faith, such as those in the *Greenbelt Act*, impermissibly derogates from this core jurisdiction.

[73] In the third part, I consider three possible counterarguments to my analysis. I find that none of these counterarguments is sufficient to displace my *prima facie* conclusion that the provisions in the *Greenbelt Act* which immunize public officials from claims for misfeasance and bad faith are inconsistent with s. 96 and, to that extent, are of no force and effect.

II. The superior courts' constitutionally protected core jurisdiction includes functions necessary to maintain the rule of law

[74] As Wagner C.J. affirmed for a unanimous court in *Democracy Watch*, at para. 7, "[i]ntrinsic to the very idea of a constitution is the notion that legal powers and authorities are bounded; all delegated power has limits, and no authority may be used in a manner inconsistent with the purpose for which it is granted". Section 96 of the *Constitution Act* protects the superior courts' ability to "fulfill their role as guardians of the rule of law, and ensure that Canadians are 'protected from arbitrary government action'": *Democracy Watch*, at para. 41, citing *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 S.C.R. 291 ("*CCP Reference*"), at para. 51.

[75] Although *Democracy Watch* concerned the constitutionality of privative clauses which purported to oust judicial review, Wagner C.J.'s analysis offers helpful guidance to resolve the question of whether s. 96 protects judicial oversight of the legality of state action outside the administrative law context.

[76] The jurisprudence on s. 96 has evolved significantly over the past half century: see e.g., *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; and *CCP Reference*.

[77] The Supreme Court's decision in *Crevier* remains one of the foundational cases in this area. For a unanimous court, Laskin C.J. held that provincial legislatures could not oust the jurisdiction of superior courts to review a provincially-appointed tribunal's decisions on questions of jurisdiction. To permit a provincially-appointed tribunal to determine the limits of its own jurisdiction would be to turn that tribunal into a s. 96 court. Since judges of s. 96 courts must be appointed by the Governor General, privative clauses purporting to exclude judicial review are inconsistent with s. 96 and are of no force and effect. See *Crevier*, at pp. 233-39.

[78] The development of s. 96 since *Crevier* has been guided by an understanding of the broader underlying purpose of the provision, which is to protect the "inherent" or "core" jurisdiction of superior courts that is essential to the administration of justice and maintenance of the rule of law: see *MacMillan Bloedel*, at paras. 15, 30, 38; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 88; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 17-19, 26; *Trial Lawyers*, at paras. 33-34, 38-40; *CCP Reference*, at paras. 4, 41-52, 63-69. As the Supreme Court recognized in *CCP Reference*, at para. 63, "The superior courts' core jurisdiction includes the powers and jurisdiction essential to their role as the cornerstone of the unitary justice system and the primary guardians of the rule of law."

[79] Importantly, the core jurisdiction analysis in relation to s. 96 is not primarily historical in nature and is not limited to what the superior courts exercised exclusively at the time of Confederation. Rather it protects the “very essence of the superior courts” and “extends to whatever is needed in order to preserve the vigour and strength of those courts”: *CCP Reference*, at para. 67. The Supreme Court has expressly directed that s. 96 “must be able to evolve in accordance with the living tree doctrine”: *CCP Reference*, at para. 53. And it is well established that unwritten constitutional principles, particularly the rule of law, may be utilized to determine the purpose and scope of s. 96: *Reference re Remuneration*, at para. 89; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845, at para. 55.

[80] Legislation that has the effect of removing any of the attributes of superior courts’ core jurisdiction is contrary to s. 96 and is therefore invalid: *CCP Reference*, at paras. 63-69. “[E]ven if no parallel court is created, the superior courts could be impaired to such an extent that they can no longer play their constitutional role. This would be the case if the legislature were to interfere impermissibly with the exercise of core jurisdiction”: *CCP Reference*, at para. 63.

[81] The superior courts “have inherent powers that flow from their very nature, and the particular purpose of those powers is to enable the superior courts to ensure the maintenance of the rule of law in our legal system”: *CCP Reference*, at para. 51. Neither Parliament nor the provincial legislatures can impair the core

jurisdiction of superior courts so as to prevent them from playing their constitutionally guaranteed role. In *CCP Reference*, at para. 51, Côté and Martin JJ., for a majority of the Supreme Court, expressly held that this role includes "the power to review exercises of public power for legality and to ensure that citizens are protected from arbitrary government action".

III. Legislation immunizing public officials from liability for misfeasance in public office or bad faith conduct impairs the core supervisory jurisdiction of superior courts

[82] The tort of misfeasance in public office is concerned with the distinct harm resulting from bad-faith exercises of public power. Immunizing public officials who engage in such conduct from legal liability for such harm is inherently inimical to the rule of law.

[83] This conclusion follows from an understanding of the conduct captured by the tort of misfeasance. As the Supreme Court explained in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 23, there are two key elements that must be established in order to prove the tort of misfeasance. First, the public officer must have engaged in deliberate and unlawful conduct in their capacity as a public officer. Second, the public officer must have been aware that their conduct was unlawful and that it was likely to harm the plaintiff. The essence of the tort is that the officer blatantly disregarded their official duty while demonstrating a "conscious disregard for the interests of those who will be affected

by the misconduct in question": *Odhavji Estate*, at paras. 26-29. The tort is squarely aimed at public officers acting with an element of bad faith: *Odhavji Estate*, at para. 28.

[84] The rule of law requires that superior courts have independent authority to protect three fundamental values: (i) equality of all before the law, (ii) the creation and maintenance of an actual order of positive laws, and (iii) oversight of the exercise of public powers. See *CCP Reference*, at para. 47. Shielding deliberately unlawful conduct by public officials from effective legal redress for the damage caused by that conduct undermines all three of these values.

[85] This was the fundamental point made by Rand J. in his concurring reasons in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, the case widely regarded as having firmly established the tort of misfeasance in public office in Canadian law: see *Odhavji Estate*, at para. 19. After finding that the cancellation of Mr. Roncarelli's liquor license at the direction of Premier Duplessis was "a gross abuse of legal power" (at p. 141), Rand J. identified the dangerous consequences that would follow if there were no legal redress afforded for this wrongful conduct (at p. 142):

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, <u>would signalize the beginning of disintegration of the rule</u>

> of law as a fundamental postulate of our constitutional structure. [Emphasis added.]

[86] The same point was made in *Odhavji Estate* where Iacobucci J., for a unanimous court, observed that the rationale for the tort of misfeasance is that "in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes": *Odhavji Estate*, at para. 26, citing *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220, at p. 1230.

[87] Similar language was used to describe the tort of malicious prosecution (which is a particular form of misfeasance) in *Nelles v. Ontario*, [1989] 2 S.C.R. 170. Writing for a majority of the court, Lamer J. (as he then was), noted that where the Attorney General or a Crown Attorney has advanced a prosecution for an improper purpose, it amounts to "a fraud on the process of criminal justice": *Nelles*, at p. 194. The argument that prosecutors should be granted absolute immunity under the common law for such misconduct was therefore fundamentally flawed because it would allow wrongdoers to escape accountability and would be "akin to granting a license to subvert individual rights": *Nelles*, at p. 195. The existence of such absolute immunity "strikes at the very principle of equality under the law" and would be "especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust": *Nelles*, at p. 195. Alternative remedies in the form of criminal consequences

against the malicious prosecutor are inadequate because they would vindicate the public wrong, but they would do nothing to affirm the injured party's private right of action: *Nelles*, at p. 198.

[88] Adopting this logic, the grant of immunity for misfeasance in public office or bad faith is inconsistent with the rule of law because it allows public officials who cause harm by deliberately abusing their legal powers to escape accountability for their misconduct. There can be no order of positive law or effective oversight of public power if those charged with implementing and administering the law are free to ignore it with improper intent. Nor can all individuals in Canadian society be equal under the law if public officials whose mandate is to ensure legal equality are instead permitted to apply the law in accordance with their own arbitrary preferences without legal accountability.

[89] There is no inconsistency between holding public officials to account for damage caused by deliberately wrongful conduct and principles of legislative supremacy. Indeed, quite the opposite is the case. It is public officials who engage in such misconduct that pose the actual threat to legislative supremacy because, as Rand J. noted in *Roncarelli*, they seek to substitute their "arbitrary likes, dislikes and irrelevant purposes" in place of "administration according to law": *Roncarelli*, at p. 142. It is only by holding those wrongdoers accountable for their actions that courts can provide effective oversight of the exercise of public powers, thereby

ensuring that the law as enacted by Parliament or the provincial legislatures remains supreme.

[90] While it may be difficult to comprehensively define the core jurisdiction of superior courts, I have no trouble concluding that the adjudication of claims for misfeasance and bad faith falls within that core: see *MacMillan Bloedel*, at paras. 30, 38. As McLachlin C.J. held in *Trial Lawyers*, "the s. 96 judicial function and the rule of law are inextricably intertwined" and "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law": *Trial Lawyers*, at paras. 39-40. Superior courts can only fulfill their role as the primary guardians of the rule of law if they are permitted to hear and decide the very cases where it is alleged that deliberate state conduct contravenes the rule of law, since "all legal powers have limits" and "[a]n unlimited power is, definitionally, not a legal power": *Democracy Watch*, at para. 1. The conferral of absolute immunity is the antithesis of a legal power with limits.

[91] I therefore conclude that legislation that grants absolute immunity to public officials who deliberately cause harm through the abuse of public power impairs the superior court's core jurisdiction and is inconsistent with s. 96.

IV. The *Greenbelt Act* provisions which purport to confer immunity for misfeasance and bad faith conduct are inconsistent with s. 96 and are of no force and effect

[92] There is no dispute that the *Greenbelt Act* purports to immunize public officials from any remedy for misfeasance or bad faith arising from conduct by public officials related to the designation of the appellant's land as falling within the Greenbelt. This follows from the combined effect of s. 19(1)(e) & (f), s. 19(2) and s. 19(3) of the *Greenbelt Act,* (the "Immunity Provisions"), which eliminate causes of action and bar proceedings in relation to such conduct.

[93] My analysis thus far has explained why I would hold that, to the extent that they purport to confer such immunity, the Immunity Provisions are *prima facie* of no force and effect.

[94] In this final section I consider three possible counterarguments to the analysis set out above: (i) whether any *prima facie* inconsistency between the Immunity Provisions and s. 96 is sufficiently addressed by the fact that the right to pursue judicial review is preserved by s. 19(4); (ii) whether there are any policy reasons which would justify upholding the Immunity Provisions; and (iii) whether recent binding authority of this court has already determined that the Immunity Provisions are constitutionally valid.

1. The preservation of a right of judicial review does not sufficiently address the inconsistency between the Immunity Provisions and s. 96

[95] The respondent argues that the preservation of a right of judicial review in s. 19(4) of the *Greenbelt Act* is sufficient to address any *prima facie* inconsistency between the Immunity Provisions and s. 96.

[96] I do not agree.

[97] As the Supreme Court recently held in *Resler v. Anglin*, 2026 SCC 23, 514 D.L.R. (4th) 655, the tort of misfeasance addresses different harms and serves different purposes than administrative law remedies such as judicial review. Because misfeasance in public office arises from the misuse of a public power that causes material damage, the tort addresses misconduct that is "uniquely tortious in nature and distinct from an administrative wrong, thus providing an entirely separate remedy": *Resler*, at para. 84, citing Erika Chamberlain, "When Unlawfulness Becomes Tortious: Misfeasance in a Public Office and Administrative Law" (2015), 44 Adv. Q. 489, at pp. 492-93. The focus in tort is not on reassessing the propriety of an administrative decision but, rather, on providing redress for deliberate unlawfulness that causes damage. No such redress is available in a judicial review proceeding. In this sense, the purpose and context of claims for misfeasance in public office is materially different from those in administrative law proceedings: see *Resler*, at paras. 85-86.

[98] This important distinction between claims for misfeasance or bad faith, on the one hand, and administrative law remedies on the other, can be practically illustrated by considering the circumstances in *Roncarelli*. The cancellation of Mr. Roncarelli's liquor licence completely destroyed his restaurant business. Since the damage had already been done, it would have been pointless for Mr. Roncarelli to have sought to overturn Premier Duplessis' cancellation of his licence. The only effective remedy for the harm suffered was an action in misfeasance because this was the only way *Roncarelli* could receive proper redress for the Premier's unlawful conduct.

[99] The same point was made in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, where the plaintiff brought a claim in contract, negligence, and misfeasance for damages resulting from an allegedly unfair tendering process concerning telecommunications licences by the Minister of Industry Canada. Canada argued that before TeleZone could pursue a civil claim, it had to successfully quash the Minister's decision granting licenses to other applicants.

[100] The Supreme Court disagreed and held that TeleZone should be permitted to advance its civil claim without first seeking to overturn the Minister's decision through judicial review. For a unanimous court, Binnie J. emphasized that "while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate

justiciable issues": *TeleZone*, at para. 30. TeleZone was seeking compensation for the losses it suffered from the tendering process rather than seeking to set aside the outcome of that process. The only effective way to obtain this redress was through a civil action for damages, even though judicial review was available: *TeleZone*, at paras. 18-19, 27-28, 79-80.

[101] I conclude that the preservation of judicial review in s. 19(4) does not provide the appellant with an effective remedy for the losses it claims it suffered as a result of the alleged misfeasance and bad faith conduct of public officials. The fact that the statute permits the appellant to seek judicial review is thus no answer to the appellant's assertion that immunizing public officials from its civil claim for misfeasance and bad faith is inconsistent with s. 96.

2. There are no policy reasons which would justify immunity for misfeasance and bad faith in the *Greenbelt Act*

[102] In *CCP Reference*, the majority articulated six factors that were relevant to determining whether Quebec's grant of private law jurisdiction to its provincial court impaired the superior court's ability to develop the private law: see *CCP Reference*, at para. 88. One of those factors is whether there is an "important societal objective" to justify the grant of jurisdiction: see *CCP Reference*, at paras. 126-30. It is not enough to simply allege that an important societal objective exists; the state authority seeking to uphold the legislative scheme must be able to

demonstrate the objective is real and there is a connection between the scheme and the achievement of the objective: *CCP Reference*, at para. 126.

[103] I recognize that the Supreme Court has in the past endorsed absolute immunity provisions and relied in part on their policy rationale to uphold them. For example, in *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, the court upheld an absolute immunity provision set out in an international convention which was expressly incorporated into Canadian federal law. The court was persuaded that the convention provided a uniform and exclusive scheme in relation to damages liability and that scheme wholly barred an award of damages for breach of language rights during an international flight. The court declined the invitation to carve out an exception to this liability regime, since doing so would depart from Canada's international obligations and put Canada off-side the strong international consensus in favour of the convention's liability regime: *Thibodeau*, at paras. 6, 57.

[104] In *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, the Supreme Court considered the validity of a statutory provision conferring absolute immunity for members of a provincial quasi-judicial regulatory board (the "Board"). Cromwell J., on behalf of four members of the court, noted that the absolute common law immunity from civil suits enjoyed by judges (which is itself a

necessary corollary of the constitutional principle of the rule of law)[4] has been extended to many quasi-judicial bodies and agencies: *Ernst*, at para. 50. Such immunity is justified on policy grounds because it permits quasi-judicial decision-makers to fairly and effectively make decisions without interference, thereby ensuring their independence and impartiality: *Ernst*, at para. 51. Cromwell J. also found that the party seeking to bring an action against the Board had an alternative and effective remedy because she could have pursued judicial review of its decision: *Ernst*, at paras. 32-41. He therefore concluded that the immunity provision validly immunized Board members from all claims, including those for *Charter* damages under s. 24.

[105] McLachlin C.J., on behalf of four other members of the court, found that there was insufficient evidence on the record to establish that absolute immunity for members of the Board was necessary in order for them to properly fulfill their roles: *Ernst*, at paras. 168-78. McLachlin C.J. specifically noted exceptions to common law immunity in the case of judges (when acting outside their adjudicative role), prosecutors (when perverting or abusing their office), and Ministers of Justice (when acting in bad faith or with serious recklessness): *Ernst*, at para. 176. She also disagreed that judicial review provided an alternative and effective remedy for damages that may have been suffered by the appellant: *Ernst*, at para. 167.

[4] See *Morier and Boily v. Rivard,* [1985] 2 S.C.R. 716, at pp. 737-45

McLachlin C.J.'s ultimate conclusion was that that there were no compelling policy grounds justifying a general rule that all decision-makers with an adjudicative role were necessarily immune from *Charter* damages for actions taken in bad faith.[5]

[106] While these authorities establish that there may be particular circumstances where an absolute immunity provision can be justified on policy grounds, the respondent has not advanced any policy justification to support the *Greenbelt Act*'s immunity for misfeasance and bad faith conduct. Moreover, there is no indication that the possibility of the appellant proceeding with its claim in misfeasance and bad faith has had a "chilling effect" on public officials dealing with the appellant's land. This is because the impugned decisions and conduct by public officials in respect of the appellant's lands have already occurred and the alleged losses have already been suffered. Thus, the possibility of the claim for misfeasance does not appear to have dissuaded the relevant officials from acting.

[107] I also regard it as relevant that Ontario has in recent years begun inserting provisions immunizing public officials from actions for misfeasance and bad faith in a wide variety of statutes. See e.g., *Buy Ontario Act (Public Sector Procurement), 2025*, S.O. 2025, c. 27, Sched. 1, s. 11; *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 195.10, as amended by S.O. 2024, c. 25, Sched. 4; *Ontario Free Trade and Mobility Act, 2025*, S.O. 2025, c. 3, Sched. 5, s. 6; *Ontario Heritage Act*,

[5] The ninth member of the court, Abella J., declined to consider the constitutional validity of the immunity provision because the appellant failed to provide proper formal notice of a constitutional challenge to the provision and the record was insufficient to decide the issue: *Ernst*, at paras. 65-67, 111-14, 124.

R.S.O. 1990, c. O.18, s. 66.2, as amended by S.O. 2025, c. 4, Sched. 7 (not yet in force); *Rebuilding Ontario Place Act, 2023*, S.O. 2023, c. 25, Sched. 2, s. 17; and *Special Economic Zones Act, 2025*, S.O. 2025, c. 4, Sched. 9, s. 7. The apparently routine practice of inserting such absolute immunity provisions in these enactments belies any claim that there are compelling or significant policy grounds justifying their specific inclusion in the *Greenbelt Act*.

3. This court's prior jurisprudence does not determine the constitutional validity of the immunity for misfeasance and bad faith in the *Greenbelt Act*

[108] The respondent points to two decisions of this court which upheld the validity of statutory provisions restricting or eliminating civil claims for misfeasance and bad faith: *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172, 479 D.L.R. (4th) 469, leave to appeal refused, [2023] S.C.C.A. No. 188, and *Ontario Place Protectors v. Ontario*, 2025 ONCA 183, 175 O.R. (3d) 561, leave to appeal granted, [2025] S.C.C.A. No. 386. The respondent argues that these recent decisions are a complete answer to the constitutional challenge to the Immunity Provisions at issue in this appeal.

[109] I am not persuaded by this submission.

[110] *Poorkid* considered the validity of s. 17 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 (the "*CLPA*"), which provides that any claim against the Crown or an officer or employee of the Crown that

includes a claim for the tort of misfeasance in public office or a tort based on bad faith conduct may only proceed with leave of the court. Subsection 17(7) provides that the court shall not grant leave for the matter to proceed unless it is satisfied that the proceeding is brought in good faith and that there is a "reasonable possibility that the claim … would be resolved in the claimant's favour." The provision is an attempt to weed out unmeritorious claims at the outset of the litigation, similar to screening mechanisms found in other Ontario statutes. One example is s. 138.8 of the *Securities Act*, R.S.O. 1990, c. S.5, considered by the Supreme Court in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106. Other procedural examples are found throughout the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as Huscroft J.A. noted in *Poorkid*, at para. 21.

[111] This court upheld the validity of s. 17 of the *CLPA* in *Poorkid* on the basis that the provision does no more than regulate the way in which disputes come before the superior courts: *Poorkid*, at para. 35. The requirement to obtain leave does not offend the core jurisdiction of superior courts protected by s. 96 since the strength of a claimant's case is determined by the superior court itself: *Poorkid*, at para. 37. Moreover, as Huscroft J.A. pointed out, "[n]othing in s. 17 bars, denies, or otherwise prevents access to the superior courts and their core function of adjudicating disputes": at para. 37. Because the purpose and effect of s. 17 of the *CLPA* is quite different from the Immunity Provisions at issue in this appeal, I do

not regard this court's decision in *Poorkid* as having resolved the question of whether the Immunity Provisions are inconsistent with s. 96.

[112] I acknowledge that in *Ontario Place Protectors*, this court upheld the validity of immunity provisions that are virtually identical to those at issue in this appeal. Although *Ontario Place Protectors* was granted leave to appeal by the Supreme Court of Canada and a hearing has been scheduled[6], I recognize that in the interim this recent authority must be followed unless it can be distinguished: see *Stamford Kiwanis Non-Profit Homes Inc. v. Municipal Property Assessment Corporation*, 2025 ONCA 450, 177 O.R. (3d) 161, at paras. 35-41.

[113] In considering whether *Ontario Place Protectors* resolves any doubts over the constitutional validity of the *Greenbelt Act*, I note that the appellants in *Ontario Place Protectors* had not commenced a civil claim, whether for misfeasance or any other cause of action. Nor was there any evidence that the appellant's private rights were at stake or that they were specially affected by the relevant legislation. In her conclusion that s. 96 was not infringed, which was upheld by this court on appeal, the application judge in *Ontario Place Protectors* (2024 ONSC 4194, 173 O.R. (3d) 586) offered the following comments, at para. 42:

> Such provisions do not *per se* improperly violate s. 96. Perhaps there are circumstances in which such a provision goes too far. However, no such circumstance

[6] I note that the issues in *Ontario Place Protectors* are related to those in the present appeal, so the outcome of that matter at the Supreme Court of Canada could very well affect or determine the outcome of this matter, depending on the arguments advanced and the scope of the decision.

> is apparent in this application. At this stage, the applicant, who seeks to bring no action that is prohibited by s. 17(2), asks the court to declare theoretically in a vacuum that s. 17(2) goes too far. I find no basis for doing so on the record before me.

[114] On this same factual backdrop, the application judge also dismissed the applicant's request for public interest standing, offering the following explanation at para. 19 of her reasons:

> This challenge would better be brought to court by a party that wishes to assert a cause of action that is extinguished by s. 17(2). This would enable the court to analyse the provision's impact within a proper factual matrix. It would provide the court with contending points of view of those most directly affected. The paucity of facts adversely affects the level of analysis the court is able to undertake….

[115] I acknowledge that this latter element of the application judge's decision (concerning public interest standing) was overturned on appeal: see *Ontario Place Protectors*, at paras. 17-28. The purpose of reproducing these paragraphs is simply to reinforce that neither the first instance judge nor the panel on appeal had the benefit of an actual action that was barred by the absolute immunity provision while assessing whether that immunity infringed s. 96 of the *Constitution Act*. Because there was no actual action that had been extinguished by the absolute immunity provision in *Ontario Place Protectors*, this court did not specifically address whether the grant of immunity in respect of claims for misfeasance or bad faith (as distinct from other civil claims) was inconsistent with s. 96.

[116] Unlike in *Ontario Place Protectors*, the Immunity Provisions in this case have purported to extinguish actual claims for misfeasance and bad faith brought by the appellant. Given the distinction between the circumstances here as compared to those in *Ontario Place Protectors*, I do not regard that judgment as having conclusively determined the specific issue of whether provisions extinguishing claims for misfeasance and bad faith offend s. 96.

V. Disposition

[117] I would grant the appeal and declare that s. 19(1)(e) & (f), s. 19(2) and s. 19(3) of the *Greenbelt Act* are inconsistent with s. 96 of the *Constitution Act, 1867* and therefore of no force and effect to the extent that they bar claims for misfeasance and bad faith conduct.

[118] I would award the appellant costs in this court of $25,000, inclusive of applicable taxes and disbursements, as agreed to by the parties. I would set aside the costs order made by the application judge and award the appellant the partial indemnity costs it would have sought if successful below in the all-inclusive amount of $117,151.

P.J. Monahan J.A.

Released: August 28, 2026

Appendix – Impugned *Greenbelt Act* Provisions

Designation of area

2(1) The following areas of land are designated as the Greenbelt Area:

[…]

3. The area of land designated as Parts 1 to 36, both inclusive, on a plan entitled "Plan of the Boundary of the Protected Countryside" dated February 23, 2005 and filed on that date with the Office of the Surveyor General of Ontario, the area of land designated as Parts 1 to 5, both inclusive, on a plan entitled "Plan of the Boundary of the 2017 Protected Countryside Additions" dated May 4, 2017 and filed on that date with the Office of the Surveyor General of Ontario and the area of land designated as Part 1 on a plan entitled "Plan of the Boundary of the 2022 Protected Countryside Additions" dated December 12, 2022 and filed on that date with the Office of the Surveyor General of Ontario, but not the area of land designated as Parts 1 to 34, both inclusive, on a plan entitled "Plan of the Boundary of the 2017 Protected Countryside Removals" dated May 4, 2017 and filed on that date with the Office of the Surveyor General of Ontario.

[…]

Statutory amendment to Plan

14.1 The Greenbelt Plan is deemed to provide that,

(a) the lands designated as Parts 1 to 20, both inclusive, on a plan entitled "Plan of the Boundary of the 2022 Protected Countryside Removals" dated December 12, 2022 and filed on that date with the Office of the Surveyor General of Ontario are designated as Protected Countryside;

(b) the lands referred to in clause (a) that were, on December 13, 2022, part of the Natural Heritage System of the Greenbelt Plan are identified as part of the Natural Heritage System of the Greenbelt Plan;

[…]

Limitations on remedies

19(1) No cause of action arises as a direct or indirect result of,

…

(b) the making, amendment or revocation of any provision of the regulations made under this Act, including, for greater certainty, the making of, amendments to and revocation of Ontario Regulation 59/05 (Designation of Greenbelt Area) made under this Act, including,

…

(ii) the amendments made to that Regulation by Ontario Regulation 567/22 made under this Act;

(c) the establishment of the Greenbelt Plan or the approval of any amendments to the Greenbelt Plan under subsection 14 (1), including, for greater certainty, the approval of Greenbelt Plan Amendment No. 3;

…

(e) anything done or not done in accordance with this Act, the regulations made under it, the Greenbelt Plan or a plan referred to in clause (d), including, for greater certainty, any review or reconsideration of the Greenbelt Area and the Greenbelt Plan, or any purported failure to review or reconsider the Greenbelt Area and the Greenbelt Plan, including in relation to the land that is identified as “Featureless Lands” in the Statement of Claim filed in the Superior Court of Justice proceeding commenced at Newmarket and identified as Court File number CV-17-131956-00; or

(f) any representation or other conduct by current or former employees, officers or agents of the Crown in right of Ontario or current or former members of the Executive Council that is related, directly or indirectly, to,

(i) the actual or potential enactment of any Act or actual or potential making of any regulation made under this Act or other instrument concerning,

(A) the removal of land from the Greenbelt Area, including under Ontario Regulation 567/22 made under this Act, or

(B) the identification of any land, including by Greenbelt Plan Amendment No. 3,

(ii) the actual or potential acquisition, disposal, use or development of any land removed from the Greenbelt Area pursuant to Ontario Regulation 567/22 made under this Act or redesignated by Greenbelt Plan Amendment No. 3,

(iii) the actual or potential granting or issuance of any approval, permit, order or other instrument in respect of any land removed from the Greenbelt Area under Ontario Regulation 567/22 made under this Act or redesignated by Greenbelt Plan Amendment No. 3,

(iv) any actual or potential agreement under section 49.2 of the *Planning Act* in respect of any land referred to in clause 14.1 (a) of this Act, including any negotiations respecting any such actual or potential agreement,

(v) the addition of land that is identified as "Featureless Lands" in the Statement of Claim filed in the Superior Court of Justice proceeding commenced at Newmarket and identified as Court File number CV-17-131956-00 to the Greenbelt Area under Ontario Regulation 59/05 made under this Act and the designation of that land as Protected Countryside by the Greenbelt Plan, any review or reconsideration of that addition and designation or any purported failure to review or reconsider that addition and designation, or

(vi) the settlement of the Superior Court of Justice proceeding commenced at Newmarket and identified as Court File number CV-17-131956-00, including the disclosure of any information relating to that settlement, regardless of whether such information is privileged or confidential, or any purported breach of that settlement.

No remedy

(2) No costs, compensation or damages, including for loss of revenues or loss of profit, are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, any equitable remedy or any remedy under any statute, is available to any person in connection with anything referred to in subsection (1).

Proceedings barred

(3) No proceeding that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against any person.

Application

(4) Subsection (3) does not apply with respect to an application for judicial review, but does apply with respect to any other court, administrative or arbitral proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief or the enforcement of a judgment, order or award made outside Ontario.

Retrospective effect

(5) Subsections (1), (2) and (3) apply regardless of whether a cause of action on which a proceeding is purportedly based arose before, on or after the day section 4 of Schedule 2 to the Greenbelt Statute Law Amendment Act, 2023 comes into force.

…

Termination of settlement agreement

19.1 The agreement dated November 3, 2022 between Minotar Holdings Inc. and His Majesty the King in Right of Ontario as represented by the Minister of Municipal Affairs and Housing respecting the settlement of the Superior Court of Justice proceeding commenced at Newmarket and identified as Court File number CV-17-131956-00 is terminated on the day the Greenbelt Statute Law Amendment Act, 2023 receives Royal Assent.